Attorneys representing general contractors and subcontractors should be concerned about the current state of construction defect law. A few panels of the Illinois Appellate Court have expanded the scope of the implied warranty of habitability (IWH) in the sale of new homes, while also curtailing the available defenses to such claims. The implied warranty arises from a contract between the seller and buyer of a new residential property where the seller impliedly warrants that the home is suitable as a residence. Under certain circumstances, the Illinois Appellate Court has applied this warranty to general contractors and subcontractors even though these entities did not sell the home to the purchaser and were not a party to the contract in which the warranty is implied. These expansions have occurred despite the Illinois Supreme Court’s instruction that the appellate court may not expand the supreme court’s decisions or create new causes of action.

Overview

Over the last three decades, the IWH has evolved from a limited and challenging cause of action to prove, into its current status as a preferred method of establishing liability. Today, the IWH is almost guaranteed to ensnare any type of construction professionals. This monograph explains the history of the IWH and will define the contours of the IWH as conceived by the Illinois Supreme Court. This monograph will also evaluate the IWH by class of plaintiff, by type of structure, and by class of defendant, as well as popular defenses to the IWH. This will be interspersed with an explanation of the various appellate expansions of its scope, and how available defenses have been severely curtailed. In addition, it will catalog many of the open issues that currently puzzle defense counsel. This monograph concludes by encouraging defense counsel to be skeptical of appellate expansions and limitations that have not been confirmed by the Illinois Supreme Court, to be aggressive with motion practice, and to seek appeals when possible.

History of the Implied Warranty of Habitability

A. Origins

The IWH has a rich history in America, and most lawyers would find it difficult not to cheer its advent. As early as 1931, the Minnesota Supreme Court held that there was an IWH for apartment leases. As Professor Cunningham explained, the Minnesota decision did not gain immediate traction, thus delaying the “revolution
in tenant’s rights” until the 1960’s and 70’s. In 1961, the Wisconsin Supreme Court kick-started the revolution in *Pines v. Perssion*, formally rejecting *caveat emptor* and finding that a warranty of habitability should be implied in every lease, stating:

... it is socially (and politically) desirable to impose these duties on a property owner—which has rendered the old common-law rule obsolete. To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliché, *caveat emptor*. Permitting landlords to rent ‘tumble-down’ houses is at least a contributing cause of such problems as urban blight, juvenile delinquency, and high property taxes for conscientious landowners.

**B. Illinois Origins**

Illinois joined the revolution in 1972 when the Illinois Supreme Court held in *Jack Spring Inc. v. Little* “that included in the contracts, both oral and written, governing the tenancies of the defendants in the multiple unit dwellings occupied by them, is an implied warranty of habitability...” Both before and after *Jack Spring*, the plaintiffs repeatedly raised the issue of whether the IWH applied to cases involving the sale of new homes by a builder-vendor. Appellate panels considered the issue with mixed results. Because of split authority concerning the scope of the IWH, the Supreme Court of Illinois agreed to hear *Petersen v. Hubschman Constr. Co.*

In *Petersen* the supreme court resolved the split and defined the scope of the IWH as it applies to cases involving the sale of new homes by a builder-vendor:

Because of the vast change that has taken place in the method of constructing and marketing new houses, we feel that it is appropriate to hold that in the sale of a new house by a builder-vendor, there is an implied warranty of habitability which will support an action against the builder-vendor by the vendee for latent defects and which will avoid the unjust results of *caveat emptor* and the doctrine of merger.

The Illinois Supreme Court voiced the policy reason for recognizing this new cause of action:

The vendee is making a major investment, in many instances the largest single investment of his life. He is usually not knowledgeable in construction practices and, to a substantial degree, must rely upon the integrity and the skill of the builder-vendor, who is in the business of building and selling houses.

The IWH does not spring from judicial pronouncement, but instead, is found implied in the sales contract, and nowhere else; “[I]t arises by virtue of the execution of the agreement between the vendor and the vendee.” It is limited to those who vend or sell a new home. “It is implied as a separate covenant between the builder-vendor and the vendee because of the unusual dependent relationship of the vendee to the vendor.” An “express warranty covering the same defects as the implied warranty of habitability [will] not displace or render that implied warranty nonactionable.” But, the Illinois Supreme Court did not intend the builder-
vendor to be defenseless from a contractual perspective, and so made the IWH disclaimable. “[W]e do not consider a knowing disclaimer of the implied warranty to be against the public policy of this State.”15

Stating a Cause of Action

A. Who can Sue?

Initial and subsequent purchasers may file an IWH claim. When the Illinois Supreme Court first recognized the IWH in Petersen, it spoke of the warranty as an implied term within the contract between the builder-vendor and the vendee for the sale of the newly constructed home.16 Thus, standard contract principles would apply and for the plaintiff to allege that the builder-vendor breached the IWH, the plaintiff must be the original purchaser in contractual privity with the builder-vendor by virtue of the sales contract.17 Later, in Redarowicz v. Ohlendorf, the Illinois Supreme Court expanded the class of plaintiffs able to file suit.18 The court held that “subsequent purchasers” may assert an IWH claim against a builder-vendor for “latent defects which manifest themselves within a reasonable time after the purchase of the house.”19 Subsequent appellate decisions disagree on the impact of Redarowicz, some holding that Redarowicz simply expanded the class of plaintiffs.20 Other appellate decisions are utilized by plaintiff’s attorneys to argue Redarowicz may have eliminated privity altogether from the IWH analysis.21

A condominium association, through its board of managers, also has standing to assert IWH claims. To do so, the latent defect must involve the common elements or more than one unit, and interfere with the unit owners’ use of the units as a residence.22 Remember that the IWH “is implied as a separate covenant between the builder-vendor and the vendee...[i]t arises by virtue of the execution of the agreement between the vendor and the vendee.”23 Thus, the IWH is a contract claim premised on the individual contract rights of the unit owners. A condominium association is not party to the agreement between the builder-vendor and the purchaser, and as such, would generally not have the right to assert other’s contract claims. But, the Illinois Condominium Property Act (Act) provides standing to the condominium association through its board of managers.24

The Act states that “[t]he board of managers shall have standing and capacity to act in a representative capacity in relation to matters involving the common elements or more than one unit, on behalf of the unit owners, as their interests may appear.”25 The Act further allows the unit owners and/or the board of managers to create a separate not-for-profit legal entity (the condominium association) “for the purpose of facilitating the administration and operation of the property.”26 Under these circumstances, “all of the rights, titles, powers, privileges and obligations vested in or imposed upon the board of managers in this Act and in the declaration may be held or performed by such corporation. . . .”27 Therefore, a condominium association and/or the board of managers obtain their standing to assert an IWH claim pursuant to the Act.

B. What Structures can be Targeted?

A prerequisite for asserting an IWH claim is that the latent defect relate to a newly constructed residential dwelling.28 Since Petersen, many courts have interpreted whether an alleged defect was sufficiently related to a residential dwelling to permit an IWH claim. In addition to newly constructed homes, Illinois courts have applied the IWH to claims relating to latent defects in construction of a substantial addition to a residence29 and latent defects associated with a prefabricated home.30 Illinois courts have found the IWH did not apply to latent defects relating to an apartment converted to condominiums where no construction or substantial
refurbishment occurred and the sale of unimproved land. Therefore, only those latent construction defects that relate to newly constructed residential dwellings, or a substantial part thereof, will be subject to the IWH.

With respect to condominiums, the individual living units will be subject to the IWH. The common elements of a condominium building or development will be subject to the IWH so long as the defect interferes with the unit owners’ habitability of the units. For instance, a freestanding clubhouse within a condominium development will not be subject to the IWH because the dwelling units are not within the clubhouse building and thus the defects would not interfere with the habitability of the residence.

C. Class of Defendants

It is useful to conceptualize the IWH as applicable (or not) to certain classes of defendants when it comes to the sale of new homes. A hierarchy of defendants is apparent in the decisions, which generally include (1) the builder/developer-vendor, (2) the downstream contractors, and (3) design professionals.

1. Builder/Developer-Vendor

_Petersen_ created an IWH enforceable against an entity that built and sold the home, commonly referred to as the builder-vendor. In _Park v. Sohn_, the Illinois Supreme Court defined a builder-vendor as one who is engaged in the business of building, so that the sale is of a commercial nature, rather than a casual personal one. _Petersen_ noted that the primary reason for the IWH is “because of the unusual dependent relationship of the vendee to the vendor.” “In many cases, the purchase of a home is the most important investment of a lifetime and it would be unjust to apply the rule of _caveat emptor_ to an inexperienced home buyer in favor of a builder who is in the business of building and selling homes.” Due to this sales aspect, the builder-vendor is always at risk for an IWH claim. “The implied warranty does not arise as a result of the execution of the deed, but arises by virtue of the execution of the agreement between the vendor and the vendee.”

One year after _Petersen_, the Illinois Appellate Court for the First District confronted a new home sale by a developer. In _Tassan v. United Dev. Co._, the court held the IWH applicable to the developer-vendor because, like the builder-vendor, it had control of the building process and made a sale:

Purchasers from a builder-seller depend on his ability to construct and sell a home of sound structure. Purchasers from a developer-seller depend on his ability to hire a contractor capable of building a home of sound structure. The buyers here had no control over United’s choice of a builder. United stood in the best position to know which contractor could perform the work adequately. The dependent relationship here between the buyers and United is the same as if United was a builder-seller. Necessarily, we hold that United could be deemed to have made an implied warranty of habitability in this case.

That the Illinois Supreme Court in _Petersen_ and the First District in _Tassan_ would limit the IWH to sellers who control the building process is not surprising since the judicial motivation for the IWH was to dull _caveat emptor_—a doctrine that unfairly benefitted sellers. Whether the sale is made by a builder or a developer, both are subject to the IWH.
2. Downstream Contractors

Downstream from the modern builder/developer-vendor, it is common to find a general contractor and then various subcontractors. Almost universally, the builder/developer-vendor has a contract with a general contractor to complete the construction project, while the general contractor contracts with various subcontractors to perform the individualized work. None of these downstream contractors have a contract with the homeowner—only the builder/developer-vendor is a party to a contract.

After Petersen, the issue of whether downstream entities could be targeted for violating the IWH was presented in Waterford Condo. Ass’n v. Dunbar Corp. There, the First District held the IWH does not apply to the subcontractor of a builder-vendor. “[T]he warranty exists between builder (developer)-vendors and their vendees and does not apply where, as here, the defendants are not builder (developer)-vendors but merely are employed by the builder. Plaintiff’s remedy for breach of warranty of habitability is against the developers and sellers.”

Downstream contractors did not remain safe for long. In Minton v. The Richards Grp., the First District ruled contrary to Waterford. In Minton, the court held the IWH applicable against a downstream contractor (in that case a subcontractor) because “the builder-vendor has been dissolved as an entity and is insolvent.” It further held, “where the innocent purchaser has no recourse to the builder-vendor and has sustained loss due to the faulty and latent defect in their new home caused by the subcontractor, the warranty of habitability applies to such subcontractor.”

Put another way, the Minton decision departed from Petersen, Tassan, and Waterford to expand the scope of the IWH to include downstream contractors who never made a sale, when the home purchaser had no recourse against the builder/developer-vendor.

The Minton expansion, however, did not spread to all of Illinois. In Lehmann v. Arnold, the Illinois Appellate Court for the Fourth District directly disagreed with Minton and declined to follow it. “If a subcontractor impliedly warrants his work to the purchaser, however, then his liability should be independent of the builder’s solvency.” Thereafter, the Illinois Appellate Court for the Second District agreed with Lehmann and registered its disagreement with Minton. In Bernot v. Primus Corp., the Second District explained that “Lehmann properly questioned whether, under Redarowicz, the builder’s later solvency was relevant to whether the subcontractor originally made an implied warranty to the purchaser.” In the Second and Fourth Districts, the IWH is applied in the strict Petersen, Tassan and Waterford sense against only builder/developer-vendors. As such, downstream contractors named as defendants in those districts would have a very strong motion to dismiss.

Despite the criticisms voiced by other appellate districts, Minton’s vitality in the First District has not abated. Recently, the First District issued two decisions on the scope of a Minton claim utilizing the IWH. In 1324 W. Pratt Condo Ass’n v. Platt Constr. Grp. (Pratt II), the First District held that a Minton claim does not reach all downstream entities at once. Instead, when the plaintiff is confronted with an insolvent builder/developer-vendor, he can pursue the next solvent downstream contractor, i.e. the general contractor, but not the subcontractors further down the line. The court explained:

In the present case, the seller, Wayne, is insolvent, but the general contractor-builder, Platt, is not. Accordingly, applying the rationale of Minton and Washington Courte to the facts of this case, we are compelled to conclude that the condominium association cannot proceed against the subcontractor, EZ Masonry, while it still has recourse against Platt.
Then, in *Pratt III*, the First District changed the standard to bring *Minton* claims against the next solvent downstream contractor. Rather than requiring the plaintiff to prove a “lack of recourse” against the builder/developer-vendor as *Minton* suggested, the First District instead declared the plaintiff must only demonstrate that the builder/developer-vendor meets the fluid definition of “insolvency”:

. . . we hold and clarify that for purposes of determining whether a purchaser may proceed against a subcontractor on a breach of implied warranty of habitability claim, the court must look to whether the general contractor is solvent. Insolvency simply means that a party’s liabilities exceed the value of its assets, and that it has stopped paying debts in the ordinary course of business. See Black’s Law Dictionary 799 (7th ed. 2007); see also 740 ILCS 160/3 (West 2010) (“(a) A debtor is insolvent if the sum of the debtor’s debts is greater than all of the debtor’s assets at a fair valuation. (b) A debtor who is generally not paying his debts as they become due is presumed to be insolvent.”).

3. Design Professionals

Design professionals, such as architects and engineers, do not meet the definition of builder/developer-vendor described in *Petersen* or *Tassan*. In *Paukovitz v. Imperial Homes*, the Illinois Appellate Court for the Third District explained:

It is undisputed that Imperial did no construction work on Paukovitz’ home. It only supplied the shell materials and the plans which Vignali then used to construct the residence. The parties do not cite, and we are unable to find, any reported cases in which a court held that the supplier of plans and shell materials was a builder-vendor for the purposes of the implied warranty of habitability. Moreover, in every case cited by Paukovitz to support his contention that Imperial was the builder-vendor, the defendant had conducted some kind of construction work on the home in question. Inasmuch as Imperial did not contribute to the actual construction of Paukovitz’ home, we find that it was not a builder-vendor which could be held liable for the breach of the implied warranty of habitability.

Whether design professionals are reachable as downstream entities through a *Minton* claim has never been decided by the Illinois Appellate Court in a published decision.

D. Habitability/Latent Defects

The IWH applies only to “latent” defects. Latent defects include: defects that were not discoverable through reasonable and diligent inspection, “could not have been discovered by the exercise of ordinary and reasonable care,” and are hidden or concealed. Whether a defect is latent or patent is generally a question of fact, but will be a question of law when reasonable minds could not differ as to whether the defects are latent or patent. By way of example, the defects in *Petersen* included: “a basement floor pitched in the wrong direction away from a drain; improperly installed siding; a defective and ill-fitting bay window; a seriously defective front door and door frame; and deterioration and ‘nail-popping’ in the drywall on the interior.” Interestingly, the Illinois Supreme Court later explained in *Park v. Sohn* that defining latent defects as those “that cannot be discovered in an ordinarily careful inspection” would mean that the defects in *Petersen* are not latent. The court in *Park* then clarified that latent defects include “defects that were not apparent to the purchaser on viewing the property.” The court reasoned that this view is consistent with the policy behind the
warranty—“that the purchaser typically is unskilled in the building trade and must rely on the training, knowledge and skill of the builder-vendor.”

Based on the title of the warranty, one would expect that in order for a latent defect to be actionable, it must interfere with the “habitability” of the dwelling. But, when the Illinois Supreme Court announced the extension of the IWH to the sale of new homes in Petersen, the court rejected the idea that only defects that render the home uninhabitable are actionable. “The use of the term ‘habitability’ is perhaps unfortunate. Because of its imprecise meaning it is susceptible of misconstruction.” Relying on the language of the Uniform Commercial Code (UCC) warranties, the court in Petersen ultimately concluded that an IWH claim is actionable if the latent defects interfere with the buyer’s legitimate expectation that the home be “reasonably suited for its intended use.” The application of this definition has been confusing. In VonHoldt, the Illinois Supreme Court stated that an implied warranty of habitability claim may be brought so long as the alleged construction defect is sufficiently serious to interfere with the habitability of the home.

It appears that the only relevance of the term “habitability” is to limit the warranty to residential dwellings. In Bd. of Dirs. of Bloomfield Club Recreation Ass’n, the supreme court found that the plaintiff could not state an IWH claim where the claimed defect was located in a commonly held amenity in a residential development (i.e. clubhouse) and which did not affect the habitability of the dwelling area. Recently, the Second District stated that “a house that is reasonably fit for habitation must, at a minimum, offer reasonable safety and reasonable protection from the elements.” Thus, it appears that these cases have set forth a rather loose standard for alleging a latent defect interfering with the habitability of the residential dwellings. Based on current case law, the plaintiff need only allege that the defect was not apparent upon the plaintiff viewing of the property and that this defect is connected in some fashion to a residential dwelling that could interfere with the use of the dwelling as a residence.

E. Damages

In Park v. Sohn, the Illinois Supreme Court set forth the measure of damages for breach of the implied warranty of habitability.

The measure of damages should be the cost of correcting the defective conditions. If, however, the defects could be corrected only at a cost unreasonably disproportionate to the benefit to the purchaser, or if correcting them would entail unreasonable destruction of the builder’s work, the amount by which the defects have reduced the value of the property should be the measure of damages.

In Nisbet v. Yelnick, the First District further explained that the plaintiff may recover for loss of use of the portion of the dwelling rendered uninhabitable. The Nisbet court reasoned that similar to UCC damages, the plaintiff may recover consequential damages resulting from the seller’s breach. “The measure of damages in such instance is the reasonable rental value of similar property for the period of deprivation.” Later, in Hills of Palos Condo. Ass’n v. I-Del, Inc., the First District clarified that consequential damages for breach of the IWH was limited to loss of use damages and only applicable where the “defects in the home were so extensive that the entire home was, in fact, uninhabitable.” In Auburn v. Amoco Oil Co., the Fourth District held that the plaintiff could not recover for personal injury or property damages premised on a breach of the IWH.
Common Defenses

A. Disclaimer

At the same time that the Illinois Supreme Court announced the IWH cause of action, the court also held that a “knowing disclaimer of the implied warranty of habitability is not against the public policy of this state” and will be enforced. A valid disclaimer “(1) is a conspicuous provision (2) which fully discloses the consequences of its inclusion (3) that was, in fact, the agreement of the parties.” The court in Pratt II suggested that the following disclaimer was valid:

(b) IMPLIED WARRANTY OF HABITABILITY

Illinois law provides that every contract for construction of a new home, as here, carries with it a warranty that when completed, the new home will be free of defects and will be fit for its intended use as a home. This law further provides that this Implied Warranty does not have to be in writing to be a part of the contract and it covers not only structural and mechanical defects such as may be found in the foundation, roof, masonry, heating, electrical and plumbing, but it also covers any defect in workmanship which may not easily be seen by the Purchaser. However, the law also provides that Seller and Purchaser may agree in writing, as here, that this Implied Warranty is not included as part of their particular contract.

(c) WAIVER-DISCLAIMER. THE SELLER HEREBY DISCLAIMS AND THE PURCHASER HEREBY WAIVES THE IMPLIED WARRANTY OF HABITABILITY DESCRIBED IN PARAGRAPH 10(B) ABOVE AND THEY ACKNOWLEDGE, UNDERSTAND AND AGREE THAT IT IS NOT PART OF THE CONTRACT.

(d) Effective and Consequences of this Waiver-Disclaimer. Purchaser acknowledges and understands that if a dispute arises with Seller and the dispute results in a lawsuit, Purchaser will not be able to rely on the Implied Warranty of Habitability described above, as a basis for suing the Seller or as a basis of a defense if Seller sues the Purchaser.

These disclaimers are typically included in the contract documents for the sale of the residences prepared by the builder/developer-vendor and signed by the original purchaser. Thus, general contractors and subcontractors are not parties to this disclaimer, and as a result, will not be able to satisfy the third requirement of the defense: that the disclaimer “was, in fact, the agreement of the parties.” In Pratt II, the builder/developer-vendor was insolvent and no longer a party to the case. The plaintiff relied on Minton to state a claim against the general contractor, and in turn, the general contractor sought to enforce the disclaimer. But, because the general contractor was not a party to the agreement that contained the disclaimer, the court held that the general contractor could not rely on the disclaimer. There is no case law addressing the applicability of the disclaimers to a “subsequent purchaser;” however, based on the standard set forth above, a builder/developer-vendor would likely not be able to rely on the disclaimer in response to an IWH claim brought by a subsequent purchaser because that subsequent purchaser was not a party to the original sales contract containing the disclaimer.
B. Statute of Limitations

A construction defect claim premised on the IWH is subject to the four-year limitation period set forth in section 13-214 of the Illinois Code of Civil Procedure. This limitation applies where liability rests on construction-related activity, which is usually the case when builder/developer-vendors, general contractors and/or subcontractors are alleged to have breached the IWH based on a latent defect in the construction of the dwelling. A cause of action premised on an act or omission in the “construction of an improvement to real property . . . shall be commenced within 4 years from the time the person bringing an action, or his or her privity, knew or should reasonably have known of such act or omission.” This statute, however, will not begin to run as to a condominium association “until the unit owners have elected a majority of the members of the board of managers” despite the condominium association having knowledge of the claim prior to the election of the board.

While the statute of limitations defense seems rather straightforward when applied to the builder/developer-vendor, this defense becomes complicated when raised in defense to a Minton claim against downstream entities. Recall that the First District under Minton and Pratt II applied the IWH against downstream entities other than the builder/developer-vendor when the immediate upstream entity was insolvent. The First District in Dearlove Cove Condos. v. Kin Constr. Co. held that the limitation period in section 13-214 does not begin to run until the plaintiff knew or reasonably should have known of the immediately upstream parties’ insolvency, so long as the plaintiff sued that upstream party within the applicable statute of limitations. The court in Pratt III recently stated:

Where the plaintiff timely filed his action against a general contractor for construction defects, and the general contractor subsequently became insolvent, under Minton, the plaintiff could proceed against the subcontractor even if he failed to file the complaint within the applicable statute of limitations so long as the action was timely filed against the general contractor.

Thus, despite the fact that a purchaser knew or should have known of the subcontractor’s acts or omissions, the claim against it does not accrue until the plaintiff is aware of the general contractor’s insolvency.

C. Statute of Repose

While First District decisions have subjected downstream entities to claims beyond the conventional statute of limitations, defendants may have the protection of the 10-year statute of repose set forth in section 13-214. This section provides that no cause of action premised on an act or omission in the construction of an improvement to real property may be commenced “after 10 years have elapsed from the time of such act or omission.” The First District has held that the construction statute of repose begins to run upon completion of construction, while the Second District has held that it begins to run on the date that the home was conveyed.

Note that the construction statute of repose is not absolute, like most of its repose counterparts. Rather, the construction statue of repose is unique because the language allows for a “grace period,” which permits the plaintiff to file suit beyond the 10-year repose period so long as the plaintiff learned of the act or omission of the defendant within the 10-year repose period, and filed suit within four years after learning of the act or omission.
It is unclear the effect that *Dearlove Cove Condos.* and *Pratt III* would have on a situation where the plaintiff learns of the builder-vendor’s insolvency beyond the statute of repose and whether the plaintiff would be able to assert a claim against the next solvent downstream entity. Based on a literal reading of the statute of repose, we would anticipate that the claim is time-barred. However, in accordance with the courts’ demonstrated policy of protecting homeowners, it is not unforeseeable that a court would find the claim timely in light of First District authority stating that the claim against the next solvent downstream entity does not accrue until there is knowledge of the upstream entity’s insolvency.

**D. Available Recourse and Solvency**

Downstream entities can defeat a *Minton* claim by effectively arguing that the upstream entity is indeed solvent or that there are other forms of recourse available to the purchaser against the builder/developer-vendor. As discussed briefly above, the correct standard for asserting a *Minton* claim against the next downstream entity is a bit elusive. In *Minton*, the court referred to a purchaser having “no recourse against the builder-vendor,” while the court in *Pratt III* interpreted the standard to be one of “insolvency” of the builder/developer-vendor. These decisions are from the First District, and thus, it cannot be said that *Pratt III* overruled *Minton*. Thus, a downstream entity could defend itself by arguing that the immediate upstream entity is solvent or that other forms of recourse are available to the purchaser against the builder/developer-vendor. Such recourse could be had under the Illinois Uniform Fraudulent Transfer Act, the trust fund doctrine, the Limited Liability Company Act, or if applicable, the avoidance provisions of the Bankruptcy Code. Furthermore, should the builder/developer-vendor have liability insurance, downstream entities may argue for dismissal because the insurance proceeds act as either a source of recourse under *Minton* or create solvency under *Pratt III*.

**The Consequences of Expansion**

There are definite consequences to expanding the IWH, and those consequences have been felt most acutely by general contractors and subcontractors downstream from the builder/developer-vendor. The discussion up to this point suggests that liability in Illinois is no longer defined by its supreme court’s jurisprudence that consistently articulated a limited and defensible IWH. Rather, IWH liability is currently driven by the appellate decisions expanding the scope of the IWH and curtailing the defenses.

Defense counsel should not accept the appellate expansions of the IWH and their accompanying limitations on defenses as necessarily good law. Until confirmed by the Illinois Supreme Court, these various decisions are subject to challenge. Defense counsel should be suspicious of these expansions and limitations. Care should be taken in motion practice to object to any liability tethered to an appellate expansion, because that argument must be preserved in anticipation of the day the Illinois Supreme Court overrules the expansion. Care should also be taken to pursue interlocutory appeals from trial court orders that follow the expansions. When pursuing this motion practice and/or these appeals, defense counsel have multiple arguments that the appellate court’s expansions of IWH liability downstream from the builder/developer-vendor are wrong and should be overruled.
A. Minton’s Potential Flaws

The trend in expanding liability to downstream contractors began with the First District’s Minton decision. Minton created a new cause of action against downstream entities contingent upon the builder/developer-vendor’s poverty—an insignificant inquiry in the law. Numerous potential errors seem apparent in the Minton decision, and they should be voiced on the record for eventual Illinois Supreme Court review.

In the first instance, the Minton decision perhaps resulted from an unfair fight. The defendant subcontractor prevailed in the trial court, but never filed an appellate brief, leaving the First District to consider only the plaintiff’s brief. The plaintiff invited the appellate court to extend the IWH to downstream entities if there was no recourse against the builder/developer-vendor and the court obliged. In so doing, the Minton court became the first panel to expand the class of defendants originally narrowly drawn by Petersen and Tassan. It is not error for the appellate court to decide an appeal without one party’s brief, but that this watershed and influential decision was rendered without input from the defense bar may help us obtain further review of the issue.

Beyond this, the Illinois Supreme Court should be made aware of one critical flaw in Minton’s reasoning. The court in Minton was aware its ruling was contrary to Waterford, but it reasoned that Waterford was less persuasive having been decided prior to Redarowicz:

In this case we agree with the reasoning in Redarowicz that the purpose of the implied warranty is to protect innocent purchasers. For that reason, we hold that in this case where the innocent purchaser has no recourse to the builder-vendor and has sustained loss due to the faulty and latent defect in their new home caused by the subcontractor, the warranty of habitability applies to such subcontractor. We recognize that our opinion is contrary to Waterford Condominium Association v. Dunbar Corp. (1982), 104 Ill. App. 3d 371, 432 N.E.2d 1009, but that opinion was rendered prior to Redarowicz v. Ohlendorf.

But Minton’s view of Redarowicz’s impact has since been withdrawn by the First District in Washington Courte Condo. Ass’n-Four v. Washington-Golf Corp.:

Regarding plaintiffs’ contention that Redarowicz expanded the scope of potential defendants in a breach-of-warranty-of-habitability action, we disagree with plaintiffs’ interpretation. As previously discussed, the Redarowicz court’s holding, predicated on its finding that privity was not required in a warranty-of-habitability action, was specifically limited to extending the cause of action to subsequent purchasers. The Redarowicz court emphasized that its decision was to further the purpose of the warranty of habitability, which is to hold builder/vendors accountable for their performance. The court made no reference to subcontractors. We find plaintiffs’ interpretation, which results from taking the lack of privity finding out of context, to be unpersuasive.

Accordingly, it is difficult to understand how Minton can remain standing. Minton departed from Waterford based upon an interpretation of Redarowicz that has since been declared faulty by Washington Courte.

Furthermore, Minton may violate the prohibition against the appellate court creating new causes of action. “Appellate courts should not create new causes of action. Our supreme court and legislature are capable of and primarily responsible for deciding the need for new causes of action.” Had the Illinois
Supreme Court in Petersen wished to visit liability upon contractors downstream from the initial vendor, it could have done so. Instead, it limited the IWH to the initial vendor. Accordingly, any appellate decision that expands the class of IWH defendants, like Minton, may have been in excess of the appellate court’s authority.

Arguably, another such appellate decision is Pratt I. There, the developer-vendor was insolvent, and as such Minton provided an IWH claim against the general contractor. Though there was no need to justify the general contractor’s IWH liability beyond Minton, the court held that the general contractor could also be held liable for the IWH without utilizing the Minton privity bridge. “Our review of the supreme court’s cases on this subject and our consideration of the public policy behind the implied warranty of habitability confirm that the warranty applies to builders of residential homes regardless of whether they are involved in the sale of the home.” The Pratt I court cited Redarowicz for the notion that privity is no longer required in the IWH context, but this is the same justification for expansion utilized by Minton and later characterized as faulty in Washington Court. Though the Pratt I ruling can be considered dicta because it was not necessary to a finding of IWH liability against the general contractor, it can be questioned as beyond the appellate court’s authority to expand the class of IWH defendants to anyone who builds.

Juxtaposed against Minton and Pratt I are appellate panels that believe they are structurally powerless to expand a right of action created by the Illinois Supreme Court. Consider VonHoldt v. Barba & Barba Constr., where one such panel refused to expand the IWH:

In order to grant the relief sought by the plaintiff, we would be required to eliminate the condition that the defendant occupy the position of a vendor and hold that a warranty of habitability is implied into the contract of a builder that undertakes to construct a structural addition to an existing home. We view such a holding as a substantial modification of a right of action created by the Supreme Court. Acknowledging that the appellate court lacks the authority to modify decisions of the Supreme Court, we decline to extend the cause of action for breach of an implied warranty of habitability in a construction setting beyond a right of action against a builder-vendor of a new residence.

If VonHoldt was correct in refusing to create expansions of Petersen, then Minton and Pratt I were wrong to do so.

Finally, Minton has been rejected by the Second and Fourth Districts and at least one court outside of Illinois. Iowa considered whether to adopt the Minton position:

Outside authority is obviously not binding on this court. And while Minton did apply Illinois’ version of the implied warranty to a subcontractor where the general contractor was insolvent, another Illinois case issued two years later directly disagreed with the decision. See Lehmann v. Arnold. There is currently a split in the Illinois appellate courts, and White Birch is unable to cite any other jurisdiction extending the implied warranty to subcontractors. The Minton case represents an isolated extension rather than the general consensus.

A close read of recent Illinois case law even suggests that the First District would welcome a reexamination of Minton. In one of the most recent appellate court decisions to build on Minton’s foundation, the court did so with an ominous caveat: “More importantly, aside from the aforementioned brief and singular citation to Minton, we never discussed the holding, rationale, or viability of that decision. As such, our intent
was not to expand or overrule Minton, which to this day remains good law in this state.\textsuperscript{125} The time might be ripe to challenge Minton.

\textbf{B. Unfair Application of Disclaimer of the IWH}

The expansion of the IWH to entities downstream from the builder/developer-vendor has resulted in a seemingly unfair reduction in available defenses, particularly with respect to a knowing disclaimer. When the Illinois Supreme Court originally adopted the IWH in Petersen, it emphasized that the IWH “is implied as a separate covenant between the builder-vendor and the vendee . . . [i]t arises by virtue of the execution of the agreement between the vendor and the vendee.”\textsuperscript{126} The court further explained that it is the public policy of this State to allow a builder-vendor to disclaim the implied warranty of habitability in its agreement with the purchaser.\textsuperscript{127} When the First District in Minton and Pratt II expanded the IWH to include downstream entities, these courts did not contemplate the inability of these entities to disclaim the IWH. In fact, when the First District was presented with the issue whether a downstream entity subject to an IWH claim could rely on the builder/developer-vendor’s disclaimer, the court answered in the negative.\textsuperscript{128}

The inability of general contractors and subcontractors to disclaim a disclaimable warranty raises an issue of whether the court’s efforts to provide innocent home purchasers with recourse has resulted in injustice to downstream entities. Removing the privity requirement for IWH claims has placed those defendants that do not contract with the purchasers at a severe disadvantage—they are responsible for the builder/developer-vendor’s implied warranty, but cannot avail themselves of the builder/developer-vendor’s preexisting disclaimer. In fact, White & Summers, well-respected commentators on the UCC, have expressed similar concerns with allowing recovery by non-privity plaintiffs for direct economic loss under the UCC.\textsuperscript{129} These commentators have stated, “unresolved issue involves the extent to which a remote seller may employ warranty disclaimers and remedy limitations.”\textsuperscript{130} Because the IWH in Illinois is based on the UCC implied warranties,\textsuperscript{131} White & Summers’ concern is equally applicable to the IWH.

\textbf{C. Unprecedented Discovery of the Defendants’ Pecuniary Position}

Permitting expansion of the IWH to downstream entities when the upstream entity or entities is/are insolvent has created the need for discovery of these parties’ financial status. As discussed above, claims against downstream entities such as general contractors and subcontractors will accrue at the time the plaintiff knows or should have known of the immediate upstream entities’ insolvency. In Pratt III, the court followed Minton and determined that the plaintiff could proceed against a subcontractor for an IWH claim based on the general contractor’s insolvency.\textsuperscript{132} In determining the solvency of an entity, the court stated, “[i]nsolvency simply means that a party’s liabilities exceed the value of its assets, and that it has stopped paying debts in the ordinary course of business.”\textsuperscript{133} It is the burden of the plaintiff to establish the insolvency of the upstream entity prior to asserting an IWH claim against the next entity in line.\textsuperscript{134} In this case, the court held that because the general contractor was insolvent, the plaintiff may assert an IWH claim against the subcontractor.\textsuperscript{135} In concluding that the general contractor was insolvent, the appellate court relied on discovery responses of the general contractor that provided the specific form and value of the general contractor’s assets and liabilities.\textsuperscript{136} Consequently, it would appear that Pratt III may have opened the door to discovery relating to the defendant’s pecuniary position.

It is important for construction defect defendants to recognize and guard against the potential compulsory disclosure of sensitive information in these types of construction defect cases. If faced with this type of
discovery, the defendant has a variety of options to consider. The defendant could insist on a strict protective order relating to the financial information, object to the scope of such discovery requests, or in lieu of the actual financial information, provide an affidavit factually averring that the defendant’s assets exceed its liabilities and that the defendant continues to pay its debts in the ordinary course of business. A final option would be to request a “friendly contempt” order to test the disclosure order on appeal.

D. Construction Defendants Subject to Time-Barred Claims

Expanding the IWH to downstream entities and pegging the accrual of these claims to the date the plaintiff knows or should know of the upstream entity’s insolvency may expose general contractors and subcontractors to a claim that may be otherwise time-barred. For example, if the plaintiff files suit against the builder/developer-vendor within the four-year period, and three years into the litigation, the builder/developer-vendor becomes insolvent, then that plaintiff may have four years to file suit against the next downstream entity—the general contractor. In the event that the general contractor itself later becomes insolvent, the plaintiff potentially could have four years to file suit against the subcontractor. All of these claims may be considered timely by a court pursuant to Dearlove Cove Condos. and Pratt III, despite the fact that the plaintiff would likely have known of the general contractor’s/subcontractor’s acts or omissions more than four years prior to filing suit against them. Dearlove Cove Condos. and Pratt III have rewritten the statute of limitations passed by the General Assembly, lengthening the four-year statute of limitations to serve the public policy of protecting homeowners. This is likely contrary to the Illinois Supreme Court’s admonition that “[s]tatutes should be interpreted and applied in the manner written, and should not be rewritten by a court to make them consistent with the court’s idea of orderliness and public policy.”

Need for Clarity from the Illinois Supreme Court

Counsel for general contractors and subcontractors have reason to be concerned with the appellate court’s expansions in scope of the IWH. All trial courts are bound to follow binding appellate decisions. Therefore, unless the Illinois Supreme Court overrules the expansive decisions, they remain controlling precedent, at least in trial courts within the First District. This is precisely the predicament construction defect defense lawyers find themselves in, and particularly so with respect to decisions like Minton, Dearlove Cove Condos., and the Pratt trilogy of cases. These decisions are binding on trial judges, but they represent expansions in liability and limitations on defenses that have never been confirmed by the Illinois Supreme Court.

Today feels a lot like 1979. Then, the state of IWH law in Illinois was in severe flux. Nobody could be certain whether the IWH existed in construction defect cases, under what circumstances it did exist, or against whom it existed. Today, the same state of confusion exists. There is considerable disagreement regarding the scope of the IWH as applied to any entity downstream from the builder/developer-vendor. There is considerable disagreement regarding the nature of the defenses available to those downstream entities now stuck defending another party’s warranty. To get the Illinois Supreme Court’s attention today, as in 1979, we must put our shoulder to the wheel and stubbornly question the correctness of these appellate decisions.
(Endnotes)


4 Cunningham, supra note 3, at 75.

5 Pines v. Perssion, 14 Wis. 2d 590 (1961).

6 Pines, 14 Wis. 2d at 595.

7 Jack Spring Inc. v. Little, 50 Ill. 2d 351, 366 (1972).

8 Compare Coutrakon v. Adams, 39 Ill. App. 2d 290, 300 (3d Dist. 1963) (stating “. . . in the sale of a new dwelling or one in the process of construction there is no implied warranty on the part of the vendor of fitness, condition or quality”) with Hanavan v. Dye, 4 Ill. App. 3d 576 (3d Dist. 1972) (finding “. . . an implied warranty of habitability should be recognized in cases where the contractor-builder sells directly to a lay purchaser . . .”).


10 Petersen, 76 Ill. 2d at 39-40.

11 Id. at 40.

12 Id. at 41.

13 Id.


15 Petersen, 76 Ill. 2d at 42.

16 Id. at 41.

17 Id.

18 Redarowicz v. Ohlendorf, 92 Ill. 2d 171, 185 (1982).

19 Redarowicz, 92 Ill. 2d at 185.


22 765 ILCS 605/9.1(b); 765 ILCS 605/18.1(d).

23 Petersen, 76 Ill. 2d at 41.

24 765 ILCS 605/9.1(b); 765 ILCS 605/18.1(d).

25 765 ILCS 605/9.1(b).

26 765 ILCS 605/18.1(a).

27 765 ILCS 605/18.1(d).
28 Petersen, 76 Ill. 2d at 39-40.
30 Hefler v. Wright, 121 Ill. App. 3d 739, 742 (5th Dist. 1984).
34 Id.
36 Petersen, 76 Ill. 2d at 41 (1979).
38 Petersen, 76 Ill. 2d at 41.
40 Hefler v. Wright, 121 Ill. App. 3d 739, 741 (5th Dist. 1984).
41 Tassan, 88 Ill. App. 3d at 587.
43 Waterford Condo. Ass’n, 104 Ill. App. 3d at 375.
44 Id (citations omitted).
45 Minton, 116 Ill. App. 3d at 854-55.
46 Id. at 854.
47 Id. at 855.
48 Lehmann, 137 Ill. App. 3d at 418.
49 Id.
51 Id. at 754-55.
55 2013 IL App (1st) 130744, ¶ 25.
56 See supra section C.1.
58 Petersen, 76 Ill. 2d at 42.

60  *Tassan*, 88 Ill. App. 3d at 590.


62  *Tassan*, 88 Ill. App. 3d at 590-591.

63  *Petersen*, 76 Ill. 2d at 36.

64  *Park*, 89 Ill. 2d at 464.

65  *Id.*

66  *Id.*

67  *Petersen*, 76 Ill. 2d at 42.

68  *Id.*

69  *Id.*


71  *Bd. of Dirs. of Bloomfield Club Recreation Ass’n*, 186 Ill. 2d at 432.


73  *See supra*, notes 70 and 71.

74  *Park*, 89 Ill. 2d at 464-465.

75  *Id.*


77  *Id.* (stating, “our supreme court, in recognizing this cause of action in *Petersen v. Hubschman Constr. Co.* likened it to an action for breach of warranty under the Uniform Commercial Code”) (internal citation omitted).

78  *Id.* at 471.


80  *Auburn v. Amoco Oil Co.*, 106 Ill. App. 3d 60, 64-65 (4th Dist. 1982).

81  *Petersen*, 76 Ill. 2d at 43.


83  *Pratt II*, 2012 IL App (1st) 111474, ¶ 4 (emphasis in original).

84  *Id.* ¶ 29.

85  *Id.* ¶¶ 33-34.

86  Because the developer was insolvent and not a party to the case, it seems obvious that the general contractor was liable as the next solvent downstream entity under *Minton*. But, what is puzzling, is that in an earlier appeal in the case, known as “*Pratt I,*” the court’s language can be interpreted differently. *1324 W. Pratt Condo. Ass’n v. Platt Constr. Group*, 404 Ill. App. 3d 611 (1st Dist. 2010). In *Pratt I,* the court spoke of the general contractor defendant as a proper target of the
Petersen IWH even though it was not a vendor of any sort. Id. at 618. In our years of practice since Pratt I was published, we have not seen a plaintiff successfully argue that Pratt I legitimately removed the vendor requirement from the IWH.

87 Id.
88 735 ILCS 5/13-214(a); Fins, 2013 IL App (2d) 121424, ¶ 7.
89 735 ILCS 5/13-214(a)
90 735 ILCS 5/13-214(a).
91 765 ILCS 605/18.2(f).
94 Pratt III, 2013 IL App (1st) 130744, ¶ 29; Dearlove Cove Condos., 180 Ill. App. 3d at 441.
95 735 ILCS 5/13-214(b); VonHoldt, 175 Ill. 2d at 433-34 (holding that a subsequent purchaser who purchased the dwelling 11 years after construction was time-barred by the statute of repose from recovering under an IWH claim).
96 735 ILCS 5/13-214(b).
97 Eickmeyer v. Blietz Org., 284 Ill. App. 3d 134, 139 (1st Dist. 1996) (stating “[a]ccording to the statute of repose, a plaintiff who brings an action against a defendant-builder seeking damages for the faulty construction of a house must file suit within 10 years from the time the house was built pursuant to section 13-214(b)).
98 Andreoli v. John Henry Homes, Inc., 297 Ill. App. 3d 151, 155 (2d Dist. 1998) (“We hold, therefore, that the time of accrual under section 13–214(b) governing a purchaser’s suit against a builder to recover for latent defects in the purchaser’s new house begins from the date when the house is conveyed. Because plaintiffs’ cause of action arose within 10 years from the date the house was conveyed.”).
99 See 735 ILCS 5/13-214(b) (stating “[h]owever, any person who discovers such act or omission prior to expiration of 10 years from the time of such act or omission shall in no event have less than 4 years to bring an action as provided in subsection (a) of this Section”); Andreoli, 297 Ill. App. 3d at 154-55; See Price & Pinkston, supra note 1, at 95 (discussing Andreoli).
100 Minton, 116 Ill. App. 3d at 855.
101 Pratt III, 2014 IL App (1st) 130744, ¶ 25 (stating “we hold and clarify that for purposes of determining whether a purchaser may proceed against a subcontractor on a breach of implied warranty of habitability claim, the court must look to whether the general contractor is solvent”).
102 See In re Gutman, 232 Ill. App. 3d 145, 149 (2008) (stating “[a] panel, division, or district of the appellate court has no authority to overrule another panel, division, or district”).
103 See Swaw v. Ortell, 137 Ill. App. 3d 60, 61 (1st Dist. 1984) (affirming the dismissal of the subcontractor because the purchaser had recourse against the next upstream entity, the builder-vendor).
104 740 ILCS 160/8(a)(1). See also Spartech Corp. v. Opper, 890 F.2d 949, 953 (7th Cir. 1989) (stating that a distribution to a shareholder that leaves the corporation cashless and insolvent could be a basis for a fraudulent transfer claim).
105 See Blankenship v. Demmler Mfg. Co, 89 Ill. App. 3d 569, 572 (1st Dist. 1980) (stating the “trust fund doctrine was promulgated by the equity courts to protect creditors when dissolution occurs. Pursuant to this doctrine, the property of a corporation is considered a trust fund for the payment of corporate debts. Thus, the property which is distributed to shareholders is held by them subject to the claims of the corporation’s creditors.”).
See 805 ILCS 180/25-50 (d)(2) (providing that a claim against a dissolved limited liability company may be enforced against the members of the dissolved company to the extent of the company’s assets distributed to that member in liquidation).


Available motions are authorized by 735 ILCS 5/2-615, 735 ILCS 5/2-619, and 735 ILCS 5/2-1005.

The most widely used vehicle for inter-locutory appeal in this area is Supreme Court Rule 308.

*Minton*, 116 Ill. App. 3d at 853.

*Id.* (“This defendant did not file a brief, but we find that this does not prevent resolution of this appeal”).


*Minton*, 116 Ill. App. 3d at 855.

*Washington Courte Condo. Ass’n-Four*, 150 Ill. App. 3d at 689.


*Petersen*, 76 Ill. 2d at 42.

It would not be unprecedented for the Illinois Supreme Court to overrule a line of First District cases that deviated from established supreme court precedent. See e.g. *Nationwide Financial LP v. Pobuda*, 2014 IL 116717, ¶¶ 21, 41 (stating that despite the trial court’s ruling that it is “bound and it must follow the cases in the first district,” the supreme court held “that the relevant legal principles that govern the issues presented here are clear and have been settled for many years, at least as far as this court’s precedent is concerned”).

*Minton*, 116 Ill. App. 3d at 855.

*Pratt I*, 404 Ill. App. 3d at 618.

*Id.* at 617.

*See Geer v. Kadera*, 173 Ill. 2d 398 (1996) (“The fact that the appellate court may have suggested in *dicta* that an alternative remedy might exist did not *ipso facto* create an appealable interest. *Dicta* is not binding authority under the rule of *stare decisis*. As a result, the appellate court’s comments . . . can have no effect upon the action pending in the circuit court”).

276 Ill. App. 3d 325 (1st Dist. 1995).

*Id.* at 329.

*Vill. at White Birch Town Homeowners Ass’n v. Goodman*, 824 N.W.2d 561 (Ct. App. Iowa 2012).


*Petersen*, 76 Ill. 2d at 41 (emphasis added).

*Id.* at 43.

*Pratt II*, 2012 IL App (1st)111474, ¶¶ 33-34.


White & Summers, *supra* note 128 (emphasis original).

*Petersen*, 76 Ill. 2d at 42.

133 Id. ¶ 25.

134 Id.

135 Id. ¶ 26.

136 Id.


139 *Pratt III*, 2013 IL App (1st) 130744, ¶ 29; *Dearlove Cove Condos.*, 180 Ill. App. 3d at 441.

140 *Pratt III*, 2013 IL App (1st) 130744, ¶ 29; *Dearlove Cove Condos.*, 180 Ill. App. 3d at 441.

141 735 ILCS 5/13-214.

142 *Kozak v Ret. Bd. of Firemen’s Annuity and Benefit Fund of Chicago*, 95 Ill. 2d 211, 220 (1983). See also *AXIA, Inc. v. I. C. Harbour Constr. Co.*, 150 Ill. App. 3d 645, 651 (2d Dist. 1986) (“The statute itself does not provide for any exception which would toll, or delay, the running of the statute, as it is an established rule regarding the statute of limitations that no exceptions which toll the statute or enlarge the scope will be implied”).


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