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Unfair and Deceptive Acts and Practices in Real Estate Transactions: The Duty to Disclose Off-Site Environmental Hazards

Elizabeth A. Dalberth

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I. Introduction

In today's society, a consumer's largest investment is in a home.[1] Consequently, the impact of unfair or deceptive trade practices is greatest in the area of real estate transactions.[2] A consumer involved in a real estate transaction should be afforded the same degree of protection as a consumer who purchases any other type of property. Part of this protection is offered through state unfair and deceptive acts and practices [hereinafter UDAP] statutes.[3] These statutes were enacted to combat unfair methods of competition as well as unfair and deceptive acts and practices, and they arose due to the inadequacy of protection through common and federal law.[4] Most of these statutes apply to real estate transactions,[5] and con-

1. Gabriel v. O'Hara, 534 A.2d 488, 492-93 (Pa. Super. 1987).
2. *Id.*
3. *See infra* notes 35-51 and accompanying text.
4. Every state and the District of Columbia has enacted UDAP statutes. *See* ALA. CODE § 8-19-1 (1984); ALASKA STAT. § 45.50.471 (1991); ARIZ. REV. STAT. ANN. § 44-1521 (1987); ARK. CODE ANN. § 4-88-101 (Michie 1987 & Supp. 1991); CAL. CIV. CODE § 1750 (West 1985); COLO. REV. STAT. § 6-1-101 (1973); CONN. GEN. STAT. ANN. § 42-110a (West 1987); DEL. CODE ANN. tit. 6, § 2511 (1974); D.C. CODE ANN. § 28-3901 (1991); FLA. STAT. ANN. § 501.201 (West 1988); GA. CODE ANN. § 10-1-390 (Harrison 1990); HAW. REV. STAT. § 480-1 (1985); IDAHO CODE § 48-601 (1977); ILL. REV. STAT. ch. 121 ½, para. 261 (Smith-Hurd 1991); IND. CODE ANN. § 24-5-0.5-1 (Burns 1991); IOWA CODE ANN. § 714.16 (West 1979); KAN. STAT. ANN. § 50-624 (1983); KY. REV. STAT. ANN. § 367.110 (Baldwin 1983); LA. REV. STAT. ANN. § 51:1402 (West 1987); ME. REV. STAT. ANN. tit. 5, § 206 (West 1989); MD. COM. LAW II CODE ANN. § 13-101 (1990); MASS. GEN. LAWS ANN. ch. 93A, § 1 (West 1984); MICH. STAT. ANN. § 19.418(1) (Callaghan 1990); MINN. STAT. ANN. § 325F.68 (West 1981); MISS. CODE ANN. § 75-24-1 (Supp. 1972); MO. REV. STAT. § 407.010 (Vernon 1990); MONT. CODE ANN. § 30-14-102 (1991); NEB. REV. STAT. § 59-1601 (1988); NEV. REV. STAT. § 598.360 (1989); N.H. REV. STAT. ANN. § 358-A:1 (1984); N.J. STAT. ANN. § 56:8-1 (West 1989); N.M. STAT. ANN. § 57-12-1 (Michie 1987); N.Y. GEN. BUS. LAW § 349 (McKinney 1988); N.C. GEN. STAT. § 75-1.1 (1988); N.D. CENT. CODE § 51:15-01 (1989); OHIO REV. CODE ANN. § 1345 (Baldwin 1988); OKLA. STAT. ANN. tit. 15, § 751 (West Supp. 1992); OR. REV. STAT. § 645.605 (1989); 73 PA. CONS. STAT. ANN. § 201-1 (1991); R.I. GEN. LAWS § 6-13.1-1 (Supp. 1985); S.C. CODE ANN. § 39-5-10 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 17-24-1 (1986); TENN. CODE ANN. § 47-18-101 (1988); TEX. BUS. & COM. CODE ANN. § 17.41 (West 1987); UTAH CODE ANN. § 13-11-1 (1986); VT. STAT. ANN. tit. 9, § 2451a (1984); VA. CODE ANN. § 59.1-196 (Michie 1987); WASH. REV. CODE ANN. § 19.86.010 (West 1989); W. VA. CODE § 46A-6-101 (1986); WIS. STAT. ANN. § 100.20 (West 1988); WYO. STAT. § 40-12-101 (1977).
5. UDAP statutes that do not cover real estate transactions have been enacted in Alaska, the District of Columbia, Florida, and Ohio. *See* State v. First National Bank of Anchorage, 660 P.2d 406 (Alaska 1982) (holding that UDAP statute provides no protection

sumers bringing claims under these statutes can recover treble damages as well as attorney's fees.[6] Because of this wide variety of damages and the applicability to real estate transactions, UDAP statutes provide an excellent vehicle for the protection of a purchaser affected by unfair methods in the marketplace.[7]

Our society is continuously affected by environmental concerns.[8] Land fills, toxic waste dumps, and underground hazards such as contaminated water can spread and affect numerous neighboring properties.[9] In addition to creating health hazards, possible contamination by an off-site environmental hazard can minimize the fair market value of the property.[10] This Comment addresses the question of whether real estate developers and brokers, under the UDAP statutes of the various states, have a duty to disclose off-site environmental hazards that have the possibility of affecting the property involved in sales transactions.[11] This Comment argues that UDAP statutes should be extended to include the recognition of environmental hazards as material facts that must be disclosed to potential purchasers before a sale of land occurs. Since this is an issue of first impression, this Comment will analyze existing UDAP case law and how it relates to the issue at hand. Part II will examine the history of UDAP statutes and the problems they were designed to solve.[12] Part III will discuss the background of the different types of UDAP statutes.[13] Part IV will focus on legislative policy and explore whether environmental hazards are within the scope of the UDAP

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because real estate is not mentioned in the statute); Owens v. Curtis, 432 A.2d 736 (D.C. 1981) (holding that sale of real estate is not within the meaning of "primarily for personal, household or family use"); State *ex rel.* Herring v. Murdock, 345 So.2d 759 (Fla. Dist. Ct. App. 1977) (holding that real estate sales not included within definition of "consumer transaction"); Brown v. Liberty Club, Inc., 543 N.E.2d 783 (Ohio 1989) (holding consumer act has no application in a "pure" real estate transaction).

6. *See infra* note 37 and accompanying text.

7. For an extensive background on the UDAP statutes of the various states see JONATHON SHELDON, UNFAIR AND DECEPTIVE ACTS AND PRACTICES (2d ed. 1988).

8. Society's increased environmental awareness has greatly affected law schools across the country, as evidenced by the existence of a variety of environmental law reviews. *See, e.g.*, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW; COLUMBIA JOURNAL OF ENVIRONMENTAL LAW; DICKINSON ENVIRONMENTAL LAW JOURNAL; GEORGETOWN INTERNATIONAL ENVIRONMENTAL LAW REVIEW; HARVARD ENVIRONMENTAL LAW REVIEW; PACE ENVIRONMENTAL LAW REVIEW; STANFORD ENVIRONMENTAL LAW JOURNAL; VILLANOVA ENVIRONMENTAL LAW JOURNAL; VIRGINIA ENVIRONMENTAL LAW JOURNAL.

9. Daniel K. Slone, *Real Estate Contaminated by Off-Site Sources*, 1990 A.B.A. SEC. REAL PROP., PROB. & TR. L. 28.

10. *Id.*

11. For purposes of this commentary, an environmental hazard includes toxic waste, land fills, pollution, and cancer causing chemicals and substances. "Affecting" means influencing the property financially or through actual contact.

12. *See infra* notes 17-51 and accompanying text.

13. *See infra* notes 52-93 and accompanying text.

statutes.[14] In Part V, material facts, omissions, and disclosure requirements will be discussed by analyzing UDAP statutes and case law.[15] Finally, this Comment will propose a legislative amendment to supplement the UDAP statutes so that consumers are afforded the protection necessitated by the risks caused by off-site environmental hazards.[16]

II. History

A. The Federal Trade Commission Act

In 1914, the Federal Trade Commission Act[17] was enacted in response to the industrialization in America in the early 1900's.[18] Although the Clayton Act[19] had been in effect since October 15, 1914, Congress sought to supplement anti-trust laws that were already in existence and ensure that anti-competitive actions would be stopped quickly before they became imbedded in society.[20] A new act was needed; an act which would specifically list prohibited practices but in broad enough terms to include a wide array of unfair commercial practices.[21] Congress realized, however, that if the act was too broad it could lead to an enormous increase in litigation.[22] Thus, in September 1914 Congress passed the Federal Trade Commission Act and formed the Federal Trade Commission.[23] The Act provides consumers and businessmen with a protective law that is flexible enough to encompass a wide variety of factual contexts.[24] The relevant provision states: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."[25] Similarly, the Federal Trade Commission

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14. *See infra* notes 94-118 and accompanying text.
15. *See infra* notes 119-55 and accompanying text.
16. *See infra* notes 156-88 and accompanying text.
17. 15 U.S.C. § 45 (1988).
18. Holloway v. Bristol-Myers Corp., 485 F.2d 986, 990 (D.C. Cir. 1973).
19. 15 U.S.C. §§ 12-27 (1988). The Clayton Act prohibits conduct that encourages the formation of monopolies, including price discrimination, price fixing, exclusive dealing, and anti-competitive mergers and acquisitions. *Id.* The Act also provides a variety of enforcement authority. *See* 15 U.S.C. §§ 15, 26 (authorization of private actions for both treble damages and equitable relief); 15 U.S.C. § 21 (F.T.C. and other agencies empowered to issue cease and desist orders); 15 U.S.C. § 24 (criminal penalties); 15 U.S.C. § 25 (Justice Department can bring action to enjoin violations).
20. *See* H.R. REP. No. 533, 63d Cong., 2d Sess. 4-6 (1914); S. REP. No. 597, 63d Cong., 2d Sess. 12-13 (1914); H.R. REP. No. 1142, 63d Cong., 2d Sess. 18-19 (1914).
21. Holloway v. Bristol-Myers Corp., 485 F.2d 986, 990 (D.C. Cir. 1973).
22. *See* S. REP. No. 597, 63d Cong., 2d Sess. 6-7 (1914) (quoting Wilson's Presidential Message of January 20, 1914).
23. 15 U.S.C. § 45 (1988).
24. *Holloway*, 485 F.2d at 990.
25. 15 U.S.C. § 45(a)(1) (1988).

provides a forum that businessmen and consumers can utilize for dispute resolution; thus, the courts are free from the possibility of intensified litigation.[26] The Commission was given broad discretion to make decisions that further the public interest.[27] Section 45(b) of the Act states:

> Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair methods of competition in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof *would be in the interest of the public*, it shall serve upon such person, partnership or corporation a complaint . . .[28]

This focus on public interest led the courts to declare that Congress never intended to provide for private enforcement of the Federal Trade Commission Act.[29] Therefore, where no other statute covered the claim, private individuals were forced to resort to common law fraud actions for relief.[30]

B. Common Law Fraud and the Emergence of State UDAP Statutes

Although varying from state to state, the elements of common law fraud generally are knowledge of falsity, intent to deceive, reliance, and damages.[31] Due to the number of elements that had to be established as well as the availability of a variety of defenses, the protection afforded to consumers through fraud actions was ineffec-

26. 15 U.S.C. § 45(a)(6) provides that "[t]he Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

27. The theory that the Commission is to protect the public interest is firmly embodied in case law. *See, e.g.*, F.T.C. v. Klesner, 280 U.S. 19, 28 (1929) (stating that the public interest must be specific and substantial); Spiegel, Inc. v. F.T.C., 494 F.2d 59, 62 (7th Cir. 1974) (stating that protection of public is essential to justify filing a complaint under Act); Gimbel Bros. v. F.T.C., 116 F.2d 578, 579 (2d Cir. 1941) (stating that the purpose of Act is protection of the public and not punishment of a wrongdoer).

28. 15 U.S.C. § 45(b) (1988) (emphasis added).

29. *See, e.g.*, F.T.C. v. Klesner, 280 U.S. 19, 25-26 (1929) ("Section 5 . . . does not provide private persons with an administrative remedy for private wrongs."); Motion Picture Advertising Co. v. F.T.C., 194 F.2d 633, 637 (5th Cir. 1952) (stating that the chapter was not passed to protect private rights).

30. Holloway v. Bristol-Myers Corp., 485 F.2d 986, 999 (D.C. Cir. 1973).

31. WILLIAM L. PROSSER, LAW OF TORTS 685-86 (4th ed. 1971). *See also* Pittman v. Larson Distributing Co., 724 P.2d 1379, 1386 (Colo. Ct. App. 1986); Schmeusser v. Schmeusser, 559 A.2d 1294, 1297 (Del. 1989); Gordon v. Etue, Wardlaw & Co., P.A., 511 So. 2d 384, 391 (Fla. Dist. Ct. App. 1987); Brown v. Broadway Perryville Lumber Co., 508 N.E.2d 1170, 1175 (Ill. App. Ct. 1987); Eagle Properties, Ltd., v. Scharbauer, 807 S.W.2d 714, 723 (Tex. 1991).

tive in many commercial situations.[32] For instance, a purchaser seeking recovery under common law fraud "was likely to be told by the court that scienter had not been adequately proved, that his reliance on the misrepresentation was unreasonable because he should have examined the goods or obtained the counsel of reliable persons, [or] that the representations concerned matters of opinion."[33] Furthermore, the ancient doctrine of caveat emptor, or "let the buyer beware," was fully embedded in common law.[34]

Because of these common law inadequacies, the lack of recovery for private individuals under federal law, and the existence of large scale industrialization in commercial society, the states were prompted to provide consumers with greater protections against fraudulent practices.[35] Thus, in the mid-1960s and 1970s states enacted unfair and deceptive acts and practices statutes.[36] These statutes protect private individuals against abusive commercial practices, and offer a broad range of remedies, including treble damages and attorney fees.[37] This expansive remedial offering is the real plumb of the UDAP statutes, and if a transaction falls within the purview of a UDAP statute it is advantageous to utilize the statute for recovery. To accommodate changing practices in the marketplace, the broad language of the UDAP statutes allows for flexibility in interpretation.[38] They also apply to most consumer transactions, including the

32. For UDAP cases mentioning the ineffectiveness of common law actions see State *ex rel.* Miller v. Hydro Mag, Ltd., 436 N.W.2d 617, 620 (Iowa 1989); Bernard v. Central Carolina Truck Sales, Inc., 314 S.E.2d 22 (N.C. Ct. App. 1984).

33. Note, *Developments in the Law: Deceptive Advertising* 80 HARV. L. REV. 1005, 1017 (1967) (citations omitted).

34. The doctrine of caveat emptor stands for the proposition that the buyer is responsible for all risks involved in sales transactions. *See generally* Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 113 (1931).

35. Several state statutes even include a separate provision stating the purpose of the act. *See* DEL. CODE ANN. tit. 6 § 2511 (1974); IDAHO CODE § 48-601 (1977); KY. REV. STAT. ANN. § 367.120 (Baldwin 1983); MD. COM. II LAW CODE ANN. § 13-102 (1990); TENN. CODE ANN. § 47-18-102 (1988); UTAH CODE ANN. § 13-11-2 (1986); W. VA. CODE § 46a-6-101 (1986).

36. SHELDON, *supra* note 7, § 1.1. These statutes are referred to differently in different states. *See, e.g.*, Deceptive Trade Practices Act, ALA. CODE § 8-19-1 (1984); Consumer Fraud Act, ARIZ. REV. STAT. ANN. § 44-1521 (1987); Consumer Protection Act, COLO. REV. STAT. § 6-1-101 (1973); Unfair Trade Practices Act, CONN. GEN. STAT. ANN. § 42-110a (West 1987); Deceptive Consumer Sales Act, IND. CODE ANN. § 24-5-0.5-1 (Burns 1991); Consumer Sales Practices Act, OHIO REV. CODE ANN. § 1345 (Baldwin 1988); Deceptive Trade Practices and Consumer Protection Law, 73 PA. CONS. STAT. ANN. § 201-1 (1991).

37. The availability of damages varies between the states. For instance, Hawaiian courts do not allow damages for personal injury or mental pain and suffering. *See, e.g.*, Beerman v. Toro Manufacturing Corp., 615 P.2d 749 (Haw. Ct. App. 1980). Similarly, Ohio does not allow treble damages unless there is a violation of a practice adopted by the attorney general. Sinkfield v. Strong, 517 N.E.2d 1051 (Cleveland Mun. Ct. Ohio 1987).

38. *See, e.g.*, State v. O'Neill Investigations, Inc., 609 P.2d 520 (Alaska 1980); Skinner v. Steele, 730 S.W.2d 335 (Tenn. Ct. App. 1987). *But compare* Commonwealth *ex rel.*

sale of land, merchandise, and the sale of goods or services.[39] As a result, the UDAP statutes can provide an all-purpose remedy if a particular practice does not fall within an existing statute or under a common law remedy.[40]

In addition to providing a remedy to private individuals, the elements of UDAP statutes are easier to prove than the elements of common law fraud because many do not require proof of intent to defraud,[41] reliance, actual damage,[42] or even actual sale.[43] A case

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Creamer v. Monumental Properties, Inc., 314 A.2d 333 (Pa. Commw. Ct. 1973) which stated that Pennsylvania's Unfair Trade Practices and Consumer Protection Law must be strictly construed because of the "penal" provision which allows up to five thousand dollars in damages. The Pennsylvania Supreme Court reviewed the case and decided that while the penal provisions are to be strictly construed, all other provisions must be liberally construed to effectuate the broad legislative purpose in preventing unfairness and deception in all consumer transactions. Commonwealth *ex rel.* Creamer v. Monumental Properties, Inc., 329 A.2d 812, 816-17 (Pa. 1974).

39. See *supra* note 5 for a list of states that do not include real estate in the purview of the UDAP statutes. Other transactions that are not covered by UDAP statutes are security transactions, the practice of law, and employer/employee relationships. *See generally* SHELDON, *supra* note 7, §§ 2.2-2.4.

40. Some UDAP statutes will apply even if the practice *does* fall within another statute. *See, e.g.*, Conway v. Prestia, 464 A.2d 847 (Conn. 1983) (holding that defendant's actions offended the public policy behind the Landlord and Tenant Act so conduct amounted to "unfair or deceptive acts or practices"); Piccuirro v. Gaitenby, 480 N.E.2d 30 (Mass. App. Ct. 1985) (holding that failure to comply with environmental code regulation was violation of consumer protection statute).

Conversely, the UDAP statute may be pre-empted by other state statutes. *See, e.g.*, Reiter Oldsmobile, Inc. v. General Motors Corp., 393 N.E.2d 376 (Mass. 1979) (holding that if conflict exists between ch. 93A, which regulates business practices for consumer protection, and ch. 93B, which regulates business practices between motor vehicle dealers, distributors and manufacturers, ch. 93B governs); Animal Legal Defense Fund Boston, Inc. v. Provimi Veal Corp., 626 F. Supp. 278 (D. Mass. 1986) (holding that complaint under consumer protection statute alleging cruelty to animals pre-empted by comprehensive federal scheme regulating labeling, packaging, and marketing of meat).

41. *See, e.g.*, Lane v. First National Bank of Boston, 737 F. Supp. 118 (D. Mass. 1989) (explaining that Consumer Protection Act does not require showing of knowing or willful conduct); Covenant Radio Corp. v. Ten Eighty Corp., 390 A.2d 949 (Conn. Super. Ct. 1977) (holding that there is no need to establish subjective intent to deceive); People *ex. rel.* Fahner v. Walsh, 461 N.E.2d 78 (Ill. App. Ct. 1984) (explaining that court looks to effect of alleged violator's conduct, not intent); Myers v. Liberty Lincoln-Mercury, Inc., 365 S.E.2d 663 (N.C. Ct. App. 1988) (holding that purchaser need not prove fraud, bad faith or intentional deception); Thomas v. Sun Furniture & Appliance Co., 399 N.E.2d 567 (Ohio Ct. App. 1978) (holding that evidence of intent to deceive not required).

A New Jersey court has distinguished the intent requirement for affirmative acts as opposed to acts of omission. Chattin v. Cape May Greene, Inc., 581 A.2d 91 (N.J. Super. Ct. App. Div. 1990). In *Chattin*, homeowners brought a consumer fraud action alleging that the real estate developer's advertisement misled them as to the quality of the windows in the home. *Id.* at 93. The developer argued that the trial court erred in permitting the jury to impose liability for consumer fraud without any showing of intent to mislead. *Id.* at 94. The court began its reasoning by analyzing the Consumer Fraud Act, which prohibits: "The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely . . . ." *Id.* at 95 (citing N.J. STAT. ANN. § 56:8-2 (West 1982)). The court found that this provision created two separate categories of prohibited acts; the first category consists of affirmative acts (deception, fraud, false pretense, that illustrates the refusal to codify common law in state UDAP statutes is *State ex rel. Miller v. Hydro Mag Ltd.*[44] In *Miller*, the defendant manufactured and marketed a questionable water purifying device.[45] The lower court held that in order to recover under the Iowa Consumer Fraud Act[46] the plaintiffs had to prove four elements: material misrepresentation, intent to induce the purchaser to act or refrain from acting, justifiable reliance, and damages.[47] The Iowa Supreme Court discussed the policy behind the Act and found that it was not necessary to prove reliance or damages.[48] The court emphasized that the Act prohibited unlawful practices regardless of whether a person relied on them or was damaged.[49] The court reasoned that the elimination of the reliance and damage requirements was essential in order to fulfill the policy behind the Act.[50] Thus, the court concluded that the Act was not a mere codification of common law fraud but provided greater protection to consumers by eliminat-

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false promise, misrepresentation) and the second category consists of acts of omission (concealment, suppression, omission). 581 A.2d at 95. As a result, the court decided that while affirmative acts do not require a showing of intent, an essential element of an act of omission is that it be knowing. *Id.* (citing Fenwick v. Kay American Jeep, Inc., 371 A.2d 13, 16 (N.J. 1977)). Thus, a New Jersey court must instruct a jury that a defendant can be liable without a showing of intentional wrongdoing only if he committed an affirmative act; acts of omission must be committed knowingly in order for the defendant to be liable.

It is interesting to note that the *Chattin* court disregarded the existence of the comma after the word "knowing" in the Consumer Fraud Act. The provision could thus be interpreted as the "knowing . . . of any material fact," and the knowledge element would not necessarily carry over to the "concealment, suppression or omission of any material fact."

42. *See, e.g.*, People *ex rel.* Babbitt v. Green Acres Trust, 618 P.2d 1086 (Ariz. Ct. App. 1980) (holding that reliance, actual deception or damage are not prerequisites to a consumer fraud action); State *ex rel.* Kidwell v. Master Distrib., Inc., 615 P.2d 116 (Idaho 1980) (holding that intent to deceive and actual damage not necessary); Salkeld v. V.R. Business Brokers, 548 N.E.2d 1151 (Ill. App. Ct. 1989) (holding that actual reliance not required); State *ex rel.* Miller v. Hydro-Mag, Ltd., 436 N.W.2d 617 (Iowa 1989) (reliance and damages are not elements of Consumer Fraud Act); *In re* Leger, 34 B.R. 873 (Bankr. D. Mass. 1983) (holding that no need to prove actual reliance under Consumer Protection Act).

43. Various states include the term "offer for sale" in the definition of "sale," "trade," or "commerce." For example, Section 201-2(3) of the Pennsylvania Act states that "trade" and "commerce" mean "the advertising, offering for sale, [or] sale or distribution of any services and any property . . . ." 73 PA. CONS. STAT. ANN. § 201-2(3) (1991). *See also* COLO. REV. STAT. ANN. § 6-1-102(10) (1973 & Supp. 1991); CONN. GEN. STAT. ANN. § 42-110a(4) (West 1987); ME. REV. STAT. ANN. tit. 5, § 206(3) (West Supp. 1989); N.J. STAT. ANN. § 56:8-1(e) (West 1989); R.I. GEN. LAWS § 6-13.1-1(2) (1985); TENN. CODE ANN. § 47-18-103(9) (1988).

44. 436 N.W.2d 617 (Iowa 1989).

45. *Id.* at 618.

46. IOWA CODE ANN. § 714.16 (West 1979).

47. *Miller*, 436 N.W.2d at 619.

48. *Id.* at 621.

49. The definition of an unlawful practice under the Iowa Code provides that an act may be prohibited "whether or not any person has in fact been mislead, deceived or damaged thereby." IOWA CODE ANN. § 714.16(2)(a) (West 1979 & Supp. 1990).

50. *Miller*, 436 N.W.2d at 621.

ing common law requirements.[51] Thus, in eliminating common law requirements and allowing recovery of treble damages and attorney fees, UDAP statutes provide the consumer with maximum protection against unfair and deceptive acts and practices.

III. Construction of UDAP Statutes

States followed several models when developing UDAP statutes. Some states borrowed directly from the Federal Trade Commission Act[52] and incorporated a provision stating that due consideration and great weight should be afforded to the Federal Trade Commission Act when interpreting the state's UDAP statute.[53] Other states adopted a modification of the Federal Trade Commission Act[54] or borrowed from a variety of sources to create new distinctive UDAP statutes.[55] Because UDAP statutes vary according to which model was used for a basis, it is necessary to analyze the statute to ascertain whether a particular action is included within its scope.[56] The following subparts will explore the scope of various state UDAP statutes.

A. Group I—Uniform Trade Practice and Consumer Protection Law

The majority of states[57] adopted various forms of the Uniform

51. *Id.* at 622. The court also looked to statutes of Illinois, Arizona, and Delaware to support its decision. *Id.* at 621-22.

52. *See* CONN. GEN. STAT. ANN. § 42-110 (West 1987); FLA. STAT. ANN. § 501.201 (West 1988); HAW. REV. STAT. § 480-1 (1985); ILL. REV. STAT. ch. 121 ½, para 261 (Smith-Hurd 1991); LA. REV. STAT. ANN. § 51:1402 (West 1987); ME. REV. STAT. ANN. tit. 5, § 206 (West 1989); MASS. GEN. LAWS ANN. ch. 93A, § 1 (West 1984); MONT. CODE ANN. § 30-14-102 (1990); NEB. REV. STAT. § 59-1601 (1988); N.Y. GEN. BUS. LAW § 349 (McKinney 1988); N.C. GEN. STAT. § 75-1.1 (1988); S.C. CODE ANN. § 39-5-10 (Law. Co-op. 1985); VT. STAT. ANN. tit. 9 § 2451a (1984); WASH. REV. CODE ANN. § 19.86.010 (West 1989); W. VA. CODE § 46A-6-101 (1986).

53. For instance, Alabama's Deceptive Trade Practices Act states: "It is the intent of the legislature that in construing section 8-19-5, due consideration and great weight shall be given where applicable to interpretations of the federal trade commission and the federal courts relating to section 5(a)(1) of the Federal Trade Commission Act . . . ." ALA. CODE § 8-19-6 (1984).

54. *See* ALA. CODE § 8-19-1 (1984); ALASKA STAT. § 45.50.471 (1991); GA. CODE ANN. § 10-1-390 (Harrison 1990); IDAHO CODE § 48-601 (1977); MD. COM. LAW II CODE ANN. § 13-101 (1990); MISS. CODE ANN. § 75-24-1 (Supp. 1972); N.H. REV. STAT. ANN. § 358-A:1 (1984); 73 PA. CONS. STAT. ANN. § 201-1 (1991); R.I. GEN. LAWS § 6-13.1-1 (Supp. 1985); TENN. CODE ANN. § 47-18-101 (1988).

55. *See, e.g.*, D.C. CODE ANN. § 28-3901 (1991); IND. CODE ANN. 24-5-0.5-1 (Burns 1991).

56. *See* SHELDON, *supra* note 7, § 2.1.

57. *See supra* note 52.

Trade Practice and Consumer Protection Law model statute.[58] This Statute was drafted by the Committee on Suggested State Legislation of the Council of State Governments along with the Federal Trade Commission as a guide for states to follow when enacting their own statutes.[59] The first type of UDAP statute is modeled after Section 5 of the Federal Trade Commission Act.[60] Like the Federal Trade Comimssion Act,[61] these statutes prohibit unfair methods of competition as well as unfair or deceptive acts or practices. These statutes also contain a provision declaring the precedential weight to be given to the interpretations of the Federal Trade Commission and the federal courts.[62] There is an important distinction between these provisions. If the FTC and the federal court rulings are given "great weight and due consideration," the state courts may be limited in interpreting the state UDAP statute.[63] Conversely, if the state courts are only "guided" by the FTC and the federal court rulings, it shows the legislative intent to provide for flexibility in interpretation; thus, the courts are given the ability to broaden protections.[64] Therefore, it

58. DEE PRIDGEN, CONSUMER PROTECTION AND THE LAW § 3.02(2)(c) at 3-6 (1989).

59. *Id.*

60. 15 U.S.C. § 45(a)(1) (1988).

61. Section 45(a)(1) of the Federal Trade Commission Act provides that "[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful." *Id.*

62. Each statute gives different precedential value to FTC interpretations. *Compare* CONN. GEN. STAT. § 42-110b(b) (West 1987) (providing that state courts shall be "guided" by the FTC and the federal courts) *with* FLA. STAT. ANN. § 501.204(2) (West 1988 & Supp. 1991) (providing that due consideration and great weight shall be given to interpretations by the federal courts and the FTC).

63. UDAP statutes adopting the model that give due consideration and great weight to the F.T.C. and the federal courts are FLA. STAT. ANN. § 501.204(2) (West 1988 & Supp. 1991); MONT. CODE ANN. § 30-14-104 (1991).

64. Although the Massachusetts and North Carolina statutes only provide for "guidance" from the FTC and the federal courts, the courts have virtually adopted the FTC Act's definitions of "deceptive" and "unfair." *See* Purity Supreme, Inc. v. Attorney General, 407 N.E.2d 297 (Mass. 1980); Hageman v. Twin City Chrysler-Plymouth Inc., 681 F. Supp. 303 (M.D.N.C. 1988). *See also* Bailey Employment System v. Hahn, 545 F. Supp. 62 (D. Conn. 1982). In *Bailey*, the defendant alleged that since the courts were to be guided by Federal Trade Commission and federal court interpretations and the federal regulation dealing with franchises was not in effect at the time of the transaction, an unfair and deceptive trade practice action could not be sustained. *Id.* at 70. The court found that the original statute provided that prohibited state practices were those "determined to be" unfair or deceptive by the Federal Trade Commission or the federal courts. *Id.* at 71. However, the court determined that the legislative amendment providing that the courts were to be "guided" by the Federal Trade Commission and the federal courts evinced the clear intent to permit the state courts to prohibit practices which had not been previously declared unlawful. *Id.* Thus, the court reasoned that the statute was to be liberally construed and not limited by lack of Federal Trade Commission rulings on the matter. *Id.* This decision is an example of how issues of first impression may fall within UDAP statutes although the federal system does not explicitly provide protection. *Cf.* Ai v. Frank Huff Agency, Ltd., 607 P.2d 1304, 1311 (Haw. 1980) (explaining that UDAP statute constructed with broad language constituted a "flexible tool to stop and prevent fraudulent, unfair or deceptive business practices").

is best to utilize this underlying legislative policy when arguing cases of first impression.[65]

Other states following this model enumerate prohibited practices but provide a catch-all phrase to include other acts or practices that are unfair or deceptive.[66] These catch-all provisions enable the courts to include transactions that the legislature did not specifically enumerate.[67] A case indicative of a catch-all provision's effect on the scope of the UDAP statute is *Klotz v. Underwood*.[68] The purchasers in *Klotz* brought a claim under the Tennessee Consumer Protection Act[69] alleging that the sellers concealed the existence of extrinsic structural damage of a private residence before it was sold.[70] The sellers argued that the Act did not apply to real estate transactions or to isolated transactions between private individuals who were not regularly engaged in the business of making such sales.[71] The court found that the mention of real estate in three separate places manifested the legislature's intent that the Act cover real estate transactions, although the acts enumerated in the statute were directed at the sale of "goods" or "services."[72] Furthermore, the court determined that the catch-all phrase included real estate because subsection 104(b) of the Act stated that the enumerated list was not to limit the scope of the general catch-all phrase.[73] The Tennessee Consumer Protection Act represents one of the broadest forms of UDAP statutes, and the catch-all phrase is extremely useful when bringing cases of first impression.[74] Other states utilize narrower catch-all

65. *See infra* notes 98-118 and accompanying text.

66. *See supra* note 54.

67. The catch-all provisions embrace real estate transactions in both Pennsylvania and Tennessee. Commonwealth *ex rel.* Creamer v. Monumental Properties, Inc., 329 A.2d 812 (Pa. 1974); Klotz v. Underwood, 563 F. Supp. 335 (E.D. Tenn. 1982), *aff'd*, 709 F.2d 1504 (6th Cir. 1983).

68. 563 F. Supp. 335 (E.D. Tenn. 1982), *aff'd*, 709 F.2d 1504 (6th Cir. 1983).

69. TENN. CODE ANN. § 47-18-101 (1988).

70. *Klotz*, 563 F. Supp. at 337.

71. *Id.*

72. *Id.* The statute's definition of goods does not specifically include real property. TENN. CODE ANN. § 47-18-103(5) (1988).

73. *Klotz*, 563 F. Supp. at 337. Interestingly, the court also found that the Act applied to isolated sales between individuals because the legislature did not explicitly limit the Act in this respect through the "exemption" clause. Other states have come to a contrary conclusion. *See* Lantner v. Carson, 373 N.E.2d 973 (Mass. 1978) (holding no violation of act if strictly private real estate transaction not done in ordinary course of business); Noack Enterprises, Inc. v. County Corner Interiors of Hilton Head Island, Inc., 351 S.E.2d 347 (S.C. Ct. App. 1986) (holding that unfair or deceptive act or practice that affects only parties to a transaction is beyond act's embrace).

74. The catch-all phrase in Tennessee's act is especially broad because it provides relief for the consumer and "any other person." TENN. CODE ANN. § 47-18-104(b)(27) (Supp. 1991).

phrases, with limitations as to transactions[75] and individuals[76] covered by the statutes. Again, these differences demand a careful reading of the statute in order to determine if the statute embraces a particular transaction.

B. Group II—Uniform Consumer Sales Practices Act

Several states[77] have modeled their UDAP statutes after the Uniform Consumer Sales Practices Act.[78] These statutes apply only to consumer transactions and prohibit both deceptive acts or practices and unconscionable practices.[79] As an example of what constitutes an unconscionable practice, the Kansas statute states that in determining whether an act is unconscionable, the court should consider circumstances of which the supplier knew or had reason to know existed.[80] These circumstances include the inability of the consumer to protect himself due to ignorance, illiteracy, or physical infirmity; whether the price grossly exceeded the price at which similar goods could be obtained by like consumers; whether misleading statements of opinion were made to induce reliance by the consumer; and whether the transaction was one-sided in the seller's favor.[81] In order to take advantage of the broad scope provided by these UDAP statutes, it is best to claim that the seller engaged in both unconscionable practices as well as deceptive acts and practices.

C. Group III—Uniform Deceptive Trade Practices Act

Several states[82] have modeled their statutes after the Uniform

75. The catch-all provision in the Rhode Island Trade Practices Act only prohibits practices that affect the public in a material respect. R.I. GEN. LAWS § 6-13.1-1(N) (Supp. 1991).

76. Some UDAP statutes require that the transaction apply to personal, family or household purposes, so that businesses are excluded from protection. *See* George v. United Kentucky Bank, Inc., 753 F.2d 50 (6th Cir. 1985) (applying Kentucky law); Hydro Air of Connecticut, Inc. v. Versa Technologies, Inc., 599 F. Supp. 1119 (D. Conn. 1984); Waldo v. North American Van Lines, Inc., 669 F. Supp. 722 (W.D. Pa. 1987).

77. *See* KAN. STAT. ANN. § 50-624 (1983); OHIO REV. CODE ANN. § 1345.01 (Baldwin 1988); UTAH CODE ANN. § 13-11-1 (1986).

78. 7A U.L.A. 231 (1978). This Act was drafted by the National Conference of Commissioners on Uniform State Laws and the American Bar Association to aid the state legislatures in developing the UDAP statutes. *Id.*

79. The unconscionable acts provisions are seperate sections of the Statutes. KAN. STAT. ANN. § 50-627 (1983); OHIO REV. CODE ANN. § 1345.03 (Baldwin 1988); UTAH CODE ANN. § 13-11-5 (1986).

80. KAN. STAT. ANN. § 50-627(b) (1983).

81. *Compare* OHIO REV. CODE ANN. § 1345.03(B) (Baldwin 1988) (enumerating what costitutes an unconscionable act) *with* UTAH CODE ANN. § 13-11-5(3) (1986) (directing the court to consider circumstances which the supplier knew or had reason to know existed).

82. *See* COLO. REV. STAT. § 6-1-101 (1973); NEV. REV. STAT. § 598.360 (1989); N.M. STAT. ANN. § 57-12-1 (Michie 1987); OR. REV. STAT. § 645.605 (1989).

Deceptive Trade Practices Act.[83] Although the Uniform Act focuses on prohibiting unfair methods of competition,[84] the states have adopted it with variations, omissions, and additions.[85] For instance, Colorado's Consumer Protection Act[86] differs from the Uniform Deceptive Trade Practices Act in several respects. Unlike the Uniform Act, Colorado's statute contains explicit definitions of the terms "property" and "sale."[87] Therefore, it affords more explicit protection than the Uniform Act.[88] Other states that have adopted alterations of the Uniform Deceptive Trade Practices Act also provide more specific definitions of the terms used in the statutes.[89]

D. Group IV—Consumer Fraud Acts

Other states have developed consumer fraud acts which prohibit:

> [T]he act, use, or employment by any person of any deception, deceptive act or practice, fraud, false pretense, false promise, misrepresentation, or concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise whether or not any person has in fact been mislead, deceived, or damaged thereby . . . .[90]

By listing types of prohibited practices in broad terms, these statutes apply to a myriad of unfair or deceptive trade practices.[91] These statutes also apply to transactions where a seller or supplier fails to disclose a material fact, as opposed to statutes that only apply to

83. 7A U.L.A. 265 (1985).

84. "The deceptive trade practices singled out by the Uniform Act can be roughly subdivided into conduct involving either misleading trade identification or false and deceptive advertising." 7A U.L.A. 265, 266 (1985) (prefatory note to Uniform Deceptive Trade Practices Act).

85. *See* N.M. STAT. ANN. § 57-12-1 (Michie 1987) (Notes following statute comment on Uniform Deceptive Trade Practices Act).

86. COLO. REV. STAT. § 6-1-102 (1973 & Supp. 1991).

87. COLO. REV. STAT. § 6-1-102(8),(10) (1973 & Supp. 1991).

88. The Uniform Act does not define "property," "sale," or "advertising." 7A U.L.A. 265 (1985).

89. *See supra* note 82.

90. ARIZ. REV. STAT. ANN. § 44-1522 (Supp. 1992). *See also* ARK. CODE ANN. § 4-88-101 (Michie 1987 & Supp. 1991); DEL. CODE ANN. tit. 6, § 2511 (1974); IOWA CODE ANN. § 714.16 (West 1979); MO. REV. STAT. § 407.010 (Vernon 1990); N.J. STAT. ANN. § 56:8-1 (West 1989).

91. In employing language of this type, the legislature clarifies its intent that the statute does not parallel common law fraud: the last sentence explicitly omits the requirements of being mislead, deceived or damaged. In re Brandywine Volkswagon, Ltd., 306 A.2d 24, 29 (Del. Super. Ct. 1973).

misrepresentations.[92] This is important because if particular information constitutes a material fact the statute may afford protection for omissions and concealment as well as misrepresentation.[93]

The foregoing discussion shows that the differences between the various UDAP statutes directly affect whether the statute will cover a particular transaction. The next portion of this Comment will explore the relationship of the scope of the UDAP statutes to a real estate developer's duty to disclose environmental hazards located off the property in question. The analysis will begin with a brief synopsis of the interpretation of UDAP statutes that explicitly cover real estate transactions. The analysis will then focus on statutory interpretation and legislative policy arguments pertaining to UDAP statutes that do not explicitly cover real estate transactions.

IV. The Scope of UDAP Statutes and Legislative Policy

In examining a UDAP statute to ascertain whether off-site environmental hazards are included within the scope of the statute, it is first necessary to see if the state legislature explicitly included real property within the statute.[94] If real property is included in the statute, it must then be determined whether environmental hazards are part of the definition of real property. For instance, *Barry L. Kahn Defined Benefit Pension Plan v. Township of Moorestown*[95] involved the sale of a tax certificate on property. After sale, the purchasers discovered that the ground under the property was contaminated with hazardous materials.[96] The court concluded that the Consumer Fraud Act did not afford protection because the certificate, as opposed to the underlying property, was the only "merchandise" sold, and it was not defective.[97] With regard to the issue at hand, it can be argued that an environmental hazard located in the surrounding environment is not being "sold" or does not fall within the statute's definition of "merchandise." If it does not affect the property, then it

92. *See infra* note 124. The Pennsylvania statute only applies to misrepresentations, although the courts have enlarged the scope to include omissions on a case by case basis. *See, e.g.*, Commonwealth *ex rel.* Biester v. Luther Ford Sales, Inc., 430 A.2d 1053 (Pa. Commw. Ct. 1981) (holding that nondisclosure that used car was damaged by flood was violation of the statute); Commonwealth *ex rel.* Packel v. Tolleson, 321 A.2d 664 (Pa. Commw. Ct. 1974) (holding that defendants violated the statute by failing to disclose complex corporate structure, additional expenses that could be incurred, and required membership fee).

93. *See infra* part V.

94. *See supra* note 5.

95. 579 A.2d 366 (N.J. Super. Ct. Ch. Div. 1990).

96. *Id.* at 368. The property was also under investigation by the United States Environmental Protection Agency and the New Jersey Department of Environmental Protection. *Id.*

97. *Id.* at 372.

is not part of the property and should not be included within the protection of the UDAP statutes.

If real estate transactions are not specifically covered by the UDAP statute, it is necessary to rely on legislative policy to broaden the scope of the statute. Both the Federal Trade Commission Act as well as individual state UDAP statutes are remedial in nature and must be liberally construed.[98] It is best to rely on these underlying policies of flexibility and remedy when arguing for the disclosure of environmental hazards because the courts are free to decide which transactions should fall within the statutes.[99] For example, in *Gabriel v. O'Hara*,[100] the Pennsylvania Superior Court decided that the sale of residential real estate was within the purview of the Unfair Trade Practices and Consumer Protection Law [UTPCPL].[101] In doing so, the court relied heavily on policy considerations.[102] The court stated: "That sales of real property would be protected by the UTPCPL is consonant with its broad remedial purposes. Residential real estate is almost always a consumer's largest single purchase. Consequently, the impact of unfair or deceptive practices is greatest in this type of transaction."[103] Although *Gabriel* involved the purchase of a house containing interior defects, the court's reliance

98. *See* F.T.C. v. Colgate-Palmolive Co., 380 U.S. 374 (1965) (holding that prohibited practices are flexible and are to be defined by the various cases in the business community); Kugler v. Banner Pontiac-Buick, Opel, Inc., 295 A.2d 385 (N.J. Super. Ct. App. Div. 1972) (holding that act should be liberally interpreted so that public purpose is fully effected); First Title Company of Corpus Christi, Inc. v. Cook, 625 S.W.2d 814 (Tex. Ct. App. 1981) (holding that act should be given the most liberal construction possible without violating its terms).

99. *See, e.g.*, Bailey Employment System, Inc. v. Hahn, 545 F. Supp. 62 (D. Conn. 1982) (holding that act permits Connecticut courts to hold unlawful practices not yet declared unlawful by federal authorities).

100. 534 A.2d 488 (Pa. Super. Ct. 1987).

101. *Id.* at 492.

102. *Gabriel*, 534 A.2d at 492-93. Similarly, the Illinois court utilized legislative policy arguments in deciding that the Consumer Fraud Act covers real estate transactions. Beard v. Gress, 413 N.E.2d 448 (Ill. App. Ct. 1980) (analyzing ILL. REV. STAT. ch. 121 ½, para. 261 (Smith-Hurd 1991)). In *Beard*, the defendant real estate broker alleged that real estate transactions were not included within the Act because the purchasers, who were private individuals, were not "consumers" as defined by the statute. *Id.* at 451. In rejecting this argument, the court stated that the Act had been amended to specifically include real property within the definition of "trade" or "commerce." *Id.* at 452. The court reasoned that the policy of the Act was to protect consumers, borrowers, and businessmen against fraud, and it would be inconsistent with this purpose to give protection to businessmen and not private consumers. *Id.* Because of this policy consideration, the court held that purchasers were able to sue although they do not explicitly come within the definition of "consumer." *Id.*

In comparison, the New Jersey Unfair Trade Practices Act does not expressly include real property in its definition of "merchandise." N.J. STAT. ANN. § 56:8-1 (West 1982). However, the legislature added a separate provision for fraud in connection with the sale of real estate in order to clarify its intent to cover real property. *See* Arroyo v. Arnold-Baker Associates, Inc., 502 A.2d 106 (N.J. Super. Ct. Law Div. 1985).

103. *Gabriel*, 534 A.2d at 492-93.

on the remedial purposes of the statute and the importance of the transaction to the consumer indicates that environmental hazards off the property could also fall within the scope of UDAP statutes. The underlying policy of flexibility shows that state legislatures granted the courts the authority to address contemporary commercial problems.[104] Because the threat of adverse impacts of environmental hazards has increased in recent years, the courts should interpret UDAP statutes to include abusive commercial practices involving environmental hazards. Also, since environmental hazards have an adverse impact on property just as interior structural defects do, and consumers should be afforded protection in this area especially in light of the significance of the purchase. For example, a carcinogenic environmental hazard could contaminate drinking water and adversely affect a family to a much higher degree than a cracked foundation of a house. These grave health risks necessitate that courts protect the consumer involved in this type of transaction from marketplace abuse.

However, several states' courts seem to ignore underlying legislative policy and rely instead on statutory construction to determine whether transactions are protected.[105] Therefore, these courts will only afford protection if a particular transaction is explicitly mentioned in the definitions of trade, commerce, merchandise, goods, services, or consumer transaction.[106] This statutory interpretation is an obstacle to consumers bringing cases of first impression under the UDAP statutes. For example, the Supreme Court of Alaska ruled that real estate transactions are not included within the definition of "goods and services" of the Unfair Trade Practices and Consumer Protection Act.[107] In *State v. First National Bank of Anchorage*, the State brought suit against a real estate broker who failed to disclose that lots for sale were subject to flooding from Lake George.[108] Although the court admitted that the Act was remedial and should be liberally construed, it employed the rule of *ejusdem generis*[109] and

104. *See* sources cited *supra* notes 98-99.

105. *See supra* note 5.

106. *See supra* note 5.

107. State v. First National Bank of Anchorage, 660 P.2d 406 (Alaska 1982) (interpreting ALASKA STAT. § 45.50.471 (1991)).

108. *Id.* at 409.

109. *Ejusdem generis* is a canon of statutory construction and literally means "of the same genus or class." BLACK'S LAW DICTIONARY 464 (5th ed. 1979). It is employed in interpreting verbal patterns and stands for the proposition that whenever a statute contains a specific enumeration followed by a general catch-all phrase, the general words should be construed to mean only things of the same kind or same characteristics as the specific words. Campbell v. Board of Dental Examiners, 125 Cal. Rptr. 694, 696 (Cal. Ct. App. 1975).

found that real estate was not included in any of the specifically enumerated deceptive practices, nor was it included in any other provision of the Act.[110] Thus, the Act offered no remedy for victims of deceptive practices involving real property.[111]

There is an inherent problem with these statutory interpretations of state UDAP statutes. The legislative purpose behind all of these statutes is to afford a remedy to consumers who are victims of marketplace abuse.[112] The texts are intentionally broad to provide interpretive flexibility.[113] In many UDAP statutes, the terms "goods" or "services" are not explicitly defined,[114] and many statutes state that the enumerated lists are not exclusive.[115] This evinces the legislature's intent that the statutes should encompass a wide variety of deceptive practices.[116] However, courts that are reluctant to in-

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110. *First National*, 660 P.2d at 412-14. Florida courts have similarly refused to include real estate transactions within the definition of "consumer transaction." State *ex rel.* Herring v. Murdock, 345 So.2d 759 (Fla. Dist. Ct. 1977) (interpreting FLA. STAT. ANN. § 501.203 (West 1988)). In *Herring*, real estate purchasers brought an action under the Deceptive and Unfair Trade Practices Act to enjoin false advertising practices. *Id.* at 760. The court conceded that the text of the statute was broad enough to include real estate transactions, especially in light of the provision regarding consideration of Federal Trade Commission decisions. *Id.* Nonetheless, the court concluded that real estate transactions were not protected because they were not explicitly mentioned in the Act's definition of "consumer transaction." *Id.* The court added that even if the legislature intended to include real estate sales it did not actually do so, and the court could not properly make such an addition. *Id.*

111. Several purchasers then tried to recover under the Uniform Land Sales Practices Act, which contains an anti-fraud provision, but were denied recovery because the Act did not apply retroactively. 660 P.2d at 411-16.

Alaska's Uniform Land Sales Practices Act provides:

> It is unlawful for a person, in connection with the offer, sale or purchase of subdivided land directly or indirectly, to knowingly
> (1) employ a device, scheme or artifice to defraud;
> (2) make an untrue statement of a material fact or omit a statement of material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
> (3) engage in an act, practice or course of business which operates or would operate as a fraud or deceit upon a person.

ALASKA STAT. § 34.55.006 (1990). Although this Act deals with consumer protection, it only applies to transactions involving subdivided land and does not provide for treble damages as the UDAP statutes do. ALASKA STAT. § 34.55.030 (1990). Hawaii, Kansas and Utah have adopted similar statutes. *See* HAW. REV. STAT. § 484-1 (1985); KAN. STAT. ANN. § 3301 (1983); UTAH CODE ANN. § 57-11-1 (1990).

112. *See supra* notes 35-40 and accompanying text.

113. *See* cases cited *supra* notes 98-99.

114. *See* ALA. CODE § 8-19-3 (1984) (no definition of services); ALASKA STAT. § 45.50.471 (1991) (no definition of goods or services); COLO. REV. STAT. Ann. § 6-1-102 (1973) (no definition of goods or services); FLA. STAT. ANN. § 501.203 (West 1988) (no definition of trade or commerce); NEB. REV. STAT. § 59-1601 (1988) (no definition of assets, services, or commerce).

115. Every state except Wisconsin has a provision for exclusions or exemptions. *See supra* note 5.

116. *See, e.g.*, People *ex rel.* MacFarlane v. Alpert Corp., 660 P.2d 1295, 1297 (Colo. Ct. App. 1982) (holding that legislature intentionally declined to define "goods or services" in order to provide the courts with broad interpretive powers).

clude particular transactions within the purview of the UDAP statutes seem to overlook this legislative intent, although they *admit* that the statutes are intentionally broad and should be liberally construed.[117] The UDAP statutes were meant to provide an expedient remedy to those affected by deceptive acts and practices in the changing marketplace.[118] To exclude transactions of first impression merely because they are not specifically enumerated is avoidance of judicial responsibility, especially in light of the policy behind the statutes.

A strong policy argument is most advantageous when arguing that off-site environmental hazards should be included within the UDAP statutes. The previous discussion shows that the definitions within the UDAP statutes, although seemingly broad, are still confining. With regard to environmental hazards located off of the property, one should assert that although this is a relatively new concern it has increased in importance and impact over the years. Also, because of the grave threat to the health, safety and welfare of the citizens of a particular state, that state should assert its police powers and provide consumer protection against unfair and deceptive practices in this area.

Assuming that real estate transactions are included within the scope of the UDAP statutes through legislative or judicial action, it is necessary to determine what type of conduct falls within the statute. This Comment will next address the requirements of material facts, omissions, and disclosures.

V. Conduct Covered by UDAP Statutes

A. *Material Fact*

In order to be liable under the UDAP statutes, a real estate developer or broker must misrepresent, conceal, or omit a material fact.[119] Thus, after determining that environmental hazards located

117. This is especially troubling if the state legislature included a provision stating the flexible purpose of the statute. *See supra* note 35.

118. *See supra* note 35.

119. UDAP statutes that explicitly state the material fact requirement include: ARK. CODE ANN. § 4-88-101 (Michie 1987 & Supp. 1991); ARIZ. REV. STAT. ANN. § 44-1521 (1987); COLO. REV. STAT. § 6-1-101 (1973); DEL. CODE ANN. tit. 6, § 2511 (1974); D.C. CODE ANN. § 28-3901 (1991); ILL. REV. STAT. ch. 121 ½, para. 261 (Smith-Hurd 1991); IOWA CODE ANN. § 714.16 (West 1979); KAN. STAT. ANN. § 50-623 (1983); MICH. STAT. ANN. § 19.418(1) (Callaghan 1990); MO. ANN. STAT. § 407.010 (Vernon 1990); NEV. REV. STAT. § 598.360 (1989); N.J. STAT. ANN. § 56:8-1 (West 1989); OR. REV. STAT. § 646.605 (1989); R.I. GEN. LAWS § 6-13.1-1 (1985); TEX. BUS. & COM. CODE ANN. § 17.41 (West 1987); W. VA. CODE § 46A-6-101 (1986).

in the surrounding environment are within the purview of the UDAP statutes through policy reasoning, it is necessary to ascertain whether a particular hazard constitutes a material fact. At common law, a material representation is one that a "reasonable man would attach importance to in determining his choice of action in the transaction in question."[120] The Federal Trade Commission Act defines a material fact as a fact that, if known by the prospective purchaser, would influence the decision of whether to purchase.[121] Similarly, in order to be liable under the UDAP statutes, the broker or developer must misrepresent or omit a material fact which in turn has an impact on the purchaser's decision to buy.[122] An environmental hazard such as pollution or a toxic waste dump in the environment surrounding a particular piece of property could very well influence a prospective purchaser's decision on whether to buy the property. In gaining knowledge about an off-site environmental hazard, consumers will question whether their health is at risk. Similarly, consumers will also question whether their property will decrease in value as the community gains knowledge of the hazardous environment, and whether it may become virtually impossible to sell the property. These serious considerations will affect the purchaser's decision to buy the property. Thus, the hazard would constitute a material fact.

B. *Omissions and Disclosure*

After establishing that an off-site environmental hazard constitutes a material fact, it becomes necessary to explore the omission and disclosure requirements of the UDAP statutes. The UDAP statutes are not uniform in that they do not all include omissions, concealment, and misrepresentations of a material fact.[123] With regard to the states that do not include omissions in their statutes,[124] it may

120. RESTATEMENT (SECOND) OF TORTS § 538(2)(a) (1976).

121. Heller & Son v. Federal Trade Commission, 191 F.2d 954, 956 (7th Cir. 1951) (citing Haskelite Manufacturing Corp. v. Federal Trade Commission, 127 F.2d 765 (7th Cir. 1942)).

122. Connor v. Merrill Lynch Realty, Inc., 581 N.E.2d 196 (Ill. App. Ct. 1991), *appeal denied*, 587 N.E.2d 1012 (1992); Homsi v. C.H. Babb Co., 409 N.E.2d 219 (Mass. 1980).

123. *Compare* sources cited *supra* note 54 *with* sources cited *supra* note 90.

124. Statutes that specifically enumerate misrepresentations only include: ALA. CODE § 8-19-1 (1984); CAL. CIV. CODE § 1760 (West 1985); IND. CODE ANN. § 24-5-0.5-1 (Burns 1991); MICH. STAT. ANN. § 19.418(1) (Callaghan 1990); MINN. STAT. ANN. § 325F.68 (West 1981); MISS. CODE ANN. § 75-24-1 (Supp. 1972); N.H. REV. STAT. Ann. § 358-A:1 (1984); N.D. CENT. CODE § 51:15-01 (1989); OHIO REV. CODE ANN. § 1345.01 (Baldwin 1988); OKLA. STAT. ANN. tit. 15, § 751 (West Supp. 1992); OR. REV. STAT. § 646.605 (1989); 73 PA. CONS. STAT. ANN. § 201-1 (1991); R.I. GEN. LAWS § 6-13.1-1 (1985); S.D. CODIFIED LAWS ANN. § 37-24-1 (1986); TENN. CODE ANN. § 47-18-101 (1988); UTAH CODE ANN. § 13-11-1 (1986); WYO. STAT. § 40-12-101 (1977).

prove difficult to bring a claim against a broker for failing to disclose the existence of an environmental hazard affecting the property. However, some state courts have broadened the UDAP statutes in order to include nondisclosures of material facts.[125] For instance, the Pennsylvania Unfair Trade Practices and Consumer Protection Law does not specifically provide for omissions.[126] However, in order to prevent deception the Pennsylvania courts have required affirmative disclosure in some circumstances.[127] Consumers could utilize this judicial activity as precedent supporting the argument that nondisclosure has been included in the statute through judicial response. Thus, even if the statute does not explicitly apply to nondisclosure, the argument can be made that the judiciary has included it.

The consumer fraud acts that specifically prohibit omissions or concealment of material facts will invariably dictate the diclosure of a known material fact that is basic to the transaction.[128] Since it can be argued that an environmental hazard constitutes a material fact, it follows that the hazard should be disclosed. A case that does not deal with environmental hazards but nonetheless illustrates the duty to disclose material facts is *Grossman v. Waltham Chemical Co.*[129] In *Grossman*, the Appeals Court of Massachusetts concluded that the failure to disclose termite damage in a barn permitted the purchaser to recover under a UDAP statute.[130] The court stated that the concealment could have prompted the purchaser to act differently

125. *See, e.g.*, Paty v. Herb Adcox Chevrolet Co., 756 S.W.2d 697 (Tenn. Ct. App. 1988) (holding that failure to disclose that automobile had decreased in market value after an accident constituted deceptive act); Peabody v. P.J.'s Auto Village, Inc., 569 A.2d 460 (Vt. 1989) (holding that plaintiff must show that a deceptive omission influenced consumer's conduct regarding decision to buy).

126. 73 PA. CONS. STAT. ANN. § 201-3 (1991). The statute specifically enumerates prohibited practices involving misrepresentations.

127. *See* Commonwealth *ex rel.* Biesther v. Luther Ford Sales, Inc., 430 A.2d 1053 (Pa. Commw. Ct. 1981) (holding that nondislosure that used car was damaged by flood was violation of UDAP statute); Commonwealth *ex rel.* Packel v. Tolleson, 321 A.2d 664 (Pa. Commw. Ct. 1974) (holding that defendants violated UDAP statute by failing to disclose complex corporate structure, additional expenses that could be incurred, and required membership fee).

128. State *ex rel.* Corbin v. Goodrich, 726 P.2d 215 (Ariz. Ct. App. 1986) (holding that seller's failure to inform investors that metals being sold had never been purchased was violation of UDAP statute); Brandywine Volkswagen, Ltd. v. State, 312 A.2d 632 (Del. Super. Ct. 1973) (holding seller liable for failure to disclose mileage of automobile for sale); American Security Benevolent Ass'n, Inc. v. District Court of Black Hawk County, 147 N.W.2d 55 (Iowa 1966) (holding seller liable for failing to disclose that purchaser was not buying insurance).

129. 436 N.E.2d 1243 (Mass. App. Ct. 1982).

130. *Id.* at 1245. Other cases that deal with nondisclosure or misrepresentations with regard to termite damage include Harkala v. Wildwood Realty, Inc., 558 N.E.2d 195 (Ill. App. Ct. 1990); Robertson v. Boyd, 363 S.E.2d 672 (N.C. Ct. App. 1988); Rudolph v. ABC Pest Control, Inc., 763 S.W.2d 930 (Tex. Ct. App. 1989).

than he otherwise would have acted.[131] However, the court took its analysis one step further and proclaimed that "[a] failure to disclose any fact, the disclosure of which may have influenced a person not to enter into a transaction, is a violation [of the consumer protection law]."[132] Under this broad interpretation, almost any environmental hazard which has a possibility of affecting the property involved in the transaction must be disclosed.

It is important to recognize, however, that the duty to disclose is not absolute. For example, UDAP statutes are not intended to impose liability upon a broker for latent or hidden defects.[133] Thus, some states require that in order to be liable for failing to disclose a material fact the fact must be within the developer's knowledge.[134] For example, in *Sheehy v. Lipton Industries, Inc.*[135] a purchaser of commercial real estate[136] brought suit under the state consumer protection law against the sellers and the brokerage firm.[137] Contamination of the area by hazardous material had been widely publicized in the news media[138] and prompted the purchaser to inquire of the broker whether there was any problem with the land.[139] The broker told the purchaser not to worry, but after the sale the purchaser was denied a building permit.[140] Consequently, the purchaser employed a firm to conduct an environmental audit of the property. The results

131. *Grossman*, 436 N.E.2d at 1245 (citing Lowell Gas Co. v. Attorney General, 385 N.E.2d 240 (Mass. 1979)).

132. *Id.* (citing Homsi v. Babb Co., Inc., 409 N.E.2d 219 (Mass. App. Ct. 1980)). The *Homsi* court looked to the attorney general regulations for guidance. *See* MASS. REGS. CODE tit. 940, § 3.16(2) (1978) (failing to disclose any fact which may have influenced buyer not to enter into transaction is a violation of the consumer protection law).

133. Harkala v. Wildwood Realty Inc., 558 N.E.2d 195, 199 (Ill. App. Ct. 1990) (holding that legislative amendment constituted persuasive evidence that act was not intended to apply to hidden or latent defects).

134. Wellesley Hills Realty Trust v. Mobil Oil Corp., 747 F. Supp. 93, 103 (D. Mass. 1990) (holding that defendant must have actual knowledge that contamination existed); Pfeiffer v. Ebby Halliday Real Estate, Inc., 747 S.W.2d 887, 889 (Tex. App. Ct. 1988) (holding that defendant cannot be liable for failing to disclose facts he does not know).

135. 507 N.E.2d 781 (Mass. App. Ct. 1987).

136. The Massachusetts's Consumer Protection Act applies to "any trade or commerce directly or indirectly affecting the people of this commonwealth." MASS. GEN. LAWS ANN. ch. 93A, § 1(b) (West 1984). Thus, any transactions made within a business context are included within the Act, and it is not limited to consumer transactions. *See also* Lynn v. Nashawaty, 423 N.E.2d 1052 (Mass. App. Ct. 1981); Lantner v. Carson, 373 N.E.2d 973 (Mass. 1973).

137. *Sheehy*, 507 N.E.2d at 781.

138. *See* Alberta I. Cook, *Did Dumping Cause Cancer?; Mother's Questions Lead to Suits*, NAT'L L.J., May 5, 1986, at 6; *Firm Liable for Tainted Wells-Jury to Decide if Contamination Caused Leukemia*, CHI. TRIB., July 29, 1986, News, at 5; Brook Larmer, *Toxic Waste Issue Boiling in Bay State*, CHRISTIAN SCI. MONITOR, Feb. 19, 1986, National, at 3; Arthur Unger, *'Nova' Takes Balanced Look at Toxic-Waste Controversies*, CHRISTIAN SCI. MONITOR, Feb. 25, 1986, Arts and Leisure, at 24.

139. *Sheehy*, 507 N.E.2d at 782.

140. *Id.*

of the audit showed that the property was contaminated.[141] The court found that the broker could be held liable only if he knew that the property was contaminated.[142]

Applying this reasoning to the issue at hand, a broker will only be liable for nondisclosure of environmental hazards if the broker had actual knowledge of the hazard. It follows that if a broker or developer is not from the area where the property is sold and consequently is not aware of the hazards, the broker or developer cannot be liable for nondisclosure. This interpretation of the UDAP statutes is too narrow and confining. It allows ignorance to become a shield against liability and provides an incentive for brokers and developers to deliberately "close their eyes" to the existence of environmental hazards.[143] Instead, the statutes should utilize a negligence standard of "known or should have known" in order to fully protect the consumer.[144]

The duty to disclose is also affected by the actual knowledge of the consumer. If a consumer had actual knowledge of the defect or hazard prior to the purchase she may not be able to recover under a UDAP statute.[145] A case that does not deal with environmental hazards but nonetheless illustrates this point is *Connor v. Merrill Lynch Realty, Inc.*[146], which involved the flooding of a piece of real estate. The seller, who was the previous owner of the home, represented that the home had flooded previously but the problem had been corrected, and the brokers stated that there was no evidence of flooding in the home.[147] Prior to sale, the purchasers hired a home inspector through the aid of the broker and accompanied him on the inspection of the home.[148] In reliance on this inspection and previous statements made by the broker and seller, the buyer purchased the home.[149] Thereafter, the home was subject to repeated flooding and

141. There was evidence in the record that at least one neighbor owning adjoining property experienced problems caused by hazardous materials dumped on part of the land. 507 N.E.2d at 783 n.2.

142. There was evidence that two years prior to the sale Lipton had been informed of the presence of animal hides and odors in the vicinity of the property. *Id.*

143. Easton v. Strassburger, 199 Cal. Rptr. 383, 388 (Cal. App. Ct. 1984).

144. *See supra* notes 161-81 and accompanying text.

145. Nei v. Burley, 446 N.E.2d 674 (Mass. 1983); Pfeiffer v. Ebby Halliday Real Estate, Inc., 747 S.W.2d 887 (Tex. App. Ct. 1988).

146. 581 N.E.2d 196 (Ill. App. Ct. 1991).

147. *Id.* at 199.

148. *Id.* The purchasers could have chosen to have a written inspection, but opted for a cheaper, oral inspection in which the inspector walks the clients through the house and points out any defects. *Id.* Consumers should choose written inspections as a rule, in order to avoid conflicting testimony if litigation ensues.

149. *Id.* at 200.

the purchasers discovered that the brokers had knowledge that the surrounding neighborhood was subject to periodic flooding.[150] The purchasers brought an action under the Illinois Consumer Fraud and Deceptive Business Practices Act.[151] The court stated that the Act was not meant to apply to latent or hidden defects or to turn nondeceptive assertions into positive affirmations.[152] The court found that any misrepresentations made by the broker were cured when the purchasers were informed of the water damage by the seller and home inspector.[153] Also, there was no evidence to support the fact that the brokers knew of the deceptive nature of the statements made.[154]

Applying this reasoning to the issue at hand, if a purchaser previously lived in an area subjected to environmental hazards he would have actual knowledge of the hazard through ordinary prudence and may be barred from bringing a claim under the UDAP statute if he decides to purchase neighboring property. Thus, any alleged misrepresentations or omissions made by the broker or developer as to environmental hazards are immaterial if the purchasers knew of the hazards previously. Furthermore, if the consumer gains awareness of an environmental hazard from anyone involved in the transaction, including the previous owner of a home, any misrepresentations or omissions of the broker or developer will be cured and they cannot be found liable.[155] This could be extended even further to include

150. 581 N.E.2d at 200. The purchasers argued that the brokers lived in the same area in which the property was located and knew of the flooding propensities. *Id.* at 201. However, the court rejected this argument stating that the purchasers also lived in the area prior to purchasing the home and must of learned by the "use of ordinary prudence" of the area's flooding problems. *Id.* This reasoning suggests that courts may impute constructive knowledge upon the purchasers or the sellers of real estate when considering the actual knowledge requirement.

151. ILL. REV. STAT. ch. 121 ½, parà. 261 (Smith-Hurd 1991).

152. *Connor*, 581 N.E.2d at 202 (citing Harkala v. Wildwood Realty, Inc., 558 N.E.2d 195 (Ill. App. Ct. 1990)). The Illinois Consumer Fraud Act was revised by the legislature in 1982 in order to exclude:

> The communication of any false, misleading or deceptive information, provided by the seller of real estate located in Illinois, by a real estate salesman or broker . . . unless the salesman or broker knows of the false, misleading, or deceptive character of such information.

ILL. REV. STAT. ch. 121 ½, para. 270b(4) (Smith-Hurd 1992). The *Connor* court found that this was evidence of the legislature's intent not to impose liability upon a broker for hidden or latent defects. 581 N.E.2d at 202.

153. *Connor*, 581 N.E.2d at 202.

154. *Id.* The actual knowledge standard should be displaced by a negligence standard because actual knowledge demands a subjective test and causes proof problems. *See infra* note 172 and accompanying text.

155. If a purchaser is informed of an environmental hazard, although not informed of the extent of possible damage which is not within the brokers knowledge, courts have held that the broker cannot be held liable. Connor v. Merril Lynch Realty, 581 N.E.2d 196, 203 (Ill.

statements made to the consumer by people in the neighborhood, who are not part of the transaction but nontheless inform the consumer of the existence of the hazard. This is a needed protection for the brokers and developers because it prevents the consumer from utilizing the UDAP statutes to bring frivolous claims based on nondisclosure if they are unhappy with their purchase.

The foregoing discussion shows that although the UDAP statutes are flexible and remedial, they are still limited. The obstacles of fitting environmental hazards into the UDAP statutes through statutory analysis or policy as well as the variances among the state statutes regarding misrepresentations and omissions make it quite difficult to sustain a claim based on the duty to disclose environmental hazards. However, the UDAP statutes provide excellent remedies to the victimized consumer, and are needed to provide an expedient remedy against deceptive practices in real estate transactions. Therefore, state legislatures should enact a new provision within the existing UDAP statutes to specifically cover real estate transactions and off-site environmental hazards which may affect the property.

VI. Development of a New UDAP Provision

Because of the seriousness involved when environmental hazards threaten the purchaser's property interests, a separate provision should be adopted within the existing UDAP statutes to cover environmental hazards and real estate transactions. This would resolve any ambiguities created by the broad language contained in the UDAP statutes, and would aid the court in interpretation.[156] This provision should be limited to real estate transactions and environmental hazards; otherwise, the provision would be too broad, would envelop a variety of circumstances, and would enable the purchaser to bring suit for nondislosure or concealment of almost any circum-

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App. Ct. 1991). In other words, once a consumer is warned about the possibility of damage caused by environmental hazards located off the property, the broker has fulfilled his duty to disclose: he does not have to explain the degree of possible damage. *But cf.* Nei v. Burley, 446 N.E.2d 674 (Mass. 1983) The *Nei* court stated:

> If a person is in the trade or business of acting as a broker for the sale of residential house lots, has described a lot as "[t]ested" and "ready to go," and has furnished a potential buyer accurate soil tests which demonstrate a significant problem to an informed person but not to a layman, a serious question would arise as to whether the broker's conduct was an unfair or deceptive act, at least where the broker knew or should have known of the significance of the test results.

Id. at 679.

156. This will also ease the consumer's burden in arguing policy under the existing statutes. *See supra* part IV.

stance regarding the surrounding environment. For instance, if the provision is not limited to environmental hazards it could be possible for purchasers to bring suit for misrepresentations or omissions regarding nearby school districts, transportation, and religious meeting places.[157] Also, the provision should parallel the language of the consumer fraud acts,[158] for the UDAP statutes based on the Federal Trade Commission Act and the UDAP statutes employing catch-all phrases[159] are not specific enough. Because the language of the consumer fraud act expressly applies to misrepresentations as well as the known concealment or omission of material facts, the courts have an explicit standard to follow in each case.[160]

Furthermore, the duty to disclose should involve a negligence standard which would require an objective test holding brokers liable for disclosure of hazards which they knew or reasonably should have known existed.[161] Although it does not deal with environmental hazards located on surrounding property, a controversial[162] California case exploring the duty to disclose is *Easton v. Strassburger*.[163] The *Easton* case dealt with a home situated on property subject to periodic movement caused by an underground landfill that was improperly engineered.[164] This movement caused the foundation of the

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157. The broker needs to be protected from consumers' misuse of what constitutes a "material fact" in order to get out of an unsatisfactory legal obligation. *See supra* note 155 and accompanying text.

158. *See supra* note 90.

159. *See supra* notes 52, 54.

160. This will avoid the problem of arguing expansion if the statute only applies to misrepresentations. *See supra* notes 123-27 and accompanying text.

161. IDAHO CODE § 48-603 (1977) (person is liable if he "knows, or in the exercise of due care should have known" that he engaged in violative conduct); Nei v. Burley, 446 N.E.2d 674, 679 (Mass. 1983) (holding that nondisclosure of significance of soil test results which broker knew or should have known could constitute deceptive act); State *ex rel.* Medlock v. Nest Egg Society Today, Inc., 348 S.E.2d 381, 383 (S.C. Ct. App. 1986) (holding that statute requires a constructive knowledge standard involving the ordinary exercise of due diligence). *But see* Wellesley Hills Realty Trust v. Mobil Oil Corp., 747 F. Supp. 93, 102 (D. Mass. 1990) (holding that defendant must have actual knowledge of contamination to be liable); Connor v. Merrill Lynch Realty, Inc., 581 N.E.2d 196, 202 (Ill. App. Ct. 1991) (holding no liability unless brokers had prior knowledge of defects); Sheehy v. Lipton Industries, Inc., 507 N.E.2d 781, 785 (Mass. App. Ct. 1987) (holding broker cannot be held liable for something he does not know).

162. *See* Lawrence M. Fisher, *National Notebook: San Francisco: Disclosure In Home Sales*, N. Y. TIMES, May 11, 1986, § 8, at 1; Dian Hymer, *Consumer Notebook: Seller Beware: House's Defects Must be Told*, L.A. TIMES, Apr. 28, 1991, § K (Real Estate), at 2; Richard D. Lyons, *New Accountability for Realty Agents*, N.Y. TIMES, Nov. 9, 1986, § 8, at 1; Ruth Ryon, *Toxic Waste Sites: Peril of Liability; Appeal Court Holds Realtors Responsible for Risk Disclosure*, L.A. TIMES, Nov. 10, 1985, § 7 (Real Estate), at 1; Mike Teverbaugh, *Suits Put Brokers on Gaurd; Realtors Try to Cut Risks with Extra Prudence*, L.A. TIMES, May 25, 1986, § 8 (Real Estate), at 1.

163. 199 Cal. Rptr. 383 (Cal. Ct. App. 1984).

164. *Id.* at 385.

house to settle, destroying portions of the house.[165] Although the brokers were aware of the soil problems and the corrective measures taken by the previous owner, they did not inform the purchaser of these facts.[166] The purchasers subsequently brought suit for fraudulent concealment and intentional and negligent misrepresentation.[167] The court held that a broker has a duty to conduct a "reasonably competent and diligent inspection of property he has listed for sale in order to discover defects for the benefit of the buyer."[168] The court reasoned that if a broker only had a duty to disclose known defects, ignorance and incompetence would in effect shield the broker from liability at the expense of the unwary purchaser.[169] Furthermore, most purchasers believe that their broker is protecting their interest, so that injury caused by any misplaced confidence on the broker's misrepresentations could be substantial.[170]

This supports the contention that the duty to disclose environmental hazards situated in the surrounding neighborhood should be based on a negligence standard of "known or should have known." This standard protects the buyer's interest in placing confidence in the broker and does not place a heavy burden on the broker because most brokers already impose this standard on themselves.[171] Furthermore, this standard would remedy the proof problems accompanying an actual knowledge standard. Since an actual knowledge standard is subjective, it is quite difficult to support the contention that a broker or developer had knowledge of an environmental hazard prior to purchase.[172] A reasonable person standard cures this problem while

165. *Id.* After a 1976 slide, the damage was so severe that experts, who had previously appraised the property at $170,000, estimated that the value of the property had fallen to $20,000. *Id.*

166. *Id.* at 386. The real estate agents did not request a soil test in spite of the fact that cursory inspections indicated that soil problems existed. *Easton*, 199 Cal. Rptr. 383, 386 (Cal. Ct. App. 1984).

167. *Id.*

168. *Id.* at 388. This contention caused professional liability insurance, called errors and omissions insurance in the real estate industry, to skyrocket. *See generally* Teverbaugh, *supra* note 162, § 8 (Real Estate), at 1. This insurance increase had adverse effects on both large and small companies: small companies could not afford coverage and insurance companies were reluctant to cover large companies because their greater sales volume could result in increased litigation. *Id.*

169. *Easton*, 199 Cal. Rptr. at 388. The court found that the seller's broker is in the best position to obtain reliable information on the property.

170. *Id.* at 389.

171. *See* INTERPRETATIONS OF THE CODE OF ETHICS Art. 9 (National Assoc. of Realtors, 7th ed. 1978) (broker "has an affirmative obligation to discover adverse factors that a reasonably competent and diligent investigation would disclose").

172. *See* Wellsley Hills Realty Trust v. Mobil Oil Corp., 747 F. Supp. 93, 103 (D. Mass. 1990) (no evidence to support allegation that defendant knew property was contaminated); Connor v. Merrill Lynch Realty, Inc., 581 N.E.2d 196, 202 (Ill. App. Ct. 1991) (no

retaining a test that is fair to both buyer and seller.

The requirement of a negligence standard would also support the procurement of environmental assessments.[173] Lawyers and businesses representing both buyers and sellers of real estate use environmental assessments of the property before it is purchased, which involves tracing deeds back 30-40 years, taking aerial photographs of property, and even interviewing neighbors.[174] These environmental assessments should become a requirement included in the proposed UDAP provision. The assessments should be broadened to include possible contamination of property due to off-site sources. Requiring that environmental assessments include off-site conditions will protect both the seller and broker from potential harm, because it is written evidence of the condition of the surrounding property before sale and serves to give notice to the buyer, thus protecting the broker from liability.[175] If it is established that property has the potential of being contaminated by surrounding environmental hazards, the environmental assessment should address the future use of the property, for concerns may vary depending on whether the property will be used for commercial or residential use. The environmental assessment should also address the awareness of the broker regarding hazardous substances located on surrounding property, including underground soil and water conditions. These assessments should be legislatively mandated. For instance, in 1987 the state of California enacted legislation[176] in response to the *Easton* case.[177] This legislation applies to any transfer of real property consisting of not less than one nor more than four dwelling units.[178] It requires the transferor to fill out a Real Estate Transfer Disclosure Statement representing the state of the property before sale.[179] It includes assess-

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evidence to support contention that broker had knowledge of deceptive nature of statements).

173. For an example of an environmental assessment letter see *Environmental Assessment Letter*, 305 PRACTICING L. INST./ REAL ESTATE 773 (1988).

174. *Id.*

175. *See supra* note 155 and accompanying text.

176. CAL. CIV. CODE § 1102 (West 1991).

177. 199 Cal. Rptr. 383 (Cal. Ct. App. 1984). *See generally* Fisher, *supra* note 162, § 8, at 1.

178. CAL. CIV. CODE § 1102 (West 1991). This section states:

> [T]his article applies to any transfer by sale, exchange, installment land sale contract . . . lease with an option to purchase, any other option to purchase, or ground lease coupled with improvements, of real property, or residential stock cooperative, improved with or consisting of not less than one nor more than four dwelling units.

Id. The California Association of Realtors lobbied to limit application to smaller dwelling units for fear that requiring disclosure forms for each individual unit in larger buildings would hinder sales. Fisher, *supra* note 162.

179. CAL. CIV. CODE § 1102.6 (West 1991).

ment of interior and exterior conditions of a home as well as any environmental hazards and land fills located on the property.[180] Although the California disclosure form does not apply to environmental hazards located off of the property,[181] this form could serve as a model in creating the proposed consumer fraud act provision providing for disclosure of off-site environmental hazards.

In taking an environmental assessment the broker or developer should presume that the consumer is investing in a long term purchase; therefore, even possible effects from the slow deterioration of toxic substances should be disclosed. For example, the purchase of a home is often a major investment and most purchasers assume that they will live in a home for many years.[182] The slow seepage of underground toxic wastes has a possibility of affecting neighboring property at some point, because the wastes will eventually rise to the surface and spread across the land.[183] Thus, consumers purchasing a home will most likely be affected by a slow deterioration of toxic waste.[184] Furthermore, even if a consumer does not intend to stay in the home for many years, the fair market value of the property will most likely be affected by the existence of off-site environmental hazards as they become known throughout the community. Thus, the home may eventually decrease in fair market value and the purchaser may suffer a loss upon disposition of the property.

The environmental assessment requirement also leads to consideration of the radius involved when disclosing a material fact. For example, an out-of-state purchaser may not know of environmental hazards inherent in an area, such as a contaminated canal or a nuclear power plant. These things could exist many miles off of the property and if the statute is too broad with regard to distance a real

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180. *Id.* The question pertaining to environmental hazards states, "Are you (seller) aware of any of the following: 1. substances, materials or products which may be an environmental hazard such as, but not limited to, asbestos, formaldehyde, radon gas, lead-based paint, fuel or chemical storage tanks, and contaminated soil or water on the subject property." *Id.* § 1102.6(II)(c)(1).

181. *Id.*

182. NAT'L ASS'N OF REALTORS, HOMEBUYING AND SELLING PROCESS: 1989, at 62 (1990) (34% of people surveyed remained in home ten or more years; 11% for 8 to 9 years; 22% for 4 to 7 years).

183. This spreading, or leaching, can occur even if a landfill is closed. *See, e.g.*, VI-Concrete Company v. State, Department of Environmental Protection, 556 A.2d 761 (N.J. 1989) (closed landfill discharged pollutants into surrounding water); Atlantic City Municipal Utilities Authority v. Hunt, 509 A.2d 225 (N.J. Super. Ct. App. Div. 1986) (closed landfill discharged hazardous substances).

184. The leaching rate depends upon the substance. *See, e.g.*, Atlantic City Municipal Utilities Authority v. Hunt, 509 A.2d 225, 227 (N.J. Super. Ct. App. Div. 1986) (leaching rate of twelve years for carcinogen).

estate developer may never sell any property. On the other hand, if the statute is too specific the consumer may be precluded from bringing significant and actionable claims and the developer or broker will be afforded too much protection. Thus, a reasonable person standard would be best in determining the parameter for which the duty to disclose must be required. In this way, the statute would still further the policy of flexibility and the duty to disclose will be made on a case by case basis.

The new UDAP provision could also work in conjunction with other statutes enacted for the purpose of environmental protection.[185] For instance, New Jersey has enacted the Environmental Cleanup Responsibility Act[186] which establishes procedures that ensure the safe transfer of property that was previously utilized for the generation, handling, storage and disposal of hazardous substances and waste.[187] Failure of the transferor to comply with the provisions of the Act could result in voiding of the sale or transfer, damages, and strict liability without fault.[188] This statute would not only supplement the new UDAP provision but would also take some of the burden off of the developer or broker by placing it on the person responsible for creating the environmental hazard. The environmental protection statutes, along with the proposed UDAP environmental hazard provision, would offer the consumer the protection needed against deception and would further the health, safety and welfare of the community in general.

VII. Conclusion

As off-site environmental hazards increase and continue to threaten the population, more involvement from the law is needed to preserve existing marketplace standards. As the threat of environmental hazards broadens, the incentive for marketplace abuse increases. Brokers and developers may fail to inform purchasers of off-site hazards for fear of hindering sales. This potential abuse necessitates legal or legislative action in order to protect consumers from both financial and physical tragedy. Since the UDAP statutes provide an excellent vehicle for consumers to utilize for commercial protection, the scope of the statutes should be broadened by the legisla-

185. *See* Comprehensive Environmental Response, Compensation and Liability (CERCLA) Act of 1980, 42 U.S.C. § 9601 (1988); Spill Compensation and Control Act of 1970, N.J. STAT. ANN. § 58:10-23:11 (West 1982).
186. N.J. STAT. ANN. § 13:1k-7 (West 1982).
187. *Id.*
188. N.J. STAT. ANN. § 13:1k-13(a) (West 1982).

ture to include off-site environmental hazards. Although the proposed UDAP provision is just a minor change, it is the first step in prevention of the destruction of marketplace transactions involving the environment.

Elizabeth A. Dalberth