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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ROBIN HICKS et al., Petitioners, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; KAUFMAN AND BROAD HOME CORPORATION et al., Real Parties in Interest.	No. B167843 (Los Angeles County Super. Ct. No. BC198414)

ORIGINAL PROCEEDINGS in mandate. Charles W. McCoy, Judge. Petition denied.

Cohenlan & Khoury, Timothy D. Cohelan, Isam C. Khoury and Micahel D. Singer; Freeman & Freeman and Lawrence P. Freeman for Robin Hicks, Manuel A. Gonzales and Vicki Ann Gonzales.

No appearance for Respondent.

Quinn Emanuel Urquhart Oliver & Hedges, D.M. “Chip” Rawlings and A. Brooks Gresham for Real Parties in Interest Kaufman and Broad Home Corporation et al.

Heller Ehrman White & McAuliffe, Richard DeNatale, Michael T. Williams and Jilana L. Miller; Murchinson & Cumming and Friedrich W. Seitz for Real Parties in SI Corporation et al.

Cooper, White & Cooper, Kathleen F. Carpenter and Dee A. Ware for Amicus Curiae California Building Industry Association on behalf of Real Parties in Interest.

Newmeyer & Dillion, Gregory L. Dillion and Stacey H. Sullivan for Amicus Curiae Centrex Homes, Inc., Fieldstone Communities, Inc., Standard Pacific Corporation and William Lyon Homes, Inc. on behalf of Real Parties in Interest.

We issued an order to show cause in this case to determine whether, at the time of the home sales at issue, California law permitted the builder of newly constructed homes from modifying or excluding from its sales contracts the common law implied warranty of quality first recognized in *Pollard v. Saxe & Yolles Dev. Co.* (1974) 12 Cal.3d 374 (*Pollard*). We now hold that, if set forth in conspicuous and understandable language, a disclaimer of the implied warranty of quality is enforceable and further hold that the trial court in this case correctly concluded the written disclaimers in the sales and express warranty documents provided to the home buyers preclude their claim for breach of implied warranty.

INTRODUCTION

A. *Procedural Background*

Robin Hicks, Manuel A. Gonzales and Vicki Ann Gonzales (collectively home buyers), individually and as representatives of a putative state-wide class of purchasers of new homes, filed a lawsuit to recover repair or replacement costs for allegedly defective concrete slabs on grade in newly constructed homes they had purchased from developer Kaufman and Broad Home Corporation (KB Home). The home buyers allege the concrete slabs contain either "Fibermesh" or other brands of polypropylene fiber additives to control cracks that occur when concrete cures, rather than the older (and

more expensive) welded wire mesh previously used in new home construction. Because polypropylene fiber is purportedly inferior to welded wire mesh, which restricts cracks to a hairline width, the use of "an inadequate substitute" as a reinforcement system in the non-weight-bearing concrete slabs allegedly constitutes "a serious design and construction defect."

The home buyers originally alleged causes of action for strict liability, negligence and breach of express and implied warranties. After KB Home answered the complaint, the home buyers moved for an order certifying the case as a class action. The trial court denied the motion. We reversed the order denying class certification as to the causes of action for breach of express and implied warranty, but affirmed the order with respect to the tort causes of action. (*Hicks v. Kaufman & Broad Home Corp*. (2001) 89 Cal.App.4th 908 (*Hicks I*).)

On remand the home buyers were permitted to file a new, Fourth Amended Complaint. KB Home demurred to the third cause of action for breach of implied warranty pursuant to Code of Civil Procedure section 430.10, subdivision (e), contending that each of the named home buyers had waived any implied warranties in connection with the purchase of his or her home. (More specifically, the demurrer asserted that the implied warranty disclaimers set forth in the written warranties alleged in the second cause of action for breach of express warranty barred the claim for breach of implied warranty.) The trial court overruled the demurrer, concluding that, although the disclaimers of implied warranties contained in the KB Home sales documents (the sales agreement, disclosure statement and limited warranty) are sufficiently conspicuous within the meaning of California Uniform Commercial Code section 2316 to be enforceable as a matter of law and are not made unenforceable by the Song-Beverly Consumer Warranty Act, Civil Code sections 1790 et seq., the home buyers' claim of unconscionability required resolution of factual issues that could not properly be determined on demurrer.

KB Home was granted leave to file a summary adjudication motion directed to the implied warranty cause of action. KB Home argued, in part, that the implied warranty

disclaimers are not unconscionable because homeowners were provided a comprehensive express warranty in the place of any implied warranties. Following an opportunity for discovery by the home buyers, full briefing by all parties and oral argument, the trial court granted the motion. The court reiterated its prior determination that the disclaimers were sufficiently conspicuous to be enforceable and concluded that the waiver of implied warranties in favor of the extensive express warranty was neither procedurally nor substantively unconscionable.

B. *KB Home's Express Warranties and Implied Warranty Disclaimers*

In connection with their 1991 purchase of new homes, each of the named home buyers signed a written sales agreement, a disclosure statement and an express warranty agreement entitled "Limited Warranty," which provided a one-year express warranty for defects in materials and workmanship for the entire house, a two-year express warranty for defects in materials and workmanship for "major components"[1] of the home and a 10-year warranty for serious structural defects.[2]

The disclosure statement contained a separate section, "III. Warranty," which advised the home buyer "Kaufman and Broad makes no warranty or guarantee, express or implied, except that which is specifically set forth in the Kaufman and Broad 'Limited Warranty,' a copy of which is attached to this disclosure. The limited warranty describes in detail Kaufman and Broad's repair obligations and warranty obligations. . . ."

The Limited Warranty begins with a statement to home buyers that the protection expressly provided by that document is the only guarantee KB Home is providing, "This Warranty is the only warranty given by Kaufman and Broad in connection with your new

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[1] "Driveways" and "floor coverings" are defined as major components by the Limited Warranty, and cracks and displacement in the driveways and floor coverings are apparently covered items if they equal or exceed one-eighth of an inch in width.

[2] The 10-year warranty covers "any defect resulting in or causing tangible damage to the roof, walls or foundation of the Home which materially diminishes the structural integrity and the load-bearing performance of the Home," including damage resulting from "expansion, subsidence or lateral movement of the soil."

home." The Limited Warranty concludes with an "agreement and acceptance" provision to be signed by both KB Home and the home buyer, which provides: "By signing in the appropriate area below, *K&B* agrees to fulfill all of its obligations under this Warranty. By its signature(s), *Home Owner* acknowledges its receipt and understanding of the Warranty and its acceptance of the Warranty in lieu of all other warranties, express or implied, including merchantability and fitness for a particular purpose."

The written sales agreement itself, also signed by each of the home buyers and countersigned by KB Home, states "seller makes no other warranties, whether express or implied, and buyer hereby waives any implied warranty of merchantability and/or warranty of fitness for a particular use, and any other implied warranties." This disclaimer was written with all capital letters and printed in bold type.

C. *Evidence Relating to the Home Buyers' Claim of Unconscionability*

To refute the home buyers' claim of unconscionability, KB Home presented evidence that the named home buyers, like all other purchasers, were given an opportunity to review all the sales documents for three days prior to signing them; that other housing comparable to that purchased by the home buyers from KB Home was available from other area developers; and that KB Home would have deleted the implied warranty disclaimers rather than lose a sale to one of the named home buyers. The home buyers presented no evidence suggesting they could not negotiate terms of their sales contracts or that they were unable to buy similarly priced homes somewhere near the houses they actually purchased.

Based on this evidence, the trial court concluded KB Home's implied warranty disclaimers were neither procedurally nor substantively unconscionable: "When an implied warranty is waived and replaced, in part, by an express warranty, the waiver of the implied warranty cannot shock the conscience legally unless the replacement itself shocks the conscience. [¶] Here, the express warranty (with up to a ten-year limitations period) provides in certain respects for more protection for major defects than do the waived implied warranties (with a four year limitations period). The express warranty

does not, as a matter of law, shock the conscience. What was given in the form of express warranties was more comprehensive and thorough than what was waived. Reading the overlapping express and implied warranties together, waiver of the implied warranties does not, as a matter of law, rise to the level of contractual misbehavior that permits a court to void it as unconscionable."

After the home buyers petitioned this court for a writ of mandate compelling the trial court to vacate its order granting summary adjudication, we issued an order to show cause why the requested relief should not be granted.

CONTENTIONS

The home buyers contend the trial court erred in granting KB Home's motion for summary adjudication because (1) disclaimers of implied warranties in new home sales are void as against public policy, (2) the disclaimers at issue in this case are invalid because they are not set forth in conspicuous and understandable language, and (3) the home buyers' waiver of implied warranties is unconscionable.

DISCUSSION

1. *Pollard's Recognition of Implied Warranties Covering Newly Constructed Homes*

The California Uniform Commercial Code,[3] enacted in 1963 (Stats. 1963, ch. 819, p. 1849 et seq.; see *Krieger v. Nick Alexander Imports, Inc*. (1991) 234 Cal.App.3d 205, 212), defines three types of warranties applicable to consumer purchases: express warranty, the implied warranty of merchantability and the implied warranty of fitness for a particular purpose. (Cal. U. Com. Code, §§ 2313, 2314, 2315.)[4] A seller is permitted to

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[3] All further references to "the Commercial Code" are to the California Uniform Commercial Code.

[4] The implied warranty provisions of the Commercial Code are similar in many respects to the warranty protections previously provided by former Civil Code sections 1735(1) [implied warranty of fitness for particular purpose] and 1735(2) [implied warranty of merchantability].

limit its liability for defective goods by disclaiming or modifying a warranty. (Cal. U. Com. Code, § 2316.)

In 1970 the Legislature adopted the Song-Beverly Consumer Warranty Act (Stats. 1970, ch. 1333, p. 2478 et seq. (Song-Beverly Act)), which regulates warranty terms, imposes service and repair obligations on manufacturers, distributors and retailers of consumer goods who make express warranties, requires disclosure of certain information in express warranties and expands the consumer's remedies for breach of warranty. (*Krieger v. Nick Alexander Imports, Inc., supra,* 234 Cal.App.3d at p. 213.) The Song-Beverly Act provides for an implied warranty of merchantability in every sale of consumer goods at retail (Civ. Code, § 1792) and an implied warranty of fitness under specified conditions (Civ. Code, § 1792.1); the Act expressly prohibits providing express warranty protection in place of the implied warranties of quality and fitness: "[A] manufacturer, distributor, or retailer, in transacting a sale in which express warranties are given, may not limit, modify, or disclaim the implied warranties guaranteed by this chapter to the sale of consumer goods." (Civ. Code, § 1793.) The Song-Beverly Act "supplements, rather than supersedes, the provisions of the California Uniform Commercial Code. (Civ. Code, § 1790.3; see also Civ. Code, § 1794, subd. (b), incorporating specific damages provisions of the Cal. U. Com. Code.)" (*Krieger*, at p. 213.)

In 1974, subsequent to the adoption of both the Commercial Code and the Song-Beverly Act, the Supreme Court extended the theory of implied warranties of quality and fitness from sales of consumer goods and other personal property to contracts for the construction and sale of newly constructed homes. (*Pollard, supra*, 12 Cal.3d at p. 379; see *Mills v. Forestex Co*. (2003) 108 Cal.App.4th 625, 635, fn. 4.) The *Pollard* Court first noted, in contrast to the sale of personal property where warranties of quality and fitness have been implied, courts have traditionally applied the doctrine of caveat emptor to sales of real property, "with the buyer assuming the risk on quality -- absent express warranty, fraud, or misrepresentation." (*Pollard*, at p. 377.) The *Pollard* Court then

explained the doctrine of implied warranty is based on the knowledge of the seller, the buyer's reliance on the seller's skill or judgment and the ordinary expectations of the parties. (*Id.* at p. 379.) Those same factors, the Court held, support recognition of a common law implied warranty of quality that attaches to the sale of new construction. (*Ibid*.)

"In the setting of the marketplace, the builder or seller of new construction -- not unlike the manufacturer or merchandiser of personalty -- makes implied representations, ordinarily indispensable to the sale, that the builder has used reasonable skill and judgment in constructing the building. On the other hand, the purchaser does not usually possess the knowledge of the builder and is unable to fully examine a completed house and its components without disturbing the finished product. Further, unlike the purchaser of an older building, he has no opportunity to observe how the building has withstood the passage of time. Thus he generally relies on those in a position to know the quality of the work to be sold, and his reliance is surely evident to the construction industry. [¶] Therefore, we conclude builders and sellers of new construction should be held to what is impliedly represented -- that the completed structure was designed and constructed in a reasonably workmanlike manner." (*Pollard, supra,* 12 Cal.3d at pp. 379-380.)

After affirming the existence of nonstatutory implied warranties of quality and fitness by builders and sellers of new construction, the *Pollard* Court cited its earlier decision in *Greenman v. Yuba Power Products, Inc*. (1963) 59 Cal.2d 57, 61 for the proposition that, "[i]n treating common law warranties, it has been recognized that statutory standards should be utilized where appropriate" to define the nature of an implied warranty and the procedural requirements for its enforcement.[5] The Court then

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[5] In *Greenman v. Yuba Power Products, Inc., supra,* 59 Cal.2d at page 61, the Court explained it has invoked Uniform Sales Act provisions to define the defendant's liability in many situations involving noncontractual warranties, "but it has done so, not because the statutes so required, but because they provided appropriate standards for the court to adopt under the circumstances presented." In *Greenman* itself, however, the Court

held the reasonable notice requirement of Commercial Code section 2607, subdivision (3), which is "based on a sound commercial rule designed to allow the defendant opportunity for repairing the defective item, reducing damages, avoiding defective products in the future, and negotiating settlements," barred the action for breach of warranty by the home buyer before it. (*Pollard, supra,* 12 Cal.3d at p. 380.)

2. *General Principles Permitting Waiver of Implied Warranties of Quality and Fitness*

In *Burr v. Sherwin Williams Co.* (1954) 42 Cal.2d 682 the Supreme Court recognized that statutory implied warranties may be disclaimed by the seller "provided the buyer has knowledge or is chargeable with notice of the disclaimer before the bargain is complete." (*Id.* at p. 693.) In determining whether an effective disclaimer of statutory warranties has been made, however, the entire document containing the disclaimer language must be examined (there, the label on a drum of insecticide); and the disclaimer itself will be strictly construed against the seller. (*Id.* at pp. 693-694.) Under the rule of strict construction, the disclaimer before the Court was limited to any warranty concerning "use" -- that is, any warranty that the substance sold to the plaintiffs was an effective or safe insecticide -- and not the implied warranty that the substance sold actually met the description of the product ordered by the plaintiffs: "More specifically, there is nothing in the disclaimer which suggests that Sherwin Williams was refusing to warrant that the liquid in the drums was compounded so as to conform with the description and was free from any impurity which would make it unsalable for the general purposes of a product of the kind ordered by the plaintiffs." (*Id.* at p. 695.)

Section 2316 of the Commercial Code clarifies and broadens prior law with respect to exclusion or modification of warranties: "[T]o exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied

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declined to apply the notice provisions of the Uniform Sales Act to injured consumers against manufacturers. (*Ibid*.)

warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that 'There are no warranties which extend beyond the description on the face hereof.'" (Cal. U. Com. Code, § 2316, subd. (2)[6]; see Cal. U. Com. Code com. 2, 23A, pt. 1 West's Ann. Cal. U. Com. Code (2002 ed.) foll. § 2316, p. 355 ["While this section like the Burr case requires the seller to specifically disclaim implied warranties, it goes further in establishing a minimum standard, i.e., the seller must mention 'merchantability' and in the case of a writing it must be conspicuous."].)

3. *California Law Governing the Home Buyers' Purchases from KB Home Permits Clear and Understandable Waivers of Implied Warranties*

At least prior to the effective date of Senate Bill No. 800 (2001-2002 Reg. Sess.), which governs actions for residential construction defects in homes originally sold on or after January 1, 2003, nothing in California law prohibited KB Home from offering an express warranty to purchasers of its newly constructed homes coupled with a clear disclaimer of any implied warranties of quality or fitness for a particular use. (See *Shapiro v. Hu* (1986) 188 Cal.App.3d 324, 332-333 [affirming order granting judgment notwithstanding the verdict in favor of seller of improved parcel of real property on breach of contract action on ground that sales agreement excluded all implied warranties as to quality or condition].) To the extent *Pollard*'s extension of the theory of implied warranties to the construction and sale of new housing was expressly intended for the protection of the individual home purchaser, rather than to advance general public interests (see *Pollard, supra*, 12 Cal.3d at p. 379), a knowing waiver of those implied warranties in the sale of a private residence should be effective. (Civ. Code, § 3513 ["Any one may waive the advantage of a law intended solely for his benefit. But a law

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[12] California Uniform Commercial Code section 2316, subdivision (3), provides: "Notwithstanding subdivision (2) [¶] (a) Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like 'as is,' 'with all faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty . . . ."

established for a public reason cannot be contravened by a private agreement."]; *Loughrin v. Superior Court* (1993) 15 Cal.App.4th 1188, 1193-1194 ["We find that none of the characteristics cited in *Tunkl* [*v. Regents of University of California* (1963) 60 Cal.2d 92] as creating a 'public interest' exists in the typical private real estate purchase and sale transaction."].)

Although both the home buyers and the dissent broadly assert, based primarily on the significance of a new home purchase for most people, that public policy should preclude *any* disclaimer of the implied warranty of quality or merchantability for newly constructed housing, the argument actually presented is directed to the *manner* in which a waiver must be made to be effective. Thus, the dissent selects the rigorous standards of the Song-Beverly Act governing waiver and concludes they should be fully applicable to the sale of new housing, although the Legislature expressly limited the protections of this statute to "consumer goods," defined as "any new product or part thereof that is used, bought, or leased for use primarily for personal, family, or household purposes, except for clothing and consumables." (Civ. Code, § 1791, subd. (a).) But even the Song-Beverly Act permits a waiver of the implied warranty of merchantability if clearly expressed by an "'as is'" or "'with all faults'" provision. (Civ. Code, §§ 1792.4, subd. (a); 1792.5 ["Every sale of goods that are governed by the provisions of this chapter, on an 'as is' or 'with all faults' basis, made in compliance with the provisions of this chapter, shall constitute a waiver by the buyer of the implied warranty of merchantability and where applicable, of the implied warranty of fitness."].)

Similarly, the home buyers urge this court to look to case law from outside California specifically addressing disclaimers of implied warranties in new home sales, yet concede that such waivers will be upheld in most jurisdictions if clear language has been used and appropriate procedures followed by the developer; the home buyers even quote from a law review article summarizing non-California case law as imposing "as many as eight different requirements for effective disclaimers of implied warranty protection in the sale of real property." In the end, therefore, although heightened

judicial scrutiny may be required, clearly expressed waivers of implied warranties in the new housing market are not contrary to public policy and should be enforced. (See Civ. Code, § 3268 [rights and obligations of parties to contract as defined in Civil Code are subordinate to the intention of the parties; benefits may be waived unless waiver would be against public policy].)

This result is fully consistent with the Supreme Court's decision in *Pollard*, which looked to the provisions of the Commercial Code, based on "sound commercial rule[s]," and not the more restrictive consumer protection provisions of the Song-Beverly Act, to provide guidance for the enforcement of the common law implied warranty of quality that attaches to the sale of new construction. (*Pollard, supra*, 12 Cal.3d at p. 380 [adopting Commercial Code's requirement that buyer provide notice of breach within a reasonable time].) The Commercial Code, as previously discussed, is less demanding than the Song-Beverly Act in the procedural prerequisites for upholding the parties' decision to modify or exclude the implied warranties of quality and fitness. (*See Southern Cal. Edison Co. v. Harnischfeger Corp*. (1981) 120 Cal.App.3d 842, 855-856 [affirming summary judgment where provisions of express warranty disclaimed all implied warranties].)

Enforcement in appropriate cases of a written agreement to waive implied warranties is also consonant with the general rule in California that the parties are free to write their own contract, provided only that the purchaser has been placed on fair notice of any disclaimer or modification of a warranty and has freely agreed to its terms. (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 119-120; see *Seely v. White Motor Co.* (1965) 63 Cal.2d 9, 18 ["A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will."].)

Finally, the dissent's proposal for a new rule of liability for developers and contractors implicates serious issues relating to the development of safe and affordable

housing in California. In light of the Legislature's recent enactment of comprehensive legislation dealing with problem of construction defects litigation (Stats. 2002, ch. 722, § 3, adding title VII, "Requirements for Actions for Construction Defects" to the Civil Code),[7] and its active involvement in extending warranty protection to other classes of consumers -- not only in commercial transactions covered by the Commercial Code and the purchase of consumer goods protected by the Song-Beverly Act, but also in connection with the purchase of a mobile or manufactured home (Civ. Code, §§ 1797-1797.7) and the installation or replacement of the roof of a residential structure (Civ. Code, §§ 1797.90-1797.96) -- the public policy concerns raised by the home buyers and the dissent are more appropriately addressed by the political branches of our state government. (See *Aas v. Superior Court* (2000) 24 Cal.4th 627, 652 ["In our view, the many considerations of social policy this case implicates, rather than justifying the imposition of liability for construction defects that have not caused harm of the sort traditionally compensable in tort [citation], serve instead to emphasize that certain choices are better left to the Legislature."].)

4. *The KB Home Disclaimers Are Conspicuous*

Looking to the provisions of the Commercial Code for guidance, as did the Supreme Court in *Pollard*, we agree with the trial court that the disclaimers of implied

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[7] Senate Bill No. 800 sets standards for actionable construction defects, provides new procedures and remedies designed to expedite resolution of construction defect claims and enumerates required and optional warranty coverage to be provided to new home buyers. (Civ. Code, § 895 et seq.) The legislation has been described as "groundbreaking reform for construction defect litigation." (Assem. Com. on Judiciary, Rep. on Sen. Bill No. 800 (2001-2002 Reg. Sess.) as amended Aug. 28, 2002.) "As many prior bill analyses on this subject have noted, the problem of construction defects and associated litigation have vexed the Legislature for a number of years, with substantial consequences for the development of safe and affordable housing. This bill reflects extensive and serious negotiations between builder groups, insurers and the Consumer Attorneys of California, with the substantial assistance of key legislative leaders over the past year, leading to consensus on ways to resolve these issues." (*Ibid*.)

warranty in the KB Home sales documents are sufficiently conspicuous to be enforceable.[8]

A term or clause is "conspicuous" under the Commercial Code "when it is so written that a reasonable person against whom it is to operate ought to have noticed it. . . . Language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color . . . ." (Cal. U. Com. Code, § 1201, subd. (10).) Although section 1201, subdivision (10), illustrates some of the means by which a contract term may be made conspicuous, ultimately "the test is whether attention can reasonably be expected to be called to it." (Cal. U. Com. Code com. 10, 23A, pt. 1 West's Ann. Cal. U. Com. Code, § 1201, p. 88.)

The written sales agreement signed by each of the home buyers contains a provision, written in all-capital letters, advising the home buyers: "SELLER AND ITS CONTRACTOR SHALL NOT BE LIABLE FOR ANY CLAIMS RELATING TO THE CONTRUCTION OF THE DWELLING ON THE PROPERTY EXCEPT UNDER THE TERMS AND CONDITIONS OF THE WRITTEN WARRANTY, IF ANY, TO BE GIVEN TO BUYER AT CLOSE OF ESCROW. SELLER MAKES NO OTHER WARRANTIES, WHETHER EXPRESS OR IMPLIED, AND BUYER HEREBY WAIVES ANY IMPLIED WARRANTY OF MERCHANTABILITY AND/OR WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE, AND ANY OTHER IMPLIED WARRANTIES." Because this disclaimer is printed in bold face and is thus in "contrasting type or color" from other portions of the sales form, it falls squarely within one of the categories of written disclosure that Commercial Code section 1201, subdivision (10), expressly deems conspicuous.[9] That the disclaimer could be made even

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[8] Whether a term or clause is "conspicuous" is a question of law for the court. (Cal. U. Com. Code, § 1201, subd. (10).)

[9] The dissent observes that the paragraph immediately preceding this disclaimer also appears in bold-face type. Yet that paragraph informs the home buyer that "there are no collateral understandings, representations or agreements [other than this written sales agreement] unless contained in a written instrument or instruments, duly executed by

more conspicuous by adopting the dissent's suggestions and including a heading, printing it in larger type or requiring the buyer to initial it does not vitiate the fact that KB Home has fully met the objective notice standards of the Commercial Code for an effective modification of the implied warranties of quality[10] and fitness.

KB Home's effective disclaimer of the implied warranties of quality and fitness is reinforced by the repetition of the waivers in both the disclosure statement -- "[KB Home] makes no warranty or guarantee, express or implied, except that which is specifically set forth in the [KB Home] 'Limited Warranty'" -- and the Limited Warranty itself --"[t]his Warranty is the only warranty given by [KB Home] in connection with your new home." To be sure, all of these disclaimer/waiver terms are contained in documents with many arguably complex provisions. But the very significance of the decision to purchase a new home that the home buyers and the dissent emphasize in arguing for a new public policy prohibition on waivers of implied warranties belies the suggestion that, when they acknowledged with their signatures that the written warranty provided to them by KB Home was "in lieu of all other warranties, express or implied, including merchantability and fitness for a particular purpose," the home buyers were not clearly warned that any risk of defects outside the written warranty fell on them. (See *Hauter v. Zogarts, supra,* 14 Cal.3d at p. 119.) In sum, the KB Home disclaimer was written so "a reasonable person against whom it is to operate ought to have noticed it." (Cal. U. Com. Code, § 1201, subd. (10).)

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buyer and seller" -- thereby reinforcing the reasonable buyer's understanding that the only protection provided by KB Home is in the form of the written warranty, not any undefined and unstated "implied" warranty.

[10] The dissent is undoubtedly correct that at least some home buyers may not understand what "merchantability," as opposed to "quality," means. But the use of the term "merchantability" in this disclaimer, mandated by Commercial Code section 2316, when coupled with the explicit exclusion of every other form of implied warranty, as well as any claim not covered by KB Home's written warranty, could not possibly mislead a reasonable new home buyer as to the scope of the waiver intended.

5. *The KB Home Disclaimers Are Not Unconscionable*

KB Home's motion for summary adjudication was directed primarily to the home buyers' contention the implied warranty disclaimers in the KB Home sales documents are unconscionable and therefore unenforceable. (Civ. Code, § 1670.5.)

Unconscionability is a question of law (*Jones v. Wells Fargo Bank* (2003) 112 Cal.App.4th 1527, 1539; *Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering*, *Inc.* (2001) 89 Cal.App.4th 1042, 1055) and has a procedural and a substantive element. Both must appear for a court to exercise its discretion to invalidate a contract or one of its individual terms. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114 (*Armendariz*); *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 174 (*Mercuro*).) These elements, however, need not be present in the same degree. "[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Armendariz*, *supra*, 24 Cal.4th at p. 114.)

"Procedural unconscionability turns on adhesiveness -- a set of circumstances in which the weaker or 'adhering' party is presented a contract drafted by the stronger party on a take it or leave it basis. [Citation.] To put it another way, procedural unconscionability focuses on the oppressiveness of the stronger party's conduct. [Citation.]" (*Mercuro, supra,* 96 Cal.App.4th at p. 174.) Substantive unconscionability focuses on the actual terms of the agreement and evaluates whether they create """overly harsh""" or "'one-sided' results" (*Armendariz, supra*, 24 Cal.4th at p. 114), that is, whether contractual provisions reallocate risks in an objectively unreasonable or unexpected manner. (*Jones v. Wells Fargo Bank*, *supra*, 112 Cal.App.4th at p. 1539.) To be substantively unconscionable, a contractual provision must shock the conscience. (*California Grocers Assn. v. Bank of America* (1994) 22 Cal.App.4th 205, 214; *Kinney v. United HealthCare Services, Inc*. (1999) 70 Cal.App.4th 1322, 1330 ["'Substantive unconscionability' focuses on the terms of the agreement and whether those terms are 'so one-sided as to "*shock the conscience*."' [Citations.]"].)

To determine whether a contract term is so one-sided as to be substantively unconscionable it is, of course, necessary to read the agreement as a whole and to evaluate what, if anything, the other party gained by accepting the disputed provision. (*Woodside Homes of Cal., Inc. v. Superior Court* (2003) 107 Cal.App.4th 723, 734 (*Woodside Homes*) [upholding contractual waiver of jury trial for construction defects litigation by home buyers who received, in return, matching waiver from developer]; *Pardee Construction Co. v. Superior Court* (2002) 100 Cal.App.4th 1081, 1092 [invalidating waiver of jury trial because no showing buyers gained anything in return for their waiver].) Here, as the trial court found, the home buyers' waiver of implied warranties was coupled with KB Home's provision of an expanded express warranty, which afforded the home buyers greater protection with respect to at least some potential defects in the homes they were purchasing. For example, KB Home expressly warranted its homes "'will be free from any defect resulting in or causing tangible damage to the . . . foundation of the home which materially diminishes the structural integrity and load-bearing performance of the home for a period of ten (10) years . . . .'" (See *Hicks I, supra,* 89 Cal.App.4th at p. 917.) The limitations period for a breach of implied warranty claim, by contrast, is four years. In addition, "privity with [KB Home] is necessary for recovery under an implied warranty theory" (*id.* at p. 926), while KB Home's express warranty is transferable to subsequent purchasers.

It is undoubtedly true, as the home buyers argue, that in some situations KB Home will have contractual defenses to an express warranty claim that would be unavailable in a claim for breach of the implied warranty of quality or fitness for a particular purpose. But the fact the home buyers may have given up something of value by waiving all implied warranties does not make their bargain unfairly one-sided or suggest KB Home reallocated risks in an objectively unreasonable fashion. The extensive (even if not complete) protection provided by the Limited Warranty, when evaluated in light of the

hypothetical additional implied warranty safeguards waived by the home buyers, certainly does not "shock the conscience."[11]

The absence of substantive unfairness in the challenged contract terms is fatal to the home buyers' claim of unconscionability. (*Mercuro, supra*, 96 Cal.App.4th at p. 174 [both procedural and substantive unconscionability "must appear in order to invalidate a contract or one of its individual terms"].) But the record before the trial court on KB Home's motion for summary adjudication also reveals the home buyers failed to submit any evidence of procedural unconscionability. KB Home presented testimony it would have negotiated the terms of its home sales, including the proposed waiver of implied warranties, to avoid losing a customer. That evidence was not disputed by the home buyers. Nor did they present any evidence that prospective purchasers had ever attempted to modify or delete the warranty disclaimer provisions. As was also the case in *Woodside Homes, supra*, 107 Cal.App.4th 723, which upheld an alternative dispute resolution procedure against claims of unconscionability, KB Home submitted unrefuted evidence that comparable housing was available in the area, all supporting the view that the KB Home sales agreement was not, in reality, a contract of adhesion -- "'a standardized contract, which imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.' [Citation.]" (*Armendariz*, *supra*, 24 Cal.4th at p. 113 ["Unconscionability analysis begins with an inquiry into whether the contract is one of adhesion."]; *Mercuro*, *supra*, 96 Cal.App.4th at p. 174 ["[p]rocedural unconscionability turns on adhesiveness"].) Thus, even assuming there was some imbalance in bargaining power between KB Home and the home buyers, neither coercion nor lack of choice, the usual

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[11] To the extent the home buyers contend *any* waiver of implied warranties for a newly constructed residence shocks the conscience and is therefore substantively unconscionable, they are simply repeating their void-as-against-public-policy argument in slightly different language. As discussed above, California law does not support this position.

hallmarks of procedural unconscionability, was present in these sale transactions. (See *Woodside Homes*, *supra*, 107 Cal.App.4th at p. 730.)

Finally, to the extent the analysis of procedural unconscionability considers the reasonable expectations of the party without bargaining power (*Armendariz, supra*, 24 Cal.4th at p. 113 [a provision in an adhesion contract "'which does not fall within the reasonable expectations of the weaker or "adhering" party will not be enforced against him'"]), as discussed in detail above, the several disclaimer provisions in the KB Home sale documents are both conspicuous and understandable. The element of "surprise," often considered in unconscionability cases, simply was not present here. (*Woodside Homes*, *supra*, 107 Cal.App.4th at p. 730.)[12]

DISPOSITION

The petition for writ of mandate is denied. Each side is to bear its own costs in this proceeding.

CERTIFIED FOR PUBLICATION

PERLUSS, P. J.

I CONCUR:

WOODS, J.

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[12] Home buyers also contend a triable issue of fact exists as to whether KB Home repudiated its disclaimer of all implied warranties by making various representations of quality in promotional materials and in pre-sale discussions with potential home purchasers. However, because the sales agreements contain a clear integration clause, the home buyers' attempt to rely on these allegedly inconsistent promises of quality is barred by the parol evidence rule. (E.g., *Alling v. Universal Manufacturing Corp*. (1992) 5 Cal.App.4th 1412, 1437; *Banco Do Brasil, S. A. v. Latian, Inc*. (1991) 234 Cal.App.3d 973, 1010.)

CERTIFIED FOR PUBLICATION

JOHNSON, J., Dissenting.

In deciding this case the first question we should ask is if, as KB Home asserts, its express warranty is "superior" to *Pollard*'s implied warranty of merchantability, why was KB Home so alarmed it might be found liable under the implied warranty it attempted to disclaim it not just once but three separate times. The answer, as the majority concedes, is that KB Home's express warranty is *not* superior overall to the implied warranty of merchantability. While the KB Home express warranty affords home buyers greater protection with respect to some potential defects in the homes they are buying it also provides KB Home with contractual defenses to an express warranty claim which would be unavailable in a claim under the implied warranty of merchantability.

Given its litigation strategy in this case KB Home obviously believes it stands a better chance of defeating plaintiffs' claims of foundation defects under its "superior" express warranty than under the implied warranty of merchantability. This leads to the second question we should be asking which is whether a builder-developer, who chooses to substitute a cheaper but supposedly better reinforcement product for one traditionally used, should, as a matter of public policy, be allowed to shift responsibility for rectification onto the buyer when the substitute product turns out to be defective. In my view, the same public policy considerations which preclude the waiver of the implied warranty of merchantability as to consumer goods—unequal bargaining power, unequal knowledge, and the buyer's necessary reliance on the seller's skill and judgment—preclude the waiver of the implied warranty of merchantability as to new housing.

Finally, even assuming the *Pollard* implied warranty can be waived under certain circumstances I disagree with the majority's conclusion KB Homes' disclaimer of the implied warranty in this case is sufficiently conspicuous to satisfy the requirements of the Uniform Commercial Code.

I. NEW HOMES BUILT AND SOLD BY DEVELOPERS SUCH AS KB HOME ARE ANALOGOUS TO CONSUMER GOODS AND THEREFORE SUBJECT TO AN UNWAIVABLE IMPLIED WARRANTY OF MERCHANTABILITY.

Housing developers have been held liable for construction defects as far back as the 18th Century B.C. when the Code of Hammurabi imposed the death penalty on a person creating a defect in the construction of a house if the defect led to the death of its owner.[1] Today developers continue to be held accountable for the quality of their construction although, at least in California, the penalties for defects are less severe.

California's implied warranty of merchantability in housing had its genesis in the post-World War II housing boom. Before World War II an individual who wanted a new house bought a tract of land and then contracted to have a home built on that land. After World War II homes began to be mass-produced on large tracts of land owned by developers, as is the case with the homes involved in the present action.[2] As one commentator has noted, housing construction "'took on all the color of a manufacturing enterprise' [proceeding] in a manner similar to the mass production of other consumer goods."[3] This new dynamic in the housing market led to "transactions characterized by unequal bargaining power between the buyer and the seller."[4] Equally important, mass production of homes resulted in a knowledge gap between developer and buyer. In the case of a custom built home the buyer usually has the ability, means and opportunity to inspect the construction as it proceeds. In the case of mass produced housing, however, the buyer must rely on the developer or general contractor to make sure the construction

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1 Comment, Constructing a Solution to California's Construction Defect Problem (1999) 30 McGeorge L. Rev. 299, 306-307 (hereafter Constructing a Solution). It is not known whether this law led developers to abandon the Babylonian housing market.

2 See Constructing a Solution, *supra*, 30 McGeorge L.Rev. at page 305; *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916.

3 Constructing a Solution, *supra*, 30 McGeorge L.Rev. at pages 305-306.

4 Constructing a Solution, *supra*, 30 McGeorge L.Rev. at page 305.

is up to standard.[5] "The modern purchaser usually has neither the time nor the money to hire experts to check a home for latent defects. Especially when this might mean peeling away layers of the house in order to examine work performed."[6]

Recognition of the unequal knowledge and bargaining power between builder and buyer led our Supreme Court to conclude "an implied warranty of quality attaches to the sale of new construction."[7] Equating sales of new houses to sales of consumer goods, the court reasoned: "The doctrine of implied warranty in a sales contract is based on the actual and presumed knowledge of the seller, reliance on the seller's skill or judgment, and the ordinary expectations of the parties. . . . In the setting of the marketplace, the builder or seller of new construction—not unlike the manufacturer or merchandiser of personalty—makes implied representations, ordinarily indispensable to the sale, that the builder has used reasonable skill and judgment in constructing the building."[8]

Neither the *Pollard* decision nor any California case I have found addresses the question whether the implied warranty of merchantability in new housing can be waived. The Supreme Court did note, however, "[i]n treating common law warranties . . . statutory standards should be utilized where appropriate."[9] Because the court based the implied warranty on the similarities between new home construction and the manufacturing of consumer goods, I conclude the statutory standard for waiver found in the Song-Beverly Act should apply to the implied warranty of merchantability in new housing.

In 1970 the California Legislature enacted broad consumer protection legislation commonly known as the Song-Beverly Act.[10] The Act protects purchasers of "consumer goods" which it defines as "any new product or part thereof that is used, bought, or leased

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5 Note, Builder's Liability To New And Subsequent Purchasers (1991) 20 Southwestern U. L.Rev. 219, 221 (hereafter Builder's Liability).

6 Builder's Liability, *supra*, 20 Southwestern U. L.Rev. at page 221.

7 *Pollard v. Saxe & Yolles Dev. Co.* (1974) 12 Cal.3d 374, 379.

8 *Pollard*, *supra*, 12 Cal.3d at page 379; citation omitted. In the present case, KB Home informed its home buyers their home "has been professionally built with quality materials and the pride of skilled craftsmen."

9 *Pollard*, *supra*, 12 Cal.3d at page 380.

10 Civil Code section 1790 et sequitur.

for use primarily for personal, family, or household purposes, except for clothing and consumables."[11] Prior to this legislation consumers had looked to the Uniform Commercial Code for protection. The Song-Beverly Act supplements the U.C.C. provisions governing sales and, where Song-Beverly provides greater consumer protection, its provisions supercede those of the U.C.C.[12] One area in which the Song-Beverly Act provides greater consumer protection is in its provisions on waiver of warranties. The first section of the Act, after its title, states: "Any waiver by the buyer of consumer goods of the provisions of this chapter, except as expressly provided in this chapter, *shall be deemed contrary to public policy and shall be unenforceable and void*."[13] The Act further provides: "*No implied warranty of merchantability . . . shall be waived*" unless the goods are sold on an "as is" basis.[14]

Predictably, KB Home and its amici predict dire consequences to the new housing industry if we were to allow plaintiffs' implied warranty claim to go forward. I am not persuaded.

If, as KB Home claims, its limited warranty is actually superior to the implied warranty of merchantability under *Pollard* then allowing this case to proceed under the implied warranty will have no effect on KB Home's potential liability. Indeed, news of KB Home's superior warranty should attract more home buyers to its products causing its competition to offer equally protective warranties and raise their construction standards accordingly thereby benefiting the housing industry and consumers alike.

If, on the other hand, KB Home's limited warranty does not afford the protection the Supreme Court held home buyers are entitled to receive it is difficult to understand why a developer should be permitted to market a shoddy product and escape liability for

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[11] Civil Code section 1791, subdivision (a). This definition explains why the court in *Pollard* had to adopt a common law implied warranty of merchantability in the sale of new houses instead of simply applying the provisions of the Song-Beverly Act. A contract to build a building, the court reasoned, "is essentially a contract for material and labor." (*Pollard*, *supra*, 12 Cal.3d at p. 378.) Traditionally, the furnishing of material and labor has been considered not to involve a sale of goods. (*Aced v. Hobbs-Sesack Plumbing Co.* (1961) 55 Cal.2d 573, 582.)

[12] Civil Code section 1790.3.

[13] Civil Code section 1790.1; italics added.

[14] Civil Code section 1792.3; italics added.

failing to deliver what was impliedly represented—"that the completed structure was designed and constructed in a reasonably workmanlike manner."[15]

Nor am I convinced prohibiting disclaimers of the implied warranty of merchantability in new houses will foster frivolous lawsuits against developers. There are studies showing, contrary to what the building industry appears to believe, home buyers do not sue over trivial flaws in construction.[16] The emotional and economic consequences of litigation are taxing to the average homeowner and legal representation in a suit over a leaking showerhead is unlikely. As one commentator put it: "The majority of consumers who have a defectively constructed home just want the problem fixed."[17]

The prediction developers will abandon the California housing market if they cannot disclaim the implied warranty of habitability is equally unpersuasive. The disclaimers at issue here would not be valid in a number of populous states including Massachusetts,[18] New York,[19] and Texas,[20] nor in our immediate neighbor to the east, Arizona.[21]

In any event the effect on the new housing market of disallowing waivers of the implied warranty of merchantability is, or soon will be, a moot point given the enactment of S.B. 800 which appears to replace the common law implied warranty as to virtually all new housing sold in California after January 1, 2003.[22] The new legislation, among other things, requires new home construction to comply with detailed statutory standards.[23] A builder may offer greater protections than those set forth in the statute but the builder

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15 *Pollard*, *supra*, 12 Cal.3d at page 380.

16 See Constructing a Solution, *supra*, 30 McGeorge L.Rev. at pages 316-317.

17 Constructing a Solution, *supra*, 30 McGeorge L. Rev. at page 317.

18 *Albrecht v. Clifford* (Mass. 2002) 767 N.E.2d 42, 47.

19 New York General Business Law section 777-b, subdivision (4)(e)(ii); *Fumarelli v. Marsam Development, Inc.* (N.Y. App. Div. 1997) 657 N.Y.S.2d 61, 62.

20 *Centex Homes v. Buecher* (Tex. 2002) 95 S.W.3d 266, 275.

21 *Nastri v. Wood Bros. Homes, Inc.* (Ariz.App. 1984) 690 P.2d 158, 161.

22 Civil Code sections 895-945.5.

23 Civil Code sections 896-900. Standards for foundations, for example, are set out in Civil Code section 896, subdivision (a)(7) and (8) and subdivision (b)(1) through (4).

cannot disclaim and the buyer cannot waive the statute's minimum standards.[24] In my view this answers the majority's "let's-leave-it-to-the-Legislature" argument why we should not invalidate waivers of the implied warranty. The Legislature has spoken and made its position very clear: the interests of the new home buying public preclude waiver of warranties intended to protect such home buyers from construction defects.

The guiding principle underlying our Supreme Court's decision in *Pollard* was that innocent home buyers should be protected and builders held accountable for what they impliedly represented—that they used "reasonable skill and judgment" in constructing the home.[25] It would defeat this principle to permit the builder to disclaim a warranty protecting the buyer from the builder's failure to deliver the kind of home represented.[26]

II. KB HOME'S DISCLAIMER OF THE IMPLIED WARRANTY OF MERCHANTABILITY IS NOT CONSPICUOUS NOR UNDERSTANDABLE BY THE AVERAGE REASONABLE HOME BUYER.

Even if the warranty provisions of the U.C.C. rather than the Song-Beverly Act applied to this case, KB Home's attempt to disclaim the implied warranty of merchantability would not satisfy the requirements of Commercial Code section 2316. In order to disclaim a warranty of merchantability under the U.C.C. "the language must mention merchantability and in the case of a writing must be conspicuous . . . ."[27] A

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[24] Civil Code section 901 states in relevant part: "A builder may not limit the application of [the standards set out in the legislation] or lower its protection through the express contract with the homeowner."

[25] *Pollard*, *supra*, 12 Cal.3d at page 379.

[26] The majority reasons that because *Pollard* adopted the Commercial Code's more demanding provisions regarding notice of breach of warranty (*Pollard*, *supra*, 12 Cal.3d at p. 380) we should adopt the Commercial Code's "less demanding" provisions on waiver of implied warranties. I fail to see the logic of this reasoning. The Supreme Court adopted the Commercial Code's provisions on notice of breach of warranty for reasons of sound public policy, not because they were contained in the Commercial Code. (*Ibid*.) In my view we should adopt the Song-Beverly provisions on waiver of implied warranties for sound reasons of public policy, not because they are contained in the Song-Beverly Act.

[27] Commercial Code section 2316(2).

contract term "is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals . . . is conspicuous. Language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color . . . . Whether a term or clause is 'conspicuous' or not is for decision by the court."[28]

The trial court previously found KB Home's warranty disclaimer to be conspicuous as a matter of law when it ruled on KB Home's demurrer to the complaint. The court repeated this ruling in granting KB Home's motion for summary adjudication. KB Home contends plaintiffs' failure to seek review of the trial court's previous ruling on conspicuousness bars it from seeking review of the current ruling. Not so.

The previous ruling occurred in the context of KB Home's demurrer to the cause of action for breach of implied warranty. In that cause of action plaintiffs alleged KB Home's attempt to disclaim the implied warranty of merchantability was ineffective because the disclaimer was inconspicuous and unconscionable. The trial court concluded the disclaimer was conspicuous but *overruled* KB Home's demurrer on the ground "unconscionability here is a factual inquiry not properly addressed by way of demurrer." An order sustaining or overruling a demurrer is not an appealable order and it is highly unlikely an appellate court would have granted writ relief to plaintiffs who disagreed with dictum in a ruling in their favor especially when the ruling was not final but could be revisited later in the proceedings, as it was.[29]

Because the Commercial Code makes conspicuousness a question of law, I review the trial court's decision de novo.

KB Home attempted to disclaim the implied warranty of merchantability in three documents it furnished to potential home buyers: a Disclosure Statement, a Sales Agreement, and a Limited Warranty.

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[28] Commercial Code section 1201(10).

[29] See *Darling, Hall & Rae v. Kritt* (1999) 75 Cal.App.4th 1148, 1156.

The disclaimer in the Disclosure Statement does not meet the requirements of Commercial Code section 2316(2) because it does not "mention merchantability."[30]

The Sales Agreement does "mention merchantability"[31] but is not "conspicuous" for the reasons explained below.

The disclaimer in the Sales Agreement is paragraph 18 of 23 single-spaced paragraphs of "additional terms and conditions" consisting of approximately 3600 words printed in 8-point type and crammed onto an 8-1/2 by 13 inch page. The page would be a "sea of print" were it not divided into two "rivers of print."[32]

Print size is an important factor in assessing conspicuousness as evidenced by the fact the Civil Code requires every retail installment contract "shall be in at least eight-point type" and requires important warnings such as the contract is a security agreement or a retail installment contract "shall appear in at least 12-point type."[33] Here the warranty disclaimer is in upper case 8-point type which provides only a slight contrast to the lower case print used in the majority of the document.

Print size is not the disclaimer's only inadequacy. No heading, such as "DISCLAIMER OF WARRANTIES," precedes the disclaimer. In contrast, other terms and conditions in the document affecting consumer rights are preceded by headings such as "LIQUIDATED DAMAGES" and "ARBITRATION OF DISPUTES." There is no space for buyers to initial they have read, understood and agree to the warranty disclaimer as there is in the liquidated damages and arbitration clauses.[34] And, although

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30 The Disclosure Statement provides in relevant part: "KB Home and Broad makes no warranty or guarantee, express or implied, except that which is specifically set forth in the KB Home and Broad 'Limited Warranty' a copy of which is attached to this disclosure."

31 It states: "Seller and its contractor shall not be liable for any claims relating to the construction of the dwelling on the property except under the terms and conditions of the written warranty, if any, to be given to buyer at close of escrow. Seller makes no other warranties, whether express or implied, and buyer hereby waives any implied warranty of merchantability and/or warranty of fitness for a particular purpose, and any other implied warranties."

32 Cf. *Ponder v. Blue Cross of Southern California* (1983) 145 Cal.App.3d 709, 722.

33 Civil Code sections 1803.1 and 1803.1, subdivision (b).

34 I acknowledge KB Home was required by statute to print the liquidated damages and arbitration clauses the way it did. (Civ. Code, § 1677; Code Civ. Proc., § 1298.)

the warranty disclaimer is printed in bold upper case 8-point type so is the clause immediately above it.

In summary, the disclaimer clause is buried in a sea of small print and so encumbered with other terms and conditions as to make it difficult to find. No heading or space for the home buyer's initials sets this clause off from the others. The use of upper case 8-point type and bold print does little to contrast the disclaimer from the rest of the document especially since the clause in the paragraph immediately above is in the same format. I conclude the disclaimer in the Sales Agreement is not written so that a reasonable home buyer ought to notice it.

KB Home's Limited Warranty document fares no better under the Commercial Code. The disclaimer states: "*Home Owner* acknowledges its receipt and understanding of the Warranty and its acceptance of the Warranty in lieu of all other warranties, express or implied, including merchantability and fitness for a particular purpose." The disclaimer appears at the end of the nine-page document. There is nothing to call the buyer's attention to the disclaimer. It is not printed in bold and it is not italicized, except for the words "home owner." It is not in larger type than the material surrounding it. In fact, it is in *smaller* type than the 21 lines immediately preceding it. The disclaimer is not introduced by a heading. The absence of a heading is particularly deceiving because every other subject in the warranty is preceded by a heading and in some cases by subheadings. The warranty disclaimer, however, appears under the heading "Agreement and Acceptance." As in the case of the Sales Agreement, I find the disclaimer in the Limited Warranty is not written in a way to attract the home buyer's attention.

Even if I were to find at least one of the disclaimers of implied warranty of merchantability was sufficiently conspicuous, the disclaimers would still fail because they do not clearly appraise the home buyers what is being disclaimed. As our Supreme Court has interpreted Commercial Code section 2316: "No warranty, express or implied, can be modified or disclaimed unless the seller *clearly* limits his liability."[35] For this

[35] *Hauter v. Zogarts* (1975) 14 Cal.3d 104, 118-119; italics in original.

reason the court held: "At the very least, section 2316 allows limitation of warranties only by means of *words* that clearly communicate that a particular risk falls on the buyer."[36]

Thus, while the conspicuous mention of merchantability is essential to a disclaimer of the implied warranty of merchantability it is not necessarily sufficient. For example, a disclaimer which conspicuously mentions merchantability may be all that is necessary in a contract between two merchants. I do not believe, however, merely "mentioning" merchantability is sufficient to support a disclaimer in a contract between a merchant and a consumer.[37] I agree with Professor Reitz's observation that "very few consumer buyers understand what 'merchantability' means."[38] To an ordinary home buyer "merchantability" may well suggest the home has a good resale value rather than the home would "pass without objection in the trade" and is "fit for the ordinary purposes for which [a home] is used."[39]

Therefore, I conclude the KB Home disclaimers are insufficient to relieve it of liability under the implied warranty of merchantability.

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[36] *Hauter v. Zogarts*, *supra*, 14 Cal.3d at page 119; italics in original, footnote omitted.

[37] Courts in other jurisdictions have reached the same conclusion. In *Testo v. Russ Dunmire Oldsmobile, Inc.* (Wash.App. 1976) 554 P.2d 349, the court held a disclaimer which specifically referred to the implied warranty of merchantability was insufficient. "Although a general disclaimer clause may negate implied warranties if there is a negotiated contract between a commercial seller and a commercial buyer, it is not appropriate to a consumer sale." (*Id.* at p. 355.) See also *Hiigel v. General Motors Corporation* (Colo. 1975) 544 P.2d 983, 989, reaching same conclusion.

[38] Reitz, Manufacturers' Warranties of Consumer Goods (1997) 75 Wash. U. L.Q. 357, 395, footnote 120.

[39] Commercial Code section 2314 defining the implied warranty of merchantability.

For the reasons set forth above, I would grant a writ of mandate directing the trial court to vacate its order granting the motion of defendant KB Home and Broad Home Corporation for summary adjudication of plaintiffs' cause of action for breach of implied warranty and to enter a new and different order denying the motion.

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JOHNSON, J.