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CLEARING THE AIR ON RADON TESTING: THE DUTY OF REAL ESTATE BROKERS TO PROTECT PROSPECTIVE HOMEBUYERS

I. Introduction

Radon, a radioactive gas,¹ has been discovered in homes² in at least thirty-eight states.³ The presence of the gas in homes poses serious health risks. Exposure to radon gas greatly increases the

1. A colorless, odorless and tasteless gas, radioactive radon comes from the natural breakdown of uranium in the soil. *See* U.S. ENVIRONMENTAL PROTECTION AGENCY & U.S. CENTERS FOR DISEASE CONTROL, PUB. NO. OPA-86-004, A CITIZEN'S GUIDE TO RADON: WHAT IT IS AND WHAT TO DO ABOUT IT 1 (1986) [hereinafter A CITIZEN'S GUIDE TO RADON]. Mixed with outdoor air, radon does not pose a significant health risk. *See id.* Because of the limited exchange between indoor and outdoor air in energy efficient homes, radon is especially hazardous in such homes. *See id.* Levels of radon vary with the building's construction, the concentration of radon in the underlying soil and the rate at which indoor air is exchanged with outdoor air. *See id.* *See generally* U.S. GENERAL ACCOUNTING OFFICE, PUB. NO. RCED-86-170, AIR POLLUTION: HAZARDS OF INDOOR RADON COULD POSE A NATIONAL HEALTH PROBLEM (1986) [hereinafter AIR POLLUTION]; *see also* NEW YORK DEPARTMENT OF HEALTH, RADON 2 (1986) [hereinafter RADON].

2. Radon moves through soil and rock and seeps into homes through cracks and openings in the floors and foundation walls, sewer pipes, wall-floor joints, and cracks in hollow-block walls, drains and sumps. *See* RADON, *supra* note 1, at 1; A CITIZEN'S GUIDE TO RADON, *supra* note 1, at 1. Radon can also be released from water or materials used in the construction of a home. *See* A CITIZEN'S GUIDE TO RADON, *supra* note 1, at 1.

3. Radon has been reported in the following states: Alabama, Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin and Wyoming. *See* Galen, *Lawyers Grapple With Radon Issue: Litigation Surge Likely*, Nat'l L.J., July 21, 1986, at 10, col. 4 [hereinafter *Lawyers Grapple With Radon Issue*]; *see also* 10 *State Survey Finds Peril From Radon in 1 in 5 Homes*, N.Y. Times, Aug. 5, 1987, at A14, col. 1 (fact sheet issued by EPA stating that "virtually every house in the United States has some level of radon gas in its air"); *Radon May Endanger 8 Million Homes*, N.Y. Times, Nov. 17, 1985, at 8E, col. 3 (physical chemist stating that he found high radon contamination in all fifty states).

risk of lung cancer⁴ to home occupants.⁵ In fact, radon is the leading cause of lung cancer after cigarette smoking.⁶ Moreover, once a homebuyer suspects that radon is present, testing⁷ takes time⁸ and costs money.⁹ To reduce radon¹⁰ to safe levels,¹¹ homeowners often must pay several thousand dollars.¹²

4. When radon breaks down, it emits radioactive alpha particles that cling to dust or smoke and can be inhaled. See *A CITIZEN'S GUIDE TO RADON*, *supra* note 1, at 2; *Lawyers Grapple With Radon Issue*, *supra* note 3, at 8, col. 3. Trapped inside the lungs, the particles continue to emit energy which can damage lung tissue cells and lead to cancer. See *AIR POLLUTION*, *supra* note 1, at 18-24. The latency period is estimated to be 20-30 years. See *id.*

5. The Environmental Protection Agency (EPA) notes that lifestyle can affect the risks of lung cancer from radon. See *AIR POLLUTION*, *supra* note 1, at 19. Exposure to tobacco smoke in homes with radon may further increase risks of lung cancer. See *id.* Children may be more sensitive to radon exposure and thus may face greater risks, especially since they often spend more time indoors. See *id.* Since levels tend to be greater in lower floors of homes, a person who sleeps in a basement bedroom probably faces greater risk than a person who sleeps on a higher floor. See *id.*; see also *RADON*, *supra* note 1, at 1; *A CITIZEN'S GUIDE TO RADON*, *supra* note 1, at 12.

6. Radon is the leading cause of lung cancer among nonsmokers—in other words, the second leading cause of lung cancer after cigarette smoking. See *Lawyers Grapple With Radon Issue*, *supra* note 3, at 8, col. 2. It is a greater cause of cancer than asbestos exposure, outdoor air pollution or other man-made sources. See *id.* According to the EPA, scientists estimate that out of 130,000 lung-cancer deaths in 1986, 5,000-20,000 may be attributed to radon. See *A CITIZEN'S GUIDE TO RADON*, *supra* note 1, at 1.

7. Detection of radon requires special equipment. See *A CITIZEN'S GUIDE TO RADON*, *supra* note 1, at 5. Two devices that lay people can use to detect the presence of radon are charcoal canisters and alpha track detectors. See *id.* Alternatively, private firms will perform radon tests. See *id.* As of October 15, 1986, the EPA released policies to approve such firms in order to promote accurate testing and to reduce fraud. *U.S. Providing Tests On Checking for Radon*, N.Y. Times, Oct. 16, 1986, at C13, col. 1. On February 3, 1986, the EPA issued a report stating that 143 firms, 80 of which operate nationally, are qualified to measure indoor radon levels accurately. 17 *Env't Rep. (BNA)* 1725 (Feb. 6, 1987). According to J. Craig Potter, EPA Assistant Administrator for air and radiation, the listing will help prevent fly-by-night firms from deceiving the public through phony measurements. See *id.* See generally *AIR POLLUTION*, *supra* note 1, at 26-34.

8. To ensure an accurate reading during the screening period, the EPA recommends that residents keep charcoal canisters in the home for three to seven days and alpha detectors for two to four weeks. See *A CITIZEN'S GUIDE TO RADON*, *supra* note 1, at 5. Since the levels vary from season to season and from room to room, a screening method merely reveals the potential for a radon problem. See *id.* at 6-7. The EPA has established follow-up measurement periods ranging from one week to one year depending on the screening measurement. See *id.* The New York Department of Health, however, recommends that the alpha track detector remain in the home for a full year to obtain average annual concentrations. *RADON*, *supra* note 1, at 4.

9. Charcoal canisters cost approximately \$10 to \$25 each, and alpha track

Because radon in homes is a recently discovered phenomenon,¹³ uncertainty persists over which homes contain it.¹⁴ Thus, a homebuyer

detectors cost approximately \$20 and \$50 each. See A CITIZEN'S GUIDE TO RADON, *supra* note 1, at 5. Certain states have provided money for testing targeted areas. See *Pennsylvania Aids Residents in Radon Fight*, N.Y. Times, Oct. 13, 1985, at 61, col. 1. For example, Pennsylvania offered free devices to residents in communities that lie along Reading Prong, an area notoriously rich in uranium deposits. See *id.* By spring of 1987, the New York State Department of Health plans to start a \$3 million testing program, free of cost to people who have taken energy conservation measures and at a cost of \$20 to others. See *Radon: For the Homeowner, Some Questions and Answers*, N.Y. Times, Jan. 1, 1987, at 39, col. 1.

10. According to the EPA, there are nine different methods to reduce radon with varying degrees of effectiveness: natural ventilation; forced ventilation; heat-recovery ventilation; air supply; covering exposed earth; sealing cracks and openings; drain-tile suction; block-wall ventilation; and sub-slab ventilation. See U.S. ENVIRONMENTAL PROTECTION AGENCY, PUB. NO. OPA-86-005, RADON REDUCTION METHODS: A HOMEOWNER'S GUIDE 4-23 (1986) [hereinafter RADON REDUCTION METHODS]. According to the EPA, the most effective methods for removing radon are drain-tile suction, block-wall ventilation and sub-slab suction. See *id.* See generally AIR POLLUTION, *supra* note 1, at 26-34.

11. Scientists measure radon levels two ways: "picocuries per liter" (pCi/l) and "working levels" (WL). See A CITIZEN'S GUIDE TO RADON, *supra* note 1, at 5-11. The EPA currently believes that the maximum radon level for safety is 0.02 WL or 4 pCi/l. See *id.* Comparable risks at these levels are 200 chest x-rays per year. See *id.* Below these levels, exposures are average or slightly above average. See *id.* At levels above 1.0 WL or 200 pCi/l, however, the EPA recommends temporary relocation if occupants cannot start to remedy the problem within a few weeks. *Id.* at 11. At these levels, radon occurs at 1000 times the average outdoor level and presents a cancer risk equivalent to that of a four pack-a-day smoker, or sixty times the non-smoker risk, and greater than the risk of 20,000 chest x-rays per year. *Id.* at 10. Factors affecting safe levels include: whether the house is weather-proofed; whether the house is ventilated; whether occupants smoke; the age of the occupant; the amount of time spent at home; and whether anybody sleeps in the basement, which is the usual entry point for radon. See *id.* at 12.

12. The cost of the most effective methods of reducing radon ranges from \$1,000 to \$5,000. RADON REDUCTION METHODS, *supra* note 10, at 4-22. The cost of other recommended methods ranges from \$100 to \$1,500, depending on the severity and the cause of the problem. See *id.* In a pilot study of three different reduction techniques in eighteen contaminated homes, cleanup costs ranged from \$4,300 to \$15,700 per home. See AIR POLLUTION, *supra* note 1, at 26-34.

Usually, the homeowner bears the cost to remove radon, since no federal funds are available to subsidize such work. See *U.S. Says Radon Gas Is States' Fight*, N.Y. Times, Aug. 16, 1986, at 29, col. 1. Some state aid, however, is available. See *id.* Pennsylvania and New Jersey each spent \$4 million to combat radon in 1986. See *id.* Pennsylvania has a low-interest loan program to help homeowners pay for radon reduction. See *id.*

On July 8, 1987, the Senate approved a bill providing \$30 million over three years to help states detect and control radon contamination in homes and schools. See *Plan on Radon Voted by Senate To Help States*, N.Y. Times, July 9, 1987, at B2, col. 6. The bill also calls for a \$1.5 million program to examine the extent

often buys a home containing radon without knowing about its presence.¹⁵ Although both case law¹⁶ and legislation¹⁷ directly address the issue of liability for man-made radon, courts have yet to address the issue of whether a real estate broker¹⁸ can be liable¹⁹ for failure

of radon contamination and methods for its control in school buildings. *See id.* The legislation is pending without serious opposition in the House. *See id.*

13. Although radon has always existed, it has only recently been discovered in homes. *See* A CITIZEN'S GUIDE TO RADON, *supra* note 1, at 3; *see also* AIR POLLUTION, *supra* note 1, at 2; *Issue of Radon: New Focus on Ecology*, N.Y. Times, Sept. 10, 1986, at A24, col. 1; *Radon: The Risks and the Remedies*, N.Y. Times, May 17, 1986, at 30, col. 4. Naturally-occurring radon in homes first became known when an engineer whose home contained extremely high radon levels set off a nuclear power plant's radioactivity alarm as he was entering work. *See Issue of Radon: New Focus on Ecology, supra*, at A24, col. 1.

14. Currently, the EPA is conducting a survey of national radon levels to estimate exposure levels and frequency, but results of this survey will not be available for three years. *See* AIR POLLUTION, *supra* note 1, at 2.

15. *See infra* notes 228-33 and accompanying text.

16. Although no cases specifically address the liability of a real estate broker for his failure to disclose the presence of radon, radon related cases do exist. *See, e.g.,* Wayne v. TVA, 730 F.2d 392 (5th Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985) (homeowner brought product liability and negligence action against producer of phosphate slag incorporated into concrete block used to construct plaintiff's home, manufacturer of blocks and seller of blocks); Robles v. Environmental Protection Agency, 484 F.2d 843 (4th Cir. 1973) (homeowner sues EPA for results of radioactivity survey and names and addresses of people owning homes which exceed safety guidelines); Brafford v. Susquehanna, 586 F. Supp. 14 (D. Colo. 1984) (homeowner sued for future damages due to enhanced cancer risk resulting from defendant mill placing radioactive mill tailings around foundation of home prior to homeowner's purchase of home); Nobel v. Marvin E. Kanze, Inc., Civ. No. 02428, at 1 (Montgomery County Court of Common Pleas, Pa. 1983) (homebuyer sues contractor after he finds natural radon entering through cracked ventilation system).

17. Although the EPA does not regulate indoor air pollution, it has jurisdiction to regulate radon under the Uranium Mill Tailings Radiation Control Act of 1978. *See* 42 U.S.C. §§ 7911-7925 (1983). EPA currently sets standards on man-made radon "for the protection of the public health, safety, and the environment from radiological and nonradiological hazards associated with residual radioactive materials . . . located at inactive uranium mill tailings sites." *Id.* § 2022(a) (Supp. 1987). Implementation and enforcement of the standards is the responsibility of the Atomic Energy Commission on the federal level and local governments at the state level. *Id.* § 2022(d). Currently, however, no statute addresses naturally-occurring radon.

18. For the purposes of this Note, all references to brokers are to the seller's broker, unless otherwise noted.

19. An injured homebuyer may sue for a broad spectrum of damages. *See, e.g.,* Nobel v. Marvin E. Kanze, Inc., Civ. No. 02428, at 5-8 (Montgomery County Court of Common Pleas, Pa. 1983). In *Nobel*, the owner of a newly-constructed home sued the contractor for installing a cracked ventilation system through which natural radon entered in dangerous amounts. *See id.* The complaint asked for

to discover radon and warn a prospective purchaser of its presence.²⁰

Compounding this problem of inadequate protection for the home-buyer against brokers²¹ is a lack of unified governmental strategy in dealing with radon issues.²² While the Environmental Protection Agency (EPA) has jurisdiction to research radon and provide technical assistance to the states,²³ it is reluctant to create and enforce regulations for liability purposes.²⁴ Furthermore, coordination of radon-related efforts among the EPA and other federal agencies²⁵

damages for expenditure of money and time in detecting the source of the emission, the expense of surviving the winter temperatures in the house while ventilating, the expense of decreasing and maintaining radon levels, the expense to repair, replaster, repaint and restore the condition of home following destruction testing, and the exposure to radon concentrations in excess of all federally-mandated radon exposure limits. *See id.* As a result of exposure to radon for over two years, the plaintiffs alleged that they had a greater risk of developing lung cancer than if they were not exposed to high radon concentrations. *See id.* As a result of exposure to radon for over two years, the plaintiffs alleged that they suffered severe emotional distress and that their lives were permanently affected by prospective medical expenses, loss of earnings and earning capacity. *See id.*

20. *See infra* notes 159-223 and accompanying text.

21. *See supra* notes 18-20 and accompanying text.

22. *See generally* AIR POLLUTION, *supra* note 1; Kirsch, *Behind Closed Doors: Indoor Air Pollution and Government Policy*, 6 HARV. ENVTL. L. REV. 339, 360-382 (1982) [hereinafter *Indoor Air Pollution*] (discussing various kinds of indoor air pollution and possible federal statutes through which EPA could regulate them).

23. The EPA has authority under § 103 of the Clean Air Act to implement a strategy of research, technical assistance and guidance to the states. *See* 42 U.S.C. §§ 7401-7642 (1983 & Supp. 1987). As a result of its efforts, the EPA has accomplished the following with respect to radon: publication of two booklets, A CITIZEN'S GUIDE TO RADON, *supra* note 1, and RADON REDUCTION METHODS, *supra* note 1; establishment of a training program for state personnel in detecting, measuring and reducing indoor radon, *see* AIR POLLUTION, *supra* note 1, at 36-37; an eighteen-home project in the Reading Prong area of Pennsylvania to assess effectiveness of various soil ventilation techniques, *see id.*; outlining of procedures to be followed for testing radon, *see id.*; assessment of labor capabilities in conducting radon testing efforts and publishing the result, *see id.*; and a projected survey to determine radon levels in homes nationwide to be completed in October, 1989. *See id.*

24. The EPA claims that it does not have authority to enforce the guidelines it publishes, since radon is not a man-made pollutant. *See Issue of Radon: New Focus on Ecology*, N.Y. Times, Sept. 10, 1986, at A24, col. 1; *E.P.A. Proposes 5-Year Program Aimed at Radioactive Radon Gas*, N.Y. Times, Oct. 10, 1985, at B21, col. 1. In addition, there is no clear statutory authority under the Clean Air Act nor other federal laws directing any agency to regulate indoor air pollutants. *See* AIR POLLUTION, *supra* note 1, at 45. *See generally* *Indoor Air Pollution*, *supra* note 22, at 363-66.

25. For example, another federal agency addressing radon is the United States Department of Energy, which tailors radon research to its home energy conservation and radiation measurement and health effects programs. *See* AIR POLLUTION, *supra*

is inconsistent,²⁶ and local efforts to address the problem vary from state to state.²⁷ While the states are generally in favor of the EPA's current research and technical assistance,²⁸ some states have expressed the need for further guidance.²⁹

This Note recommends that the federal government create legislation that will impose a duty on real estate brokers to test homes for radon and to disclose the results to prospective purchasers.³⁰

note 1, at 38-39.

The Department of Housing and Urban Development (HUD) has an interest in ensuring that HUD assisted housing exists in radon-free locations. *See id.* Other federal agencies involved in radon include the Bonneville Power Administration, the Tennessee Valley Authority and the National Cancer Institute. *See id.*

26. Differences in agency practices exist. *See id.* at 41-42. For example, there is no consensus among federal agencies regarding the level of danger at which action should be taken to reduce indoor radon levels. *See id.* at 42. Several groups, however, address certain aspects of the problem. *See id.* at 41. In 1984, the Committee on Interagency Radiation Research and Policy Coordination (CIRRPC) was formed. *See id.* In 1985, the CIRRPC established a subpanel to analyze environmental radon exposure, its health risks, the extent of exposures nationwide and the state of knowledge about radon reduction methods. *See id.*

The Interagency Committee on Indoor Air Quality (CIAQ) was formed in 1983 to develop a comprehensive research strategy on indoor air quality. *See id.* In 1985, the CIAQ created a radon working group that issued a report calling for: (1) national assessment of radon exposure in buildings; (2) development and demonstration of radon reduction techniques; (3) improved ways of radon measurement; and (4) more information on radon's health effects and estimates of risks. *See id.* at 41-42. The report designated as a priority the determination of appropriate roles for federal, state and local governments in addressing indoor radon. *See id.*

27. *See generally id.* at 40-41. State efforts to address radon problems currently include informing homeowners of the nature and existence of radon, implementing testing programs and helping homeowners to finance installation of radon-reduction mechanisms. *See id.* For example, by the end of the winter of 1987, the New York State Department of Health plans to start a \$3 million testing program. *See Radon: For the Homeowner, Some Questions and Answers*, N.Y. Times, Jan. 1, 1987, at 39, col. 1. Florida has enacted legislation giving its state agency authority to establish and enforce environmental standards for radon, and has formally adopted the .02 WL EPA safe level as a state standard and has prescribed construction techniques in potentially high-radon areas. *See AIR POLLUTION, supra* note 1, at 40. Pennsylvania has established a \$2.5 million low-interest loan program to help homeowners finance the installation of radon reduction devices. *See id.*

28. *See AIR POLLUTION, supra* note 1, at 40.

29. States have expressed the need for the following programs: (1) radon conferences and symposia for state officials; (2) funding and research of radon mitigation techniques; (3) national measurement standards and remedial action guidelines; (4) a nationwide radon data clearinghouse; (5) certification of radon detectors and mitigation contractors; and (6) financial support for testing homes for radon contamination. *See id.*

30. The Supreme Court has upheld the Surface Mining Control and Reclamation Act of 1977, a statute designed to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining

Based on a common law negligence theory,³¹ such a duty would become part of the current obligation of a real estate broker: (1) to conduct a reasonably diligent and competent search of property for sale;³² and (2) to disclose to prospective homebuyers all material defects affecting the value or desirability of the home.³³ In his investigation, the broker must use the expertise and knowledge that derive from his training and experience as a professional.³⁴

Initially, the Note addresses the dilemma of the homebuyer who discovers radon only after occupying the home and who has no formally defined cause of action based on common law precedent or statute.³⁵ Part II traces the development of a real estate broker's liability in negligence³⁶ to the recently imposed duty to discover and disclose latent defects.³⁷ Part III analyzes the duty to discover and disclose latent defects with respect to radon and concludes that real estate brokers should have an affirmative duty to test for radon and to disclose the results to prospective purchasers.³⁸ Finally, part IV recommends legislation to protect the unwary homebuyer who otherwise would take possession of the home and suffer potential economic loss and exposure to a carcinogenic substance.³⁹

II. The Evolution of the Real Estate Broker's Duty to Inspect Homes for Sale

As the doctrine of consumer protection evolved, courts have been especially willing to compensate purchasers who have suffered phys-

operations," in *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 268 (1981). The Court held that coal was a commodity that moves in interstate commerce. *See id.* at 282. Also, the Court observed that "lower federal courts have uniformly found the power conferred by the commerce clause broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." *Id.* (footnote omitted).

Radon in homes affects interstate commerce since people who move from state to state frequently purchase homes. In fact, homebuyers moving from one state are less likely to know about radon's presence in another state and have a greater need for protection. Thus, the means to be adopted by Congress—imposition on brokers of the duty to test for radon—is reasonably adapted to the end of providing adequate information to unwary homebuyers.

31. *See infra* notes 159-77 and accompanying text.

32. *See infra* notes 88-158 and accompanying text.

33. *See infra* note 120 and accompanying text.

34. *See infra* notes 169-77 and accompanying text.

35. *See supra* notes 1-20 and accompanying text.

36. *See infra* notes 40-87 and accompanying text.

37. *See infra* notes 88-158 and accompanying text.

38. *See infra* notes 159-233 and accompanying text.

39. *See infra* notes 234-78 and accompanying text.

ical injury in addition to economic loss. A home represents both a major investment and a source of security to a homebuyer—who often buys only one home in his lifetime. Thus, to protect homebuyers, courts have gradually expanded the list of people charged with a duty of due care owed to a prospective homebuyer.

A. The Decline of Caveat Emptor and the Advent of Consumer Protection

The doctrine of caveat emptor originally governed commercial transactions.⁴⁰ Literally, “let the buyer beware,” caveat emptor exhorted a purchaser to examine an item and judge its quality for himself, because the item carried no warranty.⁴¹ As commercially manufactured goods began to be mass-produced, courts modified the doctrine in order to protect the public from exposure to dangerous products and to ensure manufacturing quality.⁴²

In the area of real estate, however, caveat emptor persisted.⁴³ Absent an express agreement to the contrary, a seller was not liable for defects in property.⁴⁴ The underlying rationale was that the purchaser had ample opportunity to inspect the property and had the ability to detect defects before the sale.⁴⁵

40. See generally Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541 (1961) [hereinafter *Caveat Emptor*]; Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931) [hereinafter *The Ancient Maxim*]; Note, *When the Walls Come Tumbling Down—Theories of Recovery for Defective Housing*, 56 ST. JOHN'S L. REV. 670, 682-93 (1982) [hereinafter *When the Walls Come Tumbling Down*].

41. See BLACK'S LAW DICTIONARY 202 (5th ed. 1979). One writer has referred to the doctrine of caveat emptor as “[t]he refusal of public authority, through legislature and judiciary, to accord effective protection to the purchaser.” *The Ancient Maxim*, *supra* note 40, at 1135.

42. See generally *Caveat Emptor*, *supra* note 40, at 541.

43. See *When the Walls Come Tumbling Down*, *supra* note 40, at 682-83. Significantly, the definition in Black's Law Dictionary states that the maxim of caveat emptor is more applicable to judicial sales than to sales of consumer goods “where strict liability, warranty, and other consumer protection laws protect the consumer-buyer.” BLACK'S LAW DICTIONARY 202 (5th ed. 1979). The definition does not mention realty. See *id.*

44. See *When the Walls Come Tumbling Down*, *supra* note 40, at 683.

45. See *id.* at 685. The belief that the purchaser had ample opportunity to inspect the premises before the sale originated in the merger doctrine, which divided land sales into two steps. See *id.* First, the parties entered “into a contract of sale defining their rights and obligations.” *Id.* Later, one party tendered, and the other party accepted, the deed. See *id.* Only contractual warranties of fitness and quality that were explicitly included in the deed would determine the purchaser's future

Concerned with the harsh results of the caveat emptor doctrine in real estate transactions,⁴⁶ courts steadily began giving more protection to homebuyers.⁴⁷ As mass-produced, poorly built homes proliferated after World War II, liability was imposed on negligent builder-vendors in order to protect buyers from personal injury.⁴⁸

To support these policy-based decisions, courts have applied the reasoning of products liability cases to the area of defective housing. In *Schipper v. Levitt & Sons, Inc.*,⁴⁹ for example, the New Jersey Supreme Court found a builder-vendor liable for negligence in designing and installing a hot water system without a mixing valve

rights. *See id.*

The notion that a purchaser had an opportunity to inspect before the completion of the sale dates back to a time when the buyer and seller came from the same community. *See Dunham, Vendor's Obligation as to Fitness of Land for a Particular Purpose*, 37 MINN. L. REV. 108, 110 (1953).

46. *See, e.g., City of Aurora v. Green*, 126 Ill. App. 3d 684, 467 N.E.2d 610 (1984) (buyer of apartment building described by seller as complying with zoning ordinances had no recourse when zoning ordinance limited building to fewer units than contained in building); *O'Brien v. Noble*, 106 Ill. App. 3d 126, 435 N.E.2d 554 (1982) (buyer had no recourse when five-acre lot sold as site for construction of home while zoning prohibited all construction).

47. *See Caveat Emptor, supra* note 40, at 542-43, for a discussion of policy reasons for abandoning the doctrine of caveat emptor in home sales. The author points out that in the area of real estate, the expectations of the public differ widely from the rule of law. *See id.* at 541-42. The public is accustomed to buying merchandise with an implied warranty of merchantability and fitness based upon such consumer protection statutes as the Uniform Commercial Code. *See id.* The public, therefore, expects protection in real estate transactions, which typically involve significantly more money than do ordinary consumer transactions. *See id.* Thus, the unwitting real estate purchaser is often startled by the fact that the law offers no protection in the form of a warranty of quality or warranty of fitness. *See id.*

48. *See Caporaletti v. A-F Corp.*, 137 F. Supp. 14 (D.D.C. 1956), *rev'd on other grounds*, 240 F.2d 53 (D.C. Cir. 1957) (homebuyer injured when stairway came unbolting and threw her to ground). Explaining its abandonment of caveat emptor, the court relied upon the buyer's lack of expertise, the buyer's reliance, and the need to prevent builders from unnecessarily injuring homebuyers:

The ordinary purchaser is not in a position to discover a latent defect by inspection, no matter how thorough his scrutiny may be, because usually he lacks sufficient familiarity with the complexities of building construction and the intricacies of applicable regulations. He should be able to rely on the skill of the builder who sells the house [T]he builder should be liable for injuries caused by his negligence Any other result would . . . encourage unscrupulous builders who may be tempted to reduce their costs and increase their profits by palming off defective and inferior construction on their customers.

Id. at 16; *see also* RESTATEMENT (SECOND) OF TORTS § 353 (1965).

49. 44 N.J. 70, 207 A.2d 314 (1965), *limited*, 172 N.J. Super. 93, 96-7, 410 A.2d 1184, 1186 (1980).

which would have prevented excessively hot water from injuring the child of the purchaser's lessee.⁵⁰

Analogizing the builder to a manufacturer whose product consists of component parts supplied by others, the court relied on the landmark products liability case, *MacPherson v. Buick Motor Co.*⁵¹ and its progeny.⁵² The court held that the hot water faucet was a dangerously concealed item which the occupant and his invitees⁵³ could not have discovered through a casual visual inspection.⁵⁴ The vendor knew that when the water was turned on it flowed at a dangerously high temperature.⁵⁵ Moreover, the vendor could have repaired the faucet at minimal expense, thereby preventing exposure of the plaintiffs and their guests to an unreasonable risk of harm.⁵⁶

In the area of home sales between owners and purchasers, courts have usually disregarded the doctrine of caveat emptor⁵⁷ and held liable for intentional misrepresentation⁵⁸ vendors who have made an intentionally false statement that induced the buyer into a real estate transaction.⁵⁹ As a remedy, they allow rescission or damages or both.⁶⁰ When a seller has unintentionally made a false statement and the buyer has relied on the statement, some courts have allowed rescission but have eliminated the damages because of the vendor's lack of scienter and therefore intent.⁶¹ Some jurisdictions have found an affirmative duty to disclose a material defect that was not discoverable upon inspection by a vendee who with the vendor's knowledge, was relying on the vendor's statement.⁶² Presuming that sellers are in a better position than are buyers to know about their property

50. See *id.* at 88, 207 A.2d at 320.

51. 217 N.Y. 382, 111 N.E. 1050 (1916).

52. See, e.g., *Dow v. Holly Mfg. Co.*, 49 Cal. 2d 720, 321 P.2d 736 (1958); *Leigh v. Wadsworth*, 361 P.2d 849 (Okla. 1961); *Foley v. Pittsburgh-Des Moines Co.*, 363 Pa. 1, 68 A.2d 517 (1949); *Fisher v. Simon*, 15 Wis. 2d 207, 112 N.W.2d 705 (1961).

53. Since the cause of action was for negligence, the vendor's liability extended to those who might foreseeably be injured by his breach of duty. See *Schipper*, 44 N.J. at 95, 207 A.2d at 328.

54. See *id.* at 87, 207 A.2d at 323-24.

55. See *id.* at 78, 207 A.2d at 318.

56. See *id.* at 78, 207 A.2d at 319.

57. See *supra* notes 40-42 and accompanying text.

58. See *infra* notes 71-77 and accompanying text, for discussion of misrepresentation in the broker-buyer relationship.

59. See generally *Caveat Emptor*, *supra* note 40, at 561.

60. See *id.* at 562.

61. See *id.*

62. See *id.* at 561 & n.95.

and its physical characteristics, some courts have imposed a duty on the seller to investigate and know his property.⁶³

B. The Broker's Duty to Inspect and Disclose Defects in Property for Sale

Because the broker was historically in privity with only the seller,⁶⁴ he had no fiduciary obligations to prospective purchasers.⁶⁵ Increasingly recognizing the need to protect homebuyers, however, courts further eroded the doctrine of caveat emptor,⁶⁶ and began to examine the relationship between the buyer and the seller's broker in the real estate transaction.⁶⁷ Some courts have found duties⁶⁸ running from brokers to prospective purchasers and have imposed liability based on a number of existing doctrines, most notably, misrepresentation⁶⁹ and negligence.⁷⁰

1. Misrepresentation

Courts have traditionally permitted buyers to recover from brokers in actions for intentional misrepresentation. To prevail in a cause of action for intentional misrepresentation, the buyer must prove:

63. See, e.g., *Dugan v. Jones*, 615 P.2d 1239, 1246 (Utah 1980) (" 'owner is presumed to know the boundaries of his own land, the quantity of his acreage, and the amount of water available. If he does not know the correct information, he must find out' ") (quoting *Sorenson v. Adams*, 98 Idaho 708, 715, 571 P.2d 769, 776 (1977)). See generally Freyfogel, *Real Estate Sales and the New Implied Warranty of Lawful Use*, 71 CORNELL L. REV. 1, 19 n.70 (1985) [hereinafter *Implied Warranty of Lawful Use*].

64. Since the broker is the seller's agent, he has a fiduciary duty to act for his principal alone, and to use the utmost good faith in his efforts on the seller's behalf. See Note, *Real Estate Broker's Duties to Prospective Purchasers*, B.Y.U. L. REV. 513, 513-14 (1976) [hereinafter *Broker's Duties*]; see also Note, *A Re-examination of the Real Estate Broker-Buyer-Seller Relationship*, 18 WAYNE L. REV. 1343, 1343-44 (1972) [hereinafter *Broker-Buyer-Seller Relationship*].

65. Since the seller's relationship to the buyer is defined by the doctrine of caveat emptor, see *supra* notes 40-42, the broker, as the seller's agent, owes the buyer no fiduciary obligation. See *Broker-Buyer-Seller Relationship*, *supra* note 64, at 1345.

66. See *supra* notes 40-42 and accompanying text.

67. See generally *Caveat Emptor*, *supra* note 40; Note, *Imposing Tort Liability on Real Estate Brokers Selling Defective Housing*, 99 HARV. L. REV. 1861 (1986) [hereinafter *Imposing Tort Liability*]; *When the Walls Come Tumbling Down*, *supra*, note 40; see also *Broker-Buyer-Seller Relationship*, *supra* note 64, at 1343.

68. See *infra* notes 80-87 and accompanying text.

69. See *infra* notes 71-77 and accompanying text.

70. See *infra* notes 79-83 and accompanying text.

(1) the broker made a false representation; (2) the broker knew the misrepresentation was false (the scienter requirement); (3) the broker intended the buyer to rely on the representation; (4) the buyer justifiably relied on the misrepresentation; and (5) such reliance caused damage to the buyer.⁷¹

Frequently, the buyer has difficulty proving the elements of the cause of action, especially the requirement that the broker knowingly misrepresented the property.⁷² Commentators, however, have suggested that a false statement of material fact made without knowledge of its truth or falsity or without adequate investigation of its veracity is the equivalent of intentional misrepresentation.⁷³ Thus, to lighten the buyer's burden of proof, some courts have relaxed the scienter requirement and allowed recovery to buyers who can prove that a broker negligently misrepresented the property.⁷⁴ In other jurisdictions, courts have eliminated the need to prove the broker's knowledge and intent; the buyer need prove only justifiable reliance on the broker's misrepresentation.⁷⁵ Finally, some courts find misrepresentation in silence⁷⁶—if the defendant has a duty to speak.⁷⁷

71. See W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS §§ 105-108, at 725-54 (5th ed. 1984) [hereinafter PROSSER & KEETON ON TORTS]; see also *Lingsch v. Savage*, 213 Cal. App. 2d 729, 738, 29 Cal. Rptr. 201, 206 (1963) (broker liable in fraudulent concealment for failure to disclose defect); *Imposing Tort Liability*, *supra* note 67, at 1862-63.

72. See PROSSER & KEETON ON TORTS, *supra* note 71, § 107, at 741-45; *Implied Warranty of Lawful Use*, *supra* note 63, at 18 n.68 (discussing range of broker knowledge allowed by courts).

73. See PROSSER & KEETON ON TORTS, *supra* note 71, § 107, at 741-45.

74. See, e.g., *First Church of the Open Bible v. Cline J. Dunton Realty Inc.*, 19 Wash. App. 275, 281, 574 P.2d 1211, 1215 (1978) (court found agent negligent for failing to ascertain property for sale; broker then represented incorrect boundaries to purchaser); see also RESTATEMENT (SECOND) OF TORTS § 552c(1) (1977); PROSSER & KEETON ON TORTS, *supra* note 71, § 107, at 740-49.

75. See *Bevins v. Ballard*, 655 P.2d 757, 763 (Alaska 1982) (broker who passed on information that well on property worked liable for innocent misrepresentation based upon policy that real estate brokers possess superior knowledge of realty sold and that buyers recognize and rely on this expertise).

76. See, e.g., *Saporta v. Barbagelata*, 220 Cal. App. 2d 463, 33 Cal. Rptr. 661 (1963) (nondisclosure of termites); *Neveroski v. Blair*, 141 N.J. Super. 365, 358 A.2d 473 (App. Div. 1976) (same); *Crum v. McCoy*, 41 Ohio Misc. 34 (1974) (nondisclosure of defective sewer).

77. One court set forth the reasons underlying the duty to speak:

While silence or concealment becomes fraudulent only where there is a duty to speak and disclose, a legal duty to disclose may exist where there is no existing fiduciary relationship between the parties and where no special confidence is expressly reposed. The duty to disclose may arise from the circumstances of the case, including inequality of condition and

2. Negligence

Some courts have eliminated entirely the need to prove the elements of misrepresentation⁷⁸ by allowing the buyer to sue in negligence.⁷⁹ In a cause of action for negligence, the buyer must prove: (1) the broker owed him a legal duty of reasonable care;⁸⁰ (2) the broker breached the duty;⁸¹ and (3) the breach proximately caused injury to the buyer. One of the aspects of the broker's duty of care is to foresee harm that might result from his actions.⁸² He therefore has an affirmative duty to speak when he knows of facts that reasonably may cause harm to the plaintiff.⁸³

In some jurisdictions, the legislature has defined the broker's duty of reasonable care by enacting statutes to protect homebuyers.⁸⁴

the superior knowledge of one party, which knowledge is not within the fair and reasonable reach of the other party.

Jones v. Arnold, 359 Mo. 161, 169, 221 S.W.2d 187, 193 (1949) (quoted in *Maples v. Porath*, 638 S.W.2d 337, 340 n.2 (Mo. Ct. App. 1982)).

If the broker owes an implied duty to speak and disclose, then silence may constitute a breach of duty under the doctrine of negligence as well as under the doctrine of negligent or innocent misrepresentation. See *Imposing Tort Liability*, *supra* note 67, at 1863 n.15.

78. See *supra* notes 71-77.

79. See *Easton v. Strassburger*, 152 Cal. App. 3d 90, 199 Cal. Rptr. 383 (1984) (real estate broker held liable for negligent failure to conduct reasonably competent and diligent inspection of property subject to landslides). See generally PROSSER & KEETON ON TORTS, *supra* note 71, § 30, at 164-68 (listing elements of negligence cause of action); *Imposing Tort Liability*, *supra* note 67, at 1864-66 (discussing negligence cause of action as alternative to misrepresentation cause of action) see also *infra* notes 80-158 and accompanying text.

80. See *Earp v. Nobmann*, 122 Cal. App. 3d 270, 289-90, 175 Cal. Rptr. 767, 778 (1981).

81. Some appropriate general criteria for determining breach of duty of care are: (1) how much the transaction was intended to affect the plaintiff; (2) foreseeability of harm; (3) degree of certainty that plaintiff suffered injury; (4) relationship between defendant's conduct and plaintiff's injury; (5) moral culpability of defendant's conduct; and (6) policy of preventing future harm. See *J'Aire Corp. v. Gregory*, 24 Cal. 3d 799, 804, 598 P.2d 60, 63, 157 Cal. Rptr. 407, 410 (1979). See *infra* notes 157-58, 169-77 and accompanying text, for a discussion of specialized duty of care of broker as professional.

82. See *Easton v. Strassburger*, 152 Cal. App. 3d 90, 102, 199 Cal. Rptr. 383, 390 (1984) (for benefit of prospective homebuyers broker has affirmative duty to investigate property for latent defects).

83. See *supra* note 77 and accompanying text. See generally *Imposing Tort Liability*, *supra* note 67, at 1863-64.

84. See, e.g., Consumer Fraud and Deceptive Business Practices Act, ILL. ANN. STAT. ch. 121 1/2, paras. 261-272 (Smith-Hurd Supp. 1986); Texas Deceptive Trade Practices-Consumer Protection Act, TEX. BUS. & COM. CODE ANN. §§ 17.41-17.68 (Vernon Supp. 1986).

Certain courts construe statutes and regulations to find the obligations of brokers to prospective purchasers based on the nature of the broker-buyer relationship.⁸⁵ In other jurisdictions, when no statute explicitly requires a broker to disclose information, courts have derived the duty from general consumer protection statutes⁸⁶ and from the Code of Ethics for real estate brokers.⁸⁷

C. Expansion of the Broker's Duty to Disclose Defects

Most courts have imposed liability on brokers for failure to disclose known defects.⁸⁸ Moreover, California courts have recently expanded broker liability for failure to investigate property for sale and disclose not only known defects but also unknown defects.⁸⁹

In *George Ball Pacific, Inc. v. Coldwell Banker & Co.*,⁹⁰ the court held a lessee's broker⁹¹ liable for both breach of fiduciary duty and negligence for failing to discover the true owner of the building, which was held in a sale-leaseback.⁹² When the lessor went bankrupt,

85. See, e.g., *Sawyer Realty Group, Inc. v. Jarvis Corp.*, 89 Ill. 2d 379, 384-85, 432 N.E.2d 849, 851 (1982) (imposing duty to disclose self-interest in transaction based on regulation promulgated pursuant to Real Estate Brokers and Salesmen License Act, ILL. ANN. STAT. ch. 111, paras. 5701-5743 (Smith-Hurd 1977)).

86. See, e.g., *Mongeau v. Boutelle*, 10 Mass. App. Ct. 246, 248-49, 407 N.E.2d 352, 355 (1980) (under state deceptive practices statute, broker must disclose material facts that could influence buyer); *McRae v. Bolstad*, 32 Wash. App. 173, 176-77, 646 P.2d 771, 774-75 (1982) (under consumer protection statute broker has duty to disclose matters known to him; broker must use care to ascertain conditions of property before listing), *aff'd, remanded*, 101 Wash. 2d 161, 676 P.2d 496 (1984).

87. See *Menzel v. Morse*, 362 N.W.2d 465, 472-73 (Iowa 1985) (violation of Code of Ethics of National Association of Realtors requiring brokers to discover adverse factors that reasonably competent and diligent investigation would disclose provides evidence of negligence in malpractice action).

88. See, e.g., *Earp v. Nobmann*, 122 Cal. App. 3d 270, 290, 175 Cal. Rptr. 767, 779 (1981) (broker liable for negligence for failure to disclose); *Cooper v. Jevne*, 56 Cal. App. 3d 860, 865-66, 128 Cal. Rptr. 724, 727 (1976) (broker liable for fraud for failure to disclose); *Lingsch v. Savage*, 213 Cal. App. 2d 729, 735-36, 29 Cal. Rptr. 201, 204-205 (1963) (broker liable for negligence for failure to disclose); *Neveroski v. Blair*, 141 N.J. Super. 365, 375, 358 A.2d 473, 478 (App. Div. 1976) (broker liable for nondisclosure of termite infestation); see also *supra* notes 71-77 and accompanying text.

89. See *infra* notes 90-158 and accompanying text.

90. 117 Cal. App. 3d 248, 172 Cal. Rptr. 597 (1981).

91. Since the broker represented the lessee, he had a fiduciary duty to disclose material facts that might affect his principal's decision to rent the property. See *id.* at 256, 172 Cal. Rptr. at 601. At the same time, the court found a professional duty to conform to the community standard of care which included an affirmative investigation into record title holders. See *id.* at 255-56, 172 Cal. Rptr. at 601-02.

92. See *id.* at 254, 172 Cal. Rptr. at 600. A sale-leaseback is a "sale of an asset to a vendee who immediately leases back to the vendor." BLACK'S LAW DICTIONARY 1202 (5th ed. 1979).

the true owner of the building forced the plaintiff to renegotiate the lease at a higher price.⁹³ The sale-leaseback was known to the brokerage community.⁹⁴ Also, it was the custom in the area for a broker to inform a lessee of the actual record title holder of property.⁹⁵ Although the broker had made no affirmative representations, the court held that he had failed to comply with the community practice of determining the record holder of the property and providing the information to the lessee.⁹⁶ Thus, the broker breached his fiduciary duty to the lessor and negligently failed to discover and disclose material facts.⁹⁷

In *Pepper v. Underwood*,⁹⁸ a broker⁹⁹ used summaries of income tax information provided by the sellers of a motel to figure profitability for the purchaser.¹⁰⁰ Relying on the information, the purchaser decided to buy the motel.¹⁰¹ Although the broker later had reason to suspect the information was incorrect, he remained silent.¹⁰² The court held that the Code of Ethics of the National Association of Realtors could serve as rebuttable evidence of the standard of conduct in the community for real estate brokers.¹⁰³ The court recommended that the Code be used as a guide in the retrial of the case.¹⁰⁴

93. See 117 Cal. App. 3d at 254, 172 Cal. Rptr. at 600.

94. See *id.* at 255, 172 Cal. Rptr. at 600.

95. See *id.* at 255, 172 Cal. Rptr. at 601.

96. See *id.* at 256, 172 Cal. Rptr. at 601-02.

97. See *id.* at 256-57, 172 Cal. Rptr. at 601-02.

98. 48 Cal. App. 3d 698, 122 Cal. Rptr. 343 (1975).

99. Originally, the broker was the seller's broker, and the court held that although he received a commission from the seller, he was also the buyer's broker, and therefore owed the buyer a fiduciary duty. See *id.* at 712-13, 122 Cal. Rptr. at 353-54.

100. See *id.* at 704, 122 Cal. Rptr. at 347-48.

101. The purchaser called the information his "bible." *Id.* at 704, 122 Cal. Rptr. at 347 (quoting purchaser). In reliance on the information, he quit his job, sold his house and moved to the motel. See *id.*

102. Both the salesman's employer and the prior owners told the salesman that the expenses were obviously low. See *id.* at 705, 122 Cal. Rptr. at 347.

103. See *id.* at 715, 122 Cal. Rptr. at 355.

104. See *id.* While the court did not cite to a specific section of the Code, one commentator has noted that Article 9 of the Code of Ethics would impose upon realtors an affirmative obligation to discover adverse factors that a reasonably competent and diligent investigation would disclose. See Note, *Real Estate Brokers Liability for Failure to Disclose: A New Duty to Investigate*, 17 PAC. L.J. 327, 335 (1985); see also *Menzel v. Morse*, 362 N.W.2d 465, 472 (Iowa 1985) (Code used to establish community standards to determine whether broker acted negligently; violation of standards constituted evidence of negligence); National Ass'n of Realtors,

Thus, in both *George Ball* and *Pepper*, the court held that a broker has an obligation to find out certain information about property in order to protect the unwary buyer.¹⁰⁵ While the court narrowly based liability on the specific facts of each case,¹⁰⁶ the expansion of the duty signals a policy of compensating the injured buyer for losses that an investigation by the broker before the closing would have prevented.

In *Easton v. Strassburger*,¹⁰⁷ the California Court of Appeals for the first time¹⁰⁸ imposed general liability on two real estate brokers who had failed to disclose a defect that was not known to the defendant.¹⁰⁹ Before the decision in *Easton*, brokers had no general duty to investigate property for sale and to disclose material defects to purchasers.¹¹⁰ The brokers listed a home built on fill that had not been properly engineered and compacted.¹¹¹ The sellers failed to tell the brokers about past landslides or about subsequent remedial action that they had taken.¹¹²

Several times before the sale, the brokers' agents inspected the property.¹¹³ The court found evidence that they were aware of "red flags"¹¹⁴ that should have indicated soil problems.¹¹⁵ Deprived of

Code of Ethics, art. 9 (1974). See *infra* notes 155-58 and accompanying text for California Court of Appeals' application of the National Association of Realtors Code of Ethics to determine the standard of care in negligence cases.

105. See *supra* notes 90-104 and accompanying text.

106. See *id.*

107. 152 Cal. App. 3d 90, 199 Cal. Rptr. 383 (1984).

108. See *id.* at 99, 199 Cal. Rptr. at 388. The court stated: "Admittedly, no appellate division has explicitly declared that a broker is under a duty to disclose material facts which he should have known." *Id.*

109. See *id.* at 104, 199 Cal. Rptr. at 391.

110. See *supra* notes 90-106 and accompanying text for discussion of additional California precedents, which the *Easton* court failed to mention in its decision.

111. *Easton*, 152 Cal. App. 3d at 96, 199 Cal. Rptr. at 385.

112. See *id.*, 199 Cal. Rptr. at 386.

113. See *id.*

114. *Id.* at 104, 199 Cal. Rptr. at 391-92. The California Association of Realtors defined "red flag" as a "readily observable 'sign' (indicator) of a potential problem Brokers must be aware of the facts and circumstances (unique in each case) concerning the property in question and follow their instinct in pointing out all 'red flags'." Note, *Easton v. Strassburger: Judicial Imposition of a Duty to Inspect on California Real Estate Brokers*, 18 Loy. L.A.L. Rev. 809, 850 (1985) [hereinafter *Judicial Imposition of a Duty to Inspect*] (quoting memorandum from California Association of Realtors providing guidelines to real estate brokers for following *Easton*).

115. See *Easton*, 152 Cal. App. 3d at 96, 199 Cal. Rptr. at 386. One or both of the agents knew the home was built on fill and that settlement and erosion

adequate warning of the soil problems, the buyers purchased the home.¹¹⁶ Shortly after the sale, a massive earth movement and subsequent landslides damaged the property.¹¹⁷

Relying on a theory of common law negligence, the *Easton* court held that a broker representing the seller¹¹⁸ of a home¹¹⁹ 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."¹²⁰

The court in part derived the duty to disclose material facts discovered during an inspection¹²¹ from the duty to disclose *known* material defects.¹²² In *Cooper v. Jevne*¹²³ and *Lingsch v. Savage*,¹²⁴

problems were associated with such soil. *See id.* In addition to observing repair netting on a recent slide, one agent observed that the floor on the premises was not level, and the other agent testified that uneven floors indicate soil problems. *See id.* at 104, 199 Cal. Rptr. at 391. The court thought the agents should have investigated further through a soils report or an inquiry: "The jury merely had to conclude . . . that a reasonably competent and diligent inspection of the property *would* have uncovered the past history of soils problems." *Id.* at 104, 199 Cal. Rptr. at 391-92 (emphasis in original).

116. *See id.* at 97, 199 Cal. Rptr. at 386.

117. *See id.* at 96, 199 Cal. Rptr. at 385.

118. No privity of contract existed between the seller's broker and the buyer. *See id.* at 98 n.2, 199 Cal. Rptr. at 387 n.2. Nonetheless, the court in *Easton* cited two cases to support the rule that a broker has a duty to exercise reasonable care to a buyer even in the absence of a fiduciary relationship. *Id.* (citing *Merrill v. Buck*, 58 Cal. 2d 552, 561-62, 375 P.2d 304, 310, 25 Cal. Rptr. 456, 462 (1962)); *Earp v. Nobmann*, 122 Cal. App. 3d 270, 290, 175 Cal. Rptr. 767, 772 (1981).

119. The court distinguished the duty of a broker selling commercial property from that of a broker selling residential property. *See Easton*, 152 Cal. App. 3d at 102 n.8, 199 Cal. Rptr. at 390 n.8. The court defined the difference in terms of the buyer's inexperience and lack of representation: "Unlike the residential home buyer who is often unrepresented by a broker, or is effectively unrepresented because of the problems of dual agency, a purchaser of commercial real estate is likely to be more experienced and sophisticated in his dealings in real estate and is usually represented by an agent who represents only the buyer's interests." *Id.* (citations omitted).

120. *Id.* at 102, 199 Cal. Rptr. at 390 (footnote omitted).

121. *See id.* at 98, 199 Cal. Rptr. at 387. The court instructed the jury on the realtor's duty of care: "A real estate broker is a licensed person or entity who holds himself out to the public as having particular skills and knowledge in the real estate field. He is under a duty to disclose facts materially affecting the value or desirability of the property that are known to him or which through reasonable diligence should be known to him." *Id.*

122. *See id.* at 99, 199 Cal. Rptr. at 387.

123. 56 Cal. App. 3d 860, 128 Cal. Rptr. 724 (1976).

124. 213 Cal. App. 2d 729, 29 Cal. Rptr. 201 (1963).

two California courts had previously imposed a duty to disclose known material facts. The *Easton* court—although noting that the *Cooper* case was based on fraud—praised *Cooper* for having most clearly articulated the rule:

It is the law of this state that where a real estate broker or agent, representing the seller, knows facts materially affecting the value or the desirability of property offered for sale and these facts are known or accessible only to him and his principal, and the broker or agent also knows that these facts are not known to or within the reach of the diligent attention and observation of the buyer, the broker or agent is under a duty to disclose these facts to the buyer.¹²⁵

The court in *Easton* expanded the broker's fraud-based *Cooper-Lingsch* duty to disclose to include negligence.¹²⁶ A finding of fraud requires that the plaintiff prove that the defendant had *actual* knowledge¹²⁷ and that the facts "[were] not known to or within the reach of the diligent attention and observation of the buyer."¹²⁸

Under the *Easton* rule then, the plaintiff need not prove that the broker had either actual or constructive knowledge of the defect.¹²⁹ Moreover, the plaintiff's potential access to knowledge of the defect does not affect the cause of action.¹³⁰ Instead, a finding of negligence merely requires a legal duty¹³¹ to inspect running from the defendant to the plaintiff, a breach of that duty, and injury proximately resulting from the breach.¹³²

The *Easton* court based the broker's duty to inspect property for sale in: (1) a policy to protect homebuyers;¹³³ (2) the nature of the

125. *Easton v. Strassburger*, 152 Cal. App. 3d 90, 99, 199 Cal. Rptr. 383, 387 (1984) (quoting *Cooper v. Jevne*, 56 Cal. App. 3d 860, 866, 128 Cal. Rptr. 724, 727 (1976) (summarizing holding in *Lingsch v. Savage*, 213 Cal. App. 2d 723, 729, 29 Cal. Rptr. 201, 204 (1963))).

126. *Easton*, 152 Cal. App. 3d at 103, 199 Cal. Rptr. at 390.

127. *See id.*

128. *See id.* (quoting *Cooper*, 56 Cal. App. 3d at 866, 128 Cal. Rptr. at 727).

129. *See id.*

130. *See id.* at 103, 199 Cal. Rptr. at 391. The court did not, however, eliminate the duty of the buyer "to exercise reasonable care to protect himself," and noted the availability of contributory negligence as a defense when the plaintiff is egregiously careless. *Id.*

131. *See id.* at 98, 199 Cal. Rptr. at 387. "Whether a defendant owes a duty of due care to a particular plaintiff is a question of law." *Id.* *See infra* notes 79-87 and accompanying text for a discussion of the broker's duty to the homebuyer.

132. *See* 152 Cal. App. 3d at 98, 199 Cal. Rptr. at 387.

133. *See infra* notes 136-37 and accompanying text.

broker-buyer relationship;¹³⁴ and (3) the Code of Ethics of the National Association of Realtors.¹³⁵ First, the court noted that one of the purposes of the duty to disclose reasonably discoverable defects is to protect homebuyers from unethical brokers and sellers.¹³⁶ Another purpose of imposing such a duty is to give purchasers enough information to decide intelligently whether to purchase particular property.¹³⁷ Without such a duty, the court reasoned, a broker would have a strong disincentive to inspect.¹³⁸ Moreover, he could avoid liability by claiming ignorance.¹³⁹

The court also found the duty to disclose to be based on the nature of the broker-buyer relationship,¹⁴⁰ even though brokers represent sellers.¹⁴¹ Since the broker's interest is closer to that of the seller's interest,¹⁴² the buyer needs extra protection.¹⁴³ The homebuyer's reliance can encompass crucial issues like quality of title and condition of the premises.¹⁴⁴ Furthermore, the broker holds himself out to the buyer as a professional with skill and knowledge of the real estate field.¹⁴⁵ As a result of the broker's strong involvement and initiative in the selling process, the inexperienced buyer may perceive the broker as having greater expertise¹⁴⁶ than his own and

134. See *infra* notes 140-54 and accompanying text.

135. See *infra* notes 155-58 and accompanying text.

136. See *Easton*, 152 Cal. App. 3d at 99, 199 Cal. Rptr. at 388.

137. See *id.*

138. See *id.* at 100, 199 Cal. Rptr. at 388.

139. See *id.*

140. See *id.*

141. See *id.* at 99, 199 Cal. Rptr. at 388. The court noted that despite the lack of privity of contract between the broker and homebuyer, the broker has a duty to exercise reasonable care to protect those whom the agent is trying to induce into entering a real estate transaction for the purpose of earning a commission. *Id.* at 98 n.2, 199 Cal. Rptr. at 387 n.2.

142. See *id.* at 101 n.4, 199 Cal. Rptr. at 389 n.4. " 'Where the buyer is unappreciative of the potentially divided loyalty of the broker, he may be lulled into relying on the broker to his significant detriment.' " *Id.* (quoting Sinclair, *The Duty of the Broker to Purchasers and Prospective Purchasers of Real Property in Illinois*, 69 ILL. B.J. 260, 263-64 (1981)).

143. See *id.*

144. See *id.*

145. See *id.* at 104-05, 199 Cal. Rptr. at 392. For example, the broker advises the buyer on the value and fitness of a home as well as on financing. *Id.* at 101 n.4, 199 Cal. Rptr. at 389 n.4 (quoting *Broker-Buyer-Seller Relationship*, *supra* note 64, at 1343).

146. *Id.* at 100, 199 Cal. Rptr. at 388. The real estate broker " 'is accredited by his calling in the minds of the inexperienced or ignorant with a knowledge greater than their own.' " *Id.* (quoting *Roman v. Lobe*, 243 N.Y. 51, 54-55, 152 N.E. 461, 462 (1926), *quoted in* *Richards Realty Co. v. Real Estate Comm'r*, 144 Cal. App. 2d 357, 300 P.2d 893 (1956)).

therefore grow to rely on him.¹⁴⁷ In some cases, the buyer may believe the broker protects his interests¹⁴⁸ or even represents him.¹⁴⁹

Pointing out that the buyer's basis for such reliance is illusory,¹⁵⁰ the court sought to protect the unwary buyer from potentially substantial injury.¹⁵¹ The court concluded that the broker can greatly benefit the buyer by conducting a diligent search of the property for sale.¹⁵² The court reasoned that most of the time the broker, as a professional,¹⁵³ is in a better position than is the buyer to discover information about the property.¹⁵⁴

The court in *Easton*¹⁵⁵ also found in the Code of Ethics of the National Association of Realtors an explicit duty to discover and disclose material defects.¹⁵⁶ As part of his professional obligation, the broker "must not only 'avoid . . . concealment of pertinent facts' " but " 'has an affirmative obligation to discover adverse factors that a reasonably competent and diligent investigation would

147. See *Easton*, 152 Cal. App. 3d at 100-02, 199 Cal. Rptr. at 388-89. The court cited several propositions as sources of the buyer's reliance and trust. See *id.* Since houses are purchased infrequently, the buyer is relatively inexperienced at knowing what to look for during his search. See *id.* In contrast, the buyer sees the broker as having the wisdom of experience in determining value and fitness. See *id.* The broker not only orchestrates all phases of the purchase but also helps the buyer to obtain financing, which can be a complex process. See *id.* Again, the inexperienced buyer sees the broker as having greater expertise. See *id.*

148. See *id.* at 100-01, 199 Cal. Rptr. at 389. The court stated that "many buyers in fact *justifiably* believe the seller's broker is also protecting their interest in securing and acting upon accurate information." *Id.* (emphasis in original) (footnote omitted).

149. See *id.* at 101 n.4, 199 Cal. Rptr. at 389 n.4.

150. See *id.* at 101, 199 Cal. Rptr. at 389.

151. See *supra* note 30 and accompanying text.

152. See *Easton*, 152 Cal. App. 3d at 102, 199 Cal. Rptr. at 390.

153. See *id.* (noting that brokers are " 'supposed to possess ordinary professional knowledge concerning the . . . natural characteristics of the property' ") (quoting *Brady v. Carman*, 179 Cal. App. 2d 63, 68, 3 Cal. Rptr. 612, 616 (1960)).

154. See *id.* at 100, 199 Cal. Rptr. at 388. "[I]n residential sales transactions the seller's broker is most frequently the best situated to obtain and provide the most reliable information on the property and is ordinarily counted on to do so." *Id.*

155. The court noted that according to the California Evidence Code, it may take judicial notice of criteria published by a private professional association. See *id.* at 102 n.5, 199 Cal. Rptr. at 389 n.5. These criteria establish the requisite standard of behavior for a realtor. See *id.* In addition, the court noted that many brokers have formally acknowledged the professional responsibility to conduct a reasonable investigation of listed property before a sale, even absent privity of contract. See *id.*

156. See *id.* at 101-02, 199 Cal. Rptr. at 389-90; National Ass'n of Realtors, Interpretations of the Code of Ethics, art. 9 (7th ed. 1978).

disclose.'¹⁵⁷ The court noted that the duty to inspect applies to all agents, regardless of whether they are association members governed by the Code of Ethics.¹⁵⁸

III. The Broker's Duty to Test for Radon

Previous cases holding brokers liable to homebuyers¹⁵⁹ provide a framework for analyzing broker liability in negligence for failure to test for and disclose the presence of radon to prospective purchasers.¹⁶⁰ To prevail in an action for intentional misrepresentation,¹⁶¹ the buyer must prove that the broker intentionally¹⁶² made a false statement; similarly, to prevail in an action for negligent misrepresentation,¹⁶³ he must prove that the broker made the statement negligently.¹⁶⁴ In a radon liability case based on fraud, however, a buyer may have difficulty proving the extent of the seller's knowledge and his intent to misrepresent.¹⁶⁵ In contrast, the court in a negligence action has to determine the extent of the duty of care that the broker owes to a particular plaintiff,¹⁶⁶ a breach of that duty, and harm proximately caused to the plaintiff.¹⁶⁷

157. *Easton*, 152 Cal. App. 3d at 101, 199 Cal. Rptr. at 389 (quoting National Ass'n of Realtors, Interpretations of the Code of Ethics art. 9 (7th ed. 1978)). The court cites an example from the Code of Ethics of a violation of the duty to discover adverse factors that a reasonable investigation would reveal. *See id.* at 102 n.6, 199 Cal. Rptr. at 389 n.6. The Committee held that the absence of a sewer connection in an area where all other houses were connected was a substantial and pertinent fact. *See id.* The fact that the broker offered as a defense his ignorance that the house was not connected, and that he had never represented the house as being connected, did not excuse his failure to ascertain that the previous owners had failed to connect the house to the sewer system. *See id.* at 101-102 n.6, 199 Cal. Rptr. 389-90 n.6 (quoting National Ass'n of Realtors, Interpretations of the Code of Ethics art. 9 (7th ed. 1978)).

158. *See id.* at 102, 199 Cal. Rptr. at 390; *see also* *Menzel v. Morse*, 362 N.W.2d 465, 473 (Iowa 1985) (using violation of Code of Ethics as evidence of negligence).

159. *See supra* notes 71-158 and accompanying text.

160. *See infra* notes 161-77 and accompanying text.

161. *See supra* notes 70-77 and accompanying text.

162. *See supra* note 71 and accompanying text.

163. *See supra* note 74 and accompanying text.

164. *See id.*

165. *See Real Estate Transactions and Radon*, N.Y.L.J., July 15, 1987, at 2, col. 6 (real estate broker who has actual knowledge of radon's presence but fails to disclose could be held liable for concealment of a latent defect) [hereinafter *Real Estate Transactions and Radon*]; *see also Implied Warranty of Lawful Use*, *supra* note 63, at 18-19.

166. *See Easton*, 152 Cal. App. 3d at 98, 199 Cal. Rptr. at 387.

167. *See id.*

The California court in *Easton* was the first to impose on brokers the general affirmative duty to investigate property for sale and to disclose latent defects to prospective purchasers.¹⁶⁸ In other jurisdictions, however, courts have imposed various duties based on the standard of professional care required of a broker.¹⁶⁹ For example, some courts use the standards set forth in the Code of Ethics of the National Association of Realtors, which require brokers to discover adverse factors that a reasonably competent and diligent investigation would disclose.¹⁷⁰ Some states require prospective brokers to study the Code of Ethics to prepare for the licensing exam.¹⁷¹ Other jurisdictions simply view the licensing process as the granting of a "state-created monopoly"¹⁷² that requires a higher ethical and professional duty of care to the public.¹⁷³

168. See *supra* notes 107-10 and accompanying text.

169. See *infra* notes 170-73 and accompanying text.

170. See, e.g., *Baker v. Leight*, 91 Ariz. 112, 117-18, 370 P.2d 268, 271 (1962) ("[i]t is immaterial as to whether the broker is a member of the National Association if it is definitely established that this Association's Code of Ethics has been adopted and is applicable to those in the real estate profession in this state"); *Pepper v. Underwood*, 48 Cal. App. 3d 698, 714, 122 Cal. Rptr. 343, 355 (1975) ("upon proper proof that the Canons of Ethics adopted by the National Association of Real Estate Agents established standards of conduct to be adhered to and which were adhered to by real estate brokers and agents in the Santa Barbara area, such canons would be admissible as rebuttable evidence of such standard of care"), *overruled on other grounds sub nom. Stout v. Turney*, 22 Cal. 3d 718, 730, 586 P.2d 1228, 1235, 150 Cal. Rptr. 637, 644 (1978); *Hoefer v. Wilckens*, 684 P.2d 468, 472 (Mont. 1984) (trial court's findings of specific acts or omissions constituting broker malpractice "based largely on the standard of care required of realtors in Lake County under the Code of Ethics and Standards of Practice of the National Association of Realtors").

171. See, e.g., *Menzel v. Morse*, 362 N.W.2d 465, 472 (Iowa 1985) ("National Association of Realtors Code of Ethics [established] as accepted standards in the profession and required study for, and included in, the written examinations leading to licensing in Iowa").

172. See *id.* at 474 (citing *Milholin v. Vorhies*, 320 N.W.2d 552, 554 (Iowa 1982)).

173. See, e.g., *Zichlin v. Dill*, 157 Fla. 96, 98, 25 So. 2d 4, 4-5 (1946) ("[t]he state . . . has prescribed a high standard of qualifications and by the same law granted a form of monopoly and in so doing the old rule of caveat emptor is cast aside. Those dealing with a licensed broker may naturally assume that he possesses the requisites of an honest, ethical man"); *Dugan v. Jones*, 615 P.2d 1239, 1248 (Utah 1980) ("[i]n this state, . . . the rule of caveat emptor does not apply to those dealing with a licensed real estate agent. Though not occupying a fiduciary relationship with prospective purchasers, a real estate agent hired by the vendor is expected to be honest, ethical, and competent and is answerable at law for breaches of his or her statutory duty to the public"); *Hagar v. Mobley*, 638 P.2d 127, 138 (Wyo. 1981) ("[r]ealtors, just like doctors, lawyers, engineering

According to one respected authority, brokers as a profession generally "must all use care which is reasonable in light of their superior learning and experience, and any special skills, knowledge or training they may personally have over and above what is normally possessed by persons in the field."¹⁷⁴ Moreover, as a reasonable person, a real estate broker "stand[s] in a relation to others, which imposes on him an obligation to investigate and find out, so that [he] becomes liable not so much for being ignorant as for remaining ignorant."¹⁷⁵ More specifically, real estate brokers should know¹⁷⁶ the property they market.¹⁷⁷

A. Notice to Brokers of the Presence of Radon

By fulfilling their professional responsibility to buyers and sellers to keep abreast of news of phenomena that can affect the value or safety of property,¹⁷⁸ brokers will become aware of radon as posing a serious threat that may lower the value of a home and render it hazardous to the health of its occupants.¹⁷⁹ Currently, brokers may learn about radon through lay and trade publications and professional associations. For several years, national newspapers have been reporting on radon,¹⁸⁰ both as a health threat to home occupants¹⁸¹

consultants, and builders, hold themselves out as professionals; it is their job to know their profession. People rely on and trust them. Failure to comply with either the accepted standards in the field or the standards society is willing to recognize as acceptable, is actionable").

174. In general, professionals must exercise reasonable care in what they do. See PROSSER & KEETON ON TORTS, *supra* note 71, § 32, at 185-93. Moreover, they must possess a minimum standard of special knowledge and ability in their field. See *id.*

175. *Id.* § 32, at 185.

176. The words "should know" denote that a reasonably intelligent and prudent person or a person of the superior intelligence of the actor would ascertain the fact in question or would govern his conduct upon the assumption that such fact exists. See BLACK'S LAW DICTIONARY 785 (5th ed. 1979) (paraphrasing RESTATEMENT (SECOND) OF TORTS § 12 (1966)). For example, the occupant of premises who invites business visitors to enter is charged with the duty of affirmative action which a reasonable person would take to discover potential dangers. See PROSSER & KEETON ON TORTS, *supra* note 71, § 32, at 185.

177. See *supra* note 153 and accompanying text.

178. See *supra* notes 120, 169-77 and accompanying text.

179. See *supra* notes 4-12 and accompanying text.

180. For example, The New York Times has published a minimum of 30 articles covering various aspects of the problem. See *infra* notes 181-90 and accompanying text.

181. See, e.g., *Radon: Threat is Real, but Scientists Argue Over Its Severity*, N.Y. Times, Sept. 2, 1986, at C1, col. 1; *Radon: The Risks and the Remedies*, N.Y. Times, May 17, 1986, at 30, col. 4.

across the country¹⁸² and as a potential source of broker liability in real estate transactions.¹⁸³

Attorneys specializing in real estate law currently recognize radon as an evolving legal predicament.¹⁸⁴ As a matter of professional responsibility, attorneys have been warning clients of this potential source of liability.¹⁸⁵ Conversely, real estate brokers ought to keep abreast of current phenomena that are potentially dangerous to others¹⁸⁶ who may later sue them for resulting injuries.¹⁸⁷

Professionals indirectly involved in the real estate transaction have been taking precautions to prevent losses resulting from the possible discovery of radon after title passes. Fearing sudden property devaluation resulting from the discovery of radon, lending banks have been requiring tests as a condition to getting a mortgage.¹⁸⁸ In addition, real estate trade associations have become increasingly

182. See, e.g., *10 State Survey Finds Peril From Radon in 1 in 5 Homes*, N.Y. Times, Aug. 5, 1987, at A14, col. 1; *Radon Counts Are High in 3 Upstate Counties*, N.Y. Times, Dec. 14, 1986, at 54, col. 4; *Effort To Estimate Levels of Radon Raising Concern in New England*, N.Y. Times, Dec. 7, 1986, at 68, col. 1; *Levels of Radon In Jersey Town Exceed Limits: An Entire Neighborhood Affected by Problem*, N.Y. Times, Mar. 28, 1986, at B4, col. 6.

183. See, e.g., *New Accountability for Realty Agents: Coast Case Raises Their Liability for Defects in Property*, N.Y. Times, Nov. 9, 1986, at 22, col. 3 (California claims adjusting expert, Frederick J. Fisher, commented: "it is only a matter of time before similar suits start occurring elsewhere in the country, probably in the Northeast involving radon contamination"); see also *Big Increase Expected In Radon Pollution Suits*, N.Y. Times, Sept. 28, 1986, at 54, col. 1.

184. See, e.g., *Real Estate Transactions and Radon*, *supra* note 165, at 1, col. 1; *Lawyers Grapple With Radon Issue*, *supra* note 3, at 1, col. 4; *Radon Testing, Case Law Unclear*, N.J.L.J., May 22, 1986, at 22, col. 3; see also *Tens of Thousands of Homeowners Check for Indoor Radon in Response to Information, Direction from State, Federal Regulators*, Env't Rep. (BNA) 928-29 (Oct. 17, 1986).

185. See *supra* note 184.

186. See generally *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965), *limited*, 172 N.J. Super. 93, 96, 410 A.2d 1184, 1186 (1980).

187. The Code of Professional Ethics states that a realtor " 'should endeavor always to be informed regarding laws, proposed legislation, governmental regulations . . . in order to be in a position to advise his clients properly.' " *Menzel v. Morse*, 362 N.W.2d 465, 469 (Iowa 1985) (quoting National Ass'n of Realtors, *Interpretations of the Code of Ethics*, art. 2 (7th ed. 1978)); see also *Implied Warranty of Lawful Use*, *supra* note 63, at 20 (brokers possess substantial knowledge of property law).

188. See *Radioactive Gas Alters Lives of Pennsylvanians*, N.Y. Times, Oct. 28, 1985, at A10, col. 2. Anxious mortgage lenders as well as real estate agents, lawyers and businessmen, have phoned hotlines in New Jersey to inquire about radon. See *Fearing Radon Threat, Hundreds Phone Agencies in 2 States*, N.Y. Times, Sept. 29, 1985, at 55, col. 1.

concerned about radon¹⁸⁹ and have been *recommending* that brokers test and disclose results before the sale to prospective purchasers.¹⁹⁰ Thus, myriad sources alert the broker to radon's possible presence in the area where he sells homes.¹⁹¹ Breach of the duty to know about the area therefore constitutes negligence.¹⁹²

Moreover, as the court in *Easton* noted, certain "red flags"¹⁹³ may herald latent defects like radon to a broker.¹⁹⁴ For example, weatherized homes may harbor particularly high concentrations because they have low air exchange rates.¹⁹⁵ Certain kinds of openings, such as sewer pipe and sump pump openings, cracks in concrete, wall-floor joints, and hollow block walls, also sharply increase a

189. See *Effort to Estimate Levels of Radon Raising Concern in New England*, N.Y. Times, Dec. 7, 1986, at 68, col. 1 (Director of Southern Maine Regional Planning Commission stating, "In Maine, the realtors are becoming aware that buyers more and more want to know whether houses or buildings are radon-free. . . . As the buyers become more aware of this, the real estate interests react to it").

190. See, e.g., *Radon: For the Homeowner, Some Questions and Answers*, N.Y. Times, Jan. 1, 1987, at 39, col. 3.

The National Association of Realtors says that a sales agent must inform a buyer if the agent believes a home is in a radon prone area. Failure of a sales agent to tell a buyer facts affecting a home's value, including past radon detection, could violate the association's code of ethics and expose the agent to civil suit.

Id.

191. See *supra* notes 180-90 and accompanying text.

192. See *supra* notes 107-58, 170-77 and accompanying text. One critic said the *Easton* court went too far because the true cause of action could have been for negligent misrepresentation since the broker had reason to suspect, but failed to investigate. See *Judicial Imposition of a Duty to Inspect*, *supra* note 114, at 850.

193. The court pointed out the "red flags" to illustrate that the defects would be apparent to any alert observer. *Easton*, 152 Cal. App. 3d at 104, 199 Cal. Rptr. at 391. In addition to proving that the flags were apparent, the court also shows that the brokers knew the significance of the flags but neglected to investigate further. See *id. supra* note 114 and accompanying text.

194. The *Easton* court did not base liability on the broker's actual knowledge of the red flags. *Easton*, 152 Cal. App. 3d at 104-05, 199 Cal. Rptr. at 391-92. The court found that they merely constituted notice—actual or constructive—to the brokers of potential problems, which they should have investigated. See *id.* The brokers breached their duty in not doing more than a "casual visual inspection and a general inquiry of the owners." *Id.* at 105, 199 Cal. Rptr. at 392. One commentator has suggested that the duty to inspect be limited to situations in which red flags are present so that the agent would have warning of the problem. See *Judicial Imposition of a Duty to Inspect*, *supra* note 114, at 837 n.176.

195. As a result, the rate at which radon-laden air is replaced with outdoor air decreases. See *supra* note 1 and accompanying text. See generally AIR POLLUTION, *supra* note 1.

home's vulnerability to the gas.¹⁹⁶ From such broad exposure to information about radon¹⁹⁷ as well as from on-site warnings¹⁹⁸ a reasonable broker should know¹⁹⁹ that a radon-laden home poses foreseeable risks:²⁰⁰ physical harm,²⁰¹ economic loss,²⁰² and emotional distress.²⁰³

B. Policy Reasons for Holding Brokers Liable to Disclose Radon to Buyers

The threat of potential liability will give brokers the incentive to test for radon and thus prevent homebuyers from moving into a contaminated home and suffering various forms of injury.²⁰⁴ For example, if occupants who discover high radon levels in their homes continue to live there while remedying the problem,²⁰⁵ the remedy period added to the pre-discovery exposure period²⁰⁶ may further increase the occupants' risk of developing cancer.²⁰⁷ Occupants knowing they have been exposed to high radiation levels may suffer an ongoing fear of developing cancer.²⁰⁸ Finally, depending on the severity of the problem, the occupants may endure further hardship in the form of the time²⁰⁹ and expense²¹⁰ required to remedy the problem. In contrast, a test initiated by the broker before the owners

196. See AIR POLLUTION, *supra* note 1, at 11.

197. See *supra* notes 178-90 and accompanying text.

198. See *supra* notes 193-96 and accompanying text.

199. See *supra* note 176 and accompanying text.

200. Risk "involves a recognizable danger, based upon some knowledge of the existing facts, and some reasonable belief that harm may possibly follow." PROSSER & KEETON ON TORTS, *supra* note 71, § 31, at 170.

201. See *supra* notes 4-6 and accompanying text.

202. See *supra* note 12 and accompanying text.

203. See *supra* notes 18, 208 and accompanying text.

204. See *supra* note 18 and accompanying text.

205. If levels exceed safety levels, the EPA recommends leaving the home. See *supra* note 11 and accompanying text.

206. The purchaser and his family may have been living in the home for a long period of time before discovering the radon.

207. See *supra* note 4 and accompanying text.

208. See, e.g., *Hagerty v. L & L Marine Servs., Inc.*, 788 F.2d 315, 318 (holding that "[w]ith or without physical injury or impact, a plaintiff is entitled to recover damages for serious mental distress arising from fear of developing cancer where his fear is reasonable and causally related to defendant's negligence"), *modified*, 797 F.2d 256 (5th Cir. 1986).

209. The amount of time required varies with the remedy available and the specific cause of radon entry into the home. See *supra* notes 8-10.

210. See *supra* note 12.

move into the home²¹¹ can virtually eliminate all risks by providing notice to the homebuyer. Moreover, compared with the enormous benefits to the buyer, the cost to the broker in time²¹² and money²¹³ is minimal.

Thus, supplied with an accurate picture of the condition of the home, the buyer can make an informed decision²¹⁴ that takes into account all the health risks as well as factors affecting the value or desirability of the property.²¹⁵ If the test reveals dangerously high radon levels, the buyer may choose to wait until the health threat is eliminated before occupying the home.²¹⁶ Disclosure of moderate levels gives the buyer the opportunity to evaluate the risk of living in the home during the repair period.²¹⁷ In either situation, advance warning will prevent harmful radiation exposure.

In addition, inquiry duty and subsequent disclosure generally increase the efficiency of the real estate transaction.²¹⁸ If he chooses to eliminate the radon before selling, the broker's client can add such expenses into the sale price.²¹⁹ If he chooses, the buyer can negotiate through the seller's broker a lower selling price in exchange

211. See *supra* notes 5-6 and accompanying text; see also *Real Estate Transactions and Radon*, *supra* note 165, at 3, col. 1 (recommending that initial screening test be performed in interval between contract and closing).

212. The only time lost on the completion of the sale is the time required for a preliminary screening—at most four weeks. See *supra* note 8.

213. See *supra* note 9.

214. According to authority, the standards for professional behavior of a medical doctor constitute a model of behavior applicable to all professions. See PROSSER & KEETON ON TORTS, *supra* note 71, § 32, at 185-86. Under the doctrine of informed consent, a medical doctor or surgeon must disclose to the patient the risks involved in treatment. See *id.* at 189-90. The premise underlying the doctrine is that every person has the right to determine what shall be done to his own body. See *id.* In addition, the doctor has greater professional and scientific knowledge than does his patient. See *id.* Thus, the doctor must disclose sufficient information so that the patient can take into account the risks when he reaches a decision regarding the treatment. See *id.*

Similarly, the real estate broker has a duty to have professional and technical knowledge regarding homes and real estate transactions. See *id.* at 185-86. He must not withhold knowledge that may result in the buyer's physical injury and economic loss. See *id.* In the case of radon, the buyer's informed decision includes careful consideration of potential physical and economic harm. See *id.*

215. See generally *Easton v. Strassburger*, 152 Cal. App. 3d 90, 199 Cal. Rptr. 383 (1984).

216. See *supra* note 11.

217. See *id.*

218. See generally *Implied Warranty of Lawful Use*, *supra* note 63, at 20-21; *Imposing Tort Liability*, *supra* note 67, at 1866-75.

219. See generally *Imposing Tort Liability*, *supra* note 67, at 1866-75.

for bearing the cost to remedy.²²⁰ Alternatively, the buyer may prefer to condition the closing on the seller fixing the home. Finally, testing prior to the sale completion prevents the expense of litigation at a later date to all parties in the transaction.

Testing by brokers also saves time. By testing once, the broker eliminates the waste of each buyer arranging his own test.²²¹ Moreover, by testing as soon as he receives the listing, the broker prevents delays that may be costly and inconvenient at later stages of the transaction.²²² For example, the seller may need the cash for a new home, or the buyer may already have committed himself to vacate his former home by a certain date.

Compared with the seller and the buyer, the broker is in the best position to be aware of and to discover radon.²²³ Linked to an extensive information network of professionals,²²⁴ brokers have strong incentive to learn of defects that affect the safety, desirability, and value of real estate.²²⁵ The broker also has greater access to resources in the real estate field than the seller has and can more easily locate a qualified tester.²²⁶ In contrast, the seller has little incentive to discover a latent defect that may lower the value of his home or jeopardize its sale.²²⁷

Despite extensive coverage by the press,²²⁸ the general public continues to be unaware of radon.²²⁹ In fact, many homeowners learned about radon for the first time when it was discovered in their homes.²³⁰

220. *See id.*

221. *See generally Implied Warranty of Lawful Use*, *supra* note 63, at 19 (proposing that single investigation is more efficient than requiring all potential buyers to repeat inquiry).

222. *See id.*

223. *See supra* notes 178-203 and accompanying text. *See generally Imposing Tort Liability*, *supra* note 67, at 1866-74 (broker is most efficient information provider).

224. *See supra* notes 180-90 and accompanying text.

225. During an inspection, an experienced broker can discover much information about the condition of a home and he will be especially attuned to factors that affect real estate values. *See Imposing Tort Liability*, *supra* note 67, at 1868.

226. *See supra* notes 223-24 and accompanying text.

227. *See Imposing Tort Liability*, *supra* note 67, at 1869. An advantage of broker testing is the prevention of fraud by the seller eager to dispose of property. *See Real Estate Transactions and Radon*, *supra* note 165, at 2, col. 6 (not in seller's interest to conduct radon test); *Gas Test Assailed for Pennsylvania*, N.Y. Times, Nov. 2, 1986, at 53, col. 1 (in real estate transactions buyer should be able to trust person who is selling house).

228. *See supra* notes 180-83.

229. *See infra* notes 230-33.

230. *See, e.g., New System of Vents Eases A Radon Crisis*, N.Y. Times, Dec.

Even when they know about radon, its health threats often seem remote, mainly because of the fact that the gas is imperceptible²³¹ and the health effects are not immediate.²³² Furthermore, people have strong psychological resistance to admitting that such an insidious problem exists in their home.²³³ Thus, brokers could prevent a variety of harms by warning prospective homebuyers of radon on the premises.

IV. Recommendations

To protect unwary homebuyers²³⁴ Congress should enact legislation that requires real estate brokers to test homes for radon when they have reason to suspect its presence in houses for sale.²³⁵ To promote a comprehensive and consistent approach to the problem of radon in homes, a test should be required whenever property changes hands.²³⁶ Test results will enable homebuyers to make an informed purchase and thus avoid potentially grave physical harm and economic loss.²³⁷

24, 1986, at B2; cols. 3-4 (homeowner alerted by chemist neighbor of radon's presence in immediate area said, "I never even heard of radon and didn't understand what they were talking about").

231. Unlike many outdoor air pollutants, radon is colorless, odorless and detectible only with scientific instruments. *See generally Indoor Air Pollution, supra* note 22, at 362 n.183.

232. *See id.* Radon is not immediately harmful, since the resulting cancer has a latency period of 20-30 years. *See supra* note 4.

233. *See Indoor Air Pollution, supra* note 22, at 362 n.183. Although radon presents a problem of national significance, it tends to affect either isolated locales or families. *See id.* In contrast, the public often becomes aware of outdoor air pollution through publicized disasters, affecting large numbers of people simultaneously. *See id.*

Moreover, radon is a complex scientific dilemma requiring expert help at every stage from testing to remedying. *See supra* notes 7-12 and accompanying text. In fact, the public's reaction to radon is one of bewilderment. For example, one resident said, "We've been here all these years, and I don't see why we should get too upset." *Scenic Site Unsettled By Radon*, N.Y. Times, Apr. 3, 1986, at B1, col. 1. Another resident whose house had the highest concentration of radon ever reported in his community said, "I'm dealing with something that's invisible, it's silent and it's a killer. I don't understand it and I'm terrified." *Radioactive Gas Alters Lives of Pennsylvanians*, N.Y. Times, Oct. 28, 1985, at A10, col. 2. Finally, people have strong emotional and financial ties to their homes which, combined with radon's intangible nature, may blind them to its latent dangers. *See Indoor Air Pollution, supra* note 22, at 362 n.183.

234. *See supra* notes 228-33 and accompanying text.

235. *See supra* notes 178-96 and accompanying text.

236. *See supra* notes 16-29 and accompanying text.

237. *See supra* notes 4-6, 13-15 and accompanying text.

The EPA could easily implement and enforce such a specifically targeted statute through the states.²³⁸ The EPA and the states already have a working relationship through the EPA radon education program.²³⁹ Moreover, the EPA could establish jurisdiction through several existing statutes—most notably the Clean Air Act²⁴⁰ and the Uranium Mill Tailings Act.²⁴¹

The EPA has already researched radon²⁴² and its health hazards.²⁴³ Despite the fact that the EPA has been actively researching radon,²⁴⁴ the agency has no current plans to regulate radon because it is a naturally-occurring form of indoor air pollution.²⁴⁵ Experts, however, have called the EPA's indoor-outdoor distinction invalid from a health point of view.²⁴⁶ The ultimate effect of the gas—increased risk of lung cancer²⁴⁷—is the same, regardless of its origin.²⁴⁸ In fact, natural radon poses a greater health hazard than do most man-made pollutants.²⁴⁹ For example, “[p]eople who live near the Three Mile Island plant receive more radiation exposure from radon in their homes every day than they got in total from the 1979 accident there.”²⁵⁰ In addition, radon concentrations are higher indoors than

238. See *supra* notes 84-87 and accompanying text for examples of state statutes protecting homebuyers.

239. See *supra* notes 27-29 and accompanying text.

240. See *supra* notes 22-23.

241. See *supra* note 17 and accompanying text.

242. See *supra* note 23 and accompanying text.

243. See *supra* note 11 and accompanying text.

244. See *supra* notes 17, 23 and accompanying text.

245. See *supra* notes 17, 24 and accompanying text.

246. See *U.S. Spending on Radiation Dangers Is Skewed*, N.Y. Times, Dec. 6, 1985, at A34, col. 3 [hereinafter *Spending on Radiation*] (letter from Bernard L. Cohen, Professor of Physics, University of Pittsburgh).

247. See *supra* notes 4-6 and accompanying text.

248. Professor Cohen stated that “[w]hen radiation strikes a molecule in the nucleus of a human cell, which is a cancer-initiating event, there is no possible way for that molecule to ‘know’ whether that radiation came from radon or from plutonium produced in a reactor; the consequences must therefore be the same.” *Spending on Radiation*, *supra* note 246, at A34, col. 3; see also *U.S. to Conduct National Survey To Determine Radon Gas Hazard*, N.Y. Times, Sept. 15, 1985, at 23, col. 5 (Richard E. Yuhnke, official with the Environmental Defense Fund, stating that setting of the gas does not change its effects).

249. See *supra* note 6 and accompanying text.

250. *Spending On Radiation*, *supra* note 246, at A34, col. 3. Americans currently receive fifty times more exposure to radiation from radon in their homes than they will eventually receive from the nuclear power industry, based on nuclear accident projections by the Union of Concerned Scientists. See *id.* Even people who live next door to nuclear power plants get more radiation exposure in a day from radon than they get in a year from the plants. See *id.*

outdoors.²⁵¹ As a result, occupants who are most susceptible to the dangers of radon—the young, the old, and the ill—those who are likely to spend more time indoors,²⁵² are at greater risk.

In 1986, the Government Accounting Office (GAO), the investigative and auditing arm of Congress, published a comprehensive report²⁵³ covering: (1) the public's exposure to and health effects of radon;²⁵⁴ (2) the costs and methods of reducing radon;²⁵⁵ and (3) federal efforts to address the problem.²⁵⁶ The report recommended that Congress designate the EPA as responsible for both researching and regulating radon,²⁵⁷ which the report called a "growing national concern."²⁵⁸ The stated purpose of the GAO in proposing such EPA responsibility is "a unified, consistent, and well-coordinated approach to addressing indoor radon problems,"²⁵⁹ and "clear accountability."²⁶⁰ In fact, a recent internal EPA report concluded that the agency has been focusing on lesser environmental problems to the detriment of such "high risk"²⁶¹ problems as radon.²⁶²

Since the EPA now regulates outdoor air pollution, other federal agencies naturally look to the EPA for guidance on indoor pollution problems like radon.²⁶³ Furthermore, the EPA is now doing most of the current radon research and is implementing a strategy to address the problem throughout the states,²⁶⁴ which rely on the EPA for education and guidance in dealing with the problem.²⁶⁵ For example, the agency has published a list of qualified testers.²⁶⁶

Thus, by providing the benefits of its superior knowledge, the EPA can eliminate the need for sellers, buyers and brokers to research the difficult scientific intricacies of radon and its health hazards.²⁶⁷

251. See *Indoor Air Pollution*, *supra* note 22, at 340; see also *supra* note 10.

252. See *id.*

253. See generally AIR POLLUTION, *supra* note 1.

254. See *id.* at 18-24.

255. See *id.* at 26-34.

256. See *id.* at 36-43.

257. See *id.* at 49.

258. See *id.* at 1.

259. See *id.* at 49.

260. See *id.*

261. See *EPA Report Says Agency Focuses on Lesser Problems*, N.Y. Times, Feb. 19, 1987, at B6, col. 5.

262. See *id.*

263. See generally AIR POLLUTION, *supra* note 1, at 41-43.

264. See *id.* at 40-41.

265. See *id.*

266. See *supra* note 7 and accompanying text.

267. See *supra* notes 228-33 and accompanying text.

Furthermore, EPA regulation of testing by brokers would significantly reduce negligent and fraudulent testing.²⁶⁸ The EPA would simply prescribe official testing methods,²⁶⁹ establish mandatory safe levels,²⁷⁰ and require the broker to test, a duty which the states would enforce.²⁷¹ Such a duty would merely be one aspect of the broker's larger professional and ethical responsibility to conduct an investigation of property for sale for the protection of the physical and economic well being of the prospective homebuyer.²⁷²

In a real estate transaction, there are many variables. Usually the broker is in the best position to monitor them.²⁷³ Moreover, he has the advantage of knowledge and experience²⁷⁴ and, therefore, can easily set up a radon testing system in his practice, using outside experts.²⁷⁵ Testing costs are low,²⁷⁶ and some states currently offer free radon testing.²⁷⁷ Furthermore, potential liability would give the broker strong incentive to test.²⁷⁸

V. Conclusion

Currently, most radon in homes originates from nature, a source that Congress did not anticipate when it enacted the Uranium Mill

268. See, e.g., *Gas Test Assailed for Pennsylvanians*, N.Y. Times, Nov. 2, 1986, at 53, col. 1. Despite state recommendations that real estate companies in Pennsylvania use radon tests certified by the EPA, some companies were using outmoded tests. According to one expert, "[t]he problem with real estate transactions is you have to trust the person who owns the house. If a window is left open, you can get a very different reading. If you have an electrostatic precipitator . . . that can get the level down significantly." *Id.*

In Butte, Montana, residents opened windows hours before radon testing that was required by the Department of Housing and Urban Development, and as a result, gas levels fell. See *id.*; see also AIR POLLUTION, *supra* note 1, at 38-39.

269. See *supra* note 7.

270. Currently, the EPA merely recommends safe levels. See *supra* note 11.

271. See *supra* notes 27-29 and accompanying text.

272. See *supra* notes 204-83 and accompanying text.

273. See *supra* notes 223-27 and accompanying text.

274. See *supra* notes 169-77 and accompanying text.

275. According to one authority, "[a]s scientific knowledge advances, and more and more effective tests become available, what was excusable ignorance yesterday becomes negligent ignorance today." PROSSER & KEETON ON TORTS, *supra* note 71, § 32, at 185. Furthermore, the Code of Ethics of the National Association of Realtors prohibits a realtor from providing "specialized professional services concerning a type of property or service that is outside his field of competence unless he engages the assistance of one who is competent on such types of property or service, or unless the facts are fully disclosed to the client." *Menzel v. Morse*, 362 N.W.2d 465, 469 (Iowa 1985) (quoting National Ass'n of Realtors Code of Ethics, art. 11 (7th ed. 1978)).

276. See *supra* note 9.

277. See *id.*

278. See *supra* note 138 and accompanying text.

Tailings Control Act to address the dangers of man-made radon. Regardless of its origin, all radon causes lung cancer. Thus, Congress must regulate naturally-occurring radon in homes to prevent many potential deaths. As a knowledgeable professional obligated to inspect property for sale, the real estate broker can arrange for a test as soon as a home goes on the market, thereby preventing both loss of time in the sales transaction and potentially harmful exposure of homebuyers to deadly radon gas.

Sheldon Winicour

