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# Sell and Tell: The Fall and Revival of the Rule on Nondisclosure in Sales of Used Real Property

Serena Kafker
*University of Cincinnati*

# SELL AND TELL: THE FALL AND REVIVAL OF THE RULE ON NONDISCLOSURE IN SALES OF USED REAL PROPERTY

*Serena Kafker**

## I. INTRODUCTION

The doctrine of *caveat emptor*[1] has been in decline for many years and along with it the principle of nondisclosure in sales of used real property. Courts have moved away from a rigid application of the rule that there is no seller's duty to disclose hidden defects and toward recognition that silence in such cases may be equivalent to fraud. Nevertheless, a few courts, in Ohio and elsewhere, have discovered a possible antidote for the ailing patient in certain disclaimer clauses. Part II of this article discusses changes in how courts generally have viewed the rule as to nondisclosure over the years; Part III traces case law in Ohio on this subject; and Part IV analyzes recent rulings as to the effect of disclaimers on the duty to disclose. The conclusion argues that use of such disclaimer clauses as a shield for the seller mistakenly encourages revival of an outdated doctrine.

## II. CHANGING VIEWS OF NONDISCLOSURE IN SALES OF USED PROPERTY

For many consumers, the purchase of a home "is the most important transaction of a lifetime."[2] Traditionally the risks of such sales of real property fell on the buyer, in accord with the doctrine of *caveat emptor*.[3] For many years American courts followed this rule of English law agreeing with Lord Cairns who wrote in *Peek v. Gurney*[4] that there is no duty to disclose facts in an arm's length transaction, no matter

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* Visiting Instructor of Business Law, University of Cincinnati College of Business Administration. B.A., Barnard College (1953); M.A., Columbia University (1954); J.D., University of Cincinnati (1980).

1. *Caveat emptor*. "Let the buyer beware. This maxim summarizes the rule that a purchaser must examine, judge, and test for himself." BLACK'S LAW DICTIONARY 202 (5th ed. 1979).

2. Bethlahmy v. Bechtel, 91 Idaho 55, 67, 415 P.2d 698, 710 (1966).

3. *See, e.g.*, Dozier v. Hawthorne Dev. Co., 37 Tenn. App. 279, 262 S.W.2d 705 (1953) (purchaser of house cannot rescind contract on ground of fraud even though vendor did not disclose that a sanitary engineer had told him that septic tank drainage was inadequate); Gayne v. Smith, 104 Conn. 650, 134 A. 62 (1926) (vendor not liable for concealing fact that water company had the right to condemn the property being sold); Day v. Frederickson, 153 Minn. 380, 190 N.W. 788 (1922) (vendor under no obligation to reveal defective condition of plumbing in house, which was so installed and connected with a cesspool that sewer gas escaped into the house).

4. L.R. 6 H.L. 377 (1873).

how "morally censurable" such silence might be.[5] A frequently cited Massachusetts case decided in 1941, *Swinton v. Whitinsville Sav. Bank*,[6] summarized this attitude. The plaintiff in *Swinton* alleged fraud in the sale of a house infested with termites, a condition the purchaser could not readily discover. Holding for the vendor, the court stated that under these facts no disclosure was required: "The law has not yet, we believe, reached the point of imposing upon the frailties of human nature a standard so idealistic as this."[7]

Nevertheless, scholars had already begun to question the dominion of *caveat emptor*.[8] Leading an assault on the rule of nondisclosure, Professor W. Page Keeton wrote in 1936:

> When Lord Cairns stated in *Peek v. Gurney* that there was no duty to disclose facts, however morally censurable their nondisclosure may be, he was stating the law as shaped by an individualistic philosophy based upon freedom of contract. It was not concerned with morals. The attitude of the courts toward nondisclosure is undergoing a change and contrary to Lord Cairns' famous remark it would seem that the object of the law in these cases should be to impose on parties to the transaction a duty to speak whenever justice, equity, and fair dealing demand it.[9]

Professor Keeton's optimism may have been premature, for several years later he observed that courts were just beginning to recognize that "a vendor is under a duty of disclosing material facts which would not be discoverable by the exercise of ordinary care and diligence . . . ."[10] Still, in 1953, he could cite only four cases[11] to support this conclusion and acknowledged that there is "no unanimity" on this issue.[12]

Whatever the state of the law in the 1950's, there is little doubt that Keeton's optimism has been justified by developments since that time. In fact, some commentators have described the change as a move

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5. *Id.* at 403.

6. 311 Mass. 677, 42 N.E.2d 808 (1942).

7. *Id.* at 678–79, 42 N.E.2d at 808–09.

8. *See* Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931).

9. Keeton, *Fraud—Concealment and Non-Disclosure*, 15 TEX. L. REV. 1, 31 (1936) (footnotes omitted).

10. Keeton, *Rights of Disappointed Purchasers*, 32 TEX. L. REV. 1, 3–4 (1953).

11. Id. at 3 n.5. The four cases were: Clausner v. Taylor, 44 Cal. App. 2d 453, 112 P.2d 661 (1941); Weikel v. Sterns, 142 Ky. 513, 134 S.W. 908 (1911); Simmons v. Evans, 185 Tenn. 282, 206 S.W.2d 295 (1947); Perkins v. Marsh, 179 Wash. 362, 37 P.2d 689 (1934).

12. Keeton, *supra*, note 10, at 4. Writing shortly after Keeton's second analysis, another less sanguine commentator stated that the rule of *Peek* "is essentially still the rule today. The vendor is under no duty to disclose to the purchaser facts which materially affect the value of the property. *Caveat emptor* is the touchstone today as it was in former times." Goldfarb, *Fraud and Non-disclosure in the Vendor-Purchaser Relation*, 8 W. RES. L. REV. 5, 9 (1956).

from *caveat emptor* to *caveat venditor*.[13] Many courts have recognized some duty on the seller's part to disclose material defects which cannot be readily observed by purchasers of used real property.[14]

Those courts recognizing this duty have based their holdings on one or more of the following rationales: (A) the facts fit into one of the traditionally accepted exceptions to the rule on nondisclosure; (B) the defect poses a threat to the health and/or safety of the purchaser and cannot be readily observed; (C) the defect creates a legal impairment to the use of the property; and (D) the defect materially affects the value of the property, and knowledge of it is accessible only to the seller.

### *A. Traditional Exceptions*

Authorities have long recognized certain exceptions to the principle that silence or nondisclosure cannot be treated as misrepresentation: when there is a fiduciary relationship between the parties; when there is a change of fact so that a previous representation is no longer true; and when there is an attempt by the vendor to prevent the purchaser from acquiring information as to the condition of the property.[15] Almost every court considering this issue has found that in the ordinary sale there is no confidential or fiduciary relationship between vendor and purchaser on which to base a duty to disclose.[16] A few courts have

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13. *See, e.g.*, Note, *When the Walls Come Tumbling Down—Theories of Recovery for Defective Housing*, 56 ST. JOHN'S L. REV., 670, 682–87 (1982).

14. *See, e.g.*, Lingsch v. Savage, 213 Cal. App. 2d 729, 29 Cal. Rptr. 201 (1963); Cohen v. Vivian, 141 Colo. 443, 349 P.2d 366 (1960); Wedig v. Brinster, 1 Conn. App. 123, 469 A.2d 783 (1983); Lock v. Schreppler, 426 A.2d 856 (Del. Super. Ct. 1981); Johnson v. Davis, 480 So. 2d 625 (Fla. 1985); Wilhite v. Mays, 140 Ga. App. 816, 232 S.E.2d 141 (1976); Bursey v. Clement, 118 N.H. 412, 387 A.2d 346 (1978); Posner v. Davis, 76 Ill. App. 3d 638, 395 N.E.2d 133 (1979); Loghry v. Capel, 257 Iowa 285, 132 N.W.2d 417 (1965); Jenkins v. McCormick, 184 Kan. 842, 339 P.2d 8 (1959); Kaze v. Compton, 283 S.W.2d 204 (Ky. Ct. App. 1955); Maguire v. Masino, 325 So. 2d 844 (La. Ct. App. 1975); Williams v. Benson, 3 Mich. App. 9, 141 N.W.2d 650 (1966); Flakus v. Schug, 213 Neb. 491, 329 N.W.2d 859 (1983); Weintraub v. Krobatsch, 64 N.J. 445, 317 A.2d 68 (1974); Taylor v. Heisinger, 39 Misc. 2d 955, 242 N.Y.S.2d 281 (N.Y. Sup. Ct. 1963); Brooks v. Ervin Constr. Co., 253 N.C. 214, 116 S.E.2d 454 (1960); Holcomb v. Zinke, 365 N.W.2d 507 (N.D. 1985); Miles v. McSwegin, 58 Ohio St. 2d 97, 388 N.E.2d 1367 (1979); Shane v. Hoffmann, 227 Pa. Super. 176, 324 A.2d 532 (1974); Lawson v. Citizens & S. Nat'l Bank of S.C., 259 S.C. 477, 193 S.E.2d 124 (1972); Ware v. Scott, 220 Va. 317, 257 S.E.2d 855 (1979); Obde v. Schlemeyer, 56 Wash. 2d 449, 353 P.2d 672 (1960); Thacker v. Tyree, 297 S.E.2d 885 (W. Va. 1982);

15. *Swinton*, 311 Mass. at 677, 42 N.E.2d at 808. *See also* RESTATEMENT (SECOND) OF CONTRACTS §§ 160–61, at 429–33 (1979); 12 WILLISTON ON CONTRACTS §§ 1497, at 377–84 (3d ed. 1970).

16. *But see* Foust v. Valleybrook Realty Co., 4 Ohio App. 3d 164, 165, 446 N.E.2d 1122, 1125 (1981); *Bethlahmy*, 91 Idaho at 60, 415 P.2d at 705 (confidential relationship arising between builder and purchaser when builder knew that unsealed drainage tile ran under the purchasers' lot and garage and that the basement of the house was not of waterproof construction).

conceded that there is a possible duty to disclose based on the "superior knowledge" which the vendor possesses.[17]

Even when there is no fiduciary relationship, courts have held a seller liable if there has been a failure to disclose a change of fact between the time of making a sales contract and the closing. In a Virginia case, for example, a court awarded damages when a seller failed to disclose flooding in the house after assuring the buyer that all water problems had been repaired;[18] and a New Hampshire court rescinded the purchase and sales agreement when the sellers failed to notify purchasers of an ordinance change.[19]

Finally, courts have treated attempts to conceal or prevent purchasers from learning all of the facts as conduct equivalent to misrepresentation. In a Nebraska case, the sellers had covered over two sump holes in their basement, which the court said constituted fraudulent concealment of underground water problems.[20] A Connecticut court held that a purchaser's request for information about a sewerage system imposed a duty on the seller to tell the whole truth concerning the illegality of the existing system.[21] None of these cases represented any striking departure from the traditional rule as to nondisclosure, which had recognized these limited exceptions.

### *B. Dangerous Conditions*

Some of the earliest instances when courts extended the duty to disclose defects beyond the recognized exceptions to the rule concerned termite infestations; presence of these insects creates a serious, even dangerous, condition which is not readily observable by ordinary inspection.[22] Even when the vendor believes such infestation to have been controlled, a duty to disclose the circumstances may arise.[23] Nevertheless, some courts still followed the holding of *Swinton*[24] and refused to

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17. *See Wilhite, 140 Ga. App. at 818, 232 S.E.2d at 143 (1976) (The seller of defective realty has a duty to disclose "in situations where he or she has special knowledge not apparent to the buyer"); Holcomb, 365 N.W.2d at 512 ("While the relationship between seller and buyer may not be a fiduciary or confidential one, it is marked by the clearly superior position of the seller vis-a-vis knowledge of the condition of the property being sold.").*

18. *See Ware,* 220 Va. at 317, 257 S.E.2d at 855.

19. *Bursey,* 118 N.H. at 412, 387 A.2d at 346.

20. *Flakus,* 213 Neb. at 491, 329 N.W.2d at 859.

21. *Wedig,* 1 Conn. App. at 123, 469 A.2d at 783. *See also Jenkins,* 184 Kan. at 842, 339 P.2d at 8; *Lock,* 426 A.2d at 856; .

22. *Obde,* 56 Wash. 2d at 449, 353 P.2d at 672.

23. *Benson,* 3 Mich. App. at 9, 141 N.W.2d at 650. *See also* Annotation, *Duty of Vendor of Real Estate to Give Purchaser Information as to Termite Infestation,* 22 A.L.R.3d 972 (1968).

24. 311 Mass. at 677, 42 N.E.2d at 808.

find a duty to disclose when there was no fiduciary relationship;[25] for, as one court explained, the court in Swinton hesitated to "adopt a moral code for vendor and purchaser which to date has no substantial legal sanction."[26]

Despite these reservations, erosion of the rule had begun. In a case that did not concern termites, a Pennsylvania court recognized a duty to disclose dangerous conditions when a purchaser bought residential property and flooding in the basement caused sewage to back up.[27] In this case the purchaser had asked the realtor if the sewer was in good working order, and the broker replied that he had no knowledge of problems, even though a previous tenant had complained about sewage flooding the basement.

### C. *Legal Impairments*

How readily available the information is concerning a legal impairment to the use of property may determine whether or not a duty to disclose exists. In an Ohio case, *Gilbey v. Cooper*,[28] the vendors and their realtor did not reveal to the purchaser that part of the property was being taken by the state for a road and that there was a temporary easement for work purposes taken by the state. The purchase agreement was signed March 15, 1969, but the temporary and permanent easements were not recorded until March 18, 1969.[29] Thus there was no way for the purchasers to know of the easement at the time they signed the binding purchase agreement. The court found that the agent and vendors had a duty to disclose such facts.[30]

When, however, such facts are public record available to the purchasers, an Illinois Court of Appeals found no such duty exists.[31] In that case, the sellers had failed to disclose an assessor's revaluation of the property and consequent increase in taxes before the sale. The court refused to equate "simple silence regarding a public record freely open to all persons" with fraudulent concealment.[32]

### D. *Decrease in Value of Real Property*

Some courts have based the duty to disclose on a much looser criterion: whether the defect significantly lowers the value of the property.

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25. *See, e.g.*, Fegeas v. Sherril, 218 Md. 472, 147 A.2d 223 (1958); Riley v. White, 231 S.W.2d 291 (Mo. Ct. App. 1950).
26. Hendrick v. Lynn, 144 A.2d 147, 149 (Del. Ch. 1958).
27. *Shane*, 227 Pa. Super. at 176, 324 A.2d at 532.
28. 37 Ohio Misc. 119, 310 N.E.2d 268 (1973).
29. *Id.* at 120, 310 N.E.2d at 269.
30. *Id.* at 122, 310 N.E.2d at 270.
31. Lenzi v. Morkin, 116 Ill. App. 3d 1014, 452 N.E.2d 667 (1983).
32. *Id.* at 1019, 452 N.E.2d at 671.

In a few early cases where courts have referred to this standard, the defect was also serious enough to create a dangerous condition. In a Colorado case, for example, improperly filled soil caused a home to sink, and the purchasers had to move out.[33] Several other jurisdictions have found a duty to disclose when similar dangerous soil conditions lowered the value of real property.[34] Courts have also required disclosure of improper drainage and defective septic tanks, conditions which affect the value of the property and which are potentially hazardous to health.[35]

What Lord Cairns had characterized as a "moral" duty to speak gradually assumed the guise of a legal duty; thus, the predictability of how substantial or material the defect must be in order to trigger the duty of disclosure is reduced. For example, in a Kentucky case, the court held that drain tile beneath a house causing water to accumulate was a condition "substantial or vital enough to place a duty upon the vendors to disclose it."[36] The court explained, "The criterion of materiality is whether it probably influenced the making of the contract, that is, whether the plaintiffs would have purchased the property for the price paid had they been apprised of these conditions."[37]

In a recent decision, an appellate court in California acknowledged that it viewed the term "materiality" as "essentially a label affixed to a normative conclusion."[38] Thus, the court stated, "[i]f information

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33. *See Cohen*, 141 Colo. at 443, 349 P.2d at 366. "A latent soil defect, known to the seller of a house built on such soil, creates a duty of disclosure in the seller." *Id.* at 447, 349 P.2d at 367. "[A] vendee has a right of action against a vendor on the basis of concealment because of a latent defect known to the vendor and unkown to the vendee, the existence of which would materially affect the desirability of the property. . . ." *Id.* at 448, 349 P.2d at 368.

34. *See, e.g., Lawson*, 259 S.C. at 477, 193 S.E.2d at 124. Vendors sold lots on which they had filled a gully with debris and then covered it over with clay, without disclosing such facts to purchasers. *Id.* The filled in gully "materially affected the value of the house and lot. Since this defect was not apparent . . . the [seller] was under a duty to disclose this information to [the purchasers]." *Id.* at 485, 193 S.E.2d at 128. *See also Loghry*, 257 Iowa at 285, 132 N.W.2d at 417. "[O]ne who sells real estate knowing of a soil defect, patent to him, latent to the purchaser, is required to disclose such defect. It is evident such defect is material to the sale and will substantially affect the structure on the land . . . ." *Id.* at 289, 132 N.W.2d at 419; *Brooks*, 253 N.C. at 214, 116 S.E.2d at 454. ("[D]efendant dug a large hole on the lot . . ., filled it with debris . . . and then covered it over, and defendant without disclosing such facts to plaintiffs . . . sold and constructed for them a house centered over this covered up hole, which filled in lot materially affected the value of the house and lot. Since this defect . . . was not apparent to plaintiffs . . . defendant was under a duty to disclose this information to plaintiffs.").

35. *See Wilhite*, 140 Ga. App. at 816, 232 S.E.2d at 141 (defective septic tank); *Posner*, 76 Ill. App. 3d at 638, 395 N.E.2d at 133 (basement flooding); *Tyree*, 297 S.E.2d at 885 (cracked walls and foundation due to poor drainage).

36. *Kaze*, 283 S.W.2d at 208 (citations omitted).

37. *Id.* at 207.

38. Reed v. King, 145 Cal. App. 3d 261, 266, 193 Cal. Rptr. 130, 132 (1983) (footnote omitted).

known or accessible only to the seller has a significant and measurable effect on market value and, as is alleged here, the seller is aware of this effect, we see no principled basis for making the duty to disclose turn upon the character of the information."[39] In this case the seller was found to have a duty to disclose that a multiple murder had occurred in the house ten years before the sale.[40] Carrying this line of thinking to its logical conclusion, the Supreme Court of Florida recently declared in a case involving flooding from a leaking roof that there is a duty to disclose latent defects simply because both misfeasance and nonfeasance violate fair dealing.[41] The court noted with evident distaste the decisions of some lower courts upholding the rule that there is no duty to disclose when parties are dealing at arm's length:

> These unappetizing cases are not in tune with the times and do not conform with current notions of justice, equity and fair dealing. One should not be able to stand behind the impervious shield of caveat emptor and take advantage of another's ignorance. . . . The law appears to be working toward the ultimate conclusion that full disclosure of all material facts must be made whenever elementary fair conduct demands it.[42]

Thus, at least for a few courts, the issue appears to be simply who should bear the risk of the sale rather than how severe the undisclosed defect is. Most other courts have not yet reduced the issue to such a question.

## III. OHIO CASE LAW REVIEWED

Although an Ohio court was the first in the United States to adopt the English courts' finding of an implied warranty of habitability in the sale of an unfinished house,[43] Ohio courts have been slower to adopt the view that there is a duty to disclose latent or hidden defects in the sale of used real property. In *Traverse v. Long*,[44] the purchasers of a residence sought damages based on problems that developed because of filled in land beneath the driveway and parking area of the property.[45] In the opinion of the Supreme Court of Ohio these conditions could be observed, and since the seller had made no attempt to hinder the pur-

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39. *Id.* at 267, 193 Cal. Rptr. at 133.
40. *Id.*
41. *Johnson*, 480 So. 2d at 625.
42. *Id.* at 628.
43. Vanderschrier v. Aaron, 103 Ohio App. 340, 140 N.E.2d 819 (1957). What the English courts found was that upon the sale of a house in the course of construction,"there is an implied warranty that the house will be finished in a workmanlike manner," i.e., that it will be reasonably fit for its intended use. *Id.* at 341–42, 140 N.E.2d at 821.
44. 165 Ohio St. 249, 135 N.E.2d 256 (1956).
45. *Id.* at 249, 135 N.E.2d at 257.

chaser's investigation, the doctrine of *caveat emptor* applied.[46]

In 1970, however, an Ohio appellate court granted a purchaser rescission of a contract for the sale of a house and awarded damages for the seller's failure to disclose defects in the plumbing and electrical system based on constructive fraud.[47] Another Ohio court applied the doctrine of constructive fraud to a case where a real estate agent failed to disclose a latent defect in the premises—a water system inadequate for normal household needs.[48]

Not all Ohio courts were willing to go this far, however. For example, in *Klott v. Associates Real Estate*,[49] an appellate court took a much more cautious view of the duty to disclose saying that "[a] nondisclosure of a material latent defect known to the vendor and unknown to the vendee may or may not, according to the facts, be a fraudulent act."[50] The court conceded that a vendor is obliged to disclose "sources of peril"[51]; nevertheless, "a simple failure to disclose a fact is not equivalent to its concealment."[52] Thus, in *Klott*, the vendor was not obliged to tell the purchaser that water for the premises came from a well, which was in disrepair, rather than from the city water supply. The *Klott* court added that "it may well be concluded that equitable dealing and the rule of morality would dictate that a disclosure be made if the vendor knows of a defect, but under the circumstances we do not believe that the law would require such disclosure by the vendor."[53] Thus as late as 1974, at least some of Ohio's courts preserved the distinction made by Lord Cairns between what morality requires and what the law requires.[54]

Not until 1979 did the Supreme Court of Ohio again consider the rule on nondisclosure. In *Miles v. McSwegin*,[55] the purchasers of a house sued for damages because they had not been informed of an inspection by their lending institution which revealed termite infestation of the house. The real estate broker had previously assured them that the property was a "good solid home" and never told them of the results of the inspection.[56] The court ruled that the doctrine of *caveat*

46. *Id.* at 252, 135 N.E.2d at 259.
47. Di Pippo v. Meyer, 24 Ohio App. 2d 86, 90, 263 N.E.2d 907, 910 (1970).
48. Crum v. McCoy, 41 Ohio Misc. 34, 322 N.E.2d 161 (1974).
49. 41 Ohio App. 2d 118, 322 N.E.2d 690 (1974).
50. *Id.* at 121, 322 N.E.2d at 692.
51. *Id.*
52. *Id.*
53. *Id.* at 123, 322 N.E.2d at 693.
54. *See also* Gilbey v. Cooper, 37 Ohio Misc. 119, 310 N.E.2d 268 (1973) (finding a duty to disclose based on the unavailability of a public record as to an easement at the time of sale).
55. 58 Ohio St. 2d 97, 388 N.E.2d 1367 (1979).
56. *Id.* at 98, 388 N.E.2d at 1368.

*emptor* did not apply to latent defects which could not be detected by reasonable inspection and concluded that the seller has a duty to disclose such defects.[57]

Carrying this ruling a step further, in 1981 an Ohio appellate court in *Foust v. Valleybrook Realty Co.*,[58] held that nondisclosure of material facts which are not visible is equivalent to willful misrepresentation. The *Foust* court stated too that the purchasers "were entitled to rely upon the representations of the realtor because of the fiduciary nature of the relationship."[59] No previous Ohio court had found such a relationship to exist. In the *Foust* case, a real estate agent had failed to notify the purchasers of a pending sewer assessment and had told them that a tap-in to the sanitary system was optional, when in fact it was mandatory.[60] The court distinguished *Foust* from *Klott* saying that in *Foust* the purchasers had specifically inquired about the sanitary system, whereas in *Klott*, they had made no inquiries as to the water supply.[61]

As to the fiduciary relationship between a realty agent and a client, another Ohio appellate court in 1984, following *Foust*, stated that "when a fiduciary relationship exists, as between a realty agent and a client, the clients are entitled to rely upon the representations of the realty agent."[62]

Thus, although not in the vanguard on the issue of whether there is a duty to disclose, Ohio case law is well within the general trend of court decisions on this point. Ohio courts recognize a seller's duty to disclose material defects in the sale of used property when such defects cannot be observed by reasonable inspection. Some Ohio courts have applied this standard more rigorously than others, depending on the nature of the defects and such circumstances as the buyer's inquiries as to defects. Furthermore, at least two Ohio courts recognize the existence of a fiduciary relationship between a realty agent and a client requiring disclosure of hidden defects.

## IV. The Effect of Disclaimers on the Duty to Disclose

In an effort to protect themselves from any liability for defects in the sale of used real property, sellers have raised the issue of whether disclaimers will excuse them from such liability. Courts have disagreed

57. *Id.* at 101, 388 N.E.2d at 1370.
58. 4 Ohio App. 3d 164, 446 N.E.2d 1122 (1981).
59. *Id.* at 165, 446 N.E.2d at 1125.
60. *Id.* at 164, 446 N.E.2d at 1124.
61. *Id.* at 167, 446 N.E.2d at 1127.
62. Finomore v. Epstein, 18 Ohio App. 3d 88, 90, 481 N.E.2d 1193, 1196 (1984) (citing *Foust*).

as to the effectiveness of such disclaimer clauses to shield sellers.

### *A. General Disclaimer Ineffective to Shield Sellers*

Several courts have based holdings on the principle that a party may not make a contract avoiding liability in cases of fraud.[63] Thus, in situations where the facts indicate actual misrepresentation and reliance, i.e., when the seller actively misrepresents the condition of the property and the facts are not within the buyer's reach, an "as is" provision in the sales contract will not relieve the seller of liability for fraud.[64] The same holds true for disclaimers by examination, which state that the purchaser has made an independent examination of the property and is not relying on the vendor, again because the defects are not readily observable by the buyer.[65]

Some courts have gone even further. In a case where there was no active misrepresentation, only silence, the Kentucky Court of Appeals stated that a provision in the sales contract that the parties were not relying on oral statements and had examined the property and accepted it as is would not relieve the seller of liability for not revealing defects in the property.[66] Similarly, an Ohio municipal court in 1974 held that when a real estate agent failed to disclose an inadequate water system, a clause in the sales contract stating that the buyer relied upon his own examination of the property did not preclude an action for fraud and deceit.[67] In both of these cases, the disclaimer clause stating that the buyers had examined the property and were not relying on the seller's representations offered no protection to the seller who failed to disclose hidden defects.[68]

In a California case, *Lingsch v. Savage*,[69] the "deceit" also consisted of nondisclosure rather than any affirmative misrepresentations

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63. Rothstein v. Janss Inv. Corp., 45 Cal. App. 2d 64, 113 P.2d 465 (1941); Bryant v. Troutman, 287 S.W.2d 918 (Ky. Ct. App. 1956); A. CORBIN, CONTRACTS § 1516, at 733 (1962).

64. Crawford v. Nastos, 182 Cal. App. 2d 659, 6 Cal. Rptr. 425 (1960) ("as is" clause does not relieve defendants of liability for fraud in representations to purchaser concerning annual water supply); Cockburn v. Mercantile Petroleum, Inc., 296 S.W.2d 316 (Tex. Civ. App. 1956) ("as is" clause does not preclude rescission and damages for fraud against seller whose agent falsely represented that five gas wells to be sold were all producing wells, when only three were producing at that time). *But see* Wittenberg v. Robinov, 9 N.Y.2d 261, 173 N.E.2d 868, 213 N.Y.S.2d 430 (1961) (owner allowed to escape liability but owner's agent held liable because disclaimer provision did not inure to agent's benefit).

65. *See Flakus*, 213 Neb. at 491, 329 N.W.2d at 859 (disclaimer ineffective where the sales contract had a disclaimer clause based on the buyer's personal inspection of the premises).

66. Bryant v. Troutman, 287 S.W.2d 918, 921 (Ky. Ct. App. 1956).

67. *Crum*, 41 Ohio Misc. at 34, 322 N.E.2d at 161.

68. *See also Rothstein*, 45 Cal. App. 2d at 64, 113 P.2d at 465 (structure built on filled ground); *Cohen*, 141 Colo. at 443, 349 P.2d at 366 (duplexes built on filled soil).

69. 213 Cal. App. 2d 729, 29 Cal. Rptr. 201 (1963).

of fact. The sales agreement contained a clause stating the purchase price of the property "in its present state and condition."[70] Concerning the effect of this "as is" clause, the court held:

> [I]n an agreement for the sale of real property [w]here the seller . . . fails to disclose the true facts of its condition not within the buyer's reach and affecting the value or desirability of the property, an "as is" provision is ineffective to relieve the seller of either his "affirmative" or "negative" fraud.[71]

The court remarked that limiting the effect of an "as is" provision "equates sound law with good morals."[72] This line of reasoning reverses the presumptions of Lord Cairns.[73]

### *B. Specific Disclaimers Effective as a Shield for Sellers*

Courts in New York have distinguished between general and specific disclaimers, holding that only a specific disclaimer is effective to preclude a purchaser's suit based on fraud. In *Danann Realty Corp. v. Harris*,[74] purchasers of the lease of a building sought damages for fraud based on the sellers' oral representations as to operating expenses and profits for the building. The contract contained a clause to the effect that the purchaser acknowledged that no representations were made by sellers as to expenses, operation, or any other matter related to the premises and also that purchasers had inspected the premises, taking the premises as is.[75] The contract stated further that the parties were not relying on any statements not embodied in the contract.[76] As to the effect of this statement the court noted:

> Here . . . plaintiff has in the plainest language announced and stipulated that it is not relying on any representations as to the very matter as to which it now claims it was defrauded. Such a specific disclaimer destroys the allegations in plaintiff's complaint that the agreement was executed in reliance upon these contrary oral representations. . . .[77]

Other New York courts have followed this distinction between general disclaimers, not protecting vendors from claims of fraud based on nondisclosure, and specific disclaimers providing such a shield.[78]

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70. *Id.* at 733, 29 Cal. Rptr. at 203.
71. *Id.* at 742, 29 Cal. Rptr. at 209 (citations omitted).
72. *Id.*
73. *See also Weintraub*, 64 N.J. at 445, 317 A.2d at 68 (disclaimer does not prevent the requirement of a trial on the issue of nondisclosure of roach infestation).
74. 5 N.Y.2d 317, 157 N.E.2d 597, 184 N.Y.S.2d 599 (1959).
75. *Id.* at 320, 157 N.E.2d at 598, 184 N.Y.S.2d at 601.
76. *Id.*
77. *Id.* at 320–21, 157 N.E.2d at 599, 184 N.Y.S.2d at 602 (citation omitted).
78. *Taylor v. Heisinger*, 39 Misc. 2d 955, 242 N.Y.S.2d 281 (N.Y. Sup. Ct. 1963).

### C. *General Disclaimers Effective as a Shield for Sellers*

Appellate courts in Illinois, Arizona, and Ohio have provided protection in varying degrees for the vendor, even when only a general disclaimer clause has been included in a contract for the sale of used real property. In an Illinois case, an out-of-state vendor, who had inherited the property at issue, made no representations to the purchasers as to the state of the plumbing in a seventy-year-old house.[79] The purchasers themselves drew up the contract of sale, which specified that they were to take the house "as is."[80] More than two years later, after learning that part of the house was connected to a septic tank rather than to the city sewer, the purchasers sought rescission.[81] The court found no misrepresentation or concealment on these facts and also no grounds for rescission based on mutual mistake.[82] In this case, the "as is" clause was only one of several factors considered in excusing the vendor from liability.[83]

A general disclaimer clause played a more significant role in a decision of the Arizona Court of Appeals when the sellers sought to recover the balance due on a promissory note which was partial payment for a motel in Tucson.[84] The buyer's defense was fraudulent concealment, based on the sellers' failure to disclose the fact that a defect in the motel's electrical system violated provisions of the city code.[85] The court stated the issue to be whether the seller had a legal duty to disclose and the buyer a right to rely on the seller's silence.[86] To this, the court responded: "The 'as is' clause in the contract itself implies that the property was in some way defective and the buyer could not justifiably rely on the seller's silence as a representation that the electrical system met code specifications."[87] The Arizona court distinguished *Lingsch*,[88] because there the defect was latent, whereas in the instant case the defects were patent and the buyer knew or should have known

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79. Diedrich v. Northern Ill. Publishing Co., 39 Ill. App. 3d 851, 854, 350 N.E.2d 857, 860 (1976).

80. *Id.*

81. *Id.* at 853, 855, 350 N.E.2d at 859–60.

82. *Id.* at 857, 350 N.E.2d at 61–62.

83. *Id.* at 860, 350 N.E.2d at 864 (plaintiffs were familiar with real estate investments; plaintiffs initiated the transaction and drew up the offer to sell; plaintiffs had no personal contact with the seller at the time the contract was signed; plaintiffs did not make known their plans for use of the house to the seller and made no effort to determine if the plumbing was suitable for use in a rooming house).

84. Universal Inv. Co. v. Sahara Motor Inn, 127 Ariz. 213, 619 P.2d 485 (Ct. App. 1980).

85. *Id.* at 215, 619 P.2d at 487.

86. *Id.*

87. *Id.*

88. 213 Cal. App. 2d at 729, 29 Cal. Rptr. at 201.

of them.[89]

An Ohio appellate court has provided the most substantial protection for sellers based on a general disclaimer clause. In *Kaye v. Buehrle*, [90] the purchasers' suit claimed fraudulent misrepresentation and breach of warranty based on failure of the real estate agent to disclose the fact that the basement of the house leaked during torrential rains. The sellers defended saying they were protected from liability by the following clause in the contract: "Seller does not warrant the property or any of its systems or appliances, . . . and Buyer acknowledges that he has examined same and . . . accepts property in an 'as is' condition . . . ."[91] As to this disclaimer, the court held that "the contract clearly places the risk upon the [purchasers] as to the existence of any defects . . . . [W]hen a buyer contractually agrees to accept property 'as is,' the seller is relieved of any duty to disclose."[92] Qualifying this slightly, the court noted that when the fraud claimed is "positive" fraud rather than nondisclosure, the "as is" clause would not bar the purchaser's claim.[93]

## V. CONCLUSION

The Ohio court's holding as to the shielding effect of a general disclaimer clause goes considerably beyond the Illinois and Arizona courts. In its view, the general disclaimer clause shifts the risk back to the buyer; thus, there is no requirement to disclose latent or hidden defects when such a clause is inserted in a contract for the sale of used real property.

Considering that Ohio courts have recognized that nondisclosure may be equivalent to fraud,[94] there appears to be no logical basis on which to make a distinction between "positive" fraud and silence in determining the effect of a disclaimer. General disclaimer language should have no greater power to shield sellers in the one instance than in the other. Furthermore, some Ohio courts have found that a fiduciary relationship exists between a real estate agent and a client.[95] Thus

89. *Sahara*, 127 Ariz. at 215, 619 P.2d at 487. But in *Lingsch* the defects alleged were that the building was in a state of disrepair, that units contained therein were illegal and that the building had been condemned. These seem to be conditions that are as discoverable by purchasers as those in the Arizona case.

90. 8 Ohio App. 3d 381, 457 N.E.2d 373 (1983).

91. *Id.* at 381, 457 N.E.2d at 374–75 (emphasis omitted).

92. *Id.* at 382–83, 457 N.E.2d at 376.

93. *Id.* at 383, 457 N.E.2d at 376.

94. *See Foust v. Valleybrook Realty Co.*, 4 Ohio App. 3d at 164,165, 466 N.E.2d 1122,1125 (1985).

95. *See Finomore v. Epstein*, 18 Ohio App. 3d 88, 481 N.E.2d 1193 (1984); *Foust*, 4 Ohio App. 3d at 164, 446 N.E.2d at 1122.

clients may rely on the representations of the agent and do not have to exercise the kind of vigilance normally required, which includes the duty to reasonably investigate.[96] This view is contrary to a position which allows general disclaimers to act as a shield for the seller or his agent in real property sales. Ohio courts will have to resolve this inconsistency.

To recognize the effectiveness of a general disclaimer in relieving sellers and their agents from any duty to disclose is to give new life to the rule of *caveat emptor* in real estate transactions. It would be a mistake for Ohio courts to reverse the trend of the law in Ohio and elsewhere by reviving this moribund rule.

96. *Foust*, 4 Ohio App. 3d at 165, 466 N.E.2d at 1125. *See also Finomore*, 18 Ohio App. 3d at 90, 481 N.E.2d at 1196.