Residential Real Estate Condition Disclosure Legislation

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INTRODUCTION

In July of 1985 the California legislature enacted the first statute requiring sellers of residential real property, and participating brokers, to disclose to prospective purchasers comprehensive information relative to the condition, value and desirability of the property offered for sale.1 Within a few years thereafter, sixteen other states passed legislation mandating a more limited form of disclosure by sellers, but not by brokers.2 Presently, many of the remaining thirty-three states appear to be considering the more limited, prevailing form of mandatory property condition disclosure legislation.3

The California legislation essentially codified the state's unique common law requirement that both sellers and brokers discover and disclose all information material to the value and desirability of the property offered for sale.4 Where it has been enacted, however, the prevailing form of limited disclosure legislation has frozen the local common law at a stage of development primitive by California standards.5 The desirability of this movement toward enacting property condition disclosure legislation can be most usefully evaluated only after a comparative analysis of the common law, the various legislative regulatory schemes, and the effects of the latter on the evolution of the former.

Part I of this Article examines the common law development of inspection and disclosure duties on sellers, brokers, and buyers in

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2. See infra notes 237-344 and accompanying text.
3. See infra notes 345-46 and accompanying text.
5. See infra notes 400-03 and accompanying text.
the residential real estate sales market. It concludes that the common law has been developing in a salutary fashion to impose greater duties of fairness and commercial reasonableness on sellers and brokers.

Part II discusses developments in the seventeen states that have imposed an explicit duty of inspection or disclosure on seller or brokers. These requirements have been enacted by statute in most states, and by the real estate brokerage regulatory agency in a few others. Part II then describes the various regulatory schemes in detail and compares the approaches of the various states.

Part III synthesizes the development of the common law inspection and disclosure requirements with the recent statutory/regulatory enactments. It concludes that the growth of legislation in this area has arrested the development of the common law. This is true because these statutes and regulations generally do not require as

6. See infra notes 17-181 and accompanying text.
7. See infra notes 40-166 and accompanying text.
8. There are several related statutory disclosure developments that are not discussed in this Article. First are statutes and regulations that require real estate brokers to disclose to the buyer that they represent the seller in the transaction, known as agency disclosure laws. See, e.g., S.H.A. 225 ILCS 455/18.2 (1992); see generally ARTHUR R. GAUDIO, REAL ESTATE BROKERAGE LAW 344-46 (1987 & Supp. 1994) (claiming that a broker's failure to disclose his conflict of interest to the buyer is a breach of statutorily imposed duties); James A. Bryant & Donald R. Epley, The Conditions and Perils of Agency, Dual Agency, and Undisclosed Agency, 21 REAL EST. L.J. 117 (1992) (discussing the broker's obligations and duties to a buyer and seller in real estate transactions). Second, a number of states have enacted laws requiring environmental disclosure and remediation of contaminated sites prior to sale. See, e.g., CAL. HEALTH & SAFETY CODE § 25359.7 (West Supp. 1991); CONN. GEN. STAT. ANN. §§ 22a-134a-d, 22a-452a (West 1990); N.J. STAT. ANN. 13:1K-6 (West 1994); see generally Anne Andrew & Elizabeth L. DuSold, Seller Beware: The Indiana Responsible Property Transfer Law, 24 IND. L. REV. 761 (1991) (discussing the disclosure requirements of the Indiana Responsible Property Transfer Law which contains these provisions); Judith G. Tracy, Beyond Caveat Emptor: Disclosure to Buyers of Contaminated Land, 10 STAN. ENVTL. L.J. 169 (1991) (discussing the federal and state requirements of disclosure to buyers of contaminated land, and proposing the legislation should impose an affirmative duty on the seller to inform the buyer about contaminated land). Third, several states have enacted legislation shielding sellers and brokers from a failure to disclose psychological or prejudicial factors ("stigma statutes"). See, e.g., GA. CODE ANN. § 44-1-16 (Supp. 1992); S.C. CODE ANN. § 40-57-270 (Law. Co-op. Supp. 1992); see generally Marianne M. Jennings, Buying Property From the Addams Family, 22 REAL EST. L.J. 43, 51-53 & n.78 (1993) (listing the passage of shield laws in eighteen states); Sharlene A. McEvoy, Caveat Emptor Redux: "Psychologically Impacted" Property Statutes, 18 W. ST. U. L. REV. 579 (1991) (arguing that statutes shielding sellers and brokers from liability for nondisclosure of murder, suicide, other felonies occurring on the property, or that a resident suffers from AIDS, is improper, as it withholds material facts which may influence a purchase decision).
9. See infra notes 181-344 and accompanying text.
10. See infra notes 181-344 and accompanying text.
11. See infra notes 347-79 and accompanying text.
much disclosure as the common law required, and because most of
the legislative disclosure burden is placed on the seller rather than
on the real estate broker.\textsuperscript{12} The National Association of Realtors
(NAR) has been active in promoting the enactment of the prevail-
ing (non-California) form of legislation.\textsuperscript{18} Clearly, the NAR is at-
tempting to protect its membership from the common law develop-
ment of broker inspection/disclosure duties by promoting legislation
which places more of the burden on the seller.\textsuperscript{14}

Part IV discusses the practical ramifications of the prevailing dis-
closure requirements on purchasers, sellers, and brokers. It suggests
that purchasers might best be protected by the prevailing common
law trend.\textsuperscript{15} Finally, to the extent that additional states might con-
sider adopting legislation in this area, Part V discusses a number of
practical considerations which have thus far been ignored in the ex-
tant statutory enactments.\textsuperscript{16}

\section{I. Judicially-Created Disclosure Obligations}

The rights to buy, own, and sell property are inherent and much
protected individual rights under the common law of the United
States. Among other things, this notion is reflected in the applicable
provisions of the Fifth and Fourteenth Amendments to the Constitu-
tion.\textsuperscript{17} Consistent with that view of property rights, the sale of resi-
dential real property by its owner was not burdened with the imposi-
tion of affirmative disclosure duties by the traditional common
law.\textsuperscript{18} Historically, the duty to obtain the information necessary to
evaluate the value of property offered for sale was allocated to the
buyer rather than the seller or his agents.\textsuperscript{19}

As Lord Cairns articulated in 1873, “mere nondisclosure of materi-
al facts, however, morally censurable. . . , would in my opinion

\begin{itemize}
  \item[12.] See infra notes 347-79 and accompanying text.
  \item[13.] See infra note 400 and accompanying text.
  \item[14.] See infra notes 400-03 and accompanying text.
  \item[15.] See infra notes 379-403 and accompanying text.
  \item[16.] See infra notes 404-81 and accompanying text.
  \item[17.] U.S. CONST. amends. V, XIV.
  \item[18.] Robert M. Zeit, Comment, \textit{Real Estate - Broker Liability to Purchasers} — Herbert v.
Saffell, 877 F.2d 267 (4th Cir. 1989), 63 TEMP. L. REV. 165, 165 (1990) (stating that tradition-
ally, buyer recovery was barred by the doctrine of caveat emptor which denied the existence of a
fiduciary relationship between the buyer and seller).
  \item[19.] \textit{Id.} (noting that the doctrine of caveat emptor denies that seller or his agent has an affirm-
aitive duty to inspect or disclose defects in property).
\end{itemize}
form no ground for an action in the nature of misrepresentation."\(^{20}\)

This traditional allocation of duty to the purchaser came to be known as the doctrine of *caveat emptor*, that is, let the buyer beware (or take care).\(^{21}\) Though much criticized by those enamored of a more paternalistic regulation of commercial transactions, the doctrine is based on the premise that there is no need to burden a seller of real property with protecting the buyer.\(^{22}\)

Speaking for the United States Supreme Court in 1970, Justice Davis emphatically stated:

> No principle of the common law has been better established, or more often affirmed, both in this country and in England than . . . the maxim of *caveat emptor*. Such a rule, requiring the purchaser to take care of his own interests, has been found best adapted to the wants of trade in the business transactions of life.\(^{28}\)

Accordingly, unlike an individual investor in corporate securities for example, a prospective purchaser of real property has been thought not to lack the economic bargaining power or the financial sophistication to protect herself.\(^{24}\)

Closely related to *caveat emptor*, and also serving to insulate the seller from liability, is the doctrine of merger. In real estate transactions, the doctrine of merger holds that all warranties and representations made in connection with a sale, unless specifically given effect after the passage of title, are considered to be merged into the deed.\(^{26}\) The deed is considered full performance of the contract of sale.\(^{28}\) Once the buyer accepts the deed, the rights between seller and buyer are regulated by the deed; the contract ceases to exist.\(^{27}\)

The merger doctrine satisfies and extinguishes all contact covenants which relate to title, possession, quantity or emblements of the land.\(^{28}\)

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22. Hamilton, supra note 21, at 1133-86.
24. Hamilton, supra note 21, 1133-86.
26. Id.
27. Id.
28. Id. (finding a vendor liable for breach of the warranty of habitability under the doctrine of merger); see also Knight v. Breckheimer, 489 A.2d 1066, 1068 (Conn. App. Ct. 1985) (prohibiting buyers from recovery due to the doctrine of merger). But see Deerhurst Estates v. Meadow
Although the early common law refrained from mandating any disclosure by prospective sellers of real property, it did not leave the parties to real estate transactions without important and perhaps generally adequate legal remedies. Justice Davis also noted that the doctrine of 
\textit{caveat emptor} does not shield a seller from liability in the case of an express warranty, where the buyer has not had an opportunity to inspect the property, or where the seller is guilty of fraud. The usual contract remedies have always been available to both parties, including remedies for breach of any express warranties. More relevant to the issue of regulation by mandatory disclosure are the classic common law tort remedies for damages caused by intentional misrepresentation, negligent misrepresentation, or fraudulent concealment. These remedies are clearly applicable to

\begin{itemize}
  \item Barnard v. Kellogg, 77 U.S. 383, 388 (1870).
  \item Id.
  \item Id.
  \item Id.
\end{itemize}

32. Traditionally, a purchaser of a used residence had no remedy against a seller under an implied warranty of habitability theory, a theory generally applicable to builder-vendors in the sale of new homes. See, e.g., Haygood v. Burl Pounders Realty, Inc., 571 So. 2d 1086, 1087 (Ala. 1990); Bernstein v. Ainsworth, 371 N.W.2d 682, 687-88 (Neb. 1985). For cases involving sales of new homes by the builder, see Hope v. Brannan, 557 So. 2d 1208, 1210 (Ala. 1990); Stevens v. Bouchard, 532 A.2d 1028 (Me. 1987); Mobley v. Copeland, 828 S.W.2d 717 (Mo. Ct. App. 1992). A New Jersey Appellate Court, however, has recently broken new ground by allowing a buyer to recover against the seller of a used home with a defective septic system holding that "an implied warranty of habitability should also apply to the sale of a used home," based on "current notions of what is right and just." Andreychak v. Lent, 607 A.2d 1346, 1348 (N.J. Super. Ct. App. Div. 1992).

34. The elements of intentional misrepresentation are: (1) a false representation of fact; (2) knowledge by the defendant that the representation is false (or reckless disregard for the truth or falsity of the statement); (3) intent to induce the plaintiff to rely on the information; (4) justifiable reliance upon the representation by the plaintiff; and (5) damage to the plaintiff resulting from the reliance on the representation. \textit{Restatement (Second) of Torts} § 525 (1989); \textit{W. Page Keeton et al., Prosser & Keeton On the Law of Torts} § 105, at 728 (5th ed. 1984); see, e.g., \textit{Stewart v. Thrasher}, 610 N.E.2d 799, 803 (Ill. App. Ct. 1993) (applying elements of intentional misrepresentation to areas of recent real estate sales).

35. The primary difference between negligent misrepresentation and intentional misrepresentation is that in a negligent misrepresentation suit the plaintiff does not have to prove that the defendant made the false representation with the intent to deceive, or that he or she knew the disclosed information was false. See, e.g., \textit{Lyons v. Christ Episcopal Church}, 389 N.E.2d 623, 625 (Ill. App. Ct. 1979) (recognizing that an action for negligent misrepresentation is maintainable if it alleges the elements of a duty owed, a breach of such duty, and an injury resulting from such breach). The plaintiff may satisfy the element of culpability by proving only a lack of reasonable care. \textit{Keeton, supra} note 34, § 107, at 745.

36. \textit{Stewart}, 610 N.E.2d at 804. In order to prove that the concealment amounted to fraudulent
real estate sales and other transactions, and they are inherently capable of evolving to accommodate the changing circumstances of the relevant marketplace.

Most influential to the concept of mandating disclosure through legislation has been the very gradual expansion of the scope of actionable common law fraud to include the nondisclosure of material information by sellers and brokers.\textsuperscript{37} Essentially, courts have increasingly imposed a duty to speak and have found liability for nondisclosure because, coupled with a duty to speak, a nondisclosure is the equivalent of a false disclosure.\textsuperscript{38} It must be emphasized that while courts began to hold that nondisclosures may satisfy the elements of a false statement of a material fact, the remaining tort elements of culpability, reasonable reliance, causation, and damage have remained essential to any recovery based on common law fraud.\textsuperscript{39}

\subsection*{A. Obligations Imposed on the Seller}

Under traditional common law, sellers of real property had a duty to prospective purchasers not to make any false representations or actively conceal any defects or material facts.\textsuperscript{40} That traditional

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\textsuperscript{37} See infra note 39 (discussing remedies available to a purchaser for seller's breach of the implied warranty of habitability for a failure to disclose).

\textsuperscript{38} See infra note 39 (discussing the elements of fraudulent concealment).

\textsuperscript{39} See Restatement (Second) of Torts § 525 (1989) (defining common law fraud and outlining the necessary elements); In Lingsch, a California court defined a real estate fraud action for nondisclosure as consisting of the following five elements:

(1) Nondisclosure by the defendants of facts materially affecting the value or desirability of the property; (2) Defendant's knowledge of such facts and of their being unknown to or beyond the reach of the plaintiff; (3) Defendant's intention to induce action by the plaintiff; (4) Inducement of the plaintiff to act by reason of the nondisclosure; and (5) Resulting damages.


\textsuperscript{40} See supra notes 34-36 and accompanying text (discussing the common law tort remedies for intentional misrepresentation, negligent misrepresentation, and fraudulent concealment). Caevale emptor does not apply "where the falsity of the defendant's statements is not apparent from the inspection, where the plaintiff is not competent to judge the facts without an expert or where the defendant has superior knowledge about the matter in issue." Epperson v. Roloff, 719 P.2d 799, 803 (Nev. 1986).
duty did not, however, generally require sellers to affirmatively disclose such material facts, and mere silence without a duty to speak has never been actionable. However, courts have increasingly found that certain circumstances, particularly partial disclosure, create a duty to speak. Therefore, if the seller is asked about or speaks about a particular subject, he or she must make a full and fair disclosure as to that subject so as not to mislead the buyer. Also rather well established is the obligation of complete disclosure based on a finding of an agency, fiduciary, confidential, or other relationship of trust existing legally or factually between the parties.

A majority of state courts have expanded the scope of the duty of a seller of residential real property to disclose material facts to a prospective buyer. For example, in the often-cited leading case of Lingsch v. Savage, the California Court of Appeals concluded:

[Where it was] presented with an instance of mere nondisclosure, rather than active concealment occurring between parties not in a confidential relationship . . . [that] it is now well settled in California that where the seller knows of facts materially affecting the value or desirability of the property which are known or accessible only to him and also knows that such facts are not known to, or within reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer. Failure of


42. See infra notes 43-50 and accompanying text (discussing the duty to speak).

43. Burman v. Richmond Homes Ltd., 821 P.2d 913, 919 (Colo. Ct. App. 1991) (stating that a seller has a duty to disclose if seller states facts he knows will create a false impression unless other facts are disclosed); Catucci v. Ouellette, 592 A.2d 962, 963 (Conn. App. Ct. 1991) (claiming that the seller generally has no duty to speak but if he speaks, he must make a full and fair disclosure as to matters upon which he assumes to speak and must avoid deliberate nondisclosures); Nei v. Burley, 446 N.E.2d 674, 676 (Mass. 1983) (recognizing that the seller has a duty not to convey half-truths or partial disclosures which would then require full disclosure to avoid deception).

44. See Commercial Credit Corp. v. Lisenby, 579 So. 2d 1291, 1294 (Ala. 1991) (finding no fiduciary duty between the parties where vendor did not have actual knowledge of defect); Ramel v. Chasbrook Constr. Co., 135 So. 2d 876, 882 (Fla. Dist. Ct. App. 1961) (holding land developers and contractors liable for defects in a foundation, where such defects were not visible or discoverable at the time of sale); Haberman v. Greenspan, 368 N.Y.S.2d 717, 719 (N.Y. Sup. Ct. 1975) (holding vendor-builder liable for fraudulently concealing massive foundation cracks in home sold to plaintiffs).


the seller to fulfill such duty of disclosure constitutes actual fraud.**47**

Similarly, the New Jersey Supreme Court reversed a ruling of summary judgment in favor of a seller of real property infested with roaches, holding that “current principles grounded on justice and fair dealing, . . . clearly call for a full trial below.”**48** In support of its decision, the court noted that:

> [T]he statement may often be found if either party to a contract of sale conceals or suppresses a material fact which he is in good faith bound to disclose then his silence is fraudulent. The attitudes of the courts toward nondisclosure is undergoing a change and contrary to Lord Cairn’s famous remark, it would seem that the object of the law in these cases should be to impose on parties to the transaction a duty to speak whenever justice, equity and fair dealing demand it. This statement is made only with reference to instances where the party to be charged is an actor in the transaction. This duty to speak does not result from an implied representation by silence, but exists because a refusal to speak constitutes unfair conduct.**49**

In a third case, which involved property with a defective roof, the Florida Supreme Court affirmed a lower court’s award of rescission reasoning that:

> [M]odern concepts of justice and fair dealing have given our courts the opportunity and latitude to change legal precepts in order to conform to society’s needs. Thus the tendency of the more recent cases has been to restrict rather than extend the doctrine of caveat emptor. The law appears to be working toward the ultimate conclusion that full disclosure of all material facts must be made whenever elementary fair conduct demands it.**50**

As the above examples illustrate, state courts have begun to expand the duty of a seller to disclose, thereby making a nondisclosure as actionable as a false disclosure. In other words, the plaintiff must establish all of the several elements of common law fraud as set forth above.**61** In either case, the materiality of the nondisclosure is

47. Id. at 204 (emphasis added).
49. Id. at 72 (quoting W. Page Keeton, Fraud-Concealment and Non-Disclosure, 15 Tex. L. Rev. 1, 31 (1936)).
50. Johnson v. Davis, 480 So. 2d 625, 629 (Fla. 1986); see also Hill v. Jones, 725 P.2d 1115, 1119 (Ariz. Ct. App. 1986) (stating that nondisclosure may be equated with, and given the same legal effect as fraud and misrepresentation); Vaught v. Satterfield, 542 S.W.2d 502, 504 (Ark. 1976) (recognizing that in order to sustain alleged fraud in a failure to disclose case, the purchaser must prove that the defect was not observable); Posner v. Davis, 395 N.E.2d 133, 138 (Ill. App. Ct. 1979) (describing the measure of damages for a fraudulently concealed defect in property).
51. See supra note 39 and accompanying text (noting the elements of common law fraud in a real estate action).
critical. A fact is material as a matter of common law fraud if "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question." Specifically in the area of real estate fraud, state courts generally relied on that classic definition. For example, an Alaska court held that a material fact is one "to which a reasonable man might be expected to attach importance in making his choice of action," and a Florida court held that a material fact is one which substantially affects the value of the property.

Although materiality is a mixed question of law and fact, courts have found the following conditions to be material so that a seller's failure to disclose them is actionable: prior termite damage, active termite damage, illegal and condemned building, defective roof, defective well, radioactive mine tailings, filled soil, defective

52. See Harlan v. Smith, 507 So. 2d 943, 946 (Ala. Civ. App. 1986) (holding that a fact is material when it is likely to induce reliance on the part of the injured party); Reed v. King, 193 Cal. Rptr. 130, 131 (Cal. App. 1983) (holding seller liable for failing to disclose the material fact that the property was the site of a decade-old multiple murder); Delahanty v. First Pa. Bank, 464 A.2d 1243, 1252 (Pa. Super. Ct. 1983) (finding a misrepresentation to be material if it is of such character that had it been made, the transaction would not have been consummated); RESTATEMENT (SECOND) OF TORTS § 538, 550 (1989) (stating that the element of materiality is essential in cases of common law fraud for non-disclosure).


54. See, e.g., Hill, 725 P.2d at 1119 (stating that a reasonable person would not have entered into a real estate contract if notified of termite damage to the property); Stewart v. Thrasher, 610 N.E.2d 799, 804 (Ill. App. Ct. 1993) (noting that the other party would have acted differently had he been aware of the nondisclosed fact); Kaze v. Compton, 283 S.W.2d 204, 208 (Ky. 1955) (claiming that the plaintiffs would not have purchased the property for the price paid had they been apprised of the concealed fact); Sevin v. Kelshaw, 611 A.2d 1232, 1237 (Pa. Super. Ct. 1992) (stating that if the fact is of such character that had it not been made, the transaction would not have been consummated); see also infra notes 55-80 and accompanying text (discussing other examples of this principle).


57. Soniat v. Johnson-Rast & Hays, 626 So. 2d 1256, 1259 ( Ala. 1993); Hill, 725 P.2d at 1115.


60. Johnson v. Davis, 480 So. 2d 625, 627 (Fla. 1986).


septic system, building code violation, lot requiring retaining wall prior to constructing a building, generally deteriorated condition of the property, wood beetle damage, contaminated well, basement flooding, drain tile underneath house, structural defects, artisan well underneath property, prior fire damage, tilting house, sewer connection charges, house insulated with ureaformaldehyde insulation, defective earth-sheltered home, and flood damage.

Although this list is extensive, a few courts have found that sellers have a duty to disclose only where the defect or condition (whether or not material) is dangerous or poses a threat to health and safety. In Michigan, for example, where sellers are not liable for damages caused by defects existing at the time of sale, the courts acknowledge that they are required to "disclose to the purchaser any concealed condition known to him which involves an unreasonable danger. Failure to make such disclosure or efforts to conceal a
dangerous condition render the vendor liable for resulting injuries."82 Similarly, a Pennsylvania appeals court, in holding the sellers liable for failing to disclose a defective sewage disposal system, affirmed that "[t]he modern view . . . holds that where there is a serious and dangerous latent defect known to exist by the seller, then he must disclose such defect to the unknowing buyer or suffer liability for his failure to do so."83 Noteworthy in that case is that the seller may not have known of the dangerous condition, suggesting that in Pennsylvania the element of culpability may be satisfied by reckless disregard or negligence, at least where an unsafe condition exists.84 Another Pennsylvania court also noted that materiality is not required when the "misrepresentation is knowingly made or involves a non-privileged failure to disclose."85

As explained above, most courts view a seller's nondisclosure where there is a duty to speak as the equivalent of an affirmative misrepresentation.86 Accordingly, a buyer alleging nondisclosure must also prove the several other elements of common law fraud.87 The element of culpability in the area of real estate fraud, as elsewhere, has been the subject of considerable attention by the courts, and has resulted in some expansion of a defrauded purchaser's cause of action.88 Although traditionally that crucial element could be satisfied only where the misrepresentation or omission was knowingly made, it can now be satisfied in certain circumstances in some jurisdictions by recklessness or even negligence.89

A limited number of courts have gone so far as to find an innocent misrepresentation actionable. In a case involving defects in ti-

84. Id. at 324.
86. See, e.g., Bernard v. Gershman, 559 A.2d 1171, 1173 (Conn. App. Ct. 1989) (finding fraudulent misrepresentation where vendor failed to report inadequacy of property's water supply); see also supra notes 36-38 and accompanying text (discussing the elements of intentional misrepresentation, negligent misrepresentation and fraudulent concealment).
87. See supra note 39 and accompanying text (discussing the elements of common law fraud).
88. For a discussion of a case that expanded the defrauded buyer's cause of action, see infra text accompanying notes 149-59.
tle, a Pennsylvania court suggested that "if it is determined that a purchaser in a real estate transaction has suffered from fraud by the seller, even in the nature of an innocent misrepresentation of a material fact, a right of rescission is established." Other courts have indicated that a seller of real property may be liable for an innocent misrepresentation if the buyer justifiably relies on the misrepresentation. In a case where the transaction depended on the property being issued a permit for a septic tank, the Washington Court of Appeals found that:

When a seller, even though she acts under an honest mistake without any intent to deceive, misrepresents either the quantity or quality of the land sold, a buyer who justifiably relies on this misrepresentation is entitled to the difference between the market value of the land had it been as represented and the market value of the property as it actually was at the time of the sale.

A finding that innocent silence is actionable, however, would inappropriately expand the innocent misrepresentation doctrine; purchaser's reliance on seller's failure to disclose when the seller does not know of the defect or condition cannot form the basis of liability. It is to be expected therefore, despite the treatment of nondisclosure as misrepresentation in other regards, that nondisclosure where there is a duty to disclose is actionable only if the "silence is accompanied by deceptive conduct or suppression of material facts results in active concealment."

Some courts have relieved the seller of liability when the contract contains an "as is" clause. Generally, an "as is" clause will be

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91. See, e.g., Cousineau v. Walker, 613 P.2d 608, 614 (Alaska 1980) (stating that an owner guilty of even an innocent misrepresentation should not be able to invoke the doctrine of caveat emptor); Soursby v. Hawkins, 763 P.2d 725, 728 (Or. 1988) (holding that a real estate purchaser may rescind even if the vendor innocently misrepresents a material fact so long as the buyer justifiably relied on the misrepresentation).
93. Soniat v. Johnson-Rast & Hays, 626 So. 2d 1256, 1259 (Ala. 1993) (holding that mere concealment of a fact unless done in such a manner as to deceive and mislead will not support an action for deceit); Dee v. Peters, 591 N.E.2d 115, 116 (Ill. App. Ct. 1992) (holding that used home vendor's silence in not disclosing alleged defects, standing alone, did not give rise to cause of action for misrepresentation); Russow v. Bobola, 277 N.E.2d 769, 771 (Ill. App. Ct. 1972) (stating that the seller was obligated to disclose the denied request for a subsurface sewage system permit).
94. Russow, 277 N.E.2d at 771.
95. See, e.g., Atkins v. Kirkpatrick, 823 S.W.2d 547, 553-54 (Tenn. 1991) (stating that where there is an express allocation of risk to the buyer, the court will apply the ordinary meaning of the words).
upheld if the defects are "obvious" or "reasonably discernible." In the absence of fraud, mutual mistake, or warranty, courts will respect an "as is" clause.

Most courts, however, disregard the clause where fraud is found to exist. As one leading opinion states:

[T]he existence of an "as is" clause in a contract of sale for real estate will not relieve the vendor of his obligation to disclose a condition which substantially affects the value or habitability of the property and which condition is known to the vendor, but not to the purchaser, and would not be disclosed by a reasonable and diligent inspection. Such failure to disclose constitutes fraud.

In addition to the above-described common law imposition of certain duties to disclose on sellers of real property, there are also various statutory disclosure obligations. Any such statutory duty to disclose is sufficient also to create the duty for purposes of a common law fraud action. Except in the unlikely case of preemption, the remedy under common law fraud would exist in addition to any express remedy provided by the statute in question. If the statute contains no express remedy and none has been implied by the respective state courts, the existence of the statutory duty would simply make the aggrieved party's common law action more

97. See, e.g., Stidham v. Kinnamon, No. 86C-AP-18, 1988 Del. Super. LEXIS 483, at *11 (Del. Super. Ct. Dec. 29, 1988) (granting summary judgment to vendors for defective property sold in "as is" condition); Conahan v. Fisher, 463 N.W.2d 118, 119 (Mich. Ct. App. 1990) (holding that a termite problem was not concealed and thus, the seller had no duty to disclose the problem); Kaye v. Buehrle, 457 N.E.2d 373, 376 (Ohio Ct. App. 1983) (stating that when a buyer contractually agrees to accept property "as is," the seller is relieved of the duty to disclose unless there is evidence of an intent to conceal).
98. See, e.g., Rayner v. Wise Realty Co. of Tallahassee, 504 So. 2d 1361, 1364-65 ( Fla. Dist. Ct. App. 1987) (recognizing that the "as is" clause is not acceptable when there is evidence that the exterminator was negligent in submitting termite documentation); Wagner v. Cutler, 757 P.2d 779, 782 (Mont. 1988) (stating that the purchaser of a home is not under a duty to discover latent defects in the house, despite the "as is" clause); Brewer v. Brothers, 611 N.E.2d 492, 495 (Ohio Ct. App. 1992) (finding that a vendor who misrepresented the condition of the home's electrical system could be liable even though the real estate contract contained an "as is" clause); Mancini v. Gorick, 536 N.E.2d 8, 9-10 (Ohio Ct. App. 1987) (holding that a claim of fraudulent concealment will overcome an "as is clause" when it becomes the duty of a person to speak in order that the party with whom he is dealing may be placed on equal footing with him).
100. See infra notes 104-06, 113-15 and accompanying text.
102. Cf. GAUDIO, supra note 8, at 366-76. See generally Holcomb v. Zinke, 365 N.W.2d 507 (N.D. 1985) (allowing both statutory and common law causes of action by purchaser of residential real estate with defective sewage, water, and heating systems).
available.103

Consumer protection laws are typical required disclosure statutes. They usually list prohibited acts and allow damages or rescission to an injured party.104 Under the Connecticut Unfair Trade Practice Act, for example, a buyer of residential real estate was awarded rescission in addition to monetary and punitive damages for injury resulting from the seller's nondisclosure of defects.105 A Louisiana statute also allows an injured buyer of real property a remedy against the seller by providing that "[t]he seller, who knows the vice of the thing he sells and omits to declare it, besides the restitution of price and repayment of the expenses, including reasonable attorneys' fees, is answerable to the buyer in damages."106

If the statute fails to provide the damaged party with an express remedy, courts often refuse to imply such a private right of action under a consumer protection act.107 These courts reason that the act was intended to protect the public as a whole rather than particular individuals, who are already protected by common law fraud remedies.108 In addition, based on the same rationale, courts often refuse to read the statute's liability provisions expansively.109 Under the Massachusetts Consumer Protection Act, for example, a seller cannot be held liable to an aggrieved purchaser unless the transaction occurred in a business context.110 Factors which are considered by


104. Cf. GAUDIO, supra note 8, at 366 (finding that broker activities are covered by consumer protection laws when the broker's actions affect the public interest protected by the act). But see D. BARLOW BURKE JR., LAW OF REAL ESTATE BROKERS 213 (Supp. 1991) (suggesting consumer protection laws are not an appropriate basis for broker, as opposed to seller liability).

105. CONN. GEN. STAT. ANN. § 42-110g(a) (West 1994); see Catucci v. Ouellette, 592 A.2d 962, 964 (Conn. App. Ct. 1991) (stating that the seller was obligated to disclose the denied request for a subsurface sewage system permit).

106. LA. CIV. CODE ANN. art. 2545 (West 1994); see Leflore v. Anderson, 537 So. 2d 215, 217 (La. Ct. App. 1988) ( awarding purchaser damages for mental anguish and inconvenience as a result of agent's negligent misrepresentation of condition of the foundation); Davis v. Davis, 353 So. 2d 1060, 1064 (La. Ct. App. 1977) ( awarding purchaser damages and attorney fees as a result of vendor concealing home's tendency to flood).

107. See infra notes 110-12 and accompanying text (discussing various cases interpreting consumer protection acts within the real estate context).

108. See infra notes 110-12 and accompanying text (discussing various cases interpreting consumer protection acts within the real estate context).

109. See infra notes 110-12 and accompanying text (discussing various cases interpreting consumer protection acts within the real estate context).

110. See MASS. GEN. LAWS ANN. ch. 93A, § 2 (West 1994), which has been interpreted to apply only to acts or practices which are carried out in a business context. Lynn v. Nashawaty, 423 N.E.2d 1052, 1054 (Mass. App. Ct. 1981).
the Massachusetts courts in determining the existence of a "business context" include the nature of the transaction, the character of the parties involved, the activities in which the parties participated, and whether the transaction is motivated by business or personal reasons.\textsuperscript{111} Based on those factors, the sale of a home by another individual rarely falls within the statute.\textsuperscript{112} Constructive fraud statutes are another source of the duty to disclose imposed on a seller of residential real property. Based on such a statute, the North Dakota Supreme Court found a seller liable for nondisclosure of defects in a property's sewage, water and heating systems.\textsuperscript{113} The North Dakota statute loosely defines constructive fraud as any breach of duty which, without actual fraudulent intent, gains an advantage to the person at fault of misleading another to his prejudice.\textsuperscript{114} The court further explained that:

\begin{quote}
in cases of passive concealment by the seller of defective real property, there is an exception to the rule of caveat emptor . . . which imposes a duty on the seller to disclose material facts which are known or should be known to the seller and which would not be discoverable by the buyer's exercise of ordinary care and diligence.\textsuperscript{115}
\end{quote}

As analyzed at length below, the seventeen real property condition disclosure acts enacted during the last decade are the most recent statutory developments imposing on the seller of residential real property some affirmative duty to disclose information to prospective purchasers.\textsuperscript{116}

\section*{B. Obligations Imposed on the Broker}

Under the traditional common law, a broker participating in the sale of real property, like the seller of that offered property, has a duty to a prospective purchaser to refrain from making any false representations or actively concealing any defects or other material facts.\textsuperscript{117} Similarly, mere nondisclosure in the absence of a duty to

\begin{footnotes}
\item[112] Id.; see also George v. Kuschwa, No. 207, 1986 WL 18247, at *1 (Del. 1986) (affirming a lower court's decision which held that in order to maintain an action based on the consumer fraud act, the buyer must show that the seller is engaged in trade or commerce and that the sale was not an isolated sale of real estate by an owner); Rosenthal v. Perkins, 257 S.E.2d 63, 67 (N.C. Ct. App. 1979) ("They did not by the sale of their residence on this one occasion become realtors.").
\item[113] Holcomb v. Zinke, 365 N.W.2d 507, 511 (N.D. 1985).
\item[115] Holcomb, 365 N.W.2d at 512.
\item[116] See infra notes 200-344 and accompanying text (discussing the seventeen acts).
\item[117] See supra notes 34-36 and accompanying text (discussing the elements of intentional mis-
\end{footnotes}
speak was not actionable.\textsuperscript{118} As detailed above with respect to sellers, however, courts have increasingly imposed a duty to speak based on partial disclosure, a special relationship (such as agency, fiduciary, confidential, etc.), or other circumstances.\textsuperscript{119} That expansion of a seller's duty to disclose has been gradually extended by some courts to obligate real estate brokers.\textsuperscript{120}

Presently, a growing number of courts require brokers participating in the sale of residential real estate to disclose facts materially affecting the value or desirability of the offered property, so long as the facts are known by the broker, and neither known by the prospective purchaser nor available to her through a reasonable inspection.

representation, negligent misrepresentation and fraudulent concealment). \textit{See generally} Gaudio, \textit{supra} note 8, at §§ 291-302 (discussing the obligations which a broker owes to persons other than his principal, such as fiduciary duties, breach of contract, fraud and consumer protection). Other than committing an intentional, affirmative fraud, brokers have few obligations to the purchaser. \textit{Id.} at 344; Paul Meyer, \textit{Illinois Real Estate Brokers: The Duties of Disclosure and Accuracy}, 23 Loy. U. Chi. L.J. 241, 243 (1992) (recognizing that under common law, liability for fraudulent concealment is based not only upon false statements, but also upon intentional concealment and upon failure to disclose when there is a duty to do so).

\textsuperscript{118} \textit{See, e.g.}, Franchey v. Hannes, 207 A.2d 268, 271 (Conn. 1965) (finding vendor's silence with regard to a known defect to be the equivalent of a false representation). The broker is the agent of the seller, and therefore is usually held not to have a fiduciary duty to anyone else, including the purchaser. D. Barlow Burke Jr., \textit{Law of Real Estate Brokers} 191-217 (1982); Gaudio, \textit{supra} note 8, at 345 (examinining the possibility for an agent to act for two persons in a single transaction). \textit{See generally} Bryant & Epley, \textit{supra} note 8 (discussing dual agency and undisclosed dual agency as it pertains to real estate agents). Brokers have very little incentive (indeed, significant disincentives) to provide information to the buyer. Kevin C. Culum, Comment, \textit{Hidden-But-Discernible Defects: Resolving the Conflicts Between Real Estate Buyers and Brokers}, 50 Mont. L. Rev. 331, 333-34 (1989) (suggesting that brokers should not be allowed to continue to expect immunity from buyers' causes of action, and that brokers should be compelled to disclose to the buyer all available information).

Of course, if the broker is the buyer's agent, agency law requires the broker to fully disclose to the buyer. \textit{See, e.g.}, Roberts v. Rivera, 458 So. 2d 786, 788-89 (Fla. Dist. Ct. App. 1984) (finding the seller liable for fraudulent concealment of property defects when the brokers failed to disclose to the buyer material defects in the property); Gaudio, \textit{supra} note 8, at 346-47, 352-53 (stating that failure to fully disclose violates the broker's fiduciary duty); cf. Mintz & Mintz Realty Co. v. Sturm, 419 So. 2d 981, 983 (La. Ct. App. 1982) (holding that even when the broker is not the agent of the buyer under state statute, the broker has a duty to fully disclose material defects to the buyer).

\textsuperscript{119} \textit{See} Gaudio, \textit{supra} note 8, at 346-52 (discussing brokers' fiduciary duties to buyers); Meyer, \textit{supra} note 117, at 245-46 (recognizing brokers' position of trust with respect to purchaser as imposing a good faith duty of disclosure on broker); \textit{see also} supra notes 43-50 and accompanying text (discussing the establishment of the complete disclosure obligation).

\textsuperscript{120} Gaudio, \textit{supra} note 8, at 344-45. A broker may also be liable for a negligent misrepresentation, i.e., making a statement without actual knowledge. Meyer, \textit{supra} note 117, at 252-58 (concluding that brokers' duty to disclose is stringent and pertains not only to patent defects but to latent defects as well); Culum, \textit{supra} note 118, at 336 (arguing that negligent misrepresentation theory imposes on brokers a duty to disclose to buyers reasonable and accurate information which the buyer is justified in expecting).
Any failure to disclose in accordance with that judicially-imposed duty constitutes actionable fraud, provided, of course, that the remaining essential elements of culpability, reasonable reliance, causation, and damages can be established by the complaining purchaser. An often-cited leading case concerning a typical real estate broker's duty of disclosure is *Lingsch v. Savage,* in which the California Court of Appeals stated in 1963 that

> [t]he real estate agent or broker representing the seller is a party to the business transaction. In most instances, he has a personal interest in it and derives a profit from it. Where such agent or broker possesses, along with the seller, the requisite knowledge . . . whether he acquires it from, or independently of, his principal, he is under the same duty of disclosure. He is a party connected with the fraud and if no disclosure is made at all to the buyer by the other parties to the transaction, such agent or broker becomes jointly and severally liable with the seller for the full amount of the damages.

Based on this rationale, the court imposed a broad duty of disclosure on an involved real estate broker.

Similarly, a Florida appellate court, relying on a Florida Supreme Court decision which imposed a duty on sellers to disclose material facts, found that a purchaser could bring a cause of action against a broker for failing to disclose the existence and contents of a termite inspection report. Similarly, in *Miles v. McSwegin,* the Ohio

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121. See, e.g., Cooper v. Jevne, 128 Cal. Rptr. 724, 727 (Cal. Ct. App. 1976) (holding that a cause of action for fraud existed when sales agents failed to disclose structural deficiencies to purchasers who were ignorant as to the defect). See generally GAUDIO, supra note 8, at 353-65 (exploring liability based on a theory of fraud); Meyer, supra note 117, at 247-49 (concluding that brokers' duty to disclose is stringent and pertains not only to patent defects but to latent defects as well); Powell, supra note 45 (stating that a broker has a duty to a prospective buyer to disclose all material facts); Culum, supra note 118, at 334-35 (suggesting that brokers commit fraud when they fail to disclose material facts of which they have knowledge and on which the buyer justifiably relies); Dawn K. McGee, Note, *Potential Liability for Misrepresentation in Residential Real Estate Transactions: Let the Broker Beware,* 16 FORDHAM URB. L.J. 127 (1988) (discussing the scope of a broker's duty to a prospective buyer and noting the judicial broadening of that duty). But see Zeit, supra note 18, at 171 (discussing the Maryland law which does not require a broker to disclose known defects to a potential buyer).

122. GAUDIO, supra note 8, at 353; see also supra note 39 (defining the elements necessary to constitute fraudulent nondisclosure).


124. Id. at 205 (footnotes omitted).

125. Id. at 204.

126. Rayner v. Wise Realty Co., 504 So. 2d 1361, 1362, 1364 (Fla. Dist. Ct. App. 1987) (relying on Johnson v. Davis, 480 So. 2d 625 (Fla. 1985)). While the Florida Supreme Court did not specifically address the issue of broker's liability in *Johnson,* the lower court had stated in *dicta* that the same duty applied to real estate brokers. Id. at 1364.

Supreme Court affirmed a lower court ruling in favor of the buyer where the broker, upon receiving information regarding termite infestation, failed to disclose the information to the buyer. Citing the Restatement of Torts, the Court stated that:

[A] party is under a duty to speak, and therefore liable for non-disclosure, if the party fails to exercise reasonable care to disclose a material fact which may justifiably induce another party to act or refrain from acting, and the non-disclosing party knows that the failure to disclose such information to the other party will render a prior statement or representation untrue or misleading.\(^{128}\)

In all of the above instances of recovery, the broker was aware of the material nondisclosed information.\(^{129}\)

In view of the customary lack of any sort of confidential relationship between a prospective purchaser and the selling broker, it has been difficult for common law courts to logically impose a duty to disclose on the broker, or even to extend the seller's duty to the real estate broker.\(^{130}\) Although some courts have refused to hold a broker liable on such grounds, most agree with the \textit{Lingsch} court that an actionable real estate fraud case "does not require privity of contract."\(^{131}\) For example, a Delaware trial court stated:

[T]hat the defendant . . . is the listing broker, and not the vendor does not affect this duty. If a broker engaged to sell induces a third person to purchase by means of fraud, he may be liable to the person for loss suffered as a consequence [as if he were the vendor].\(^{132}\)

A New Mexico appellate court is in accord, stating that the broker had a duty to disclose to the buyers and that no direct contract was required between the broker and the buyers because "liability lies in

\(^{128}\) \textit{Id.} at 1369 (citing \textit{Restatement (Second) of Torts} \S 551(1)(2) (1977)).

\(^{129}\) \textit{See generally} \textit{Gaudio, supra} note 8, at 356-59 (recognizing that the broker has a duty to reveal to a prospective purchaser the existence of a material defect).

\(^{130}\) \textit{Id.} at 344 (stating that courts have had considerable difficulty in enunciating a single, clear rational to explain the brokers' duties).

\(^{131}\) \textit{Lingsch v. Savage}, 29 Cal. Rptr. 201, 205 (Cal. Ct. App. 1963) (citing Nathanson v. Murphy, 282 P.2d 174, 178 (Cal. Ct. App. 1955)); \textit{see also} \textit{Gaudio, supra} note 8, at 344 (stating that the brokers' duties arise out of his agency relationship and run to the benefit of his principal, traditionally the seller). \textit{But see} \textit{Zeit, supra} note 18, at 167-68 (discussing a Maryland law which allows for a cause of action only when there exists a "special relationship" between the broker and purchaser).

tort for negligent misrepresentation.” Also, the Ohio Supreme Court, as noted above in Miles v. McSwegin, held that because the buyers had relied on the broker’s nondisclosure, no special relationship was required to find the broker liable to them.

Courts have normally found that brokers have a duty not to mislead the buyer by providing only partial or incomplete material information in response to a prospective purchaser’s inquiry. In a case involving property that contained a defective heating and air conditioning system, the Alabama Supreme Court held that when the buyer made a direct inquiry about that system prior to closing, the broker became obligated to disclose fully as to that material matter. Similarly, a Delaware trial court held in Lock v. Schreppel that “[o]nce the broker undertook to inform the plaintiffs of the termite problem, he had a duty to fully inform the plaintiffs so as not to mislead them with inadequate information.”

As with a seller, liability cannot be found against a broker unless all of the remaining elements of fraud, including culpability, reasonable reliance and causation, are proved. The required standard of

133. Gouveia v. Citicorp Person-To-Person Fin. Ctr., Inc., 686 P.2d 262, 266 (N.M. Ct. App. 1984). See generally McGee, supra note 121, at 127 n.2 (compiling cases in states that have addressed broker liability in misrepresentation actions based on a broker’s failure to inform a buyer of defects in residential real estate).

134. 388 N.E.2d 1367 (Ohio 1979).

135. Id. at 1370 (imposing liability where the material defect was termite infestation).

136. GAUDIO, supra note 8, at 356-59 (failing to speak when one should is constructively the same as an affirmative misstatement).

137. Fennell Realty Co. v. Martin, 529 So. 2d 1003, 1005 (Ala. 1988).


139. Id. at 862; see also Ditcharo v. Stepanek, 538 So. 2d 309, 313 (La. Ct. App. 1989) (finding that a broker has the duty to relay accurate information about the property he is selling); Maxwell v. Ratcliffe, 254 N.E.2d 250, 252 (Mass. 1969) (noting that where the buyers had examined the house and raised the question of the dryness of the cellar, the brokers had a special obligation to avoid half-truths concerning periodic water seepage and to make disclosure at least of any facts known to them or of which they had been put on notice); Corazalla v. Quie, 473 N.W.2d 347, 350 (Minn. Ct. App.) (stating that if the broker undertakes to speak, he must say enough to prevent words from misleading the other party), rev’d on other grounds, 478 N.W.2d 197 (Minn. 1991); Hoffman v. Connall, 736 P.2d 242, 245 ( Wash. 1987) (reaffirming the rule set out in Tennant); Tennant v. Lawton, 615 P.2d 1305, 1309 ( Wash. Ct. App. 1980) (“The underlying rationale of his duty to a buyer who is not his client is that he is a professional who is in a unique position to verify critical information given him by the seller. His duty is to take reasonable steps to avoid disseminating to the buyer false information.”).

140. GAUDIO, supra note 8, at 353 (asserting that in order to recover on the theory of fraud, a buyer must prove the requisite elements); Meyer, supra note 117, at 243 (finding that fraud consists of a false statement of material facts, that the party knew or believed to be false, and that the other party justifiably relied on the misrepresentation); see supra note 39 and accompanying text (listing the various elements needed to prove fraudulent nondisclosure).
culpability is an intent to deceive or, in a growing number of jurisdictions, a reckless or negligent disregard of the facts.\textsuperscript{141} Accordingly, where a broker merely relays information received from a seller, courts often have difficulty finding the required intent or negligence to support liability for what seems to be an innocent misrepresentation or omission.\textsuperscript{142} In a case involving a defective roof, for example, the Alabama Supreme Court refused to hold the broker liable stating that the brokers would not be held liable in fraud "for merely conveying the statements of their principal to the agent of the [buyers], there being no evidence of bad faith on her part."\textsuperscript{143}

Yet there are at least four jurisdictions in which courts have held that a buyer may sometimes have a cause of action against a broker for an innocent misrepresentation.\textsuperscript{144} An underlying rationale, as explained by the Alaska Supreme Court in \textit{Bevins v. Ballard},\textsuperscript{145} is that brokers are licensed professionals possessing superior knowledge of

\textsuperscript{141} For examples of cases which have found culpability for reckless or negligent omission of a material fact, see \textit{supra} note 91.

\textsuperscript{142} See \textit{infra} note 143 (noting jurisdictions that will not find liability where the broker relies on the seller's statement).

\textsuperscript{143} Speigner v. Howard, 502 So. 2d 367, 371 (Ala. 1987); see also Hope v. Brannan, 557 So. 2d 1208, 1211 (Ala. 1989) (quoting Speigner, 502 So.2d at 370-71); Provost v. Miller, 473 A.2d 1162, 1163-64 (Vt. 1984) (stating that a broker is guilty of negligent misrepresentation only if he or she passes information from a seller to a buyer that he or she knows or has reason to know may be untrue); \textit{Hoffmann}, 736 P.2d at 246 (holding that real estate agents and brokers are not liable for innocently and non-negligently conveying seller's misrepresentations to the buyer). \textit{But cf.} Cameron v. Terrell & Garrett, Inc., 599 S.W.2d 680, 683 (Tex. Civ. App. 1980) (holding that under common law principal agent law, the broker will not be personally liable for damages for deceit if he honestly believes that the representations made by him to induce the third party purchaser were true), \textit{rev'd}, 618 S.W.2d 535 (Tex. 1981) (holding that the common law doctrine used above was superseded by a Texas statute which holds the broker liable in the same capacity as the principal).

\textsuperscript{144} Those jurisdictions include Alaska, Wisconsin, Minnesota and Ohio. See Gauerke v. Rozga, 332 N.W.2d 804 (Wis. 1983); see also \textit{infra} notes 145-46 and accompanying text (discussing the Alaska, Ohio and Minnesota cases so holding).

The Restatement (Second) of Torts defines innocent misrepresentation as:

One who, in a sale, rental or exchange transaction with another, makes a misrepresentation of a material fact for the purpose of inducing the other to act or to refrain from acting in reliance upon it, is subject to liability to the other for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation, even though it is not made fraudulently or negligently.

\textit{RESTATEMENT (SECOND) OF TORTS} § 552(1) (1977); see \textit{Culum}, \textit{supra} note 118, at 337-38 (discussing that some jurisdictions impose liability on brokers for incorrectly disclosing false information which materially affects buyer's decision to purchase); \textit{Zeit}, \textit{supra} note 18, at 169 (recognizing that some jurisdictions hold the broker strictly liable for incorrect, albeit innocent, information passed on to the buyer). For a more complete discussion of innocent misrepresentation, see Clarance E. Hagglund & Britton D. Weimer, \textit{Caveat Realtor: The Broker's Liability for Negligent and Innocent Misrepresentations}, 20 \textit{REAL EST. L.J.} 149, 153 (1991).

the real property for sale and real estate in general upon which buy-
ers usually rely.  

As the above discussion makes clear, some courts have imposed
upon brokers participating in a real estate transaction a common
law duty to disclose facts relating to any material defects or other
material information known to the broker. Recently, a few courts
have gone so far as to impose on brokers a duty to disclose not only
known defects but also defects that are reasonably discoverable in
the exercise of reasonable care. In other words, some courts may
find liability for a material nondisclosure based upon the broker’s
negligent failure to discover and thereafter disclose such informa-

\[146. \text{Id. at 763; Spargnapani v. Wright, 110 A.2d 82, 85 (D.C. 1954) (approving reliance by
the buyer on the broker's pretense of knowledge); Berryman v. Riegert, 175 N.W.2d 438, 442
(Minn. 1970) (finding that an inexperienced buyer has the right to rely upon an experienced
broker); Pumphrey v. Quillen, 135 N.E.2d 328, 331 (Ohio 1956) (holding that a buyer may rely
upon the knowledge implied by an assertion of fact by a broker); Polk Terrace, Inc. v. Harper,
386 S.W.2d 588, 593 (Tex. Civ. App. 1965) (relying on Bell v. Bradshaw, 342 S.W.2d 185 (Tex.
Civ. App. 1960), which recognized the difference between a skillful seller and an ignorant buyer,
to hold the broker liable).}

\[147. \text{See generally GAUDIO, supra note 8, at 359-65 (discussing that, acting as a “reasonable
person,” the broker should establish formalized procedures to detect defects).}

\[148. \text{Id. at 362 (claiming that negligent misrepresentation occurs when a broker makes a state-
ment without knowing whether the statement is true or false); Meyer, supra note 117, at 253-55
(suggesting that stringent duty placed on brokers for accurate disclosure imposes the additional
duty to discover, investigate, and obtain actual knowledge prior to making statements); Culum,
supra note 118, at 334-39 (suggesting that one way for brokers to avoid liability is by investigat-
ing sellers’ representations).}


\[150. \text{Id. at 385.} \]
Estimates of the cost to repair the damage were as much as $40,000 above the $170,000 purchase price. The sellers had not informed their agents of any prior earth movements or of their attempts at correcting the problem. It was uncontested, however, that the listing agents had conducted several inspections of the property prior to the sale and had observed warning signs indicating potential soil problems. Nevertheless, none of the agents tested the soil or informed prospective buyers of the potential soil problems.

The plaintiff purchasers based their action for damages not on intentional misrepresentation or fraudulent concealment, but rather on simple negligence. They argued that the brokers had a legal duty to use due care to discover and disclose defects and that their breach of that duty was the proximate cause of the damages suffered. Thus, the court's inquiry was whether the broker's duty of care in a residential real estate transaction includes the duty to conduct a reasonably competent and diligent inspection of the property listed for sale in order to discover defects for the benefit of the buyer. While the opinion acknowledged that no court had as yet actually held that a broker has a duty to disclose material facts which she should have known, the Easton court concluded that "such a duty is implicit in the rule articulated in Cooper and Lingsch, which speaks not only to facts known by the broker, but also and independently to facts that are accessible only to him and his principal." In so holding, the court noted that its primary purposes in imposing this broader duty on brokers were to maintain the integrity of the rule set out in Cooper and Lingsch, "to protect the buyer from the unethical broker and seller and to insure that the buyer is provided sufficient accurate information to make an informed decision whether to purchase."

The Easton court enormously expanded the common law in California to require for the first time that members of the real estate

151. Id.
152. Id.
153. Id. at 386.
154. Id.
155. Id.
156. Id. at 386-87.
157. Id. at 387.
158. Id. at 388.
159. Id.; see also Gouveia v. Citicorp Person-to-Person Fin. Ctr., Inc., 686 P.2d 262, 267 (N.M. Ct. App. 1984) (holding that the brokers' status as listing broker did not relieve them of their obligation to prospective purchasers with respect to known or discoverable defects).
brokerage industry conduct a reasonably diligent inspection of property offered for sale and disclose the fruits of that inspection to prospective purchasers. This doctrine has been rejected by all but a few of the jurisdictions that have since considered it.\textsuperscript{160}

Since most courts outside of California have declined to impose an \textit{Easton} duty of inspection and disclosure on brokers, plaintiffs desirous of recovering under common law fraud often look to state statutes as a source of the broker inspection and disclosure requirement. In addition to consumer protection and other statutes mentioned in connection with the disclosure duties of sellers,\textsuperscript{161} real estate licensing laws seem the natural choice.\textsuperscript{162} However, real estate licensing laws are not helpful in most cases since usually they neither expressly call for inspection and disclosure of unknown defects,\textsuperscript{163} nor contain any private right of action.\textsuperscript{164}

\begin{footnotesize}
\begin{enumerate}
\item Blackmon v. First Real Estate Corp., 529 So. 2d 955, 956 (Ala. 1988) (reaffirming the doctrine of \textit{caveat emptor}); Munjal v. Baird & Warner, Inc., 485 N.E.2d 855, 864 (Ill. App. Ct. 1985) (declining to recognize a broker's duty to discover undisclosed defects); see also Harkala v. Wildwood Realty, Inc., 558 N.E.2d 195, 200 (Ill. App. Ct. 1990) (reaffirming \textit{Munjal}); Provost v. Miller, 473 A.2d 1162, 1163-64 (Vt. 1984) (reversing a lower court ruling stating that the jury instruction stating that jurors "must find the brokers negligent if they failed to discover a structural defect in the house that could have been discovered by using reasonable diligence," was erroneous). \textit{Contra} Naquin v. Robert, 559 So. 2d 18, 20-21 (La. Ct. App.) (recognizing a broker's duty to communicate accurate information he knew or should have known to the purchaser, seller or both), \textit{cert. denied}, 561 So. 2d 118 (La. 1990).

\item See supra notes 104-12 and accompanying text (discussing consumer protection statutes); see generally GAUDIO, supra note 8, at 366-67 (referring to consumer fraud acts or deceptive trade practices acts as the appropriate legislative means for protecting consumers from fraudulent or deceptive practices); Meyer, supra note 117, at 241-42, 258-65 (suggesting that courts and legislatures have been willing to increase brokers' duties to prospective buyers).


\item See, e.g., \textit{TEX. REV. STAT. ANN.} § 6573 a(15)(a)(6)(a) (West 1994) (attaching liability only where the defect was latent and/or known to the broker).

\item \textit{See} Lock v. Schreppler, 426 A.2d 856, 866-67 (Del. Super. Ct. 1981) (holding that Real Estate Commission regulatory statutes did not create a private cause of action); Brunett v. Albrecht, 810 P.2d 276, 282-83 (Kan. 1991) (finding that the statute did not provide for a private cause of action); see also GAUDIO, supra note 8, at 366 (finding that maintaining a private cause of action based solely on the licensing statute was inconsistent with the legislative scheme); Meyer, supra note 117, at 267 (arguing that the Real Estate License Act of 1983 removed private}
\end{enumerate}
\end{footnotesize}
As analyzed at length below, one of the most relevant statutory developments relating to the duties of brokers involved in the sale of residential real property is the codification and narrowing of *Easton* by the California legislature in 1986.165 Similarly, the subsequent enactment of sixteen other real property condition disclosure acts which interrupt any judicial efforts to extend the duty of complete disclosure to members of the real estate brokerage industry has significantly impacted the duties of residential real estate brokers.166

C. Obligations Imposed on the Purchaser

As stated above, any person desiring to exercise his or her inherent common law right to purchase, own and enjoy residential real property is protected by those contract, tort, and other doctrines applicable to real estate sales transactions. Essentially, the common law provides an aggrieved purchaser with causes of action for breach of any provision contained in and surviving the underlying agreement of sale, and for fraudulent misrepresentation, fraudulent concealment. Now, in a growing number of jurisdictions, even fraudulent nondisclosure of material defects or other information may be actionable.167

The common law of all jurisdictions, with the arguable exception of California, falls short of guaranteeing that a prospective purchaser of residential real property is provided with all information relevant to his or her determination of the value and desirability of the property offered for sale.168 Indeed, at the extreme, the New York courts have declined to impose any affirmative duty to disclose, leaving the doctrine of *caveat emptor* totally intact.169

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165. See infra notes 200-36 and accompanying text (discussing the *Easton* decision and the California legislation).

166. See infra notes 237-305 and accompanying text (discussing the subsequent disclosure articles).

167. See supra notes 34-36, 39 (listing the elements necessary for common law tort actions).

168. GAUDIO. supra note 8, at 364-65 (claiming that courts are reluctant to hold brokers responsible for their unintentional failure to disclose).

169. Stambovsky v. Ackley, 572 N.Y.S.2d 672, 675 (N.Y. App. Div. 1991) (applying a strict rule of caveat emptor by failing to recognize any remedy for damages incurred by seller's mere silence); see also Herbert v. Saffell, 877 F.2d 267, 272-73 (4th Cir. 1989) (denying recovery when purchaser failed to exercise ordinary care during the inspection); Blackmon v. First Real Estate Corp., 529 So. 2d 955, 956-57 (Ala. 1988) (finding that broker has no duty to inspect for patent defects); Powell, supra note 45, at 139-40 (discussing application of the caveat emptor doctrine in
cordingly, every potential purchaser of residential real estate regardless of the jurisdiction is well-advised to assume a duty to undertake a complete and diligent investigation of the property itself and of all other sources of information relative to its value and desirability. That investigation should include a thorough inspection of the premises itself, the employment of any experts warranted by the age, condition, etc. of the property, as well as the assistance of experienced real estate legal counsel.

Although the primary purpose of a prospective purchaser's investigation is to avoid purchasing a property for more than its fair value, it is also invaluable to a purchaser attempting to recover damages from a seller or broker who either misrepresented a material fact or failed to disclose a material fact where a duty to speak existed. Specifically, a purchaser who has completed an inspection is in a better position to establish the elements of reasonable reliance and causation also necessary to prevail in common law fraud. Whether the fraudulent act be misrepresentation or unlawful omission, the element of justifiable reliance is often the stumbling block unless the defrauded purchaser has made a reasonably diligent investigation of the premises for patent defects discoverable as a result of such an inspection.170 The need for buyer investigation is espe-

170. Hope v. Brannan, 557 So. 2d 1208, 1211 (Ala. 1990) (holding that the purchaser's failure to inspect negated his cause of action for fraud); Turner v. Cobb, 356 S.E.2d 749, 750 (Ga. Ct. App. 1987) (denying recovery to a plaintiff who failed to exercise ordinary care in discovering potential flooding despite being put on notice of such problem); Connor v. Merrill Lynch Realty, Inc., 581 N.E.2d 196, 201 (Ill. App. Ct. 1991) (denying recovery to purchaser where brokers had recommended a home inspection regarding a potential flood problem); Hommerding v. Peterson, 376 N.W.2d 456, 459 (Minn. Ct. App. 1985) (finding that the sufficiency of the water supply was discoverable by the vendee and therefore negated his cause of action); Hinson v. Jefferson, 215 S.E.2d 102, 111 (N.C. 1975) (holding the purchaser bound by defects that a reasonable investigation would have disclosed); Foust v. Valleybrook Realty Co., 446 N.E.2d 1122, 1125 (Ohio Ct. App. 1981) (stating that a person has a duty to reasonably investigate before reliance thereon); Gutelius v. Sisemore, 365 P.2d 732, 735 (Okla. 1961) (denying recovery to buyers who fail to exercise ordinary diligence in inspection); Silva v. Stevens, 589 A.2d 852, 858 (Vt. 1991) (citing the general rule requiring a purchaser to investigate); see also Davis v. Davis, 353 So. 2d 1060, 1063 (La. Ct. App. 1977) (granting recovery to purchaser of a flood prone house where defect was not discoverable and purchasers had made flood-related inquiries).

cially strong where there are warning signs alerting him or her to a possible defect. As one court opined, "where one is put on notice as to any doubt to the truth of the representation, the person is under a duty to reasonably investigate before reliance thereon." 171

Although the doctrine of caveat emptor has been much eroded in most jurisdictions, some courts continue to have a substantial bias in favor of the principles underlying that doctrine, and they endeavor to embrace it to limit or bar real estate fraud actions. 172 In George v. Lumbrazo, 173 for example, the court stated that "[p]roof of active concealment alone, however, will not support a fraud action where the vendee should have known of the defect." 174 Likewise, in Farm Bureau Mutual Insurance Co. v. Wood 175 the court stated that purchaser's knowledge of a concealed defect relieves the seller of any duty or liability for injuries. 176 In Brown v. B & D Land Co., 177 a buyer's fraud claim based on seller's failure to disclose the property's flood plain location failed because the truth regarding the property was readily available upon inquiry. 178 And in Layman v.

171. Foust, 446 N.E.2d at 1125; see also Turner, 356 S.E.2d at 750 (denying recovery where plaintiff failed to exercise ordinary care); Connor, 581 N.E.2d at 201 (asserting that the buyer was placed on notice that the basement flooded based on visibility of water marks); Thompson v. Best, 478 N.E.2d 79, 84 (Ind. Ct. App. 1985) (holding the buyer partially responsible based on his awareness of sump pump defect); Christopher v. Evans, 361 N.W.2d 193, 197 (Neb. 1985) (holding that the seller's suggestion regarding fill around foundation of the house alerted buyer to a possible water problem); Armentrout v. French, 258 S.E.2d 519, 524 (Va. 1979) (requiring buyer to discover the true condition of the property when placed on notice of a defect). See generally GAUDIO, supra note 8, at 109 (Supp. 1993) (finding that the broker must make a reasonable investigation to discover the property's condition and has a duty to disclose defects the purchaser). See also Curnes, supra note 45, at 461-63, 466-67, 474-75 (discussing the efforts required by a prospective purchaser to discover defects).

172. Recently, the United States Court of Appeals for the Fourth Circuit, applying Maryland law, reaffirmed the doctrine of caveat emptor. Herbert, 877 F.2d at 267. See generally Zeit, supra note 18, at 166 (discussing the Maryland real estate law which adheres to the doctrine of caveat emptor and holds that a broker has no affirmative duty to inspect or report defects of a property).


174. Id. at 705; see also Evans v. Teakettle Realty, 736 P.2d 472, 474 (Mont. 1987) (reducing damages awarded to purchaser due to purchaser's own comparative negligence).


176. Id. at 411; see also Powell, supra note 45, at 140 (describing cases in which buyer stated that he was prepared to litigate zoning issues, which implied he did not rely on misrepresentation by realtors as to use of the property).


178. Id. at 382; see also Pakrul v. Barnes, 631 S.W.2d 436, 438 (Tenn. Ct. App. 1981) (denying recovery where buyer had an opportunity to discover the defect); Kuczmaszski v. Gill, 302 S.E.2d 48, 50 (Va. 1983) (denying the buyer's recovery because seller made no representation to divert him from making an inquiry and an investigation would have given the buyer the true facts). But see Combs v. Loebner, 846 P.2d 401 (Or. 1993) (declining to require an independent investigation by the buyer).
Binns, a misrepresentation about a condition that would have been observed had the purchaser chosen to look was held “not so reprehensible in nature as to constitute fraud.” A buyer who makes an independent investigation will be charged with knowledge of facts which reasonable diligence would have disclosed. Accordingly, a sensible buyer, especially in New York, but even in California, should continue to pay heed to the maxim of let the buyer beware. In practice, potential buyers should take care by undertaking a diligent inspection designed both to ferret out defects and to maximize the odds for any potentially available remedy in common law fraud.

II. STATUTORY DISCLOSURE OBLIGATIONS

On February 22, 1984, as more fully set forth above, a California Court of Appeals ruled in the landmark case of Easton v. Strassburger that a real estate broker acting for a seller of residential real property has an “affirmative duty to conduct a reasonably competent and diligent inspection of the residential property listed for sale and to disclose to prospective purchasers all facts materially affecting the value or desirability of the property that such an investigation would reveal.” At the time Easton was decided, state courts, including those in California, had repeatedly analyzed the

180. Id. at 643-44; see Meyer, supra note 117, at 253 n.71 (suggesting that if a broker becomes aware of latent defects by observation, such evidence should be equally apparent to purchasers and, therefore, the broker’s obligation to make investigations or disclose should be limited if not eliminated).
181. Epperson v. Roloff, 719 P.2d 799, 803 (Nev. 1986); cf. Cohen v. Vivian, 349 P.2d 366, 368 (Colo. 1960) (holding that an inspection by a purchaser which does not disclose the defect does not render inapplicable the rule requiring disclosure of a latent defect). Generally, the buyer is presumed to have relied on what was learned from the inspection and not on the seller’s misrepresentation. See Mobley v. Copeland, 828 S.W.2d 717, 726 (Mo. Ct. App. 1992) (denying recovery where the defects were reasonably discoverable by the purchaser); Gutelius v. Sizemore, 365 P.2d 732, 734 (Okla. 1961) (holding that a seller’s silence does not equal fraud when the defect in question was observable by the buyer); Mikkelson v. Quail Valley Realty, 641 P.2d 124, 126 (Utah 1982) (denying recovery where the buyer had inspected the house and could have discovered the defect through a diligent investigation); Boris v. Hill, 375 S.E.2d 716, 718 (Va. 1989) (precluding recovery by buyer where examination of the land would have revealed a defective septic tank); Rockley Manor v. Strimebeck, 382 S.E.2d 507, 509-10 (W. Va. 1989) (denying buyer’s recovery where a thorough examination of the land records would have uncovered the boundary dispute).
183. Id. at 390 (footnotes omitted). For a more detailed discussion of Easton, see supra text accompanying notes 149-59.
applicability of the common law torts of fraudulent concealment, intentional misrepresentation, and negligent misrepresentation to cases of nondisclosure of property defects.\textsuperscript{184} Since an essential element for the establishment of common law fraud in a nondisclosure (rather than a false disclosure) case is the existence of a duty to disclose,\textsuperscript{188} erosion of the early doctrine of \textit{caveat emptor}\textsuperscript{186} required the courts to define and rationalize the imposition of such a duty on the owner, the selling broker, or others participating in the sale of the offered property.

By the time \textit{Easton} came before the California appellate court, the scope of a real estate broker's duty to disclose material information to a prospective purchaser had been expanded to match that of a seller. The court simply reiterated that

\begin{quote}
[i]t is not disputed that current law requires a broker to disclose to a buyer material defects known to the broker but unknown to and unobservable by the buyer . . . . If a broker fails to disclose material facts that are known to him he is liable for the intentional tort of 'fraudulent concealment'.\textsuperscript{187}
\end{quote}

No court, in California or elsewhere, however, at the time of \textit{Easton} had yet interpreted a broker's duty to disclose known defects as including an obligation to conduct a reasonably competent and diligent inspection of the property. Further, no court had found, based on the imposition of such a duty, that a broker is liable to a buyer for negligently failing to disclose such discoverable information.\textsuperscript{188} By so deciding, the \textit{Easton} court took a giant step in expanding, if not creating, a remedy for not only a seller's, but also a real estate broker's, negligent failure to disclose reasonably discoverable defects or other adverse material information to a prospective buyer of the residential real property.\textsuperscript{189}

In July of 1985, California became the first state to enact legisla-
tion specifically in this area. The legislature acted largely in response to outcries from real estate brokers who reacted to the Easton court's expansive view of their duties to inspect and disclose. Under the sponsorship of the California Association of Realtors, the California legislature approved the first, and still the most comprehensive, real property condition disclosure legislation. It became operative January 1, 1986, with respect to brokers and January 1, 1987 with regard to sellers. The legislature intended to "codify and make precise," but arguably also to limit, certain aspects of the Easton decision.

The California legislature did not address the issues of whether, to what extent, and by what means the sale of residential real property should be regulated for the protection of purchasers. Unlike the United States Congress in 1933, when it decided to protect investors in securities by creating an entirely new federal regulatory scheme, the California legislature did not begin with a clean slate. Rather, it faced a body of evolving common law doctrines culminating with the Easton conclusion that the appropriate method of regulation was to require the complete and accurate disclosure of all reasonably discoverable facts material to the value or desirability of the offered property. The court arrived at that conclusion by broadly construing the scope of the duties owed to a purchaser of residential real estate alleging negligent fraud.

The California legislature chose to largely embrace, rather than

190. See generally Culum, supra note 118, at 339-41 (discussing a California statute which limits broker's duty to a visual inspection including only those areas that are reasonably accessible to such an inspection). A number of states have placed other obligations on brokers by statute. GAUDIO, supra note 8, at 366 (requiring that the broker deliver a copy of the listing agreement to the principal and advise purchasers of their right to have an attorney examine title, and stating that brokers may not engage in the unauthorized practice of law).

191. Murray, supra note 188, at 692-93.


194. King, supra note 193, at 660.


196. For a discussion of the limitations, see infra text accompanying notes 223-25 and 341-45.

197. For a discussion of the history of this analogous body of securities law regulation by disclosure, see Barbara A. Ash, Reorganizations and Other Exchanges Under Section 3(a)(10) of the Securities Act of 1933, 75 Nw. U. L. REV. 1, 1-4 (1980).

198. See supra note 187 and accompanying text (quoting Easton's fraud requirement).
reject, the expanded property condition disclosure requirements laid down by the Easton court. As explained below, however, in an effort to set objective, easily understood guidelines for making full and fair disclosure, the legislature may have created a statutory scheme that falls short of what Easton requires. As a consequence, the statute may be interpreted by the courts as having effectively limited the impact of the Easton opinion. Since California’s enactment of its mandatory property condition disclosure legislation in 1985, a total of sixteen other states have adopted a form of such regulation, albeit in every case very much less comprehensive and (with a single exception) not until their 1992 or 1993 legislative terms.

A. The California Statutory Approach

Two statutes (collectively the “California Act”) were enacted in response to Easton. The first is entitled “Article 1.5. Disclosures Upon Transfer of Residential Property” (the “Disclosure Article”). The second is entitled “Article 2. Duty to Prospective Purchaser of Residential Property” (the “Broker Duty Article”). The statutes are applicable to all sales and related transfers for value of residential real property or residential stock cooperatives containing four or fewer dwelling units. The Broker Duty Article, of course, only applies to such sales and transfers involving a licensed real estate broker. The California Act, unlike most of its progeny, applies to all sales of new or never occupied residences as well as to all resales.

With respect to the above-described broad categories of sales transactions, the California Act codifies in a more specific form cer-

199. See supra notes 195-96 and accompanying text (discussing the California legislature’s intentions for Senate Bill 453).
201. Id. §§ 2079-2079.10.
202. Section 1102 makes clear that “this article applies to any transfer by sale, exchange, installment land sale contract . . . lease with an option to purchase, any other option to purchase, or ground lease coupled with improvements, of real property . . . .” Id. § 1102.
203. Section 1102.1 excepts from the scope of the article certain categories of transfers that are unlike voluntary sales in that they are not for value, but rather result from default on a mortgage, court order, death of an owner, etc. Id. § 1102.1. These exemptions presumably derive from the legislators’ reasonable assumption that these transferees are making no investment decisions and therefore would not benefit from the article’s mandated disclosure.
204. Id. § 2079.
205. Id. § 1102; see infra notes 248, 267, 281, 296, and 318 and accompanying text (discussing Acts in Virginia, Wisconsin, Kentucky, Alaska, and seven of the later Acts, respectively).
tain of the disclosure obligations mandated by the *Easton* opinion. First, the Disclosure Article requires the seller or other transferor subject to the statute, as well as any broker involved in the transaction, to obtain and timely deliver a disclosure statement in the prescribed form. The seller and broker must also complete or cause to be completed Seller's Information, Section II of the disclosure statement, by answering all of the numerous detailed questions about the property's structural characteristics and their condition, and about legal restrictions, zoning and similar matters relating to the property. A copy of the California statutory disclosure statement form appears as an Appendix to this article.

Given the *Easton* holding, it is noteworthy that neither the statutorily mandated form nor any other provision of the California Act requires the seller to disclose any defects or other facts not specifically called for, even if they are material to the purchaser's assessment of the value or desirability of the property. However, the Disclosure Article makes clear that, "the specification of items for disclosure in this article does not limit . . . any obligation for disclosure created by any other provision of law or which may exist in order to avoid fraud, misrepresentation, or deceit in the transfer transaction." In other words, while the new law mandates that specific information on a prescribed written form must be actually delivered to the prospective purchaser, it does not by its more limited scope effect any limitation on the broader duty to disclose "all facts materially affecting the value or desirability of the property" recognized by the *Easton* opinion.

The Broker Duty Article also more specifically addresses the disclosure obligations of licensed real estate brokers who list property for sale (the "listing broker") or who act in cooperation with listing

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206. See supra notes 204-05 and accompanying text (discussing statutes).
207. The California Association of Realtors has prepared a form of Real Estate Transfer Disclosure Statement that it represents to be and is in compliance with § 1102.6. That statement is attached as an Appendix to this article.
208. In the case of an ordinary sale, the statement must be delivered "as soon as practicable before transfer of title." CAL. CIV. CODE § 1102.2(a) (West Supp. 1994). In the case of a transfer by a sales contract or by a lease with an option to purchase or by a ground lease coupled with improvements, the statement must be delivered "as soon as practicable before execution of the contract," that is, before the making or accepting of an offer. *Id.* § 1102.2(b).
209. *Id.* §§ 1102.2, 1102.6, 1102.12.
210. *Id.* § 1102.6.
211. *Id.* § 1102.8 (emphasis added).
212. See supra note 183 and accompanying text (discussing duty to disclose imposed by *Easton*).
brokers by finding a buyer (the "selling broker").\textsuperscript{213} It creates a duty on brokers, "to conduct a reasonably competent and diligent \textit{visual} inspection of the property offered for sale and to disclose to that prospective purchaser all facts materially affecting the value or desirability of the property that such an inspection would reveal."\textsuperscript{214} This disclosure is required to be made by the broker's completion of the Agent's Inspection Disclosure, Section III of the disclosure statement mandated by the Disclosure Article. (See Appendix). In the event the licensed agent is unable to obtain the required written disclosure document and does not have written assurance from the transferee that it has been received, the broker must advise the transferee in writing of his or her rights to the disclosure.\textsuperscript{215}

After defining the affirmative disclosure duties of brokers participating in a regulated sale, the California legislature, presumably in response to the uncertainties sounded by representatives of the real estate brokerage industry, added certain clarifying provisions to the statute.\textsuperscript{216} For example, Broker Duty Article Section 2079.2 explains that the standard of care owed by any broker subject to Section 2079's inspection and disclosure requirements is "the degree of care that a reasonably prudent real estate licensee would exercise and is measured by the degree of knowledge through education, experience, and examination, required to obtain a license."\textsuperscript{217} In passing over the reasonably prudent person standard, applicable to most common law tort claims including misrepresentation,\textsuperscript{218} in favor of this higher reasonably prudent licensed, educated, experienced, and examined real estate broker standard, the California legislature adopted the philosophy seemingly underlying the \textit{Easton} decision.\textsuperscript{219} That philosophy holds that a broker who holds himself out to prospective purchasers and to the public as an experienced, licensed professional in the field of residential real property transactions, and who financially benefits as a result of so doing, should be held to a

\textsuperscript{213} See \textit{supra} note 202 and accompanying text (explaining that section 1102 extends section 2079 broker's duties to leases and sales contracts).
\textsuperscript{215} \textit{Id.} § 1102.12(b).
\textsuperscript{216} Compare the statutory language with the judicial language quoted in the text accompanying \textit{supra} notes 183 and 214. See \textit{also} the discussion of the addition of the word "visual" in the text accompanying \textit{infra} notes 224-25 and accompanying text.
\textsuperscript{218} \textit{Restatement (Second) of Torts} § 552(1) (1989).
standard of care consistent with that position. While this stricter standard varies from that normally applied under ordinary negligence law, it is well established in the analogous area of the federal regulation of sales of securities. There, the public investor (like the home buyer) is less able than the broker to obtain the relevant information about the proposed investment, and as a practical matter, he is forced to rely on the selling broker.

The Broker Duty Article contains further clarification of a listing or selling broker's duties of inspection and disclosure. As noted above, the Broker Duty Article imposes upon brokers the duty to conduct only a visual inspection, rather than the complete inspection that the Easton court may well have intended. The Article further circumscribes the broker's duty of inspection by providing that the inspection "does not include or involve an inspection of areas that are reasonably and normally inaccessible. . . ." Although one of the purposes of these limitations on the broadly articulated broker duty of inspection in Easton may well have been to replace uncertainty with objectivity, another purpose may have been to place limits on the potential liability of real estate brokers to purchasers. If such a limitation were intended, any determination of whether or to what extent it was achieved depends in part upon the extent of the express statutory remedies as well as the preemptive effect, if any, of the California Act (and particularly of the Broker Duty Article) on the relevant common law as expanded by Easton.

The Disclosure Article offers no rescissionary remedy once the transaction has been completed; it does allow a purchaser to re-

220. See Culum, supra note 118, at 342 (arguing that since buyers perceive brokers as professionals, brokers must be held to a professional standard of care in inspection and disclosing).
221. See supra note 217 and accompanying text (noting the applicability of the reasonably prudent person standard in common law tort theories).
223. CAL. CIV. CODE § 2079.3 (West Supp. 1994).
224. Easton v. Strassburger, 199 Cal. Rptr. 383, 386 (Cal. Ct. App. 1984) (suggesting that the visual red flags of the soil erosion problem should have caused the broker to investigate the matter further); see supra note 217 and accompanying text (quoting Cal. Civ. Code § 2079.2 (West Supp. 1994)).
225. CAL. CIV. CODE § 2079.3 (West Supp. 1994).
226. Easton, 199 Cal. Rptr. at 386 (discussing the requirements of the Broker Duty Article).
227. CAL. CIV. CODE § 1102.13 (West Supp. 1994). Where, however, the disclosure document is made available in an untimely manner but prior to the transfer of the property, the transferee does have a period of three days (five if delivery was by mail) to terminate the agreement to transfer the property. Id. § 1102.2(b).
cover his or her actual damages suffered as a result of any person's willful or negligent failure to comply with any of the statute's requirements.\textsuperscript{228} As against the seller then, who as noted above is required to disclose only in response to the form's enumerated list of questions, a purchaser may recover damages under the statute only if the seller willfully or negligently failed to deliver the disclosure statement, failed to answer any of the enumerated questions, or falsely answered one or more of those questions.\textsuperscript{229} As mentioned above, this remedy is in addition to, and in no way replaces or limits, any common law remedy, whether or not grounded in \textit{Easton}, that may be available to a damaged purchaser.\textsuperscript{230} As against brokers, a purchaser may recover damages under the Disclosure Article if the broker willfully or negligently failed to adequately complete the visual inspection of the premises or failed to make complete disclosure of material facts discoverable from the inspection required in the Broker Duty Article.\textsuperscript{231}

The Disclosure Article makes clear that, irrespective of whether the defendant is a seller or a broker, there is no liability for any false or omitted information unless it was within the actual knowledge of the defendant or, in the case of information supplied by a public agency or a recognized expert,\textsuperscript{232} unless he or she failed to exercise ordinary care in obtaining and transmitting it.\textsuperscript{233} No seller or broker can be found liable for an innocent misstatement or omission; he or she must be found guilty of no less than negligence in fulfilling the duties of investigation and disclosure as described in the statute. Consistent with the common law, if the seller or broker exercised due diligence by meeting the required standard of care, no liability will attach.\textsuperscript{234} The affirmative defense of due diligence is reinforced by Section 2079.5, which makes it clear that a buyer must exercise reasonable care to protect himself and cannot recover

\textsuperscript{228} Id. § 1102.13.
\textsuperscript{229} See Appendix; \textit{see also} text accompanying \textit{supra} notes 206-09 (discussing the filing of the disclosure statement by the seller).
\textsuperscript{230} \textit{Cal. Civ. Code} § 1102.8 (West Supp. 1994); \textit{see supra} note 227-29 and accompanying text (discussing the common law remedies which may be available to the purchaser despite the filing of the disclosure statement).
\textsuperscript{232} Section 1102.4 allows reasonable reliance on such experts as licensed engineers, land surveyors, geologists, structural pest control operators, contractors and others. \textit{Id.} § 1102.4.
\textsuperscript{233} \textit{Id.}
\textsuperscript{234} \textit{See supra} note 217 and accompanying text (discussing the legislature's adoption of the reasonably prudent person standard).
from a broker who fails to point out a defect or other adverse fact that should have been discovered by a reasonably attentive and observant buyer.\textsuperscript{235} Indeed, further reinforcement can be inferred from the statutorily required suggestion in Section V of the mandated disclosure statement that buyers and sellers should consider having the property professionally inspected.\textsuperscript{238} (See Appendix). The statutorily available due diligence defense and its recognition of the corresponding purchaser duty of exercising ordinary care is consistent with the common law, even as expanded by \textit{Easton}.

\textbf{B. The Maine Administrative Approach}

Several years after the adoption of the California Act, the problem of real property condition disclosure was addressed in the State of Maine, somewhat indirectly, by the passage of the Real Estate Brokerage License Act (the "Maine Act").\textsuperscript{237} The Maine Act, which became effective January 1, 1988, regulates all real estate brokerage transactions, essentially all sales of real property in Maine that involve the services of a broker.\textsuperscript{238} Although the statute contains no provisions relating to property condition disclosure, the Maine Real Estate Commission has promulgated two disclosure Rules that became effective February 1, 1988 (the "Maine Rules").\textsuperscript{239} Since the Maine Commission has authority to regulate only real estate brokerage, these provisions are not applicable to sales by the owners of the offered properties.\textsuperscript{240} While the Maine Rules do not provide any damage remedy for defrauded buyers, they do establish the duty to disclose element necessary for a successful action in common law fraud.\textsuperscript{241}

Section 11 of Chapter 330 of the Maine Rules states that "the fiduciary duty of the licensee shall include the duty to disclose to the client any information which is material to the sale of the real estate."\textsuperscript{242} This section appears simply to reiterate that as a matter of

\begin{itemize}
  \item 236. \textit{Id.} § 1102.6.
  \item 238. The term "broker" or "real estate broker" is defined in § 13198.1 of the Maine Act as "any person employed by or on behalf of an agency to perform brokerage and licensed by the commission as a broker." \textit{Id.} § 13198.1.
  \item 239. \textit{Id.} § 13065.
  \item 240. Section 13002 of the Maine Act specifically excepts from real estate brokerage all transactions conducted by any person who is the owner of the real estate. \textit{Id.} § 13002.
  \item 241. \textit{Id.} § 13067(D).
established agency law the licensee must disclose to the client, that is, the seller or buyer, as the case may be, any information material to the sale of which he or she has knowledge.\textsuperscript{243} Section 14 of Chapter 330, however, appears to impose, albeit more briefly, an \textit{Easton-like} duty by mandating that "[a] licensee shall disclose to a \textit{customer} any material defect of which he has knowledge, or acting in a reasonable manner, he should have had knowledge, regarding the condition of real estate."\textsuperscript{244} That language clearly contemplates a reasonable inspection and subsequent disclosure of any material defects discoverable from that inspection, though not other material information. This analysis is supported by the addition, effective October 1, 1991, of Maine Rules Chapter 330, Sections 6-7 and 16-19. Much like the Disclosure Article of the California Act, these rules require that a written disclosure statement be prepared and delivered by the appropriate licensees, and that it contain certain specified detailed information relating to the property's private water supply, insulation, waste disposal system, and any known hazardous materials.\textsuperscript{245}

\textbf{C. The First Five Followers}

During the spring and summer of 1992, seven and four years following the adoption of the California Act and the Maine Rules, respectively, the legislatures of Virginia, Wisconsin, Kentucky, New Hampshire and Alaska adopted a form of mandatory property condition disclosure. These states' disclosure requirements warrant separate consideration.

\textbf{a. Virginia}

First in time, on March 7, 1992, the Virginia General Assembly unanimously approved the bill sponsored by the Virginia Association of Realtors as the Virginia Residential Property Disclosure Act (the "Virginia Act").\textsuperscript{246} It became effective July 1, 1993.\textsuperscript{247}

\begin{flushleft}
\textsuperscript{243} Standards of Practice," clarifies and establishes standards for practicing real estate brokerage. \textit{Id.}
\textsuperscript{244} \textit{Id.} § 14 (emphasis added).
\textsuperscript{245} See \textit{id.} §§ 6-7 (detailing the allocation of disclosure responsibilities among the listing broker, a selling broker and a licensee representing the buyer); \textit{id.} §§ 16-19 (outlining the specific information required to be provided in the disclosure statement). For a discussion of the California Disclosure Act, see \textit{supra} notes 206-12.
\textsuperscript{247} \textit{Id.}
\end{flushleft}
The Virginia Act is a very narrow version of the Disclosure Article of the California Act. Like the Disclosure Article, the Virginia Act applies to all sales and related transfers for value of residential real property of four or fewer units whether or not a real estate broker is involved. Unlike the California Act, however, first sales are excluded. The burden of timely providing a disclosure statement to a prospective purchaser falls solely on the owner. That duty is moderated by a statutory provision allowing the owner to satisfy the statute by providing a disclaimer in lieu of the mandated disclosure statement. Either statement is required to be in the form developed by the state's real estate board. In the case of the disclaimer statement, the form must state that the owner makes no representations or warranties about the condition of the property and that the purchaser will be receiving the property "as is" with all defects that may exist, except as otherwise provided in the contract of sale. In Virginia then, a seller of residential real estate may exercise an option to sell under the traditional doctrine of caveat emptor, provided that the buyer, after receiving the disclaimer statement, agrees to complete the sale.

In the case of the disclosure statement, the statute calls upon the Virginia Real Estate Board to implement the statutory provisions by listing items relative to the physical condition of the property... [which] may include defects of which the owner has actual knowledge regarding: (i) the water and sewage systems... (ii) insulation; (iii) structural systems... (iv) plumbing, electrical, heating and air conditioning systems; (v) wood-destroying insect infestation; (vi) land use matters; (vii) hazardous or regulated materials, including asbestos, lead-based paint, radon and underground storage tanks; and (viii) other material defects known to the owner.

In addition to including the above-listed items, much akin to the

248. Id. §§ 55-517, 55-518; see supra note 202 (quoting section 1102 of the California Disclosure Act stating that the act applies to all sales and related transfers); see also supra note 203 (discussing section 1102.1 of the California Disclosure Act which exempts certain transfers that are unlike voluntary sales because they are not for value).
250. Id. § 55-519(1).
251. Id. § 55-519(2).
252. Id.
253. Id. § 55-519.1.
254. See supra notes 169-81 and accompanying text (discussing the role of caveat emptor in real estate transactions).
California Act's specified items, the statute requires that the disclosure form notify owners and prospective purchasers that they may wish to obtain a professional inspection and that the information provided "is the representation of the owner and is not the representation of the broker or salesperson." In Virginia then, a prospective purchaser is entitled to receive either: (1) a disclaimer statement containing no information and a reminder that he or she takes the property "as is" with no recourse for nondisclosure; or (2) at best any information that the owner is aware of without being required "to undertake or provide any independent investigation or inspection of the property."

The Virginia Act allows a prospective purchaser to timely rescind a contract of sale for any failure of the owner to comply with its provisions. If the conveyance has already taken place, the purchaser may recover any actual damages attributable to the owner's misrepresentation or nondisclosure of a defect of which he or she had knowledge, provided that an action is commenced within one year from the date of settlement. Of some comfort to a defrauded purchaser is the Virginia Act's assurance that its limited express remedy in no way "prevent[s] a purchaser from pursuing any remedies at law or equity otherwise available against an owner in the event of an owner's intentional or willful misrepresentation of the condition of the subject property."

The Virginia Act has no equivalent to the Broker Duty Article of the California Act or the comparable Maine Rules. Section 55-523 of the Virginia Act requires only that any listing or selling broker inform the owner and any purchaser of their statutory rights and obligations as described above. Licensees have no other duties and they are expressly excluded from any liability for any failure to disclose information regarding real property covered by the stat-

256. See supra notes 206-12 and accompanying text (discussing the California Act's disclosure requirements).
258. Id. §§ 55-519.1-55-519.2.
259. Id. §§ 55-524.B.2. (referring also to section 55-520.B).
260. Id. § 55-524.B.1, § 5524.C.
261. Id. § 55-524.C; see supra notes 33-41 and accompanying text (discussing the possible common law remedies).
262. See supra notes 213-26 (discussing the California Act Broker Duty Article); see also supra notes 242-44 (discussing the Maine Act Broker Duty Article).
The primary purpose of the Virginia Act was apparently to stave off the possibility that the Virginia courts would follow *Easton* by imposing a duty to inspect and disclose on the state's real estate brokers. That purpose has been achieved.

b. Wisconsin

On March 10, 1992, the Wisconsin General Assembly approved a property condition disclosure bill that was proposed by that state's realtors association. That statute, entitled "Disclosures by Owners of Residential Real Estate" (the "Wisconsin Act"), is an even narrower version of the Disclosure Article of the California Act. Like the Virginia Act, it applies to all sales for value of properties of four or fewer units except those not yet occupied. The Wisconsin Act mandates that the owner of a property offered for sale must timely deliver to any prospective buyer a completed copy of a report, in the form specifically prescribed by the statute, disclosing whether the owner is or is not aware of the presence of each of twenty-eight enumerated defects in the water, insulation, electrical, plumbing, and other systems in the home, or dangerous substances, infestations, and the like. The form defines "am aware" as having notice or knowledge. The Wisconsin Act mandates the form of disclosure statement not yet developed under the Virginia Act, but they both cover essentially the same categories of items. Unlike the Virginia disclosure statement, it includes language that the report is not a warranty by the owner or any agent and suggests that an owner or buyer might consider obtaining an independent inspection. Unlike the Virginia Act, in Wisconsin an owner does not have the option of delivering a disclaimer statement in lieu of the

264. *Id.*
265. *See supra* note 192 (citing the National Association of Realtors' Property Condition Disclosure policy).
267. *Id.* § 709.01; *see supra* note 202 (quoting section 1102 of the California Disclosure Act holding that the Act applies to all varieties of sales); *see also supra* note 203 (discussing section 1102.1 of the California Act which exempts certain transfers that are unlike voluntary sales because they are not for value).
269. *Id.* § 709.03.
270. *Id.*
271. *Id.; see supra* note 255 and accompanying text (quoting the statutory language that instructs the Virginia Real Estate Board to implement a disclosure form which complies with the statutory requirements).
required disclosure report. The Wisconsin Act, however, does allow a buyer to waive in writing her right to receive the disclosure report, and to waive her right to rescind the contract after receiving an incomplete or inaccurate report. With respect to other recourse against an owner or agent, the statute provides that "[t]he right to rescind . . . is the only remedy under this chapter." Presumably the "under this chapter" language leaves intact the purchaser's damage remedies for intentional or negligent misrepresentation or fraudulent concealment, at least to the extent they are available under the common law of Wisconsin.

Like the Virginia Act, the Wisconsin Act contains no equivalent of the California Act's Broker Duty Article. Indeed, it imposes no duties of any kind on the broker, not even the limited duty found in the Virginia Act to inform the parties of the disclosure report obligation. Apparently the legislature of Wisconsin also decided to make more difficult an Easton-like expansion of the common law to impose on brokers or sellers any duty to inspect the property and disclose the fruits of that inspection for the benefit of the prospective purchaser. Again, that purpose has been achieved.

c. Kentucky

The third of this second group of states to require property condition disclosure was Kentucky, where the General Assembly enacted a new act relating to real estate brokers and salesmen that became effective July 14, 1992 (the "Kentucky Act"). The Kentucky Act is most similar to the regulatory scheme of Maine, in that the seller's completion and timely delivery to the prospective purchaser of the required disclosure form is the responsibility of the broker who anticipates being compensated for the sale. Like the Maine

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273. See supra note 251 and accompanying text (discussing the Virginia Act's disclaimer option).
275. Id. § 709.05.
276. See supra notes 33-41 and accompanying text (discussing those causes of actions as they have evolved).
277. See supra notes 262-64 and accompanying text (discussing Virginia's lack of a broker duty article).
278. See supra note 263 (discussing Virginia's limited duty to inform the parties of the obligation to file a disclosure report).
280. Id. § 324.360(5); see supra note 245 and accompanying text (discussing the Maine requirement that the broker provide the seller with the disclosure form in a timely manner).
scheme, it applies to all sales of all residential real estate except for sales of new homes if a warranty is offered, but only if a licensed broker is involved. The statute directed the Kentucky Real Estate Commission to authorize a "seller's disclosure of conditions form," providing for disclosure of: the basement condition and whether it leaks; the roof condition and whether it leaks; the source and condition of the water supply; the source and condition of sewage service; the working condition of component systems; and such other matters as the Kentucky Commission deems appropriate. An unusual aspect of the Kentucky Act is the imposition on the broker of the duty to inform the prospective purchaser without unreasonable delay the seller refuses to complete and sign the disclosure form.

Since the Kentucky Act regulates only the broker, a purchaser has no statutory recourse against the seller for damages as a result of an undisclosed or inaccurately disclosed defect in the disclosure of conditions form. Of course, if the seller refuses to complete the form and the prospective purchaser is so advised by the broker, he can decline to enter into the contract of sale. The broker can, however, be found liable under the Kentucky Act for violating any duty as set forth above or for "[m]aking any substantial misrepresentation or failing to disclose known defects which substantially affect the value of the property." Since the penalties for such liability are limited to suspension, license revocation, and fines, the available disciplinary action is not useful to a damaged purchaser, at least directly. Indirectly, however, such a finding of liability by the Kentucky Commission should ensure the purchaser's recovery of damages from that broker for intentional misrepresentation or concealment of a known defect under established common law.

Unlike the Broker Duty Article of the California Act or Section 14 of the Maine Rules, both of which impose a duty to inspect and disclose on the broker (and others in the case of the California Act), the Kentucky Act fails to impose any *Easton*-like duty on the brokers of that state. Again, the primary effect of the legislation ap-
pears to be to deter the state courts from expanding the common
law obligations of brokers to prospective purchasers of real property.

d. New Hampshire

The fourth state to mandate the delivery of some property condi-
tion disclosure to prospective purchasers in 1992 was New Hamp-
shire, where administrative rules became effective on June 1, 1992
(the "New Hampshire Rules"). These rules apply to all sales of
residential properties of four or fewer units where a licensee is in-
volved. They require the listing broker to ask the seller for speci-
fied information about any private water supply, the insulation, and
any private sewage system, and to disclose the information obtained
to all prospective purchasers in writing. In addition, the New
Hampshire Rules require the licensee to disclose to a prospective
buyer "any material defect of which he has knowledge regarding the
condition of real estate." Once again, the duty imposed falls far
short of an obligation to complete a diligent inspection of the prem-
ises and to disclose all of the material information reasonably dis-
coverable from such an inspection, as required by the California
Act.

Later in 1992 the New Hampshire legislature approved a bill re-
quiring the seller of any real property that includes a building to
disclose to the prospective buyer the same specified information
called for from the broker under the New Hampshire Rules, to the
extent he or she knows such information (the "New Hampshire
Act"). The required disclosure under the New Hampshire Act
applies only to information concerning the water supply and sewage
disposal system. If the required information is unknown to the
seller, that fact must be stated to the buyer in writing. This lim-
ited version of the New Hampshire Rules fails to impose on sellers
the obligation required of brokers that they disclose "any material
defect . . . regarding the condition of the real estate." The Act

288. Id.
289. Id. §§ 701.05-.07.
290. Id. § 701.04.
292. Id.
293. Id. § 477:4-c(II).
294. N.H. CODE ADMIN. R., Rea § 701.04 (1992); see also supra note 290 and accompanying
text.
also fails to provide any express remedy, although its mandate would satisfy the duty to disclose element required for a defrauded buyer to recover damages for intentional misrepresentation under state common law. The New Hampshire Act is applicable to a seller of real estate whether or not a licensed real estate broker is participating in the sale, but it is nevertheless a very narrow version of the Disclosure Article of the California Act.

e. Alaska

On July 14, 1992, Alaska became the last of this group of five states to enact a version of the California Act's Disclosure Article. Like its four predecessors, the Alaska Act mandates that the seller complete and deliver to any prospective purchaser a disclosure statement in the form to be established by the state's real estate commission. Unlike those described above, however, the Alaska Act provides no guidance concerning, among other things, the categories of information to be disclosed. It is also unique in that it applies only to single-family dwellings and two dwellings in one building. Like most of the legislation enacted in 1992-93, it is not applicable to the first sale of property which has never been occupied.

In addition to the usual limited right of rescission, the Alaska Act also provides the buyer with an express remedy for actual damages suffered as a result of even a negligent violation of the statute or failure to perform a required duty. If the violation or failure was willful, the purchaser may recover up to three times the actual damages. In either case, a court is authorized to award costs and attorneys fees to the extent consistent with its rules. On the other hand, the Alaska Act insulates the owner from any liability for any defect or other condition that is disclosed. It also allows the parties to waive the applicability of the statute to the proposed sale by

295. ALASKA STAT. §§ 34.70.010-.70.200 (Supp. 1993).
296. Id. § 34.70.010.
297. Id. § 34.70.050.
298. Id. § 34.70.200(3).
299. Id. § 34.70.120.
300. See id. § 34.70.020 (providing that the buyer may rescind an offer to purchase property after the seller's disclosure by written notice within the specified period of time).
301. Id. § 34.70.090(b).
302. Id. § 34.70.090(c)
303. Id. § 34.70.090.
304. Id. § 34.70.030.
written agreement and it has no effect on any "other obligations for disclosure required by law." The Alaska Act also contains no equivalent of the California Act's Broker Duty Article; indeed, it is altogether silent on the issue of broker responsibilities.

D. The Later Ten Disclosure Acts

During their 1992-93 legislative sessions, and generally under the sponsorship and with the support of the state association of realtors, the ten states of Delaware, Illinois, Indiana, Iowa, Maryland, Michigan, Mississippi, Ohio, Rhode Island and South Dakota each enacted a limited version of the Disclosure Article of the California Act (the "Later Ten Acts"). Like the California Act and most of its earlier progeny, these statutes generally apply to all transfers for value of residential real property containing four or fewer dwelling units. Unlike the California Act, however, but like most of its progeny, all of the Later Ten Acts, except those of Delaware, Iowa and Mississippi, exempt from their coverage sales of new or never-occupied residences. Finally, like the regulatory schemes of Maine and Kentucky, the Mississippi

305. Id. § 34.70.110 (allowing the parties to waive the applicability of the statute to the proposed sale by written agreement); id. § 34.70.070 (limiting the applicability of the waiver).

306. See supra note 192 (citing the National Association of Realtors' Property Condition Disclosure statement); see also James D. Lawlor, Seller Beware: Burden of Disclosing Defects Shifting to Sellers, 78 A.B.A. J. 90 (Aug. 1992) (noting the legislative push by state real estate broker associations and the National Association of Realtors for mandatory seller disclosure programs).


309. IND. CODE ANN. §§ 24-4.6-2 - 24-4.6-2-13 (West 1994).


315. R.I. GEN. LAWS §§ 5-20.8-1 - 5-20.8-10 (Supp. 1993).


317. Note, however, that the Ohio Act is applicable to all residential property regardless of the number of units. OHIO REV. CODE ANN. § 5302.30(B)(1) (Anderson Supp. 1993); see supra note 202 (quoting § 1102 of the California Act holding that the Act applies to all sales and transfers); see also supra note 203 (exempting sales not made for value).


319. See supra notes 237-45 and accompanying text (discussing Maine scheme).

320. See supra notes 279-86 and accompanying text (discussing Kentucky scheme).
disclosure act applies only to sales involving a licensed real estate broker.\textsuperscript{321}

Each of the Later Ten Acts contains a somewhat different combination of the disclosure provisions of the California Act and the First Five Followers. However, they all mandate that the seller disclose some amount of property condition or defect information of which he or she has actual knowledge, and in Iowa, the seller must disclose information which is available upon reasonable effort.\textsuperscript{322}

With the exception of the Iowa act, there is no duty on the disclosing seller to make any inspection whatever as a basis for his or her completion of the required disclosure document.\textsuperscript{323}

The statutes of Illinois, Michigan, Mississippi and South Dakota follow the California and Wisconsin approach by prescribing the actual text of the disclosure document required to be prepared and delivered to the prospective purchaser.\textsuperscript{324} The categories of information called for by the Michigan,\textsuperscript{325} Mississippi,\textsuperscript{326} and South Dakota\textsuperscript{327} acts are much like those required by the California Act's mandated form of disclosure (attached as an Appendix to this article) in both their considerable scope and detail. The form prescribed by the Illinois statute is modeled after that contained in the Wisconsin Act.\textsuperscript{328} It simply calls for the seller to indicate whether or not she is aware of twenty-two enumerated structural defects and other potentially dangerous conditions.\textsuperscript{329}

The remaining six of the Later Ten Acts, like the above-described Virginia and Kentucky Acts, call for the adoption of a property condition disclosure form by the state real estate commission or other agency having jurisdiction. With the exception of the Delaware statute, which like the Alaska Act leaves the content of the disclosure form entirely within the discretion of the appropriate regulatory body,\textsuperscript{330} they each direct their respective regulatory body to include at least certain specified information. The amount of mandated information varies widely, from the Indiana act's limited list of the

\begin{enumerate}
\item[323.] Id. §§ 558A.1-558A.8.
\item[324.] \textit{See} Appendix.
\item[326.] Miss. Code Ann. § 89-1-509 (Supp. 1993).
\item[327.] S.D. Codified Laws Ann. § 43-4-44 (Supp. 1994).
\item[328.] \textit{See supra} notes 268-71 and accompanying text (discussing the Wisconsin Act).
\item[329.] \textit{See} S.H.A. 765 ILCS 77/35 (Supp. 1994).
\end{enumerate}
foundation, the mechanical systems, the roof, the structure and the water and sewage systems, to the Rhode Island act's more lengthy list of thirty-four enumerated items. In every case the regulatory body has authority to include any "[o]ther areas that . . . [it] determines are appropriate." The Maryland statute offers sellers the option to deliver a residential property disclaimer statement similar in content and effect to that contained as an option for sellers under the Virginia Act.

As emphasized above, neither the California Act nor any of its five earlier progeny require the seller of residential real property to make any disclosure of material information not specifically called for by the applicable disclosure document. However, disclosure to prospective buyers of all known or reasonably discoverable material information is required of sellers and brokers by the Easton decision, and of brokers by the Broker Duty Article of the California Act. Furthermore, disclosure of all known "material defects" (though not other material information) is required of brokers by the Maine and New Hampshire Rules. It is therefore noteworthy that three of the Later Ten Acts, those of Delaware, Maryland, and Rhode Island, also impose upon sellers this more open-ended duty to disclose any other known material defects, in addition to the items specifically enumerated in the statute. While these three acts facially go further than the Disclosure Article of the California Act, the common law in most jurisdictions already prohibits the fraudulent concealment of known defects and increasingly requires disclosure of those defects that are reasonably ascertainable by sellers of real property and participating brokers.

In general, the Later Ten Acts, like the earlier five followers of California, allow a prospective purchaser to timely rescind a con-

331. IND. CODE ANN. §24-4-4.6-2-7(1) (West 1994).
332. R.I. GEN. LAWS § 5-20.8-2(b) (Supp. 1993).
333. IND. CODE ANN. §24-4-4.6-2-7(1) (West 1994).
334. MD. CODE ANN., REAL PROP. § 10-702(B) and (C) (Supp. 1993); see supra note 254 (discussing Virginia Act's sellers' option).
337. See supra notes 242, 290 and accompanying text (discussing disclosure requirements in Maine and New Hampshire).
338. DEL. CODE ANN. tit. 6, § 2572(a) (1993).
341. See supra notes 143-45 and accompanying text (discussing common law disclosure requirements).
tract of sale and, following completion of the transaction, to recover at least actual damages resulting from a violation of the statute’s disclosure or other obligations. While the specific remedies vary, none of the statutory remedies is expressly preemptive of any common law cause of action for fraud. As noted above, none of the Later Ten Acts, other than the Iowa act, imposes liability for any omission or misrepresentation in the absence of actual knowledge. Even under the Iowa act, a defrauded purchaser cannot recover where the seller exercised ordinary care in obtaining the required information.

The Later Ten Acts are essentially variations of only the Disclosure Article of the California Act. They are designed to provide prospective purchasers of real estate with written disclosure of certain property condition information from the sellers. None of these statutes contains any equivalent of the California Act’s Broker Duty Article. Accordingly, each and every statute represents the results of an apparent concerted effort by members of the real estate industry to contain Easton as it relates to broker duties of inspection and disclosure within the boundaries of California.

E. The Remaining Thirty-Three States

There are presently thirty-three states which do no require the disclosure of any property condition or other material information to prospective purchasers of residential real property by sellers or participating brokers (the “Remaining Thirty-Three”). Of those, twenty-eight have voluntary disclosure programs presently in place that are likely, given the continuing concerted efforts of the National Association of Realtors, to be enacted in a mandatory form. The legislatures of each of the remaining five states, specifically Alabama, Florida, New Jersey, Kansas and Tennessee (the “Unconvinced Five”), are apparently still comfortable with the reg-

342. But see R.I. GEN. LAWS §§ 5-20.8-4 to 8-5 (Supp. 1992) (providing the buyer only with a right of rescission and a civil penalty of $100 per occurrence in the case of any violation of that act’s provisions). Note also that section 55 of the Illinois Act, like that of Alaska, allows the court to award reasonable attorneys’ fees. S.H.A. 765 ILCS 77/55 (Supp. 1994).
344. Lawlor, supra note 306, at 90.
345. See supra notes 190-344 and accompanying text (discussing the seventeen states which adopted property disclosure laws).
346. See supra notes 190-344 and accompanying text (discussing the seventeen states which adopted property disclosure laws).
ulation of residential real property transactions primarily by its form of ever-evolving common law fraud, including the well-established but well-eroded doctrine of *caveat emptor*.

III. **Effects of Disclosure Legislation on the Development of the Common Law**

Historically, the sale of residential real property, like the sale of other real and personal property of all sorts, was regulated largely by the common law torts of fraudulent concealment, intentional misrepresentation, and negligent misrepresentation. The elements of real estate fraud are a characteristic and strength of the common law, and they have been from time to time adapted by the courts to accommodate the realities of the marketplace. The culmination of that development was the decision in *Easton* recognizing a duty on the sellers of residential real property, and imposing the same duty on any and all participating brokers, to inspect the offered real property and to disclose not only any defects discoverable during that inspection, but also "all facts materially affecting the value or desirability of the property" to any and all prospective purchasers. This expansion of real estate fraud to provide a common law damage remedy for buyers in California would, in the normal course, have been further refined by case law in that state. No doubt it would also have been adopted by at least some other state courts that have long regarded the California courts to be at the forefront of tort law evolution. Instead, the major consequence of the *Easton* decision was the enactment of the California Act and its progeny. The impact of that legislation on the scope and direction of the law of real estate fraud has been and continues to be enormous. Essentially, the evolving *Easton* approach, even to the extent preserved in the California codification, now stands dead in its tracks.

**A. The Effect of the California Act**

The California Act largely codified and thereby ratified the expanded duties owed by the sellers and brokers of residential real property. The Disclosure Article goes further than the judicially-created law by affirmatively requiring the preparation and delivery

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347. See supra text accompanying note 183 (quoting *Easton* 199 Cal. Rptr. at 390).
348. See supra notes 206-12 and accompanying text (discussing the California disclosure article).
of a disclosure statement containing prescribed detailed useful information, and by providing a buyer with a remedy for any damages caused by a violation of that requirement. While the statutory disclosure requirement clearly helps the buyer obtain at least some useful information, and presumably makes him aware of the right to obtain correct and complete information, it adds only modestly to the broad protection available to the buyer since Easton. On the other hand, the statutory remedy is consistent with that afforded by the case law and, more importantly, it is in addition to the remedies available by reliance on Easton.

The effect of the Broker Duty Article on common law real estate fraud in California is less easily evaluated. The Broker Duty Article clearly codified much of Easton’s imposition of an affirmative duty on brokers to visually inspect the offered premises and disclose all material facts reasonably discoverable from that inspection to prospective purchasers. In several respects, however, the statutory duty is in several respects more limited than that imposed by the Easton court.

Similarly, the statutory remedy against the broker, while generally consistent with the case law in matters such as the due diligence defense, is more limited. It must be commenced no later than “two years from the date of possession, which means the date of recordation, the date of close of escrow, or the date of occupancy, whichever occurs first.” The statute of limitations applicable to a common law fraud action against a broker who negligently misrepresents or omits material facts under the Easton precedent would be three years. More importantly, it would run from the earlier of the date of the discovery of the actionable misstatement or omission or the date on which it should reasonably have been discovered.

Unlike the Disclosure Article, there is no provision in the Broker Duty Article stating that it is in addition to the broader duty and

349. See supra notes 206-09 and accompanying text (discussing the disclosure form requirement); see also and supra note 228 and accompanying text (discussing the remedy).
350. See supra notes 227-31 and accompanying text (discussing the statutory remedy in light of the remedies available under Easton).
351. CAL. CIV. CODE § 1102.8 (West Supp. 1994).
352. See supra notes 206-10 and accompanying text (discussing the codification of Easton).
353. See supra notes 211-12 and accompanying text (discussing the difference between the California legislation and the Easton decision).
355. CAL. CIV. PROC. CODE § 338 (West 1994).
corresponding remedy afforded a prospective buyer by the *Easton* opinion.\textsuperscript{356} Accordingly, it could be argued that the California legislature was persuaded and that it intended to ratify only a portion of *Easton*, thereby limiting the scope of the broker's duty of inspection and disclosure to that expressly detailed in that Article.\textsuperscript{357} Under this analysis, one effect of the statute is to reduce the risk of liability that existed after *Easton* of a broker who provides false or incomplete disclosure. As a practical matter, such an interpretation of the statute would be to afford protection to the broker at the expense of the buyer, and perhaps more importantly, at the expense of the seller, to whom the buyer would be forced to look exclusively for his or her remedy. Until the intent of the legislature is determined by California courts faced with facts that would cause a broker to be found liable under *Easton* but not under the statute, the effect of the statute on the then-existing common law in this critical area of broker liability is a continuing uncertainty.

### B. The Effect of the Maine Approach

The provisions of Chapter 330 of the Maine Rules impose on all real estate brokers duties similar to, but somewhat less broad than, those imposed by the California Act's codification of *Easton*.\textsuperscript{358} Although the Maine Rules also require an inspection of the premises as explained above, they require the disclosure of only "material defects"\textsuperscript{359} rather than of "all facts materially affecting the value or desirability of that property" as required by the California Act.\textsuperscript{360}

The Maine approach does not, however, provide equivalent benefit to the purchaser of residential real estate, in that the Maine Rules provide a misinformed or uninformed buyer with no express remedy of any kind.\textsuperscript{361} While the Maine Commission, either in response to a purchaser complaint or on its own motion, may bring disciplinary proceedings resulting in substantial monetary and other penalties to a violating broker, that enforcement provides no relief to the purchaser.\textsuperscript{362} Unless a Maine court were willing to imply a private right

\textsuperscript{356} See *supra* note 230 and accompanying text.
\textsuperscript{357} CAL. CIV. CODE §§ 2079-2079.9 (West Supp. 1994).
\textsuperscript{358} See *supra* notes 237-45 and accompanying text (discussing the Maine approach).
\textsuperscript{359} See *supra* note 244 and accompanying text (quoting the Maine Act).
\textsuperscript{360} See *supra* note 214 and accompanying text (quoting the California Act).
\textsuperscript{361} See *supra* note 241 and accompanying text (discussing the remedies available under the Maine Act).
\textsuperscript{362} ME. REV. STAT. ANN. tit. 32, §§ 13066-13068 (West 1994).
of action for a violation of Section 14 of the Maine Rules, an unlikely possibility. The buyer is restricted to judicially developed remedies, as discussed above.

The Maine approach administratively regulates its real estate brokerage industry. While this approach is very helpful by imposing a duty on brokers to prospective purchasers of real property, its impact on the development of real estate fraud in Maine is indirect. Its more general impact is also limited since no other state that has mandated property condition disclosure, with the partial exception of New Hampshire, has selected an administrative rather than the broader legislative approach. Not even the two states that regulate only those sales that involve a licensed broker, Kentucky and Mississippi, have adopted the Maine approach.

C. The Effect of the California Act's Progeny

As described above, since March 7, 1992, a total of fifteen state legislatures have enacted statutes that, despite considerable variation in their provisions, can each be viewed as a narrow version of the Disclosure Article of the California Act (the "Prevailing Disclosure Act"). The Prevailing Disclosure Act mandates the preparation and delivery by the seller to any prospective purchaser of residential real estate of a disclosure document, or in the case of Virginia and Maryland either a disclosure document or a disclaimer statement. The Prevailing Disclosure Act contains no equivalent of the Broker Duty Article of the California Act.

The fifteen enactments of the Prevailing Disclosure Act during

363. See, e.g., Smith v. Rickard, 254 Cal. Rptr. 633, 636-39 (Cal. Ct. App. 1988) (holding that real estate brokers in California for sellers have no duty to inspect and disclose to buyers facts that affect the value of the property); Reeves v. Weber, 509 So. 2d 158, 160 (La. Ct. App. 1987) (holding that a purchaser's remedy against a real estate broker is limited to fraud); see supra note 244 and accompanying text (discussing section 14).

364. See supra notes 19-181 and accompanying text (discussing obligations under common law); supra notes 241, 244 and accompanying text (discussing the Maine remedies).


366. See supra notes 287-94 and accompanying text (discussing the New Hampshire Act).

367. See supra notes 237-45 and accompanying text (discussing the Maine approach).

368. See supra notes 279-86 and accompanying text (discussing the Kentucky approach).

369. See supra note 321 and accompanying text (discussing the Mississippi Act).

370. See supra notes 237-45 and accompanying text (discussing the Maine approach).

371. See supra notes 206-12 and accompanying text (discussing the Prevailing Disclosure Act).

372. See supra notes 246-344 and accompanying text (discussing the California Act).

373. See supra notes 206-12 and accompanying text (discussing the California Act).
1992-93 were, like that of the California Act, triggered by the *Easton* decision's substantial expansion of the disclosure obligations of the seller of residential real estate and of participating brokers in California. However, the impact of these statutes on the common law of their states is perhaps even more dramatic. As analyzed above, the California Act simply put into statutory form the greater part of the judicially-expanded obligations of sellers and brokers to discover and disclose all material facts, albeit with some limiting guidelines, especially with respect to broker responsibilities. Essentially, it was too late in California after *Easton* for even the powerful California Association of Realtors to convince the legislature to roll back the characteristic judicial development in the area of real estate fraud. Instead, the legislation effectively arrested that development at *Easton*.

In most jurisdictions other than California, the early well-established doctrine of *caveat emptor* remained substantially intact, precluding or at least slowing any judicial creation and expansion of disclosure duties necessary to support a remedy for nondisclosure. In general, an uninformed, rather than misinformed, buyer's only legal remedy lay in the doctrine of fraudulent concealment of a known defect to the limited extent that it existed under the applicable state law. Accordingly, the enactment of the Prevailing Disclosure Act, usually proposed and sponsored by the state association of realtors, mandated the disclosure and delivery by the seller of information perhaps not yet required by the existing common law of the state. It therefore eliminated for the foreseeable future any judicial attempts to move in the direction of imposing any duty of disclosure whatsoever on members of the real estate industry. To the limited extent that a purchaser of real estate is benefitted by the Prevailing Disclosure Act, all costs of that benefit fall on the individual seller rather than on the real estate professional.

374. See supra notes 246-344 and accompanying text (discussing the fifteen statutes which follow the California Act).
375. See supra notes 206-12 and accompanying text (discussing the California Act).
376. See supra notes 345-46 and accompanying text (discussing the thirty-three states which have not enacted disclosure legislation).
377. See supra note 39 (providing the elements for common law fraud).
IV. THE PRACTICAL RAMIFICATIONS OF THE PREVAILING DISCLOSURE ACT

The enormous adverse impact of the Prevailing Disclosure Act on the common law evolution of real estate fraud is of considerable, albeit somewhat theoretical importance. It must be considered in any useful evaluation of the desirability of the Act as an alternative to the more comprehensive approach of the California Act or the more traditional evolving common law approach of those states without mandatory disclosure legislation. Even more important are the ramifications of the Prevailing Disclosure Act on the particular parties affected and on the health of the real estate sector of the economy. The usual impetus for the enactment of a comprehensive statutory scheme is that a substantial segment of society is in need of and worthy of legal protection where none exists under common law.

An obvious example of this was Congress’ enactment of the federal securities laws in 1933-34 to protect investors from the securities fraud that was believed to have contributed to the Depression. Those statutes required all sellers of securities and all participating brokers to disclose to prospective purchasers all reasonably discoverable material information. The stated purpose of that legislation was to protect the investor.

Another category of relevant statutes is that of the various consumer protection acts, where again, the presumed purpose was to afford legal recourse to inadequately protected consumers. In those somewhat analogous areas, the lawmakers seem to have concluded that the protection of the then inadequately protected inves-

379. See supra notes 246-344 and accompanying text (discussing the fifteen states which enacted the Prevailing Disclosure Act).


381. See 15 U.S.C. § 77aa (1988) (requiring that securities brokers and dealers file a registration statement for securities which must contain a schedule of information, including the names and addresses of underwriters and major financial statements of the issuing corporation); id. § 78ll (containing similar disclosure requirements pertaining to the application for registration of the security).

382. 48 Stat. 74, ch. 38 (1933) pmbl; see 15 U.S.C. § 77g (1988) (authorizing the Securities and Exchange Commission to promulgate regulations requiring the registration statement for a security to contain any information or documents necessary for the protection of investors).

tor or consumer was necessary and desirable, that the disclosure form of regulation was effective, and that the costs of compliance were not unreasonably burdensome to the sellers and their agents, as compared to the resulting benefits for the protected class and the marketplace generally.\textsuperscript{384}

The Prevailing Disclosure Act has the appearance of being enacted in order to provide needed protection to the purchasers of residential real estate. Therefore, it too should be evaluated and measured against possible alternatives by balancing its benefits with its costs to all concerned parties.

\textbf{A. The Purchaser}

As set forth above, the purchaser of residential real estate has a common law remedy against the seller and participating brokers for damages proximately caused by the misrepresentation or fraudulent concealment of known material defects.\textsuperscript{385} Prior to the enactment of the Prevailing Disclosure Act, neither sellers nor brokers in states other than California,\textsuperscript{386} Maine, and New Hampshire\textsuperscript{387} had any duty to make any disclosure unless they had knowledge of a material defect. Furthermore, they had no duty to inspect or to take other action to discover the existence of any material defects.\textsuperscript{388}

The Prevailing Disclosure Act ensures\textsuperscript{389} that the buyer will be presented with a disclosure statement form completed by the seller containing certain specified information about the property to the extent known to the seller.\textsuperscript{390} In addition, in Delaware, Maryland, and Rhode Island, the purchaser will be advised of any material defects.\textsuperscript{391} Finally, the Prevailing Disclosure Act adds a specific remedy for any violation of its requirements.\textsuperscript{392} As emphasized

\begin{footnotes}
384. \textit{See supra} notes 381-84 and accompanying text (discussing the SEC laws and several consumer protection acts which support this conclusion).
385. \textit{See supra} note 39 (stating the elements for common law fraud).
386. \textit{See supra} notes 206-09 and accompanying text (discussing the California Act).
388. \textit{See supra} notes 40-166 and accompanying text (discussing the common law duties placed on sellers and brokers).
389. \textit{But see supra} notes 250, 334 and accompanying text (stating that in Maryland and Virginia disclaimer is permitted).
390. \textit{See supra} notes 206-12 and accompanying text (discussing the California Act); \textit{see also} note 322 and accompanying text (explaining that in Iowa, the disclosure must contain material information known or discoverable).
391. \textit{See supra} notes 338-40 and accompanying text.
392. \textit{See supra} notes 228-31 and accompanying text (discussing the remedies available under
above, except for the physical delivery of a statement with some information, the statute adds nothing to the buyer's common law protection against the seller. It limits at the status quo her remedy against the broker typically having the deeper pocket. 398

As a practical matter, the buyer must undertake the same inspection of the premises as was necessary in the absence of the Prevailing Disclosure Act to protect against overpaying and to establish the element of reasonable reliance for a possible fraud claim. 394 An unfortunate affect of the statute is that upon receiving a disclosure document with a formal and legalistic appearance, the buyer may assume that he or she is fully informed and forego such an investigation.

Another cost to the buyer is the increase in price resulting from the burdens of complying with the mandated disclosure requirements. 396 A seller may reasonably believe that the complexities of the new law preclude her selling the property without the services of a broker, and will therefore increase the price to cover the broker's commission. Ironically, however, the imposition of greater duties of inspection and disclosure on the broker was short-circuited by the passage of the Prevailing Disclosure Act, which at the same time makes the broker more essential.

B. The Seller

The seller of residential real property must comply with the disclosure obligations of the Prevailing Disclosure Act, and risks liability for failing to correctly and completely provide the information called for by the statute. 396 As a matter of substance, the seller's burden is only marginally increased, since he or she is already obligated under common law principles to disclose all known defects. 397 In addition, the seller gains some benefit since he cannot be held
liable for any damages caused by a disclosed defect or condition.\footnote{398. See, e.g., supra note 229 and accompanying text (stating that purchasers may not recover from sellers who have properly disclosed).}

Practically, however, the seller is forced or believes he is forced to engage a real estate broker in order to handle the required compliance at a cost that the seller may not be able to fully pass on to the buyer. The increased cost is at least a small burden on an individual's inherent right to acquire and sell real property, especially since many sellers list with brokers in any event. Again ironically, while the broker becomes almost indispensable as a result of the statutory compliance obligations, that same statute not only fails to impose any new duties of inspection or disclosure on the broker, but even fails to acknowledge any duties arguably still existing at common law.\footnote{399. See supra note 17-181 and accompanying text (discussing judicially created disclosure obligations).} Accordingly, the statutory limit on a broker's potential liability to a defrauded purchaser has shifted the risk of any such liability dramatically from the broker to the seller.

\section{The Broker and the Brokerage Industry}

As mentioned above, the National Association of Realtors has been the primary impetus behind the passage of the Prevailing Disclosure Act.\footnote{400. Lawlor, supra note 306, at 90. Similarly, realtor associations promoted state enactment of stigma statutes following the decision in Reed v. King, 193 Cal. Rptr. 130 (Cal. Ct. App. 1983). McEvoy, supra note 8, at 586-87.} It comes as no surprise, therefore, that the benefits to the broker and the brokerage industry are enormous. Simply put, the statute enhances the dependence of a seller of residential real estate on the services of a broker, effectively limits the broker's liability for nondisclosure to the purchaser, and prevents the imposition of a duty on the broker to inspect and disclose to the purchaser the discoverable fruits of that inspection.\footnote{401. See supra notes 246-344 and accompanying text (discussing the Prevailing Disclosure Act).} The imposition of such a duty would likely have occurred through judicial development in the absence of the statutes' enactment.\footnote{402. Meyer, supra note 117, at 242, 271-72. Professor McEvoy concludes that the development of disclosure obligations relative to psychological factors is best left to the courts, rather than the legislature. McEvoy, supra note 8, at 588.} The Prevailing Disclosure Act provides some small added disclosure to the purchaser.\footnote{403. See supra notes 246-344 and accompanying text (discussing the Prevailing Disclosure Act).} All of
these effects occur at the expense of the seller rather than the broker, without a single cost to the broker. It would be difficult to envision a statutory scheme better designed to further the special interests of the real estate brokerage industry.

V. RECOMMENDATIONS FOR THE REMAINING THIRTY-THREE STATES

A. Continued Development of Common Law Obligations

In light of the above analysis of the Prevailing Disclosure Act, the legislatures of the Remaining Thirty-Three404 should first give careful consideration to the question whether there is any need for statutory disclosure regulation of residential real estate transactions. That decision requires a consideration of whether the applicable common law regulating real estate fraud affords too little protection to potential purchasers. States must also decide whether purchasers’ inability to adequately protect themselves warrants imposing additional burdens on the sellers of offered properties or on participating brokers.

If the answer is that the common law should be superseded by a statutory scheme for the better protection of purchasers, and therefore a healthier real estate sector of the economy, the legislature would be well-advised to consider the comprehensive approach of the California Act.405 Since the seller’s common law disclosure obligations are already very complete,406 and arguably hover at the point of unlawfully interfering with her inherent right to sell the real property, any needed additional disclosure must be required from the brokers participating in the sale. Obviously, that duty must at a minimum include disclosing to prospective purchasers all information available from the broker’s reasonably diligent inspection of the premises offered for sale. As the federal securities laws have illustrated over the last sixty years, the sales professionals in the field are the best source of complete and correct disclosure.407

404. See supra notes 345-46 and accompanying text (discussing the remaining thirty-three states).
405. See supra notes 200-36 and accompanying text (discussing the California Act).
406. See supra notes 40-80 and accompanying text (discussing the seller’s common law duty to disclose defects).
There is little doubt that the evolving common law of fraud has been especially well-suited to the residential real estate marketplace. Indeed, all of the statutes enacted to date have interfered with the gradual but steady judicial expansion of those disclosure duties owed to prospective purchasers by members of the brokerage industry. Accordingly, the better approach for the Remaining Thirty-Three may well be to let the common law move forward free of statutory limitation or other interference, and to reject the self-interested lobbying efforts of the National Association of Realtors and its state affiliates.

A statutory disclosure scheme that fails to impose on brokers appropriate responsibilities and consequential potential liability is the worst of all presently available alternatives. No state should seriously consider enacting the Prevailing Disclosure Act; those states that have already done so would be well-advised either to finish the job by enacting the California Broker Duty Article to complement and balance its statutory scheme, or to restore the time-tested common law regulation of real estate fraud by repealing its limiting mandatory disclosure act.

B. Suggestions for Legislative Enactments

This article advocates continued development of the common law as opposed to state legislation in the area of seller and broker disclosure. If a state were to consider disclosure legislation, however, the format of the Broker Duty Article of the California statute is preferable over seller disclosure legislation. Whichever form of disclosure legislation a state chooses to consider, there are a number of considerations which seem to have been ignored by the existing legislation. State legislators should fully consider and debate these issues in order to insure the fairest and most comprehensive disclosure legislation.

408. See supra note 39 and accompanying text (discussing common law fraud).
409. See supra notes 117-66 and accompanying text (discussing judicial trends in disclosure duties owed by brokers).
410. See supra notes 213-36 and accompanying text (discussing the California Broker Duty Article).
411. See supra note 39 and accompanying text (discussing common law fraud).
412. See supra notes 407-11 and accompanying text (discussing this author's recommendations for the remaining thirty-three states).
413. See supra note 413 (citing the Broker Duty Article).
414. See infra notes 415-84 and accompanying text (discussing the elements that state legislatures need to consider in drafting legislation).
One of the threshold issues in any legislative scheme is whether the disclosure obligation should be imposed on the broker or the seller. As earlier discussed, the Prevailing Disclosure Act places the duty on the seller. 415 Facially, placing the duty on the seller makes the legislation appear more comprehensive, since disclosure will occur in all transactions, and no one knows the home's defects better than the seller. 416 If the requirement applies only to the broker, it will be applicable only to transactions involving a broker. 417 While it is true that a large majority of transactions do involve a broker, the legislation would still omit those transactions in which the seller does not employ a broker. 418 If the purpose of disclosure legislation is to inform the buyer so that he will not overpay or be unpleasantly surprised by defects discovered after purchase, the requirement should apply in all transactions, not just broker transactions. As a practical matter, if a seller retains a broker to represent the seller in the transaction, the broker will probably order or conduct the inspection, if one is required, or assist the seller in preparing the disclosure form if it is not based on an inspection. If no broker is involved, the statutory duty should fall on the seller.

Another reason for imposing the inspection and disclosure obligation on the seller is to guard against avoidance of the statutory requirement. If legislation imposes the requirement on the broker, a seller desiring to conceal a defect may simply choose to sell the house without a broker. If the obligation is imposed on the seller, it applies to all transactions. 419 The legislation can put an enforcement burden on the broker, if one is involved, to make sure the statutory disclosure obligation is complied with. But, the seller cannot avoid compliance as he or she could if only the broker were responsible for disclosure. 420

415. See supra notes 206-10, 396 and accompanying text (discussing the burden under the Prevailing Disclosure Act).
416. See Curnes, supra note 45, at 480 (stating that placing the duty upon the seller would help to prevent the buyer from mistaking the property's value); see also Tracy, supra note 8, at 173-74 (proposing the rejection of the caveat emptor doctrine and the imposition of an affirmative duty to disclose on the seller and requiring sellers to record the nature and extent of contamination at the time of transfer). But see Culm, supra note 118, at 333-34 (discussing the policy reasons for imposing a duty on the broker to disclose to buyers all facts materially affecting desirability of the property which are known to the broker or could be discovered by him through reasonable diligence).
417. See KY. REV. STAT. ANN. § 324.360 (Michie 1993).
418. See id.
419. See supra note 396 and accompanying text.
420. Compare supra notes 40-116 and accompanying text (discussing the common law duties
If the duty is placed on the broker, another issue which must be specified in legislation is whether the obligation applies to the listing broker or the co-operating, selling, broker. The answer here should be the listing broker, for reasons analogous to those for placing the duty on the seller rather than the buyer.

The selling broker shows a number of houses, usually listed in the area multi-list system, to various buyers. He cannot be held responsible for obtaining an inspection report on each house he shows to a buyer. On the other hand, the listing broker is the one who has first contact with the property, gathers all of the information that goes into the listing, and places the home in the stream of commerce. Therefore, imposing the inspection requirement on the listing broker is the appropriate place in the system to assure the information is correctly obtained and uniformly distributed.

One issue which should be clear in any broker disclosure legislation is whether the broker should merely solicit information from the seller and pass it on in some form to the buyer, or whether the broker should have a duty physically to inspect the property, transmitting to the buyer the results of that inspection. The same consideration might also arise in the PrevailingDisclosure Act, which requires only seller disclosure. Seller disclosure statutes can require the seller to disclose all that he or she knows concerning the property, or they can require a more extensive physical inspection.

If the purpose of either form of legislation is to fully and fairly inform the purchaser concerning the habitability, value and desirability of the property, a strong argument is presented for requiring a physical inspection of the property. Without a physical inspection,
both the seller and the broker, depending on the type of statute, will disclose only what the seller actually knows.\textsuperscript{428} This level of disclosure does not truly protect the buyer.\textsuperscript{428} Defects may exist in a house where the seller has lived for a long time, such that the seller has come to accept the defect and may neglect to disclose it. Worse, the seller may purposely fail to disclose a defect that she believes might affect marketability. That the seller (or broker) may be liable under the statute for a failure to disclose defects is cold comfort to a buyer who is disappointed in his expectation that he has received complete information on the home's defects.\textsuperscript{430} Clearly, the goal of protecting the buyer is better served by a statutory requirement of a physical inspection and disclosure. Many defects, such as electrical, plumbing, and heating and air conditioning, may be unknown to the seller or not readily discernable to the casual visual inspection. They may be hidden in walls or other inaccessible spaces. Systems may be on the verge of failure, a fact of which the seller may be ignorant, but which would be revealed by a physical inspection.

If a physical inspection is preferable, there are a number of practical and economic factors which a legislature must consider in determining the extent of the inspection duty. The first question involves whether the inspection should be conducted by the real estate broker or by a professional home inspector.\textsuperscript{431} Under the Prevailing

\textsuperscript{428} See supra notes 40-159 and accompanying text (discussing the duties of sellers and brokers under common law).

\textsuperscript{429} See supra notes 168-81 and accompanying text (discussing the obligations placed on purchasers under common law to provide for their own inspection in order to have full knowledge of defects).

\textsuperscript{430} See Zeit, supra note 18, at 168-69 (discussing cases which impose liability on a broker for merely repeating a seller's false assertions because the repeated assurances led the buyer to rely on them to his detriment, whereas the broker's silence would have been a shield against liability). However, most courts hold that a broker does not breach a duty to the buyer if the broker's disclosure is based on the seller's statement. Gaudio, supra note 8, at 360-61, 363-64 (discussing the disagreement over whether the broker can rely on the statements of the seller without making his own investigation).

\textsuperscript{431} See Culum, supra note 118, at 347. It is always prudent for the buyer of real estate to contract for his or her own home inspection; many real estate contracts are contingent on buyer's receipt of and satisfaction with an inspection report. Or, the parties can agree that the seller will repair defects discovered in the inspection of a certain type or up to a certain dollar amount. If state disclosure legislation required a professional inspection by the seller or broker as part of the listing, it would shift the inspection from being a contract contingency to be performed by the buyer at the buyer's expense after the contract is signed, to a part of the listing to be performed by the seller at the seller's expense prior to listing and showing the property. In any event, the extent of the professional inspection and the results reported should be the same in both cases. Although probably unnecessary, the buyer could still insist on an inspection contingency clause in
Disclosure Act any required inspection must be by a professional inspector. The only other choice for a physical inspection under the Prevailing Disclosure Act would be the seller. Since the seller is not a professional, and could not be expected to discover defects beyond those of which the seller already has knowledge, seller inspection does not give the buyer any additional protection. The only way to supplement the Prevailing Disclosure Act to give the buyer the added protection of a physical inspection is to require that the seller retain a professional inspector.

A more difficult question arises in a statute modeled on the California Broker Duty Article. If the required disclosure must be made by the broker, and the legislature opts for a physical inspection requirement, is there a sufficiently increased benefit to the purchaser to require a professional inspection rather than a broker inspection? Although they are not professional home inspectors, brokers handle a large number of properties, and they have some competence to know what to look for and to find defects in a physical inspection. If the broker were to conduct a complete and objective physical inspection of the property, the broker would probably discover most of the same problems as a professional inspector. On the other hand, the broker is less than objective since he is compensated only if the transaction is completed. This fact creates an inherent subjectivity in the way the broker deals with the property. Thus, even though brokers may be competent to inspect the property, this inherent conflict of interest is a strong argument in favor of requiring that disclosure based on a physical inspection be based on an independent inspection, even in broker transactions. In addition, the buyer obtains an additional benefit from the requirement for a professional inspection; if the inspector errs in his or her inspection or report, the buyer may have recourse against the inspector's errors and omissions or other liability

432. CAL. CIV. CODE § 1102-1102.5 (West Supp. 1994).
433. Id. §§ 2079-2019.10.
434. See Culum, supra note 118, at 342 (arguing that since brokers are involved in countless real estate transactions, they should be held to a professional standard).
435. See id. at 342-43 (arguing that a broker's profession regulates itself by enforcing professional standards of care, by licensing requirements, and by expanding professional knowledge within the profession).
436. See Curnes, supra note 45, at 480 (advocating that Virginia should enact a statute which includes requiring sellers to have their property inspected by an expert prior to the sale).
insurance.437

Another factor that bears on defining the parameters of any required inspection is the scope of the inspection. The key question is whether the inspection should cover only readily accessible areas or consist of a more complete investigation.438 Again, this is related to the identity of the inspector.439 A seller inspection cannot be expected to extend beyond readily accessible areas; a professional home inspector will look for hidden defects and examine hard to reach areas.440 The real question arises if a statute requires a broker inspection. Based on an assumed level of expertise, it would be fair to require brokers to perform a more complete inspection. However, brokers are not as competent or experienced as professional home inspectors to perform a truly complete inspection.441 Clearly, if the public policy goal of disclosure legislation is to fully inform the buyer of potential defects, a full, rather than a visual inspection is preferable. Following the scope of inspection logic would argue for broker inspection at a minimum and a professional inspection as preferable.

If policy moves in the direction of a professional inspection, the legislature must deal with the issue of cost. Inspection and disclosure by the seller is cost-free to the parties and provides the buyer with no additional protection. Although it is true that the broker may be liable for negligence or misfeasance if he does the inspection himself, this liability probably would not add greatly to the broker's existing liability insurance costs and the broker probably would not make an additional charge for it.442 Brokers are compensated almost universally on a commission basis, based on a percentage of the sales price. The commission covers all of the broker's activities in marketing the property, assisting the buyer, and closing the transac-

437. See generally id. at 470-71 (noting that a vendor could limit liability from a strict liability standard for nondisclosure of defects by having the property inspected by a competent expert).

438. See Culum, supra note 118, at 343 (arguing that at minimum, a broker's duty to inspect should include areas "reasonably and normally" accessible upon inspection and to detect and disclose hidden-but-discoverable defects).

439. Id.

440. Id.

441. One commentator recognizes that the appropriate scope of a broker's inspection would be patent, observable defects. Id. at 341; see also GAUDIO, supra note 8, at 361 (arguing that difficult to ascertain defects have traditionally not been within the broker's sphere of inspection).

442. See generally supra notes 117-66 and accompanying text (discussing general broker duties and liabilities). For a contrary view on both points, see Meyer, supra note 117, at 271 (arguing that a broker must be compensated not only for time spent investigating, but also for the expense of an independent inspection service, as well as for the broker's increased liability).
tion. The broker must undertake some level of property inspection for no other reason than to become familiar with the property and to make suggestions to the seller to repair or improve the house so it "shows" better. Requiring the broker to undertake a more complete physical inspection of the property for disclosure purposes does not materially add to the time or effort she devotes to the property.\textsuperscript{8} Since brokers rarely impose additional charges for aspects of their performance, other than out-of-pocket expenses, it is not unfair to require a more complete inspection by brokers without charge to sellers.

On the other hand, the old adage "you get what you pay for" might apply to opting for a broker inspection solely because it imposes no additional cost on the transaction.\textsuperscript{444} The best protection comes from a professional inspection.\textsuperscript{445} Depending on the market area, type of property, and the items included in the inspection, home inspection costs typically range from $200 to $500. If the legislature mandates a professional inspection, it should allocate the cost of the inspection in the legislation.\textsuperscript{446}

A statute requiring a professional inspection should require that the seller obtain and pay for the inspection. If the cost is placed on the buyer, there is a problem with multiple inspections by successive buyers, each having to pay for the cost of an inspection.\textsuperscript{447} At present, ordering a home inspection is optional with the buyer; many contracts are contingent on the buyer ordering an inspection report and being satisfied with the results.\textsuperscript{448} If a buyer orders a professional inspection, and then terminates the contract based on the inspection results, or for another reason, the buyer clearly pays the inspection costs.

The situation would be different, however, if state statute mandates an inspection. Once the first buyer orders an inspection, that should be sufficient; however, there is no mechanism to "assign" that inspection to a subsequent purchaser. A mandatory inspection format might therefore result in the economic waste of successive

\textsuperscript{443} See supra note 442 and accompanying text (discussing broker compensation).
\textsuperscript{444} See supra note 442 and accompanying text (discussing broker compensation).
\textsuperscript{445} See supra note 442 and accompanying text (discussing broker compensation).
\textsuperscript{446} See Meyer, supra note 117, at 271 (arguing that a statute must provide for compensation to the broker for the expense of an independent inspection service).
\textsuperscript{447} Curnes, supra note 45, at 469.
\textsuperscript{448} See supra notes 167-81 and accompanying text (discussing the obligations of the purchaser).
inspections of the same property paid for by successive buyers.\textsuperscript{449}

The same is true if the legislature sought to divide equally the inspection cost between buyer and seller. While equal division of the cost appears fair, since both seller and buyer benefit from the inspection, it is in fact worse economically for the seller. If the first buyer cancels, and successive buyers require new inspections, the seller would wind up paying one-half the cost for a series of inspections, with no additional benefit to the seller.

Therefore, the only reasonable resolution of the cost issue, were the legislature to mandate a professional inspection, is to impose the requirement and the cost on the seller. The seller is the party marketing the property. It is transactionally appropriate for the seller to order a house inspection, pay for it, and present it to all prospective buyers along with the other information about the property.\textsuperscript{460} All buyers could rely on the one inspection; by its terms the inspector is liable to the ultimate purchaser and, therefore, multiple or successive inspections would be unnecessary.\textsuperscript{461} Very few, if any, purchasers would likely insist on their own house inspection when presented with an independent inspection report by the seller.\textsuperscript{462} The buyer could review the report and make a decision concerning the physical condition of the property even before signing the contract of sale.\textsuperscript{463} At worst, the buyer will make the contract of sale contingent on the buyer's review of the inspection report.\textsuperscript{464} It is therefore transactionally fair and economically efficient to place both the obligation and the expense of obtaining a professional inspection report on the seller.\textsuperscript{465}

\textsuperscript{449} Curnes, \textit{supra} note 45, at 469 (noting that the multiple inspections by consecutive purchasers results in considerable waste).

\textsuperscript{450} \textit{See id.} (stating that it is more economically efficient to allocate the risk of unknown defects to the seller since he need only make a single investigation).

\textsuperscript{451} \textit{Id.} at 470-71 (noting that under a strict liability standard a seller could still be held liable for defects that existed at the time of sale but were not disclosed because of a failure to discover in the inspection).

\textsuperscript{452} \textit{See id.} at 471 (noting the difficulty of holding the seller liable for not disclosing undisclosed defects if inspection was performed by a competent expert).

\textsuperscript{453} If the buyer knows in advance the physical condition of the property, this knowledge will probably affect price negotiations.

\textsuperscript{454} The buyer could evaluate the report during the executory period or hire a consultant to review it for the buyer. If the buyer hires a consultant, the cost should be much less than a full inspection and would properly be at the buyer's expense.

\textsuperscript{455} The seller would be free, of course, to negotiate in the contract that the buyer will pay the inspection cost or that the parties will split the cost. Or, as with most other expenses of the sale (including the brokerage commission), the seller may simply include the inspection cost in the sales price; \textit{see} \textit{Zeit, supra} note 18, at 173-74.
One effect of legislation requiring a professional inspection report is that the buyer will be better informed, with the expected result that the information will find its way into the seller/buyer price negotiations. This result is assured if the seller must obtain the inspection report at the time of listing. It is likely to occur as well if the inspection and disclosure occur at a later point in the transaction. This result is entirely fair; the same result is obtained in most transactions now without the benefit of a statutorily mandated inspection. Many real estate contracts are contingent on the buyer obtaining a satisfactory inspection report, meaning that the buyer can cancel the contract if the inspection results are unsatisfactory. However, these clauses are often drafted to permit the alternate remedy of seller repair or sales price reduction, depending on the type and extent of defects revealed by the inspection. Requiring the seller to provide the buyer with an inspection report prior to executing the contract of sale is guaranteed to motivate the buyer to bargain for a lower price or seller repairs. Since this is often the current practice, the seller would not be greatly disadvantaged by a statutory requirement to disclose defects.

If the purpose of mandatory disclosure is to achieve a rational market where essential information is known in advance, there can be no complaint that the furnishing of the information may affect the economics of the transaction. All the statute would do is mandate information. Whether the buyer then decides, based on that information, not to purchase the property, to ask the seller to perform repairs, or to attempt to negotiate a lower price, is properly an issue of negotiation between buyer and seller.

Any legislation mandating disclosure must clearly identify the types of things which must be disclosed. As most of the existing disclosure legislation provides, all defects in the physical condition of the structure itself should be disclosed. In addition, all items upon which the house is physically dependent should be disclosed, such as site conditions on the lot, drainage, sewer or septic system, water or well, gas, electric, and other utilities. While these items

456. See supra note 214 (discussing California Disclosure Act), 244 (discussing Maine Act), 269 (discussing Wisconsin Act), 282 (discussing Kentucky Act), 290 (discussing New Hampshire Act), 296 (discussing Alaska Act), 322 (discussing the Later Ten Acts) and accompanying text. 457. See, e.g., Curtiss-Warner Corp. v. Thirkettle, 137 A. 408, 408 (N.J. Eq. 1927) (holding that vendors had a duty to disclose condition of street access along the lot purchased by buyers). But see Sevin v. Kelshaw, 611 A.2d 1232, 1237-38 (Pa. Super. 1992) (holding that vendor had no duty to disclose existence of water line easement because it was not a material fact); Zeit, supra
are the bare minimum for disclosure purposes, there may be other items that would be material to the buyer's decision but which are more judgmental than actual physical condition.\footnote{18} For example, should mandatory disclosure include environmental conditions in the area, such as a dump site,\footnote{19} inconveniences in the area, such as congested and noisy streets,\footnote{20} potential factors, such as a planned new highway near the property,\footnote{21} or prejudicial factors such as the close proximity of a group home or low-income housing?\footnote{22} Even with regard to physical factors of the house itself, should disclosure include previous uses of the site, such as industrial use,\footnote{23} the health of former occupants, such as an HIV-positive resident,\footnote{24} or prior occurrences, such as a grisly murder in the house?\footnote{25}

\footnote{18} Note 18, at 174 (suggesting that soil conditions may be excluded from the disclosure obligation).

\footnote{19} See generally McEvoy, supra note 8 (arguing that the psychological effect of such events as suicide, AIDS, murder, and other felonies on the buyer are relevant to the purchase decision).


\footnote{21} See, e.g., Coral Gables, Inc. v. Mayer, 271 N.Y.S. 662, 664 (N.Y. App. Div. 1934) (holding that omission to notify buyer of proximity of an obnoxious business development was fraudulent).

\footnote{22} See, e.g., Whitlach v. Bertagnolli, 609 P.2d 902, 904-05 (Or. Ct. App. 1980) (holding that intentionally concealing a planned future highway condemnation of part of the property being sold constituted a cause of action even though the injury is based upon a future act).

\footnote{23} Or, perhaps, the neighbors from hell. Jennings, supra note 8, at 48-49. The California Disclosure Article requires disclosure of "neighborhood noise problems or other nuisances." Id. at 49; see also Cal. Civ. Code § 1102.6 (West 1994) (requiring seller to indicate in the disclosure form whether or not seller is aware of "neighborhood noise problems or other nuisances"); Appendix (requiring the seller to disclose this information).


\footnote{25} See VanCamp v. Bradford, 623 N.E.2d 731, 731 (Ohio Ct. Com. Pleas 1993) (giving a general discussion of disclosure requirements of psychologically stigmatized properties); Jennings, supra note 8, at 50 (identifying communicable diseases as a controversial psychological issue in real estate disclosure duties); see also Colo. Rev. Stat. Ann. § 38-35.5-101(1)(A) (West 1994) (providing that there is no duty for a broker to disclose that a former occupant of the property is, or was at any time suspected to be, infected with HIV, AIDS, or any other disease which has been determined by medical evidence to be highly unlikely to be transmitted through the occupancy of a dwelling place). How about bacterial contamination of farmland? See Green Spring Farms v. Spring Green Farm Assoc. Ltd. Partnership, 492 N.W.2d 392, 397 (Wis. Ct. App. 1992) (holding that caveat emptor does not excuse real estate vendors form fully disclosing to potential buyers the existence of salmonella contamination which may be material to purchase and which purchaser is in a poor position to discover).

\footnote{26} See, e.g., Reed v. King, 193 Cal. Rptr. 130, 133-34 (Cal. Ct. App. 1983) (holding that multiple murders committed on property is a material fact in the consideration of purchase).
Once disclosure goes beyond the structure, the lot, and the utilities serving it, problems of definition abound. The classes of things to disclose is somewhat dependent on the characteristics of the individual buyer. Obviously, any non-structural or off-site disclosure would be relevant to the extent it affects the "value or desirability" in a material manner. However, "value," "desirability" and "material" are all very subjective terms. It is very difficult to define what factors might materially disturb a buyer and what might not. For example, a landfill one mile from the property may bother one buyer but be immaterial to another. Proximity from the property is very subjective and may differ for different types of off-site hazards. Since off-site and non-structural factors are so subjective, it is virtually impossible to legislatively establish parameters for this type of disclosure. Purchasers should bear some responsibility for ascertaining factors affecting the property which may not be to their liking. Should a seller have to disclose the poor performance of public schools to potential buyers, especially since this may involve subjective judgments and may not be relevant, except as a matter of resale, to buyers who are childless? School performance may in fact be unknown to the sellers if they are childless. Especially with regard to off-site, neighborhood conditions, buyers should make their own determinations based on what is important to them. It is true that some off-site or non-structural conditions may be difficult for the buyer to discover, but the area is entirely too subjective to lend itself to rational, uniform regulation.

Most of the existing disclosure legislation applies the duty to sales of existing residences rather than newly constructed houses. This

concluding that nondisclosure of psychological factors is misrepresentation).

It is interesting that a number of states, bucking the disclosure trend, have enacted shield laws protecting sellers and brokers from disclosures of this type of information. See, e.g., Jennings, supra note 8, at 51-53 & n.78 (listing jurisdictions which have passed shield laws); COLO. REV. STAT. ANN. § 38-35.5-101(1)(b) (West 1994) (providing that there is no duty for a broker or salesperson to disclose "that the property was the site of a homicide or other felony or of a suicide").

466. Strawn v. Canuso, 638 A.2d 141, 149 (N.J. Super. Ct.), cert. granted, 645 A.2d 134 (N.J. 1994); see also McEvoy, supra note 8, at 579-81 (discussing the case of Reed v. King, 193 Cal. Rptr. 130 (Cal. Ct. App. 1983), and arguing that a prospective purchaser must have the right to consider all relevant facts regarding occurrences that may have taken place on the property); Curnes, supra note 45, at 477-78 (suggesting an approach which requires disclosure of conditions which have a substantial bearing on the value the buyer may place on the property or may have an adverse impact on the market value of the property).

467. Jennings, supra note 8, at 43-44.

468. See supra note 318 and accompanying text.
seems to be the correct approach. In most states, sales of newly constructed dwellings are covered by well-established warranty doctrines of merchantability, fitness, and habitability.469 Several states have enacted legislation requiring that builders expressly or impliedly warrant the new home.470 Even where warranties are not statutorily mandated, many builders offer warranties as a marketing tool. In addition, all new construction is inspected by state or local building inspectors during construction.471 While such inspections do not assure absence of defects, they do provide adequate protection to the purchaser.

This combination of common law, statute, and practice sufficiently covers the new house construction field that purchasers are not in need of further defect disclosure protection. It would add nothing in the way of additional benefit to require an inspection of the property prior to transfer. Applying an inspection requirement to new houses would add an element of cost without additional benefit.

It is common for buyers to insist on a contract inspection clause and to commission a professional inspection pursuant to the rights reserved in that clause. Disclosure legislation may obviate the need for and expense of this form of buyer protection. If legislation merely requires disclosure by the seller or broker of facts known to the seller, buyers would be wise to negotiate a buyer inspection clause and to order a professional home inspection. If the legislation mandates that the seller or broker provide a professional inspection report to the buyer, the buyer should not have to go to the trouble

469. See, e.g., Cochran v. Keeton, 252 S. 2d 313, 315 (Ala. 1971) (holding that the rule of caveat emptor does not apply in the sale by a builder-vendor of a newly constructed house); Wimmer v. Down East Properties, Inc., 406 A.2d 88, 92-93 (Me. 1979) (finding an implied warranty of workmanship to apply to contractors building new houses for purpose of resale); Mobley v. Copeland, 828 S.W.2d 717, 727-29 (Mo. Ct. App. 1992) (denying builder-vendor warranty of implied habitability where home had been previously occupied for twelve years prior to purchasers' possession); McDonald v. Mianeczki, 398 A.2d 1283, 1292 (N.J. 1979) (applying the builder-vendor warranty of implied habitability to a new home, even though builder was not a mass-developer); see also Curnes, supra note 45, at 466 (noting that in the sale of new homes, most states have replaced the caveat emptor doctrine with an implied warranty of fitness).


and expense of what, at that point, would be a duplicative inspection.

However, disclosure legislation should not expressly interfere with the buyer's ability to negotiate whatever clause the buyer feels is necessary for his or her protection. Even if the legislation requires a professional inspection and disclosure of the results of that inspection, the buyer may feel a need to have the buyer's "own" inspection.472 This should remain a right of the buyer. If the buyer wants to negotiate an inspection clause in the contract, and order and pay for his or her own inspection, that should remain the buyer's right. It may be unlikely that many buyers will opt for their own inspection if the seller is providing a professional inspection report, but that is a matter that should be left to the buyer's discretion without legislative interference.

Suppose a defect is overlooked in a statutorily mandated inspection. What should be the rights and liabilities of the parties? If state statute requires a professional inspection, the inspector should be liable under errors and omissions insurance to the injured party. The legislature may want to consider regulation of home inspectors if professional inspections become universally required as a result of the adoption of disclosure legislation.473 Such regulation should include, aside from the licensing, experience, and testing procedures common to licensing schemes, requirements that the inspector will be liable to the ultimate purchaser of the house who relied on the inspection report, and that the inspector maintain insurance at a prescribed minimum level. If there is liability on the part of the house inspector, there is no need to create liability in the broker or seller, since they, almost as much as the buyer, have relied on the professional inspection.

If a state opts for legislation requiring broker inspection or simple disclosure of what the seller knows, the legislation should clearly establish liability on the person making the disclosure. If the broker inspects and discloses, it is fair that the broker should be liable for

472. See Meyer, supra note 117, at 270 (arguing that buyers' reliance on brokers is misplaced since, in serving the seller, the broker may act adversely to buyers' interests); Zeit, supra note 18, at 173 (arguing that buyers should have an obligation independent of a broker to access property for their own protection).

473. Tex. Rev. Civ. Stat. Ann. art. 6573a, §§ 16(c), 23(c)(1) (West 1994) (mandating that professional inspectors obtain a license before conducting inspections for a buyer or seller); see Culum, supra note 118, at 347-48 (arguing that courts and legislatures should ensure that the broker profession does not control the inspection business).
his or her failure to discover or adequately disclose defects. Under the Prevailing Disclosure Act, only the seller discloses. In this scheme, the seller should be liable for what he or she fails to disclose or discloses improperly. If the legislature opts for the hybrid scheme where the broker discloses only information obtained from the seller, it would be good policy to make both the broker and the seller liable. As earlier discussed, the broker disclosure-seller information scheme is inherently weak and does not sufficiently protect the buyer. However, if the broker is rendered liable for incorrect or omitted information obtained from the seller, the broker should be more diligent in ferreting out such information. In this manner, the weakness of this type of statute can be somewhat strengthened to the benefit of the buyer.

The remaining question, assuming either broker or seller liability, is whether that liability ought to be premised on a negligence or strict liability theory. Negligence is often difficult to prove, especially when dealing with broker liability under the broker disclosure-seller information format. If the guiding principle of disclosure legislation is protection of the buyer, basing seller/broker responsibility on strict liability principles would strengthen the legislative purpose.

A related question is whether statutory required disclosure should constitute a representation or warranty between seller and buyer. Seller disclosure, or broker disclosure of seller information, should be actionable by the buyer if material items are omitted or misrepresented. Therefore, a statutory scheme that bases disclosure on the seller's statements should form the basis for buyer's suit, either on the basis of strict liability, or as a breach of warranty under the sales contract between the parties. While strict liability provides a more certain remedy for the buyer, a legislature desiring to balance the rights and liabilities of the parties may opt to allow buyer recov-

474. See supra notes 206-12 and accompanying text (discussing the disclosure obligations under the Prevailing Disclosure Act).
475. See, e.g., supra note 300 and accompanying text (discussing ALASKA STAT. § 34.70.020) (Supp. 1993)).
476. See supra notes 418-37 and accompanying text (discussing this author's recommendations for disclosure duties).
477. See Zeit, supra note 18, at 169 (discussing Alaska case which imposed strict liability on a broker for conveying incorrect information to the buyer).
478. See supra note 477 and accompanying text (discussing strict liability in this context).
479. See supra notes 468-71 and accompanying text (discussing the benefits of a warranty theory).
ery based on breach of warranty. Any such liability should survive settlement, since otherwise the doctrine of merger would erase seller liability for misstatements in the disclosure form, which is part of the contract. However, if the statute provides for broker disclosure, even based on seller information, this author would prefer strict liability. Since the broker is a professional, he or she should be held to a higher standard. The legislature would want the broker to discover all defects that are reasonably discoverable (even when the broker’s duty is based on seller information), and can encourage this type of performance by making the broker strictly liable in the performance of his or her statutory obligations.

CONCLUSION

The unimpeded development of the common law would provide sufficient buyer protection, without the necessity of state legislation. The Prevailing Disclosure Act weakens buyer protection compared to that developed by the common law. There are some benefits to legislation, however, but only if the legislation is comprehensive and clear in mandating an inspection and disclosure duty. The best solution is a statute mandating that the seller or listing broker retain and provide an inspection report by a professional home inspector. Such an inspection should include all material elements of the house, including physical systems and other items located in inaccessible areas.

One benefit of a statutory solution over continued development of the common law is that legislation would specify what items and systems must be inspected, which would make the disclosure obligation more uniform and less subject to interpretation. The item by item development of the common law leaves areas of uncertainty. What areas must be disclosed, what types of defects, and the materiality of the defect must all be developed through litigation. One major advantage of legislation would be to clearly established the types of things that must be disclosed, thus making the disclosure

480. A good, recent example is Strawn v. Canuso, 638 A.2d 141 (N.J. Super. Ct. App. Div.), cert. granted, 645 A.2d 134 (N.J. 1994), in which the court mandated disclosure of off-site conditions which “based on reasonable foreseeability, might materially affect the value or desirability of the property.” Id. at 149. The court did not define the types of off-site conditions that must be disclosed, the distance from or effect on the property necessary to trigger disclosure, or give any parameters to the very subjective concepts of value or desirability. New Jersey is now wide open for future litigation to define the parameters of the obligation created in Strawn.
duty less subject to interpretive difficulties. 481 A clearly defined disclosure obligation coupled with a professional inspection should serve to rationalize the seller's disclosure obligation and provide a high level of protection for the buyer.

481. See supra notes 457-687 and accompanying text (discussing the items which should be included in a statutory disclosure form).
REAL ESTATE TRANSFER DISCLOSURE STATEMENT

THIS DISCLOSURE STATEMENT CONCERNS THE REAL PROPERTY SITUATED IN THE CITY OF ___________, COUNTY OF ___________, STATE OF CALIFORNIA, DESCRIBED AS ____________________________.

This settlement is a disclosure of the condition of the above described property in compliance with Section 1102 of the Civil Code as of ______, 19___. It is not a warranty of any kind by the seller(s) or any agent(s) representing any principal(s) in this transaction, and is not a substitute for any inspections or warranties the principal(s) may wish to obtain.

I

COORDINATION WITH OTHER DISCLOSURE FORMS

This Real Estate Transfer Disclosure Statement is made pursuant to Section 1102 of the Civil Code. Other statutes require disclosures, depending upon the details of the particular real estate transaction (for example: special study zone and purchase-money liens on residential property).

Substituted Disclosures: The following disclosures have or will be made in connection with this real estate transfer, and are intended to satisfy the disclosure obligations on this form, where the subject matter the same:

________________________________________

________________________________________

________________________________________

________________________________________

(list all substituted disclosure forms to be used in connection with this transaction)
Sellers Information

The Seller discloses the following information with the knowledge that even though this is not a warranty, prospective Buyers may rely on this information in deciding whether and on what terms to purchase the subject property. Seller hereby authorizes any agent(s) representing any principal(s) in this transaction to provide a copy of this statement to any person or entity in connection with any actual or anticipated sale of property.

The following are representations made by the Seller(s) and are not the representations of the Agent(s), if any, this information is a disclosure and is not intended to be part of any contract between the Buyer and Seller.

Seller ___is ___is not occupying the property.

A. The subject property has the items checked below (read across):

- Range
- Dishwasher
- Washer/Dryer
- Hookups
- Burglar Alarms
- T.V. Antenna
- Central Heating
- Wall/Window Air Cndtng.
- Septic Tank
- Patio/Decking
- Sauna
- Security Gate(s)
- Garage:
- Pool:Spa Heater:
- Water Heater:

- Oven
- Trash Compactor
- Window Screens
- Burglar Alarms
- Smoke Detector(s)
- Satellite Dish
- Central Air Cndtng.
- Sprinklers
- Public Sewer System
- Sump Pump
- Built-in Barbeque
- Pool
- Automatic Garage Door Opener(s)
- Attached
- Not Attached
- Carport
- Gas
- Solar
- Electric
- Private Utility
Water Supply: __City __Well __Other
Gas Supply: __Utility __Bottled
Exhaust Fan(s) in ____ 220 Volt Wiring in ____ Fireplace(s) in ____
Gas Starter ____ Roof(s): Type: _______ Age: _______ (approx.)
Other: __________________________________________________________________________

Are there, to the best of your (Seller's) knowledge, any of the above
that are not in operating condition?
__Yes __No. If yes, then describe.
(Attach additional sheets if necessary):

B. Are you (Seller) aware of any significant defects/malfunctions
in any of the following? __Yes __No. If yes, check appropriate
space(s) below.
__Interior Walls __Ceilings __Floors __Exterior Walls __Insulation
Roof(s) __Windows __Doors __Foundation __Slab(s) __Driveways
__Sidewalks __Walls/Fences __Electrical Systems __
Plumbing/Sewers/Septics __Other Structural Components
(Describe: ______________________________________________________________________)
If any of the above is checked, explain. (Attach additional sheets if
necessary):

_________________________________________________________________________________
_________________________________________________________________________________

C. Are you (Seller) aware of any of the following:

1. Substances materials, or products which may be an environ-
mental hazard such as, but not limited to, asbestos, formaldehyde,
radon gas, lead-based paint, fuel or chemical storage tanks, and con-
taminated soil or water on the subject property ____________ __Yes __No
2. Features of the property shared in common with adjoining
landowners, such as walls, fences, and driveways, whose use or re-
sponsibility for maintenance may have an effect on the subject
property ___________________________________________ __Yes __No
3. Any encroachments, easements or similar matters that may af-
fect your interest in the subject property ____________ __Yes __No
4. Rooms additions, structural modifications, or other alterations
or repairs made without necessary permits ____________ __Yes __No
5. Room additions, structural modifications, or other alterations
or repairs not in compliance with building codes ____________ __Yes __No
6. Landfill (compacted or otherwise) on the property or any por-
tion thereof ..................................  __Yes__ __No

7. Any settling from any cause, or slippage, sliding, or other soil problems ...........................................  __Yes__ __No

8. Flooding, drainage or grading problems .........................  __Yes__ __No

9. Major damage to the property or any of the structures from fire, earthquake, floods, or landslides ..........................  __Yes__ __No

10. Any zoning violations, nonconforming uses, violations of "set-back" requirements ...........................................  __Yes__ __No

11. Neighborhood noise problems or other nuisances ..................  __Yes__ __No

12. CC&R's or other deed restrictions or obligations ..................  __Yes__ __No

13. Homeowners' Association which has any authority over the subject property ...........................................  __Yes__ __No

14. Any "common area" (facilities such as pools, tennis courts, walkways, or other areas co-owned in undivided interest with others) ...........................................  __Yes__ __No

15. Any notices of abatement or citations against the property ..........................  __Yes__ __No

16. Any lawsuits against the seller threatening to or affecting this real property ...........................................  __Yes__ __No

If the answer to any of these is yes, explain. (Attach additional sheets if necessary): ________________________________________________________________

Seller certifies that the information herein is true and correct to the best of the Seller's knowledge as of the date signed by the Seller.

Seller________________________ Date________________________

Seller________________________ Date________________________

III

AGENTS INSPECTION DISCLOSURE

(To be completed only if the Seller is represented by an agent in this transaction.)

THE UNDERSIGNED, BASED ON THE ABOVE INQUIRY OF THE SELLER(S) AS TO THE CONDITION OF THE PROPERTY AND BASED ON A REASONABLY COMPE-
TENT AND DILIGENT VISUAL INSPECTION OF THE ACCESSIBLE AREAS OF THE PROPERTY IN CONJUNCTION WITH THAT INQUIRY, STATES THE FOLLOWING:

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

Agent (Broker Representing Seller) ___________________ By ___________________  
(Please Print) (Associate Licensee or Broker-Signature)  
Date ___________________

IV

AGENTS INSPECTION DISCLOSURE

(To be completed only if the agent who has obtained the offer is other than the agent above.)

THE UNDERSIGNED, BASED ON A REASONABLY COMPETENT AND DILIGENT VISUAL INSPECTION OF THE ACCESSIBLE AREAS OF THE PROPERTY, STATES THE FOLLOWING:

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

Agent (Broker Representing Seller) ___________________ By ___________________  
(Please Print) (Associate Licensee or Broker-Signature)  
Date ___________________

V

BUYER(S) and SELLER(S) MAY WISH TO OBTAIN PROFESSIONAL ADVICE AND/OR INSPECTIONS OF THE PROPERTY AND TO PROVIDE FOR APPROPRIATE PROVISIONS IN A CONTRACT BETWEEN BUYER AND
SELLER(S) WITH RESPECT TO ANY ADVICE/INSPECTIONS/DEFECTS.

I/WE ACKNOWLEDGE RECEIPT OF A COPY OF THIS STATEMENT.

Seller________________ Date______ Buyer________________ Date______
Seller________________ Date______ Buyer________________ Date______

Agent (Broker Representing Seller) ________________ By ________________
(Please Print) (Associate Licensee or Broker-Signature)
Date ____________________

Agent (Broker Obtaining the Offer) ________________ By ________________
(Please Print) (Associate Licensee or Broker-Signature)
Date ____________________

A REAL ESTATE BROKER IS QUALIFIED TO ADVISE ON REAL ESTATE. IF YOU DESIRE LEGAL ADVICE, CONSULT YOUR ATTORNEY.