TOURO COLLEGE
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 36 | Number 2 Article 3

2020

Caveat Emptor: Real Property Law's "Get Out of Jail Free" Card V. the Property Condition Disclosure Act

Alessandra E. Albano
Touro Law Center

CAVEAT EMPTOR: REAL PROPERTY LAW'S "GET OUT OF JAIL FREE" CARD V. THE PROPERTY CONDITION DISCLOSURE ACT

*Alessandra E. Albano**

I. INTRODUCTION

The doctrine of caveat emptor, or the real-life "get out of jail free card," is a common law doctrine that traces back to our English roots and greatly influenced many state laws over time.[1] The premise of "let the buyer beware"[2] was replaced by legislation in many states requiring disclosure statements in the purchase and sale of residential real property.[3] While the use of the doctrine varies from state to state, it was regarded favorably in New York until the adoption of new legislation approximately eighteen years ago.[4]

In New York, the remnants of the doctrine of caveat emptor can be seen today, as the state has taken a different approach from its old roots.[5] Before March 1, 2002, New York was considered a caveat emptor state, in which it abided by the traditional common law doctrine on all matters regarding the sale of residential real estate.[6] The doctrine imposed "no duty on the seller to disclose any information concerning the premises when the parties deal at arm's length unless there is some conduct on the part of the seller which constitutes active

* J.D. Candidate 2021, Touro College Jacob D. Fuchsberg Law Center; B.S. Business Administration, St. Joseph's College – Long Island. I would like to thank Professor Rena Seplowitz for providing unlimited guidance and support throughout the writing process. I would also like to thank Howard M. Stein, Esq. and the entire Real Estate Department at Certilman Balin Adler & Hyman, LLP for igniting my interest in this area of law.

1 Cendant Mobility Financial Corp. v. Asuamah, 285 Ga. 818, 819 (2009).

2 *Id.*

3 *See* N.Y. REAL PROPERTY LAW § 462 (McKinney 2019).

4 *See id.*

5 *See id.*

6 *See* Platzman v. Morris, 724 N.Y.S.2d 502 (App. Div. 2d Dep't 2001).

concealment."[7] The doctrine of caveat emptor further states that to be successful in an action for active concealment, the purchasing party must prove that the selling party thwarted the purchasing party's efforts in fulfilling its due diligence.[8]

The New York legislature's enactment of the Property Condition Disclosure Act (the "PCDA") on March 1, 2002, altered the way New York viewed residential real property transactions.[9] Here, each seller must furnish the purchaser with a truthful and complete Property Condition Disclosure Statement (the "PCDS").[10] The PCDA gives more power to the purchasing party to obtain accurate information.[11] If the premises differ from any of the responses on the form, the seller would be liable.[12]

The use of the PCDA allowed for the doctrine of caveat emptor to be diminished.[13] However, Section 465 of the PCDA recalls the common law doctrine.[14] This section allows sellers to opt-out of providing purchasers with a PCDS by giving purchasers a five-hundred-dollar credit at closing.[15] This credit resembles liquidated damages because the purchaser cannot sue a seller for any other defects or deficiencies regarding the property.[16] The reestablishment of the doctrine of caveat emptor creates a seller-centric selling environment.

This Note will focus on the PCDA's impact on residential real estate transactions from both a seller's standpoint and a purchaser's standpoint. It will address the PCDA's initial shift of liability from the purchaser to the seller. It will further address how the inclusion of the opt-out option subsequently shifts the liability back to the purchaser. Furthermore, this Note will discuss the irrelevancy of the PCDA with the inclusion of the opt-out option.

This Note will be divided into nine sections. Section II will discuss the common law doctrine of caveat emptor and its applicability in New York. Section III will examine the well-known New York

---

[7] *Id.* at 504.

[8] *Id.*

[9] *See* N.Y. REAL PROPERTY LAW §§ 462-65 (McKinney 2019).

[10] *See id.* § 462. This forty-eight-question form outlines property conditions.

[11] *See id.*

[12] *Id.*

[13] *See id.*

[14] *See id.* § 465.

[15] *Id.* § 465(1).

[16] *See generally id.* § 465.

Appellate Division case, *Stambovsky v. Ackley*.[17] Section IV will provide an overview of the PCDA and explore the legislative intent behind the PCDA. Section V will explore the "opt-out" option included in the PCDA. Section VI will analyze the impact of "as-is" clauses. Section VII will discuss similar legislation in other states. Section VIII will examine the relevance of the PCDA with the inclusion of the "opt-out" option. This section will also recommend changes to the PCDA for the future. Finally, Section IX will conclude the Note.

II. CAVEAT EMPTOR AND ITS APPLICABILITY IN NEW YORK

The doctrine of caveat emptor is a longstanding rule within traditional English law.[18] This doctrine acts as a warning to purchasers to beware of potential problems lurking in the shadows of their future purchases. In New York, the doctrine of caveat emptor heavily influenced the state's residential real property laws.[19] Under the doctrine, it shows that a seller has no duty to disclose any information concerning the property when dealing at arm's length unless there is a confidential, fiduciary relationship or the conduct of the seller rises to the level of active concealment or material misrepresentation.[20] Furthermore, "to maintain a cause of action to recover damages for active concealment in the context of a fraudulent non-disclosure, the buyer must show, in effect, that the seller thwarted the buyer's efforts to fulfill the buyer's responsibilities fixed by the doctrine of caveat emptor."[21] A duty to disclose also arises in the case of negligent

---

[17] 572 N.Y.S.2d 672 (App. Div. 1st Dep't 1991).

[18] Alan M. Weinberger, *Let the Buyer Be Well Informed? – Doubting the Demise of Caveat Emptor*, 55 MD. L. REV. 387, 387-88 (1996).

[19] *See, e.g.*, Mancuso v. Rubin, 861 N.Y.S.2d 79, 83 (App. Div. 2d Dep't 2008); Simone v. Homecheck Real Estate Servs., Inc., 840 N.Y.S.2d 398, 400 (App. Div. 2d Dep't 2007); Platzman v. Morris, 724 N.Y.S.2d 502, 504 (App. Div. 2d Dep't 2001); London v. Courduff, 529 N.Y.S.2d 874, 875 (App. Div. 2d Dep't 1988).

[20] *Stambovsky*, 572 N.Y.S.2d at 675; *Platzman,* 724 N.Y.S.2d at 504. A fiduciary relationship is "one founded upon trust or confidence reposed by one person in the integrity and fidelity of another." Holmes v. Lorch, 329 F. Supp. 2d 516, 526 (S.D.N.Y. 2004) (quoting Penato v. George, 383 N.Y.S.2d 900, 904-05 (App. Div. 2d Dep't 1976)). Examples of fiduciary relationships include attorney/client relationships, principal/agent relationships, and trustee/beneficiary relationships.

[21] *Mancuso*, 861 N.Y.S.2d 79, 83 (App. Div. 2d Dep't 2008) (quoting *Simone*, 840 N.Y.S.2d at 400).

misrepresentation[22] and fraud.[23] Generally, mere silence does not amount to active concealment unless there is some accompanying act in which the seller attempted to hide the truth surrounding the property.[24]

A. The Purchaser's Burden of Proof

Sellers generally favor caveat emptor because the burden of proof falls on the purchaser to show misrepresentation, concealment, or fraud.[25] In *Mancuso v. Rubin*,[26] the plaintiff purchaser entered into a contract for the sale of a single-family home.[27] The purchaser was responsible for obtaining an engineer's inspection report.[28] The engineering company completed the inspection and claimed that there was no evidence of termite infestation or termite damage.[29] After closing, the purchaser discovered termites and commenced an action against the seller for fraudulent concealment and breach of contract.[30]

The court found that the purchaser's contentions were not viable.[31] Generally, to prove fraud, the purchaser has the burden of proof using facts.[32] Here, the court stated that the purchaser's claim was merely a conclusory allegation because the purchaser did not provide evidence of concealment by the sellers.[33]

---

[22] *See* Sample v. Yokel, 943 N.Y.S.2d 694, 697 (App. Div. 4th Dep't 2012). Negligent misrepresentation requires proof of three elements: "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff[s]; (2) that the information was incorrect; and (3) reasonable reliance on the information." *Id.*

[23] *Id.* at 697. "[T]o establish a cause of action for fraud, plaintiff[s] must demonstrate that defendant knowingly misrepresented a material fact upon which plaintiff[s] justifiably relied and which caused plaintiff[s] to sustain damages." *Id.* (quoting Klafehn v. Morrison, 906 N.Y.S.2d 347, 348 (App. Div. 3d Dep't 2010)).

[24] *See* Anderson v. Meador, 869 N.Y.S.2d 233, 237 (App. Div. 3d Dep't 2008).

[25] *See generally* 17 WILLISTON ON CONTRACTS § 50:26 (4th ed. 2019).

[26] 861 N.Y.S.2d 79, 83 (App. Div. 2d Dep't 2008).

[27] *Id.* at 81.

[28] *See id.*

[29] *Id.* Because it is difficult to find termites, the engineering company disclaimed liability if termites were subsequently found.

[30] *Id.* at 81.

[31] *Id.* at 83.

[32] *Id.*

[33] *Id.* Also, the court held that the "as-is" clause in the contract for sale precluded the purchaser's breach of contract claim. *Id.* In addition to the "as-is" clause, the doctrine of merger controlled. *Id.* The doctrine of merger states that all representations, documents, and

The doctrine of caveat emptor instructs the purchaser to beware of all property conditions prior to closing. The purchaser has the burden of inspecting the property to investigate defects and inconsistencies.[34] When dealing at arm's length, a seller does not have a duty to disclose any property defects.[35] However, a seller cannot fraudulently conceal defective property conditions to deceive the purchaser.[36]

B. A Purchaser's Duty to Exercise Due Diligence

When purchasing residential real property, a purchaser's obligation to exercise due diligence is essential. In *Schottland v. Brown Harris Stevens Brooklyn, LLC*,[37] the plaintiff purchased a home in 2010 and later commenced an action for fraud and negligent misrepresentation.[38] After closing, the purchaser discovered an easement on the property, which was properly recorded in 2003.[39] The court found for the seller because the purchaser should have exercised due diligence in attempting to discover the easement before closing.[40] The court stated:

> Where the facts represented are not matter peculiarly within the party's knowledge, and the other party has the means available to him of knowing by the exercise of ordinary intelligence, the truth of the real quality of the subject of the representation, he must make use of those means or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations.[41]

---

forms merge under the deed and, if not present within the written deed, such provisions are excluded. *See* Hunt v. Kojac, 666 N.Y.S.2d 330, 332 (App. Div. 3d Dep't 1997).

34 17 WILLISTON ON CONTRACTS § 50:32 (4th ed. 2019).

35 *See* Platzman v. Morris, 724 N.Y.S.2d 502, 504 (App. Div. 2d Dep't 2001).

36 *See id.*

37 968 N.Y.S.2d 90 (App. Div. 2d Dep't 2013).

38 *Id.* at 91.

39 *Id.* at 91-92.

40 *Id.* at 92.

41 *Id.*

The seller properly recorded the easement.[42] Therefore, the purchaser had all available means to discover the easement before purchasing the property.[43]

A purchaser's duty to exercise due diligence plays a vital role in purchasing residential real property. In *Rosenblum v. Glogoff*,[44] the purchasers entered into a contract for the sale of a Manhattan co-op.[45] The plaintiff purchasers commenced an action against the defendant sellers, alleging that the sellers materially misrepresented that the apartment had "through wall air conditioning," when, in fact, only two rooms had it.[46]

Before their June closing, the purchasers were conducting a final walk-through and noticed the apartment's high temperature.[47] The sellers' broker told the purchasers that the air conditioning unit was located in the living room cabinet.[48] However, the purchasers did not find the unit there.[49] The purchasers then tried to cancel the contract.[50]

The court held that the purchasers had every means of investigating the air conditioning system, or lack thereof, before entering the purchase and sale agreement. [51] With this, there was no evidence of concealment.[52] The sellers did not thwart the purchasers' "effort to fulfill their responsibilities fixed by the doctrine of caveat emptor," and the purchasers "had the means to discover the truth by the exercise of ordinary intelligence."[53] Furthermore, the court held that because the purchasers defaulted, they breached the contract.[54] Thus, the sellers were able to retain the purchasers' down payment.[55]

---

[42] *Id.*

[43] *Id.* at 92-93.

[44] 932 N.Y.S.2d 763 (Sup. Ct. N.Y. Cty. 2011).

[45] *Id*. at 763.

[46] *Id.* The purchasers initially visited the apartment during the winter months and inquired about the air conditioning system. *Id.* The sellers' broker explained that there existed "through wall air conditioning," except in the kitchen. The purchasers claimed reliance on the broker's word. *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

Exercising due diligence is a formal way of saying that purchasers must "do their homework" before entering into a contract for sale. Inspection is the most common way to satisfy the duty of due diligence in caveat emptor cases.[56] The previous cases show how each purchaser did not exercise due diligence.[57] As such, the doctrine of caveat emptor allowed the courts to find for the sellers.

C. Exceptions to the Doctrine of Caveat Emptor

While the doctrine of caveat emptor has a broad application in traditional common law, the doctrine would not apply if there is evidence of fraudulent concealment.[58] A seller, who the court finds engages in such misconduct, loses the benefit of the doctrine of caveat emptor.[59] In *Delano v. USA Home Inspection Servs.*,[60] the purchaser chose to have the property inspected before entering into the sales contract.[61] In the inspection report, the inspector noted that the home's heating system was working.[62] However, after closing, the purchaser discovered that the heating system was disconnected in various places and sued the sellers for fraud.[63]

The court held that "the doctrine of caveat emptor has been held not to apply in instances where a party has been found to engage in active concealment."[64] Here, the sellers disguised the connection of the heating system by finishing and painting the walls where the heating system was disconnected, in addition to carpeting the floor.[65] Furthermore, the sellers installed register vents in the walls to give the impression that the system was connected.[66] The court found this to be active concealment for which the sellers were held liable.[67]

Typically, it is the purchaser's responsibility to research and investigate the property prior to entering the sales contract. However,

---

[56] *See* cases cited *supra* note 33.

[57] *See, e.g.*, Schottland v. Brown Harris Stevens Brooklyn, LLC, 968 N.Y.S.2d 90 (App. Div. 2d Dep't 2013); *Rosenblum*, 932 N.Y.S.2d 763.

[58] 17 WILLISTON ON CONTRACTS § 50:29 (4th ed. 2019).

[59] *See infra* note 60.

[60] 841 N.Y.S.2d 819 (Sup. Ct. Suffolk Cty. 2007).

[61] *Id.* at 819.

[62] *Id.*

[63] *Id.* In addition to suing the sellers, the purchaser also sued the inspector.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

if the purchaser reasonably inspected the property and did not find any defects, the seller may be liable if the purchaser finds evidence of concealed defects.[68] Actively concealing leaks by using reservoirs to catch the falling liquid is one form of active concealment.[69] Additionally, disguising mechanisms to hide their dysfunctionality also constitutes active concealment.[70] Here, a reasonable purchaser and inspector would likely assume that the property is in good condition. Thus, this casts responsibility on the seller for lying about the property conditions.

D. Duty to Disclose Jurisdictions

Another approach to residential real property law is the duty to disclose. Some states apply this standard instead of caveat emptor.[71] Here, a seller must disclose material defects regarding any condition that is not readily observable by the purchaser, plus any defective condition within the seller's knowledge.[72] Some duty to disclose jurisdictions, like Indiana, "codified a portion of the normal home-buying back-and-forth between buyers and sellers, and in doing so streamlined the process with the aim of starting every such transaction on the same footing."[73]

Additionally, jurisdictions such as Florida opted to utilize the duty to disclose approach.[74] In *Johnson v. Davis*,[75] the sellers failed to disclose material, defective conditions.[76] Under the sales contract, it was the purchasers' responsibility to obtain a written report drafted by

---

[68] *See infra* note 69.

[69] *See* Margolin v. I M Kapco, Inc., 932 N.Y.S.2d 122, 124 (App. Div. 2d Dep't 2011). The plaintiff purchaser brought an action for fraudulent concealment. *Id.* After purchasing a home in Nassau County, she noticed multiple leaks from the skylights in the home, which caused extensive damage. *Id.* The court held that there was significant evidence that the seller fraudulently concealed the leaks. *Id.* The purchaser contended that the seller used "large commercial-size aluminum roasting pans" to disguise the presence of any leaks. *Id.* at 124. The appellate court held that this showed evidence of active concealment. *Id.* Thus, if such conduct is proven, the seller would be held liable. *Id.*

[70] *See Delano*, 841 N.Y.S.2d at 819.

[71] *See infra* notes 73-76.

[72] Florrie Young Roberts, *Let the Seller Beware: Disclosures, Disclaimers, and "As Is" Clauses*, 31 REAL EST. L. J. 303 (2003).

[73] IND. CODE ANN. § 32-21-5-7 (West 2019).

[74] *See* Alan M. Weinberger, *Let the Buyer Be Well Informed? – Doubting the Demise of Caveat Emptor*, 55 Md. L. Rev. 387, 400 (1996).

[75] 480 So. 2d 625 (Fla. 1985).

[76] *Id.* at 626.

a roofer indicating the watertight condition of the roof.[77] Under the agreement, if repairs were needed, the sellers shall pay for them.[78] Upon inspection, the purchasers noticed buckling and peeling plaster around a window, as well as stains on the wallpaper.[79] The roofers hired by the purchasers claimed that the roof was completely defective, and the only solution to create a watertight seal would be to replace the roof.[80] Consequently, the purchasers sued claiming breach of contract, fraud, and misrepresentation, in addition to requesting the return of their deposit.[81]

The Supreme Court of Florida held that Florida law has since shied away from the doctrine of caveat emptor and moved towards a fairer and more equitable standard: duty to disclose.[82] The court stated that "[o]ne should not be able to stand behind the impervious shield of caveat emptor and take advantage of another's ignorance."[83] Here, "where the seller of a home knows of facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer."[84] Since sellers knew of the material defect and opted not to disclose, they were held liable for their actions.[85] Accordingly, the court awarded the purchasers their deposit plus interest, costs, and fees.[86]

The duty to disclose standard imposed throughout many states proves to be fairer because it takes some pressure off the purchaser to discover latent material defects during a home inspection. Under the traditional doctrine of caveat emptor, even if there are latent material defects, a seller is not liable so long as he did not actively conceal or misrepresent the property.[87] As such, the duty to disclose standard provides for a more equitable solution to solving real property disputes. With the combination of concepts modeled on the doctrine

---

[77] *Id.*

[78] *Id.*

[79] *Id.* The sellers stated that the problem was already corrected. *Id.* However, in the days following the confrontation, the purchasers were greeted with water gushing from the defective area, the ceiling, and light fixtures. *Id.*

[80] *Id.*

[81] *Id.*

[82] *See id.* at 628.

[83] *Id.*

[84] *Id.* at 629.

[85] *Id.*

[86] *Id.*

[87] 17 WILLISTON ON CONTRACTS § 50:29 (4th ed. 2019).

of caveat emptor and disclosure rules modeled on fairness, the duty to disclose standard provides a "happy-medium" for purchasers and sellers alike.

E. Analysis of Recent Caveat Emptor Cases

An example of a typical caveat emptor case is *Platzman v. Morris*.[88] In *Platzman*, the plaintiff purchasers entered into a contract for the sale of a home in Nanuet, New York.[89] Upon inspecting the home and before entering the agreement with the defendant sellers, the purchasers observed that the home included three kitchens, one on each level of the home.[90] In the sales contract, the sellers represented the home as a legal one-family home.[91] The contract further included an "as-is" clause, which provided that the purchasers were aware of the current condition of the property and agreed to take possession of it in its final, "as-is" condition from the sellers.[92] Moreover, the "as-is" clause stated that the purchasers would not rely on any other representations or information given by the sellers.[93] After discovering the illegality of the second-floor kitchen, the purchasers claimed fraud.[94]

The court held that the doctrine of caveat emptor applied.[95] The purchasers had the duty to inspect the property at their leisure.[96] A proper inspection would have included an inquiry into the legality of each of the three kitchens.[97] Since the purchasers did not make any attempt to investigate, they did not fulfill their duty under caveat emptor.[98] Additionally, the purchasers signed the contract with the "as-is" clause, which provided that the purchasers were fully aware of the condition of the property before purchase.[99]

---

[88] 742 N.Y.S.2d 502 (App. Div. 2d Dep't 2001).

[89] *Id.* at 503.

[90] *Id.* The sellers stated that the basement kitchen was illegal, while the kitchens on the first and second floors were legal.

[91] *Id.*

[92] *Id.*

[93] *Id.* The purchasers were responsible for taking the property subject to their inspection.

[94] *Id.*at 503-04.

[95] *Id.* at 504.

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.* The presence of such a clause further emphasized the purchasers' need to fully inspect the premises.

While professional inspection is essential for claimants suing for fraud or misrepresentation, the presence of factual statements is equally important.[100] In *Glazer v. LoPreste*,[101] the plaintiff purchasers entered into a contract for the sale of a home in Nassau County.[102] Prior to entering the agreement, the purchasers inquired about the desirability of the area and how it correlated to raising children.[103] The defendant sellers stated that the neighborhood was "a good place to raise children."[104] According to the purchasers' complaint, a convicted sex offender lived across the street from the property.[105] The purchasers sought damages on the basis that the sellers fraudulently misrepresented the characteristics of the neighborhood.[106]

The court held that the doctrine of caveat emptor applied because there was no indication of misrepresentation on the part of the sellers.[107] There are only two ways of recovering under the doctrine of caveat emptor for misrepresentation: either the presence of a fiduciary relationship or the presence of fraud.[108] The court determined that this was a traditional arm's length transaction and that no fiduciary relationship could be inferred.[109] Furthermore, the sellers did not fraudulently misrepresent property information.[110] The court found that any information provided to the purchasers regarding the characteristics of the neighborhood constituted mere opinions.[111] A seller makes a misrepresentation when the statements are fact-based and not opinions.[112]

Additionally, the court also found that the purchasers could not maintain a claim for fraud because they could have easily discovered the charges against their new neighbor by due inquiry.[113] Any

---

100 *See* Glazer v. LoPreste, 717 N.Y.S.2d 256 (App. Div. 2d Dep't 2000).
101 *Id.*
102 *Id.* at 257.
103 *Id.*
104 *Id.*
105 *Id.*
106 *Id.*
107 *Id.* at 258.
108 *Id.*
109 *Id.*
110 *Id.*
111 *Id.*
112 *See id.*
113 *Id.*

reasonably prudent purchaser could have become aware of these charges by reading articles printed in local newspapers.[114]

Before the enactment of the PCDA, New York Real Property Law focused heavily on limiting liability for the seller.[115] Purchasers bore the brunt of the responsibility.[116] Essentially, sellers were shielded from liability for property defects unless there was some indication of misrepresentation or fiduciary relationship. Purchasers, on the other hand, were responsible for knowing and understanding all property conditions. It is a purchaser's responsibility to investigate the property prior to entering into a contract.

New York's historical doctrine of caveat emptor required purchasers "to do their homework" before they entered a contract.[117] Purchasers always maintain the right to inspect the property before closing.[118] Thus, the purchasers had the duty to inspect the premises for illegalities and other nonconformities.[119] However, in *Platzman*, the purchasers relied on the sellers' word and did not exercise due diligence.[120] Similarly, in *Glazer*, the purchasers claimed reliance on the sellers' opinions about the characteristics of the neighborhood and its compatibility with raising a child.[121] The purchasers did not make any effort to investigate the neighborhood before contracting with the sellers.[122] By adopting the doctrine of caveat emptor, New York desired to eradicate the use of non-justifiable reliance as an excuse to rescind a contract.[123]

When negotiating, purchasers should not rely on sellers' words. It is a well-known rule of contract law that the duty of good faith and fair dealing only applies once the parties form a contract.[124] During the negotiation process, there is no direct duty of good faith and fair dealing.[125] The doctrine of caveat emptor reminds purchasers that they

---

114 *Id.* As such, the court held for the sellers.

115 *See* 17 WILLISTON ON CONTRACTS § 50:26 (4th ed. 2019).

116 *See id.*

117 *See id.*

118 *See* Platzman v. Morris, 742 N.Y.S.2d 502 (App. Div. 2d Dep't 2001).

119 *Id.*

120 *Id.*

121 Glazer v. LoPreste, 717 N.Y.S.2d 256, 257 (App. Div. 2d Dep't 2000).

122 *Id.*

123 *See generally* 17 WILLISTON ON CONTRACTS § 50:26 (4th ed. 2019).

124 U.C.C. § 1-304 (AM. LAW INST. & UNIF. LAW COMM'N 1977).

125 In re 50 Pine Co., LLC, 317 B.R. 276, 283 (Bankr. S.D.N.Y. 2004) (*See* RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. LAW INST. 1981)).

need to investigate for themselves, regardless of what was said or promised prior to contracting for the sale of the property, absent fraud.[126]

III. STAMBOVSKY V. ACKLEY

The doctrine of caveat emptor involves a large amount of double, double toil and trouble. For purchasers, this doctrine is considered one of the most feared of all. Lurking in the shadows, the haunting caldron of caveat emptor bubbled over in *Stambovsky v. Ackley*.[127]

The quaint village of Nyack, New York is known for its charm and traditional Victorian homes.[128] However, the village was publicized for unique folklore involving poltergeists.[129] *Stambovsky v. Ackley* took New York on a journey throughout the riveting world of paranormal activity.[130]

The plaintiff purchaser, Stambovsky, sought to purchase a home from the defendant seller, Ackley.[131] Unbeknownst to Stambovsky, the home was purportedly haunted.[132] Throughout the 1970s and 1980s, the home caught the eyes of thousands, captivating residents' eyes and drawing their attention towards this perplexing, paranormal phenomenon through its publication in newspapers.[133] Stambovsky willingly entered into the contract without the knowledge of the haunting to which he became bound.[134] Once becoming cognizant of the situation, Stambovsky sought to rescind the contract.[135] Not only was Stambovsky concerned about his well-being,

---

[126] While this rule is clearly advantageous for sellers, it is blatantly unfair to unsuspecting purchasers. This opens up a realm of opportunity for justifiable reliance by the purchasers, which is seemingly pushed to the side when the doctrine of caveat emptor is involved.

[127] 572 N.Y.S.2d 672 (App. Div. 1st Dep't 1991).

[128] *See generally* Win Perry, *History of Nyack NY*, VISIT NYACK, http://visitnyack.org/history-of-nyack/ (last visited Apr. 15, 2020).

[129] *See generally Stambovsky*, 572 N.Y.S.2d 672.

[130] This case received special emphasis in this Note because of the unique situation of the parties and the applicability of the doctrine of caveat emptor.

[131] *Stambovsky*, 572 N.Y.S.2d at 674.

[132] *Id.*

[133] *Id.* However, as a native New York City resident, Stambovsky did not receive local newspapers, and thus was unaware of the news.

[134] *Id.*

[135] *Id.*

but he was worried about the current property value and the future resale value of the home.[136]

The issue was whether Stambovsky was entitled to rescind the purchase agreement based on fraudulent misrepresentation.[137] The trial court dismissed the action and Stambovsky appealed.[138] At the time, New York primarily operated under the doctrine of caveat emptor.[139]

Here, the appellate court insinuated that the presence of paranormal activity was considered a material defect.[140] Under the doctrine of caveat emptor, a purchaser must "act prudently to assess the fitness and value of his purchase."[141] While a purchaser is under a duty to conduct a reasonable investigation of the premises before entering a contract for sale, such investigation would not have been reasonable.[142] Justice Rubin noted that "the most meticulous inspection of the premises and the search would not [have revealed] the presence of poltergeists at the premises or [unearthed] the property's ghoulish reputation in the community."[143]

The court noted that the doctrine of "caveat emptor is not so all-encompassing a doctrine of common law as to render every act of non-disclosure immune from redress whether legal or equitable."[144] The court went on to mention the Latin phrase, *ex facto jus oritur*, or "the law arises out of facts."[145] The court reasoned that, after investigating the facts, if fairness and common sense would indicate that the court should recognize an exception to the general rule, "the evolution of law should not be stifled by rigid application of a legal maxim."[146] The court noted that the plaintiff had an equitable remedy despite the absence of one at law.[147] The court further held that it would offend the very nature of the law of equity to enforce such a

---

136 *Id.*

137 *Id.*

138 *Id.*

139 *Id.* at 675. As noted by the court, a seller does not have a duty to disclose unless there is a fiduciary relationship or the nondisclosure amounts to active concealment.

140 *Id.* at 676.

141 *Id.*

142 *See id.*

143 *Id.*

144 *Id.* at 675.

145 *Id.* at 676.

146 *Id.*

147 *Id.* The property was inevitably advertised to the public as a site for paranormal activity and Ackley may have owed Stambovsky even less of a duty to disclose.

contract for sale.[148] As such, the appellate court reinstated the claim for rescission.[149]

Enforcement of the contract would undeniably harm Stambovsky. The damaging effects of purchasing a home that has the reputation of being haunted, unbeknownst to the purchaser, would greatly outweigh any positive aspects of upholding the contract. However, the main objective of the court is to keep contracts in place. In this case, it would greatly offend the very basis of the law: to be fair and equitable. It is crucial to evaluate the claim for rescission based on both legal remedies and equitable remedies. When legal remedies fail, the court should turn to equitable remedies.[150] The court properly held that equity can support a claim for rescission.[151] Since Stambovsky was not native to the area, it would have been nearly impossible for him to know about the latent, paranormal conditions of the property.[152] Regardless of the attention the property received as a result of the seller's publication of the property as a haunted house, the purchaser still could not have reasonably anticipated such notoriety.[153] Furthermore, becoming aware of the presence of poltergeists is not similar to discovering other defective conditions, such as flooding, termites, and mold. A reasonably prudent purchaser can generally more readily observe these defects. In some cases, even an inspector can have difficulty discovering these defects. Paranormal activity is mysterious, latent, and undetectable by the naked eye.[154] As such, the court utilized its discretion correctly in determining that rescission would be fair and equitable.

Additionally, the court examined the effect of the "as-is" clause. The court noted that "[e]ven an express disclaimer will not be given effect where the facts are peculiarly within the knowledge of the party invoking it."[155] Furthermore, such a disclaimer would only

---

[148] *Id.* at 677. Additionally, the court noted that the defendant was responsible for the house's haunted reputation.

[149] *Id.*

[150] Equitable remedies may include rescission.

[151] *Stambovsky*, 572 N.Y.S.2d at 675.

[152] While the property was publicized in a national publication, approximately fifteen years had passed between the date of publication and the date of contract commencement. *Id.* at 674.

[153] Today, with the use of modern technology, a purchaser would easily be able to discover this information by initiating a Google search.

[154] *See Stambovsky*, 572 N.Y.S.2d at 676.

[155] *See id.* at 676-77 (citing Danann Realty Corp. v. Harris, 5 N.Y.2d 317, 322 (1959)).

preclude representations made regarding physical defects.[156] Here, the court clarified that paranormal activity was not considered physical or tangible, and thus the "as-is" clause did not extend to this condition.[157]

The outcome would have been the same if the litigants tried the case after the enactment of the PCDA. The court analyzed and resolved this case as a matter of equity, not as a matter of law. The PCDA limits the use of the doctrine of caveat emptor, except for the "opt-out" option.[158] However, the PCDA does not extend its grasp over the law of equity.[159] Therefore, if the court decides that the claim is equitable rather than legal, the court would shy away from the PCDA and use its sound discretion to determine the revocability of the contract or other remedies.[160]

Additionally, irrespective of the law of equity, the presence of paranormal activity was within the seller's actual knowledge.[161] The seller stated that the home was haunted and obtained national recognition for such conditions.[162] While paranormal activity is considered material and latent, the seller acted upon the information as if it was patent.[163] The seller wrongfully withheld such material information from the purchaser, and thus the purchaser agreed to the purchase without proper warning of the property conditions.[164] Under the PCDA, the seller should have disclosed property information to the buyer.[165] However, if the seller opted to provide the purchaser with the five-hundred-dollar credit, then the seller would only be liable if the purchaser could prove a misrepresentation on the seller's part.[166]

---

156 *Id.* at 260.
157 *Id.*
158 *See* N.Y. REAL PROPERTY LAW § 465 (McKinney 2019).
159 *See generally id.* § 462.
160 *See generally id.*
161 *See Stambovsky*, 572 N.Y.S.2d at 675.
162 *Id.* at 674.
163 *Id.* at 674-75.
164 *Id.*
165 *See* N.Y. REAL PROPERTY LAW § 462 (McKinney 2019).
166 *See id.* § 465.

IV. THE PROPERTY CONDITION DISCLOSURE ACT

The doctrine of caveat emptor imposes a strict burden on the purchasers.[167] In response, on March 1, 2002, the New York legislature enacted the Property Condition Disclosure Act (the "PCDA").[168] The legislature designed this statute to help buyers recover damages from undisclosed, defective conditions affecting residential real property.[169] The PCDA states that "every seller of residential real property pursuant to a real estate purchase contract shall complete and sign a property condition disclosure statement."[170] The seller shall deliver the disclosure statement to the buyer before the buyer signs the sales contract.[171] However, the PCDA does not prohibit parties from entering into "as-is" sales agreements.[172]

Section 462(2) of the PCDA outlines the format of the PCDS.[173] The PCDS is not a warranty by the seller, nor is it a substitute for property inspections.[174] Instead, the completed PCDS is a representation based on the seller's actual knowledge at the time of completion.[175] A seller will be held liable for actual damages suffered by a purchaser, and other existing equitable or statutory remedies if the seller's conduct amounts to a willful failure to perform the requirements under the PCDA.[176]

A. Legislative Intent of the Property Condition Disclosure Act

The PCDA intended to allow purchasers and sellers to obtain more information regarding the purchase and sale of residential real property and to increase the transparency with purchasers.[177]

---

[167] *See* Platzman v. Morris, 724 N.Y.S.2d 502 (App. Div. 2d Dep't 2001); Perin v. Mardine Realty Co., 168 N.Y.S.2d 647 (App. Div. 2d Dep't 1957).

[168] REAL PROP. § 462(1).

[169] *See generally id.*

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id.* § 462(2).

[174] *Id.*

[175] *Id.*

[176] *Id.* § 465(2).

[177] *Id.*

However, the PCDA falls short of significantly benefitting purchasers.[178]

The addition of the "opt-out" option shifts the law from pro-purchaser back to pro-seller. Essentially, this option allows sellers to buy-out of their statutory obligation.[179] In essence, the "opt-out" option acts as a security blanket for sellers. Sellers can provide a mere five hundred dollars at closing, which is meaningless when compared to the price of a home in New York.[180] The "opt-out" option is comparable to a "get out of jail free" card in Monopoly. It is a seller's way of avoiding punishment.

The initial intention of the PCDA was to "regularize disclosure and supplement information provided by professional inspections and tests, and searches of public records."[181] The PCDS was to be completed, signed, and delivered to the purchaser before entering into a contract for sale.[182] The statute sought to change the way New York adapted the use of the doctrine of caveat emptor by slightly limiting its scope.[183] The seller would only provide a written statement concerning the property according to the purchaser's actual knowledge at the time of completion.[184] Furthermore, the PCDA was neither a limitation on a purchaser's responsibility to conduct investigations and inspections nor a limitation on remedies.[185]

The court in *Gabberty v. Pisarz*[186] explained that if the legislature were to draft the PCDA any differently, it would significantly override the doctrine of caveat emptor.[187] The court also stated that "[m]aking it any easier on the buyer would cut a swath through the doctrine of caveat emptor that cannot be reconciled with

---

178 *Id.*

179 *Id.*

180 *See infra* Section VIII.

181 Gabberty v. Pisarz, 810 N.Y.S.2d 799, 802 (Sup. Ct. Nassau Cty. 2005). Plaintiff purchaser and defendant seller entered into a contract for the sale of residential real property. *Id.* at 800. The purchaser commenced an action against the seller for failure to disclose a material defect affecting the property (i.e. flooding). *Id.* While the seller provided the purchaser with a PCDS, it was incomplete, thus warranting the awarding of the five-hundred-dollar credit to the purchaser as damages. *Id.* at 802. This was the sole remedy for the purchaser, as the purchaser did not justifiably rely on any statements provided by the seller. *Id.* 805-06.

182 *Id.*

183 *Id.*

184 *Id.*

185 *Id.*

186 810 N.Y.S.2d 799, 802 (Sup. Ct. Nassau Cty. 2005).

187 *Id.* at 804-05.

the statements of legislative intent."[188] The statute still imposed a burden on the purchaser to obtain professional inspections of the property.[189] Eliminating this burden would persuade the seller not to complete the form and opt to provide the credit.[190] Additionally, eliminating the burden would be contrary to the enactment of the PCDA.[191] Furthermore, the court is not in a position to change the common law that puts a significant burden on the purchaser to exercise his or her due diligence before the purchase of the property.[192]

Based on the analysis of the legislative intent, it is imperative to understand both the purchaser's and seller's obligations under the PCDA. The purchaser must obtain a professional inspection of the property before closing.[193] Additionally, it is the purchaser's responsibility for understanding all patent property conditions.[194] However, the seller must make the disclosure of all property conditions on the PCDS, as well as provide truthful information within the seller's actual knowledge regarding any defective conditions.[195]

While it seems clear that the purpose of the act was to give more flexibility to purchasers, the PCDA imposes the burden of discovery of defective property conditions on the purchaser with the addition of the opt-out option.[196] This feature of the legislation encourages sellers to provide purchasers with the five-hundred-dollar credit in lieu of the PCDS.[197] The consensus among real estate attorneys is to advise their clients to provide the credit, rather than the statement.[198] Purchasers must use the utmost care in evaluating their prospective purchases before entering a sales contract. Not coincidentally, this was the original intent of the doctrine of caveat emptor. The PCDA showed to lessen that burden on the purchasers.[199] However, the "opt-out" option revived New York's common law

---

188 *Id.*

189 *Id.* at 805.

190 *Id.*

191 *Id.*

192 *Id.* at 807.

193 N.Y. REAL PROPERTY LAW § 462 (McKinney 2019).

194 *Id.*

195 *Id.*

196 *Id.* § 465(1).

197 *Id.*

198 Philip Lucrezia, *New York's Property Condition Disclosure Act: Extensive Loopholes Leave Buyers and Sellers of Residential Real Property Governed by the Common Law*, 77 ST. JOHN'S L. REV. 401, 411 (2003).

199 *See* REAL PROP. § 462.

roots. In effect, the "opt-out" option belittles the first portion of the PCDA.

B. Purchaser's Win: Material Misrepresentation

The enactment of the PCDA significantly helped purchasers recover damages for undisclosed defects. In *Kier v. Wilcox*,[200] the plaintiff purchasers commenced an action against the defendant sellers for the alleged non-disclosure of the location of the home's septic system.[201] The sellers opted to complete the PCDS and claimed that, at the time they finalized the PCDS, they were not aware that the septic system was located on adjacent property.[202] However, the court found that two weeks before closing, a real estate agent notified the sellers of the location of the septic system.[203] Generally, once the sellers become aware of a material defect that they did not previously disclose on the PCDS, the sellers then must revise the PCDS.[204] In this case, the sellers failed to revise the PCDS.[205] The failure to disclose the known issue amounted to a material misrepresentation, and thus the court found for the purchasers.

Blatantly lying on the PCDS is a misrepresentation. In *Sicignano v. Dixey*,[206] the plaintiff purchaser entered into a residential real estate contract with the defendant seller in June 2009.[207] Upon completing the PCDS, the defendant answered in the negative when approached with questions regarding flooding.[208] The defendant contended that there were no prior issues of flooding, grading issues, or standing water in the basement of the home.[209] However, after closing, the purchaser experienced severe flooding and standing water in the home and commenced an action for fraud and breach of contract.[210]

---

200 993 N.Y.S.2d 644 (City of Canandaigua Ct. 2014).

201 *Id.* at 644. The purchasers contended that the sellers were aware that the septic system was located on neighboring property.

202 *Id.*

203 *Id.*

204 *Id.*

205 *Id.*

206 2 N.Y.S.3d 301 (App. Div. 4th Dep't 2015).

207 *Id*. at 302.

208 *Id.*

209 *Id.*

210 *Id.*

During discovery, the plaintiff submitted interrogatories and deposition testimony from the defendant in which he admitted that the home experienced prior instances of flooding.[211] Additionally, the plaintiff submitted affidavits from thirteen surrounding neighbors who testified that the property was prone to chronic flooding.[212] The affidavits showed that the flooding was so severe that the water pumped from the basement of the home flooded the adjacent streets.[213] While the defendant claimed that the neighbors mistakenly confused the defendant's home with another neighbor's home, the court held that there existed a genuine issue of material fact as to whether the seller had actual knowledge of past flooding.[214] On appeal, the appellate court affirmed the lower court, and thus denied the seller's motion for summary judgment.[215]

The PCDA moved New York away from the traditional doctrine of caveat emptor. The PCDA puts more responsibility on the sellers to disclose defects regarding the property they intend to sell. There is a heightened awareness for sellers to be truthful when completing the PCDS. In light of fraudulent non-disclosure, the sellers may be held liable for actual damages and any other remedies the court finds appropriate.[216] Furthermore, a seller who executes a PCDS and discovers a defect affecting the property before closing must provide the purchaser with a revised PCDS reflecting the newly discovered defect to avoid liability.[217] Under caveat emptor, mere silence, without an affirmative action to deceive, does not amount to active concealment by the seller.[218]

---

[211] *Id.* at 303.

[212] *Id.*

[213] *Id.*

[214] *Id.* at 303-04. For a seller to be liable, the seller must knowingly misrepresent a material fact regarding the property in the disclosure statement and the purchaser must have relied on the seller's representation. *Id.* Furthermore, a false representation, such as the failure to correct a known misrepresentation in a PCDS, may constitute active concealment, which is actionable under the PCDA. *Id.*

[215] *Id.* Since there existed a genuine issue of material fact, a necessary element for summary judgment, the court refused to grant the motion. *Id.* at 303. At that point, it was not clear whether the seller was aware of the flooding issues prior to drafting the PCDS. If he had actual knowledge of the flooding issues, then he should have provided the purchaser with a revised PCDS. Additionally, having actual knowledge of the flooding issues and reporting otherwise would constitute a material misrepresentation, as the seller would be engaging in dishonesty.

[216] *See supra* note 206.

[217] *See supra* note 200.

[218] Perez-Faringer v. Heilman, 944 N.Y.S.2d 170, 172 (App. Div. 2d Dep't 2012).

C. Seller's Win: No Actual Knowledge

While the PCDA helps unsuspecting purchasers recover damages for undisclosed defects, the PCDA also helps sellers. In *Klafehn v. Morrison*,[219] the defendant sellers decided to list their four-unit apartment building for sale.[220] The sellers provided the purchaser with a PCDS, which stated that the building was prone to seasonal dampness in the basement.[221] With notice of this issue, the purchaser contacted a professional inspector before closing.[222] The inspector noted issues in the bathroom where the flooring was "soft when walked on."[223] Based on his conclusions, the inspector recommended that the purchaser have the flooring repaired.[224] The purchaser failed to act upon the advice prior to closing.[225]

Approximately one year later, the purchaser experienced these issues and commenced an action against the sellers for fraudulent non-disclosure.[226] The court held that the sellers could not have had actual knowledge of the current issues because they reasonably believed that the issues were corrected nine years earlier.[227] Furthermore, the sellers indicated that the building was subject to "seasonal dampness."[228] Here, the court held that there was no evidence of concealment by the sellers.[229] Moreover, the purchaser could not have relied on the sellers' statements on the PCDS because of his own inspector's report.[230]

Despite obtaining a PCDS, a purchaser should have a heightened awareness to confirm the validity of the statements by exercising due diligence. A seller's unwillingness to provide the disclosure should draw a red flag for the purchaser, as a buyer can reasonably understand that the seller is attempting to release himself from responsibility for any potentially defective conditions.

---

219 906 N.Y.S.2d 347 (App. Div. 3d Dep't 2012).

220 *Id.* at 348. The building had been subject to frequent wastewater discharge, which was repaired years prior to listing.

221 *Id.*

222 *Id.*

223 *Id.*

224 *Id.*

225 *Id.*

226 *Id.*

227 *Id.* at 349.

228 *Id.*

229 *Id.*

230 *Id.*

Regardless, the purchaser should always obtain a proper inspection of the property as part of his due diligence.

If a purchaser had relevant knowledge regarding any possibility of a defect, the seller might prevail. In *Meyers v. Rosen*,[231] the purchasers sued the sellers for fraudulent non-disclosure.[232] Before contracting, the purchasers received a PCDS which indicated that the septic system on the property was approximately sixteen years old.[233] However, the seller did not indicate whether the septic system was defective.[234]

The purchasers visited the property numerous times and had the property professionally inspected before closing.[235] The seller fixed any issues that arose during the inspection to the satisfaction of the purchasers.[236] Upon taking possession of the property, the purchasers noticed that the septic system had failed.[237] The purchasers then commenced the action and claimed that the sellers failed to disclose these defects on the PCDS.[238] The court held that the seller's silence about the defects did not provide a basis for a remedy.[239] In addition to understanding that the septic system was sixteen years old, the purchasers were also aware of the fact that a sump pump would frequently run during rainstorms.[240] Here, the court determined that such information warranted heightened alertness for the purchasers to beware.[241] The purchasers decided to close on the home, even with the knowledge of such information.[242] Thus, the purchasers could not obtain relief from the sellers.[243]

---

[231] 893 N.Y.S.2d 354 (App. Div. 3d Dep't 2010).

[232] *Id.* at 356.

[233] *Id.*

[234] *Id.* Additionally, the contract contained an as-is clause.

[235] *Id.*

[236] *Id.*

[237] *Id.* This is directly contrary to what the seller described on the PCDS.

[238] *Id.*

[239] *Id.* at 357. Failure to revise a PCDS when actual knowledge of a defect comes to fruition would result in the liability for the seller. However, in this case, there was no indication that the seller had actual knowledge of the failed septic system. Also, the inclusion of the as-is clause and the disclosure of the aging septic system imposed a greater duty to inspect on the purchasers.

[240] *Id.* at 357-58.

[241] *Id.* at 358.

[242] *Id.*

[243] *Id.*

D. Seller's Win: Exercise of Ordinary Intelligence

The PCDA provides more protection to unsuspecting purchasers. However, this legislation does not shelter a purchaser from responsibility. In some instances, the purchaser still bears the risk. In *Behar v. Glickenhaus Westchester Development, Inc.*,[244] the purchasers contracted to purchase a home located adjacent to an active golf course.[245] Upon closing, a large oak tree acted as a barrier between the golf course and the home.[246] However, a storm caused the tree to fall sometime after, leaving an open entryway for "out of bounds" golf balls to strike the property.[247] The purchasers sued the sellers for fraudulent concealment of the significant risks that arose from the adjacent golf course.[248]

The court in *Behar* did not apply the traditional doctrinal provisions of the PCDA.[249] Instead, the court determined this outcome based on common sense. The court held that the seller did not have any duty to disclose the purported defective condition because the risks were easily ascertainable by the exercise of ordinary intelligence since the risks concerned a matter of public record.[250] Purchasing a home adjacent to a golf course increases the risk for errant golf balls to intrude on one's property. The risk is so obvious that any reasonable purchaser should have known that this risk existed or should have researched it further.[251]

---

[244] 996 N.Y.S.2d 678 (App. Div. 2d Dep't 2014).

[245] *Id.* at 679.

[246] *Id.*

[247] *Id.*

[248] *Id.*

[249] *Id.* The court did not specify whether the seller completed the disclosure statement but the court's application of the doctrine of caveat emptor implies opting out of completion.

[250] *Id.* at 680. The court did not mention the application of the rules behind the PCDA. Instead, it focused mainly on how the purchasers could have easily apprised themselves of such information by exercising common sense.

[251] *Id. See* Esposito v. Saxon Home Realty, Inc., 679 N.Y.S.2d 152 (App. Div. 2d Dep't 1998). That case held that the boundaries of the subject property were not within the seller's knowledge and were readily ascertainable by searching public records. *Id.* at 152. The court dismissed the complaint based on the purchaser's failure to exercise ordinary intelligence. *Id. See also* Belizaire v. Keller Williams Landmark II, 111 N.Y.S.3d 800 (Sup. Ct. Nassau Cty. 2018). That case involved a purported misrepresentation of tax information on a home in Valley Stream, New York. *Id.* at 800. The purchasers claimed that the misrepresentation of the taxes attracted them to the home. *Id.* However, the court held that the tax information was a matter of public record and that any such reliance was not justifiable, as any reasonably prudent purchaser could have easily found such information. *Id.*

E. Summation: Impact and Scope of the Property Condition Disclosure Act

Completing a PCDS will not relieve the purchaser of all responsibility concerning defective property conditions. As noted in *Klafehn*, a purchaser loses his or her ability to rely on the PCDS if the seller becomes apprised of new information contrary to his original disclosure on the PCDS.[252] Furthermore, a seller, who genuinely does not have actual knowledge of the defect at the time of the completion of the PCDS and does not obtain any contrary information, cannot be held liable for the discovery of unknown defects post-closing.[253] Finally, if the defective conditions are reasonably ascertainable by the exercise of ordinary intelligence, the purchasers are responsible.[254]

The PCDA is not an ultimate shield for purchasers. There exist multiple caveats which allow a seller to still prevail on claims for non-disclosure or concealment.[255] Generally, a common caveat is whether the defects were within the seller's actual knowledge. If there is any indication that the seller and the purchaser discovered the defect simultaneously, the seller cannot be held liable.[256] Additionally, while it seems rather difficult to prove whether the condition was within the seller's actual knowledge, outside testimony can prove helpful to the purchasers.[257]

V. THE "OPT-OUT" OPTION

To avoid potential disputes, the New York legislature built a unique caveat into the PCDA: the "opt-out" option.[258] Similar to other state laws,[259] Section 465(1) of the PCDA contains a provision which states that if a seller chooses not to provide the purchaser with a PCDS

---

[252] Klafehn v. Morrison, 906 N.Y.S.2d 347, 348 (App. Div. 3d Dep't 2012).

[253] Meyers v. Rosen, 893 N.Y.S.2d 354, 358 (App. Div. 3d Dep't 2010).

[254] *Behar*, 996 N.Y.S.2d at 680.

[255] *See supra* Section IV(B).

[256] *See supra* note 219.

[257] *See supra* note 206.

[258] N.Y. REAL PROPERTY LAW § 465(1) (McKinney 2019).

[259] *See* 2019 CONN. LEGIS. SERV. P.A. No. 19-192 (H.B. No. 7179) (West); N.J. ADMIN. CODE § 13:45A-29.1 (2019); OHIO REV. CODE ANN. § 5302.30 (West 2019); OKLA. STAT. ANN. tit. 60, §§ 831-35 (West 2019).

prior to contracting, the seller shall provide the purchaser with a five-hundred-dollar credit at closing.[260]

The leniency of the "opt-out" option shifts the responsibility for property defects back to the purchaser.[261] Sellers can restore the traditional doctrine of caveat emptor if they provide the purchasers with a five-hundred-dollar credit at closing.[262] In turn, most practitioners in the real estate law industry typically recommend that sellers provide this credit so that they will not be responsible for defective conditions affecting the property.[263] Furthermore, the credit acts as "'cheap insurance' to protect sellers against an inadvertent 'incomplete statement.'"[264]

The court in *Meyers v. Rosen*[265] outlined a vital rule for purchasers when accepting the five-hundred-dollar credit.[266] If the parties use the "opt-out" option, then the purchasers need to beware of defects and to conduct thorough inspections before closing.[267] Additionally, the court noted that, by a seller not furnishing a purchaser with a PCDS, such conduct should put the purchaser on notice of potential defects.[268]

In *Daly v. Kochanowicz*,[269] the purchaser commenced an action against the sellers for fraud and breach of fiduciary duty.[270] Before entering into the purchase agreement, the purchaser had the property

---

[260] *Id.*

[261] *See generally* REAL PROP. § 465(1).

[262] *See generally id.*

[263] *See* Emily Pickrell, *Should You Sign a Property Condition Disclosure?*, NEWSDAY (Sept. 5, 2007), https://www.newsday.com/business/should-you-sign-a-property-condition-disclosure-1.876762.

[264] Blumenthal, Practice Commentary, McKinney's Cons. Laws of NY, 2018 Electronic Update, Real Property Law § 465.

[265] 893 N.Y.S.2d 354 (App. Div. 3d Dep't 2010).

[266] *See id.* at 357.

[267] *Id.*

[268] *Id.*; *see* Bishop v. Graziano, 804 N.Y.S.2d 236 (Dist. Ct. Suffolk Cty. 2005). Similarly, in *Bishop*, the purchasers sued the sellers for breach of contract and fraud. *Id.* at 237. Upon taking occupancy of the home, the purchasers noticed damage to the floors and walls. *Id.* at 238. However, based on the contract and addendum to the contract, the sellers elected not to furnish purchasers with a PCDS, but to exercise their opt-out rights. *Id.* at 237-38. The credit, therefore, precluded the purchasers' claims because it was their responsibility to inspect the home for defects prior to closing. *Id.* at 238. Additionally, any purported reliance (unless there is a misrepresentation) would not be actionable under New York law due to the credit. *Id.* at 239-40.

[269] 884 N.Y.S.2d 144 (App. Div. 2d Dep't 2009).

[270] *Id.* at 147.

inspected by a professional.[271] The inspector noted minimal evidence of water intrusion in the basement of the home, which the sellers denied.[272] Also, the inspector informed the purchaser that the Mamaroneck River sat within the confines of the property.[273] The purchaser disregarded such information and decided to close on the home.[274]

Within a few months, the home flooded.[275] The sellers provided the purchaser with the five-hundred-dollar credit at closing, which exempted the sellers from completing the PCDS.[276] The court held that the furnishing of the five-hundred-dollar credit and the sellers' refusal to sign the addendum constituted a "fair warning" to the purchaser.[277] Moreover, the survey of the property which depicted the property sitting on the Mamaroneck River should have alerted the purchaser to potential problems.[278] Lastly, the defective condition was not within the sellers' actual knowledge.[279] Such conduct amounted to a failure to exercise due diligence on the part of the purchaser, and thus the court dismissed her claims.[280]

The "opt-out" option opens purchasers up to significant risk, much like the doctrine of caveat emptor. The "opt-out" option takes the risk, which the legislature previously assigned to the sellers under the PCDA, and reassigns it back to the purchasers.[281] Thus, a seller can once again invoke the doctrine of caveat emptor. The "red flag" starts to wave as soon as the seller declines to produce the PCDS and opts to provide the purchaser with the five-hundred-dollar credit. The "opt-out" option further emphasizes the need for the purchaser to beware of all conditions regarding the subject property. If the purchaser receives the credit and notices defects after closing, courts are extremely reluctant to favor the purchaser because it is the

---

271 *Id.* at 146-47.

272 *Id.* at 151.

273 *Id.* at 147.

274 *Id.* at 82.

275 *Id.*

276 *Id.* at 150-51. The purchaser intended to have the seller sign a rider to the contract, representing that there were no signs of flooding or damage. However, the sellers declined and did not sign the addendum.

277 *Id.*

278 *Id.*

279 *Id.* at 155.

280 *Id.*

281 *See* N.Y. REAL PROPERTY LAW § 465 (McKinney 2019).

purchaser's responsibility to conduct a proper and thorough investigation of the property.[282]

VI. THE "AS-IS" CLAUSE

A clause that is commonly found in many residential real property sale contracts is an "as-is" clause. An "as-is" clause is a disclaimer of warranties or representations concerning real property.[283] Under an "as-is" clause, a seller conveys the property to the buyer in the exact condition as of the date of contract.[284] An "as-is" clause is typically paired with a merger clause in a sales contract, which states that all prior express or implied representations are extinguished unless included in the sales contract.[285] The PCDA explicitly states that the provisions of the legislation are not to prevent the governance of "as-is" clauses.[286] "As-is" clauses should be applied similarly in both caveat emptor jurisdictions and duty to disclose jurisdictions.[287]

A. "As-Is" Preempts Silence

An "as-is" clause may preempt liability for mere silence. As previously mentioned in Section II(a), the court in *Mancuso v. Rubin* noted that the contract for sale contained an "as-is" clause, in addition to a pre-purchase inspection agreement.[288] The court deemed the buyers bought the house in "as-is" condition on the date of the contract.[289] Additionally, the merger clause in the contract warranted that the purchaser did not rely on any prior representations regarding the property unless expressly stated in the contract.[290]

Here, the court stated that the purchaser made conclusory allegations, not factual observations of active concealment.[291] Both

---

[282] *See Daly*, 884 N.Y.S.2d 144 (App. Div. 2d Dep't 2009); Meyers v. Rosen, 893 N.Y.S.2d 354 (App. Div. 3d Dep't 2010).

[283] *See Simone*, 840 N.Y.S.2d at 400.

[284] *See id.*

[285] *See id.*

[286] REAL PROP. § 462(1).

[287] *See generally* Dalmazio v. Rosa, 2014 WL 7894504 (N.J. Super. Ct. App. Div. 2015); Mancuso v. Rubin, 861 N.Y.S.2d 79 (App. Div. 2d Dep't 2008); Berger-Vespa v. Rondack Building Inspectors, Inc., 740 N.Y.S.2d 504 (App. Div. 3d Dep't 2002).

[288] *Mancuso*, 861 N.Y.S.2d at 83.

[289] *Id.*

[290] *Id.*

[291] *Id.*

the conclusory allegations and the "as-is" clause worked together for the court to determine the outcome in favor of the seller.[292] When purchasing residential real property with an "as-is" clause written into the contract, the purchaser must exercise due diligence to determine any defective conditions.[293] The "as-is" clause acts as another liability shield for the sellers. If the purchaser is not careful, the "as-is" clause will control.

B. Fraud or Concealment Preempts "As-Is"

The "as-is" clause is a powerful tool in the seller's arsenal. However, the "as-is" clause is not absolute. Fraud or active concealment can preempt the "as-is" clause.[294] In *Berger-Vespa v. Rondack Building Inspectors, Inc.*,[295] the purchasers entered into a contract with the sellers to purchase a home.[296] The contract included an "as-is" clause.[297] Additionally, the agreement was contingent upon a professional inspection of the property.[298]

The inspection company stated that there were no visible defects, though there was the possibility of latent defects affecting the property.[299] Acting upon this information, the purchasers still signed the contract.[300] However, after closing, the purchasers experienced flooding and sued the sellers and the inspection company for fraud and active concealment.[301]

The court held that to preempt the "as-is" clause, the buyer needed to provide evidence of concealment or fraud.[302] Affidavits from the sellers' granddaughter, confirming that she did not experience any dampness or flooding in the basement, mimicked the findings in the inspector's report.[303] The purchasers' observations of dampness in the basement, which were contrary to both the report and the affidavits,

---

[292] *Id.*

[293] *See id.*

[294] *See* Berger-Vespa v. Rondack Building Inspectors, Inc., 740 N.Y.S.2d 504 (App. Div. 3d Dep't 2002).

[295] *Id.*

[296] *Id.* at 505.

[297] *Id.*

[298] *Id.*

[299] *Id.* at 505-06.

[300] *Id.*

[301] *Id.* at 506.

[302] *Id.* at 507.

[303] *Id.*

undermined reliance.[304] There was no evidence of active concealment, and thus the "as-is" clause governed.[305]

The "as-is" clause is similar to the "opt-out" option. For a seller to be liable in either case, the buyer needs to provide evidence of active concealment or fraud.[306] Otherwise, the purchaser is responsible for defective conditions.[307] In either case, the purchaser would have a heightened sense to be more mindful of defective property conditions. It is his or her responsibility to investigate before entering a contract.[308] However, it is unfair to assume that a reasonable purchaser can find defective conditions that the seller actively concealed. With this, the purchaser is free from responsibility as it passes to the seller, absent fraudulent conduct.

VII. LEGISLATION IN OTHER STATES

Many states enacted similar legislation to the PCDA.[309] Most of the legislation proposed in other states allows purchasers to receive some variation of a PCDS, which is based on the seller's actual knowledge.[310] Some states, including Connecticut, also included a variation of the "opt-out" option.[311] However, there are states, including Alabama, that are primarily governed by the doctrine of caveat emptor.[312] This section will analyze real property legislation in Connecticut, New Jersey, Ohio, Oklahoma, and Alabama.

A. Connecticut

On January 1, 1995, Connecticut adopted the Uniform Property Condition Disclosure – Written Residential Condition Reports.[313] On July 1, 2019, Connecticut amended its Residential Condition Report[314]

---

304 *Id.*

305 *Id.*

306 *Id.*

307 *Id.*

308 *Id.*

309 *See* 2019 CONN. LEGIS. SERV. P.A. No. 19-192 (H.B. No. 7179) (West); N.J. ADMIN. CODE § 13:45A-29.1 (2019); OHIO REV. CODE ANN. § 5302.30 (West 2019); OKLA. STAT. ANN. tit. 60, §§ 831-35 (West 2019).

310 *See id.*

311 *See* 2019 CONN. LEGIS. SERV. P.A. No. 19-192 (H.B. No. 7179) (West).

312 *See* ALA. CODE § 6-5-102 (2019).

313 *See* 1995 CONN. LEGIS. SERV. P.A. No. 95-311 (S.S.B. No. 217) (West).

314 CONN. GEN. STAT. ANN. § 20-327(b) (West 2018).

and had since added to the statute.[315] Here, the legislation looks strikingly similar to the New York PCDA. Prior to the sale of residential real property, Connecticut prompts sellers to complete a residential condition report, which outlines the condition of the property and any known defects.[316] Similar to New York, the sellers must complete the form based on their actual knowledge.[317]

Furthermore, a seller who refuses to draft a residential condition report must provide the purchaser with a five-hundred-dollar credit at closing.[318] The Connecticut legislature also added a provision which states that a seller remains liable to the purchaser, even after the delivery of the credit, if the purported defect is within the seller's actual knowledge or "significantly impairs (i) the value of such residential real estate, (ii) the health or safety of future occupants of such residential real estate, or (iii) the useful life of such residential real estate."[319] The court in *Giametti v. Inspections, Inc.*[320] stated that an essential purpose of the residential condition report was "to diminish the risk of litigation by facilitating meaningful communications between a vendor and a prospective purchaser."[321] A primary advantage for the purchaser is that the payment of the credit does not cease all obligations of liability for the seller.[322] The exceptions provide a broad range of opportunities for the responsibility to revert to the seller.[323]

Communication is an intrinsic aspect when purchasing or selling property. In *Giametti*, the purchaser commenced an action against the seller and the inspection company for fraudulent and negligent misrepresentation.[324] The seller completed and delivered the residential condition report, claiming that there were no known infestations or water damage of any kind.[325] Contrary to the seller's

---

315 *See* 2019 CONN. LEGIS. SERV. P.A. No. 19-192 (H.B. No. 7179) (West).

316 *Id.*

317 *Id.*

318 *Id.*

319 *Id.* In New York, the exception is actual knowledge, without having to meet one of the three criteria mentioned in the Connecticut statute.

320 76 Conn. App. 352 (2003).

321 *Id.* at 360.

322 *Id.*

323 *Id.*

324 *Id.* at 354.

325 *Id.*

form, the purchaser discovered a carpenter ant infestation and water damage after closing.[326]

The court held that the seller was not liable for damages because the seller did not have actual knowledge of the infestation or the water damage.[327] If the seller completed the report in good faith, and the seller did not have any indication of any contrary defects, the seller could not be held liable.[328]

The court further held that the seller could not be held liable for negligent misrepresentation.[329] First, the language of the statute does not protect the purchaser from negligence, only actual omissions of fact.[330] However, the common law can provide a remedy if the purchaser can prove that the seller made a misrepresentation on which the purchaser relied to his detriment.[331] Because the buyer hired a professional inspector, the buyer did not rely on statements the seller made about the property.[332] As such, the seller was not liable to the purchaser.[333]

B. New Jersey

Similar to New York and Connecticut, New Jersey also enacted legislation which demands that a seller provide a purchaser with a PCDS before entering a contract for the sale of residential real property.[334] The Property Condition Disclosure Form requirements are nearly identical to those of New York and Connecticut.[335] The seller must address all questions based on his or her actual knowledge and must include any actual knowledge of material defects that the questionnaire did not address.[336] Also, purchasers are still under the obligation to inspect the premises themselves, as well as have the

---

326 *Id.*

327 *Id.* at 355-56. The residential condition report is completed based on actual knowledge. *Id.* at 359.

328 *See id.* at 360.

329 *Id.* at 362.

330 *Id*.

331 *Id*. at 364.

332 *Id.*

333 *Id*. at 365. However, if the conditions were hazardous or harmful to human health, the court would have found the seller to be liable, based on the statutory exception.

334 N.J. ADMIN. CODE § 13:45A-29.1 (2019).

335 *Id.*; *cf.* N.Y. REAL PROPERTY LAW § 462-65 (McKinney 2019); 2019 CONN. LEGIS. SERV. P.A. No. 19-192 (H.B. No. 7179) (West).

336 *Id.*

premises inspected by a professional inspector.[337] Under the New Jersey statute, a real estate broker must acknowledge that she received the questionnaire from the seller.[338] Next, the broker must recognize that she intends to provide the buyer with the questionnaire.[339] Finally, the broker must acknowledge that she used reasonable diligence to inspect the property.[340] However, the form does not include an "opt-out" option, which represents a significant difference from New York and Connecticut law.

C. Ohio

Ohio previously enacted a statute similar to New York, though it is much more detailed.[341] The Property Disclosure Form[342] requires the seller to disclose any material defects concerning the physical condition of the property.[343] The seller must base the information on his or her actual knowledge.[344] If actual knowledge is unavailable, a seller may make a good faith approximation of the required disclosure.[345] Further, if a seller were to render materially inaccurate information on the Property Disclosure Form—even if accidental—a court may find that the seller violated her statutory obligations.[346] A seller can cure inaccurate information on the form by making a written amendment to the form.[347]

While the statute is one of the more detailed statutes regarding this issue, the completion of the Property Disclosure Form does not limit any duty to disclose known material defects.[348] Additionally, the Property Disclosure Form does not limit any common law remedies, including fraud, misrepresentation, concealment, and non-disclosure.[349] Furthermore, upon receipt or non-completion of the

---

337 N.J. ADMIN. CODE § 13:45A-29.1 (2019).

338 *Id.*

339 *Id.*

340 *Id.*

341 OHIO REV. CODE ANN. § 5302.30 (West 2019); *cf.* N.Y. REAL PROPERTY LAW § 462-65 (McKinney 2019).

342 OHIO REV. CODE ANN. § 5302.30 (West 2019).

343 *Id.*

344 *Id.*

345 *Id.* A seller is not liable for any conditions extrinsic to his or her actual knowledge.

346 *Id.*

347 *Id.*

348 *Id.*

349 *Id.*

Property Disclosure Form, the purchaser may elect to rescind the contract for sale and opt to obtain his or her down payment from the seller.[350] A purchaser may waive his or her right to rescind.[351]

Kramer v. Raterman[352] reflects the use of the Ohio doctrine.[353] The purchasers (collectively, "Kramer") received a residential property disclosure form from the sellers (collectively "Raterman") before executing the contract.[354] The residential property disclosure form indicated that Kramer regraded the property and installed a retaining wall to fix drainage problems.[355] Additionally, Kramer examined the property and had a professional engineer (Raterman's brother-in-law)[356] complete an inspection of the retaining wall.[357] Both inspections yielded no adverse findings regarding the wall.[358] Eventually, the retaining wall collapsed.[359] The court held that the sellers properly disclosed the retaining wall problems on the residential property disclosure form under state law.[360] As such, the seller was not liable to the purchaser.[361]

---

[350] *Id.* In other states, such as New York and Connecticut, filling out the disclosure form is not mandatory. In Ohio, if the seller elects not to fill out the disclosure form, the purchaser can rescind the contract, inevitably making the completion of the disclosure form mandatory in the seller's eyes.

[351] *Id.*

[352] 830 N.E.2d 416 (Ohio 2005).

[353] *Id.*

[354] *Id.* at 418-19.

[355] *Id.* at 418.

[356] This is facially problematic because property inspectors must be neutral third parties. *Industry & Demand*, INSPECT-IT 1ST, https://www.inspectit1st.com/franchises/industry-demand/ (last visited Apr. 15, 2020).

[357] *Kramer*, 830 N.E.2d at 418.

[358] *Id.*

[359] *Id.* Ohio operated as a duty to disclose jurisdiction. *Id.* at 419. The court noted that a purchaser is liable for any patent defects, while the seller is liable for latent defects which involved material facts. *Id.* Additionally, a seller is to complete the residential property disclosure form according to his actual knowledge. *Id.* at 420. The completion of the residential property disclosure form does not preclude a purchaser from obtaining reasonable inspections of the property. *Id.* Furthermore, to have a claim based on fraud or misrepresentation, the purchaser must have reasonably relied on the seller's representations to allocate liability to the seller. *Id.* at 419-20.

[360] *Id.* at 422.

[361] *Id.* at 423.

D. Oklahoma

Oklahoma, like New York, has a variation of a PCDS, namely the Residential Property Condition Disclosure Act (the "RPCDA").[362] The Oklahoma legislature enacted a statute which requires the seller of residential real property to complete and deliver a written PCDS if the seller previously occupied the property.[363] Similar to the PCDS in New York, the Oklahoma PCDS must be completed based on the seller's actual knowledge.[364] The PCDS must also include conspicuous notices that state the information provided is not a representation of the seller to the real estate licensee, the information is not intended to become part of any contract between the purchaser and the seller, and the information contained in the PCDS does not represent a warranty.[365] Additionally, the PCDS does not preclude any inspections from being performed under the direction of the purchaser.[366] Conversely, if the seller did not occupy the premise and has no actual knowledge of defects, the seller must furnish the buyer with a written property disclaimer statement.[367]

A seller can limit his or her liability to a purchaser if the seller notifies the buyer of all materially defective conditions before entering the contract.[368] Generally, in Oklahoma, a seller is not liable for errors made on the PCDS.[369] However, if the seller made an unreasonable approximation on the PCDS or the seller knew contrary information, then the seller may have circumvented the PCDS, and a court could find the seller liable.[370]

The main difference between the New York PCDA and the Oklahoma RPCDA is the Oklahoma Property Disclaimer Statement.[371] New York does not have this provision, as the PCDA does not apply to newly constructed homes.[372] In Oklahoma, the legislature decided to force sellers to maintain responsibility for representing to potential

---

362 OKLA. STAT. ANN. tit. 60, § 831.
363 *Id.* § 833.
364 *Id.*
365 *Id.*
366 *Id.*
367 *Id.*
368 *Id.* § 835.
369 *Id.*
370 *Id.*
371 *See id.* § 833; N.Y. REAL PROPERTY LAW § 462-65 (McKinney 2019).
372 *Id.*

purchasers that they never occupied the property, nor make any disclosures concerning its condition.[373] New York has separate legislation imposing a housing merchant implied warranty for developers of new constructions, even if they did not complete the disclaimer statement.[374] While Oklahoma's statute[375] is unique, it is unnecessary to repeat the housing warranty portion since such a statute is prevalent throughout all United States jurisdictions.

E. Alabama

Alabama is one of a handful of states across the nation that has not yet enacted legislation targeted to deemphasize the doctrine of caveat emptor completely.[376] Instead, the Alabama Legislature opted to utilize the traditional doctrine of caveat emptor to govern most residential real property disputes, exclusive of new construction.[377] However, Alabama recognizes three statutory exceptions to the general rule.[378] First, if there exists a fiduciary relationship between the purchaser and the seller, the seller is obliged to disclose relevant material defects.[379] Second, the seller must disclose all known material defects if the purchaser specifically inquired about the defect.[380] Lastly, if the seller is aware that such material defect substantially impairs health or safety, he or she must disclose the defect.[381] Each of the three exceptions leaves a few holes in the traditional doctrine of caveat emptor. As such, Alabama law mirrors a variation on the duty to disclose approach.[382] In Alabama, if the seller knows that the defect will substantially impair an unsuspecting purchaser, then the seller must disclose.[383]

---

[373] OKLA. STAT. ANN. tit. 60, § 833. This part of the statute does not create increased liability in Oklahoma as compared to other states which generally have separate statutes for new construction.

[374] N.Y. GEN. BUS. LAW § 777(a) (McKinney 2019).

[375] *See* OKLA. STAT. ANN. tit. 60, §§ 831-35 (West 2019).

[376] ALA. CODE § 6-5-102 (2019).

[377] *Id.*

[378] Elizabeth Murphy, *The Current State of Caveat Emptor in Alabama Real Estate Transactions*, 60 ALA. L. REV. 499, 508 (2009).

[379] ALA. CODE § 6-5-102; Moore v. Prudential Residential Services Ltd. Partnership, 849 So. 2d 914, 923 (Ala. 2002).

[380] *Moore*, 849 So. 2d at 923.

[381] *Id.*

[382] *See supra* Section II(D).

[383] *Id.*

An application of the law can be found in *Moore v. Prudential Residential Services Ltd. Partnership*.[384] In *Moore*, the plaintiff purchasers inquired about significant water damage and flooding before contracting.[385] The sellers denied any knowledge of the sort.[386] The sellers also suggested that obtaining an inspection of the home was not necessary, as the home was previously inspected twice.[387] The purchasers decided to close without a third inspection.[388]

The contract contained an "as-is" clause.[389] Generally, a purchaser cannot rely on prior representations when the buyer included an "as-is" clause in the contract.[390] However, during litigation, the purchasers argued that the second exception to the general rule of caveat emptor (specific inquiry) applied.[391] While the court acknowledged the purchasers' inquiry regarding water damage, the court recognized that the sellers had no actual knowledge of the defect.[392] As such, none of the exceptions applied, and the doctrine of caveat emptor prevailed.[393]

F. Summary of the Jurisdictions

New York's PCDA is not unique. Other jurisdictions, including Connecticut, New Jersey, Ohio, and Oklahoma, have similar legislation.[394] Under each of the laws, the seller is generally not liable to the purchaser, unless he or she falsely completed the disclosure statement as to misrepresent the property. However, Oklahoma has an additional caveat to its statute.[395] Oklahoma law builds in a disclaimer statement, which is necessary from developers who have not previously occupied the home.[396]

---

384 849 So. 2d 914 (Ala. 2002).

385 *Id.* at 917.

386 *Id.*

387 *Id.* at 920.

388 *Id.*

389 *Id.*

390 *Id.* at 918-19.

391 *Id.* at 923. They did not claim any other exception.

392 *Id.* at 926.

393 *Id.*

394 *See* 2019 CONN. LEGIS. SERV. P.A. No. 19-192 (H.B. No. 7179) (West); N.J. ADMIN. CODE § 13:45A-29.1 (2019); OHIO REV. CODE ANN. § 5302.30 (West 2019); OKLA. STAT. ANN. tit. 60, §§ 831-35 (West 2019).

395 OKLA. STAT. ANN. tit. 60, §§ 831-35.

396 *Id.*

On the other hand, some laws focus on an approach that illustrates a duty to disclose variation.[397] Each state imposes different variations of real property laws, and thus there is no uniformity throughout the United States.[398]

VIII. RECOMMENDATIONS

The New York legislature passed the PCDA to help shield purchasers from the harmful effects of undisclosed defects.[399] New York desired to move away from the traditional doctrine of caveat emptor and implement a new purchaser-favored body of law.[400] The initial portion of the PCDA, the physical disclosure form, does just that.[401] It shifts the burden from the purchaser to the seller and nearly eliminates the concept of buyer beware.[402] The PCDA forces sellers to remain responsible for undisclosed or misrepresented property defects.[403] However, the PCDS opens up too many avenues for litigation. The courts must determine whether the defect was within the seller's actual knowledge and if the seller misrepresented the property.[404] A seller risks litigation by completing the PCDS.

Nevertheless, a seller's completion of the PCDS is rare.[405] The "opt-out" option of the PCDA is more favorable to sellers because it forces the purchaser to be cognizant of all property conditions before purchasing the premises.[406] The PCDA, with the utilization of the "opt-out" option, takes New York back to the very essence of the doctrine of caveat emptor.

The plain meaning of the doctrine of caveat emptor suggests that the doctrine is extremely seller-centric. This concept of "buyer beware" provides for a heightened sense of purchaser awareness.

---

397 *See supra* Section II(D).

398 *See* N.Y. REAL PROPERTY LAW § 462 (McKinney 2019); 2019 CONN. LEGIS. SERV. P.A. No. 19-192 (H.B. No. 7179); N.J. ADMIN. CODE §13:45A-29.1; OHIO REV. CODE ANN. § 5302.30; OKLA. STAT. ANN. tit. 60, §§ 831-35.

399 *See* REAL PROP. § 462.

400 *See supra* Section IV(A).

401 *Id.*

402 *Id.*

403 *Id.*

404 *Id.*

405 *See supra* note 198.

406 *See* N.Y. REAL PROPERTY LAW § 465(1) (McKinney 2019).

Additionally, this doctrine forces the purchaser to bear much of the risk and emphasizes the purchaser's need to exercise proper due diligence.

Similarly, the "opt-out" option of the PCDA provides overwhelming advantages for sellers. The "opt-out" option allows the seller to buy his way out of the PCDA. The penalty for failing to provide, or purposefully opting not to provide, the purchaser with a completed PCDS is only five hundred dollars.[407] This penalty acts as a slap on the wrist. This remedy is not sufficient. A real estate study estimated that approximately eight out of ten sellers provide their purchasers with the five-hundred-dollar credit.[408] Due to extreme property diversity, New York home prices vary wildly. Thus, the "opt-out" option credit is too low.

If New York were to be broken up into four subsections, New York City, the suburban MTA counties (Nassau, Suffolk, Orange, Rockland, Putnam, Dutchess, and Westchester), and Greater Upstate New York, it might be easier to see how ineffective and disadvantageous the "opt-out" option is for purchasers. Based on a 2018 New York State study of median home prices for residential property, the average home value for areas in Greater New York (which consists of all counties, exclusive of the suburban MTA counties and New York City) was approximately $150,703.98.[409] According to the same study, the average home value for residential properties in the MTA counties, consisting of Nassau, Suffolk, Orange, Rockland, Putnam, Dutchess, and Westchester Counties, was approximately $418,571.43.[410] More recently, a 2019 study found that the average home price in New York City was approximately $670,500.00.[411]

Based on each of these studies, the five-hundred-dollar credit is considered sham. It is an inexpensive way for sellers to escape liability worth hundreds of thousands of dollars. New York should modify its version of caveat emptor to fit the vast diversity of home values. New York should consider legislation that uses the doctrine of caveat emptor with a modified credit option. This variation would

---

[407] *Id.*

[408] Pickrell, *supra* note 263.

[409] *Residential Median Sale Price Information by County*, N.Y. STATE DEP'T TAX'N & FIN., https://www.tax.ny.gov/research/property/assess/sales/resmedian.htm (last updated Apr. 7, 2020).

[410] *Id.*

[411] Oshrat Carmiel, *NYC Homebuyers Find Biggest Price Reductions in Manhattan*, BLOOMBERG (Jan. 23, 2020), https://www.bloomberg.com/graphics/property-prices/nyc/.

balance the purchaser's duty to exercise due diligence against the seller's responsibility to disclose.

If New York chose to impose the doctrine of caveat emptor with the credit, it would be in New York's best interest to increase the "opt-out" option credit to something of substantial worth. Some individual purchasers rely on the credit to cover costs of inspection, and thus it should be increased. Increasing the "opt-out" option credit to one-half percent of the property value would reflect the significant variation of home values across the state. With this, there would be no definitive credit price for all properties.

The current five-hundred-dollar credit for property valued at this price is merely ineffective. Some homes are valued at upwards of two million dollars. The approximate percentage value of the five-hundred-dollar credit for a home priced at two million dollars is 0.025%. When put into this perspective, on its face, the credit resembles a sham.

On the other hand, for property valued at seventy-five thousand dollars, the five-hundred-dollar credit may be more than necessary. Under this author's recommendation of applying the credit at one-half percent, the total credit for a residential property valued at seventy-five thousand dollars would equate to three hundred seventy-five dollars. Under the current legislation, the purchaser would have more money as a result of the current credit option.

Applying a percentage option would increase fairness for both the purchaser and the seller. If the credit is too little compared to the value of the home, then the credit is a sham. However, if the credit is too much compared to the value of the home, it could unnecessarily tip the balance in favor of the purchaser.

New York should adopt this recommendation to promote fairness while remaining objective in its enforcement of purchase and sale laws surrounding residential real property. Enforcing legislation emerging from the doctrine of caveat emptor reflects the idea that purchasers are still responsible for obtaining pertinent information about their newly-purchased property. However, the enforcement of the percentage credit shows that purchasers should not rely on any previous purported representations of the property. Additionally, the purchasers can use the credit to finance the cost of an inspection.

By refraining from adopting legislation similar to the duty to disclose jurisdictions, New York will emphasize the importance of the buyer conducting the proper research before contracting.

Incorporating this recommendation into the legislation will aid New York in pioneering a new form of property condition disclosure. While still retaining a portion of the current legislation, the state will be able to revolutionize the purchasing process of residential real estate by refining the current credit option, making the mandatory credit a percentage of total purchase price rather than a blanket fee.

IX. CONCLUSION

New York's PCDA was a brief attempt to minimize the effects of the traditional common law doctrine of caveat emptor. While the thought was there, the central provision of the PCDA, the PCDS, proves to be increasingly ineffective. This legislation gives sellers two options to choose from: one which significantly increases their liability or one that significantly limits their liability. Most sellers wisely choose to limit their liability. With this, the statement provision is substantially inadequate.

Prior to the enactment of the PCDA, New York governed all residential real property disputes under the traditional doctrine of caveat emptor.[412] All courts, most notably, the court in *Stambovsky v. Ackley*, helped determine the outcomes by applying this principle.[413] Throughout the opinion in *Stambovsky*, the court consistently noted that it was the purchaser's responsibility to inspect all aspects of the property, even though the court ultimately held that the doctrine did not apply based on fairness.[414]

However, after the enactment of the PCDA in 2002, the traditional common law governance was restricted.[415] The PCDS imposed liability on sellers to truthfully complete the form according to their actual knowledge of defective property conditions.[416] The only way for sellers to escape liability is if the defective condition was not within their actual knowledge[417] or if the defective condition was evident with the exercise of ordinary intelligence.[418]

---

412 Platzman v. Morris, 724 N.Y.S.2d 502, 504 (App. Div. 2d Dep't 2001).

413 *See generally* Stambovsky v. Ackley, 572 N.Y.S.2d 672 (App. Div. 1st Dep't 1991).

414 *Id.*

415 *See* N.Y. REAL PROPERTY LAW § 462 (McKinney 2019).

416 *Id.*

417 Meyers v. Rosen, 893 N.Y.S.2d 354, 357 (App. Div. 3d Dep't 2010).

418 Behar v. Glickenhaus Westchester Development, Inc., 996 N.Y.S.2d 678, 680 (App. Div. 2d Dep't 2014); *see* Esposito v. Saxon Home Realty Inc., 679 N.Y.S.2d 152 (App. Div.

Additionally, the PCDA includes the "opt-out" option, which allows sellers to pay their way out of being responsible.[419] Under this provision, sellers need only to provide purchasers with a credit of five-hundred-dollars to free themselves from liability.[420] The only way in which sellers could subject themselves to liability under this provision is if they actively and willfully concealed the true conditions of the property.[421]

To create a more uniform and effective statute, New York should impose a liability credit of one-half percent of the property value to cover the costs of inspections and remedies, rather than a uniform five-hundred-dollar credit. The doctrine of caveat emptor further emphasizes the purchaser's need to exercise due diligence. The credit, on the other hand, will provide for compensation to the purchaser to release the seller from any remaining responsibility to disclose defects. Passage of legislation incorporating these policies would create a healthy balance between seller and purchaser, without having the scale tip to one side or the other. While it is imperative to promote due diligence, it is also essential to keep the home-buying process fair.

2d Dep't 1998); Belizaire v. Keller Williams Landmark II, 111 N.Y.S.3d 800 (Sup. Ct. Nassau Cty. 2018).

[419] REAL PROP. § 465.

[420] *Id.*

[421] *Id.*