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I. INTRODUCTION

The occupation of real estate broker or real estate agent[1] began in the early nineteenth century.[2] Prior to the mid-nineteenth century, most sales

1. There is a distinction between a real estate broker and a real estate agent. According to the National Association of Realtors (NAR), an "agent" is "a real estate licensee (including brokers and sales associates) acting in an agency relationship as defined by state law or regulation." CODE OF ETHICS AND STANDARDS OF PRACTICE OF THE NATIONAL ASSOCIATION OF REALTORS STANDARD OF PRACTICE 1-2 (1995) (amended 1999). According to the NAR, in a particularly circular definition, a "broker" is "a real estate licensee (including brokers and sales associates) acting as an agent or in a legally recognized non-agency capacity." *Id.* According to BLACK'S LAW DICTIONARY 65 (7th ed. 1999), a "real-estate agent" is "[a]n agent who represents a buyer or seller (or both, with proper disclosures) in the sale or lease of real property. A real-estate agent can be either a broker (whose principal is a buyer or seller) or a salesperson (whose principal is a broker)." *Id.* The term "real estate broker" is also defined by state licensing statutes. *See, e.g.*, CAL. BUS. & PROF'L CODE § 10131 (West 2002); MINN. STAT. § 82.17(4) (2001); N.Y. REAL PROP. LAW § 440(1) (McKinney 2002); VA. CODE ANN. § 54.1-2100 (Michie 2002). "Real estate salesperson" is another term that is used in the licensing statutes and cases. *See, e.g.*, CAL. BUS. & PROF'L CODE § 10132 (West 2002); MINN. STAT. § 82.17(5) (2001); N.Y. REAL PROP. LAW § 440(3) (McKinney 2002); VA. CODE ANN. § 54.1-2101 (Michie 2002). In their professional licensing statutes, real estate brokers and salespersons are also referred to as "licensees." *See, e.g.*, MO. REV. STAT. § 339.710(15) (2001) (defining licensee as real estate broker or salesperson). For convenience, this Article will usually refer to real estate brokers, agents, and salespersons collectively as "real estate brokers" with the understanding that the same rules apply to all three related, yet at times, distinct groups.

2. PEARL JANET DAVIES, REAL ESTATE IN AMERICAN HISTORY 20-21 (1958) ("It was in the rapid city growth of the 1840's that real estate brokerage in the largest cities became a recognized, established business. In the 1850's this recognition spread across the country."); *see id.* at 18 (referring to a New York real estate services firm founded in 1794, which soon became a broker in real estate transactions); D. BARLOW BURKE, JR., LAW OF REAL ESTATE BROKERS § 1.1, at 1:3 (1992) ("The advent of a specialist in real estate brokerage is thus a relatively recent occurrence, dating from the last half of the nineteenth century."); STEWART RAPALJE, THE LAW RELATING TO REAL ESTATE BROKERS, AS DECIDED BY THE AMERICAN COURTS iii (1893) ("The business of a real-estate broker is of comparatively recent origin. Five years ago there were only a few reported decisions involving the relation of principal and broker with respect to real-estate transactions. . . .").

of real property involved lawyers and business persons but not real estate agents as we have come to know them.[3] In some instances, parties to real estate sales had employees who handled the transactions, but those employees were not considered real estate agents or brokers.[4]

Eventually, people began to specialize in facilitating real estate transactions, and by the mid-nineteenth century real estate brokers, as such, were involved in several cases both as litigants and as witnesses.[5] The first, though short-lived, real estate board was organized in New York City in 1847.[6] Organization of other local real estate boards followed.[7] Finally, in 1908, what is now known as the National Association of Realtors (NAR) was founded.[8] These local boards, and later the NAR, were part of an effort to facilitate real estate exchanges,[9] to improve the quality of services provided by member brokers, and to encourage ethical conduct in the profession.[10]

Today, the public widely uses real estate brokers in both residential and commercial property transfers. In 2000, there were about 5,842,000 sales

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3. 10 PATRICK J. ROHAN, REAL ESTATE BROKERAGE LAW AND PRACTICE § 2.01[2][b], at 2-9 (1985) ("Until the mid-Nineteenth Century, the principal intermediaries in the real estate sales transaction were lawyers and other business persons not specialized in real estate."); *cf.* Thruston v. Thornton, 55 Mass. (1 Cush.) 89, 91 (1848) (stating that the plaintiff, "in connection with his business as an attorney, acted as a real estate broker").

4. *See* WILLIAM SLEE WALKER, AMERICAN LAW OF REAL ESTATE AGENCY § 7, at 3 (1910) ("a salaried agent, not acting for a fee or commission, is not a broker").

5. *See* McGavock v. Woodlief, 61 U.S. (20 How.) 221, 225 (1857) (holding that a broker for the sale of a plantation and slaves was not entitled to commission on facts of the case); Kock v. Emmerling, 63 U.S. (22 How.) 69, 70-71 (1859) (holding real estate broker entitled to commission); Bagley v. Eaton, 8 Cal. 159, 163 (1857) (referring to actions of real estate brokers); Dussuau v. Municipality Number One, 6 La. Ann. 575, 576 (1851) (noting testimony of real estate broker); Chadwick v. Collins, 26 Pa. 138, 139 (1856) (discussing 1849 Pennsylvania statute requiring licensing of real estate brokers); *In re* Harland's Accounts, 5 Rawle 323, 329 (Pa. 1835) (referring to testimony of real estate brokers); Miller v. Jacobs, 3 Watts 477, 481 (Pa. 1835) (quoting deposition of "a conveyancer and broker of real estate" who stated that he had "been in that occupation for thirty-three years"); Van Hook v. Somerville Mfg. Co., 5 N.J. Eq. 137, 1845 N.J. Super. LEXIS 32, at *26 (N.J. Ch. 1845) (citing testimony of real estate broker); Glentworth v. Luther, 21 Barb. 145, 145 (N.Y. Sup. Ct. 1855).

6. DAVIES, *supra* note 2, at 21 (discussing creation of New York Real Estate Exchange).

7. *Id.* at 26 (discussing the Baltimore Board of Real Estate in 1858).

8. *Id.* at 58 (discussing the creation of the National Association of Real Estate Exchanges in 1908); BURKE, *supra* note 2, at § 1.3 (stating that the NAR was founded in 1908).

9. *See* DAVIES, *supra* note 2, at 26 (stating that early boards "provided a market convenience among men of standing, a trading place, where these men could exchange listings").

10. *Id.* at 26 (stating that boards were concerned "with the ethics of real estate business, and that means protection of the public in its real estate transactions"). The NAR has a code of ethics with a stated goal "to eliminate practices which may damage the public or which might discredit or bring dishonor to the real estate profession." *Preamble* to CODE OF ETHICS AND STANDARDS OF PRACTICE OF THE NATIONAL ASSOCIATION OF REALTORS (2000); *available at* http://websrv1.realtors.org/ realtor.nsf/pages/2000code.

of existing homes in the United States and about 877,000 sales of new privately-owned one-family houses.[11] An estimated 81% of home sales involve real estate brokers.[12] There are reportedly over two million real estate brokers and salespeople in the United States,[13] of which over 750,000 are members of NAR.[14] With the volume of real estate that is transferred each year, it comes as no surprise that disputes associated with real property sales abound and that many of these cases involve real estate brokers as defendants.

This Article first explores the history of real estate broker liability and various theories for liability of real estate brokers to purchasers of real property. Then it considers statutory and contractual provisions limiting real estate brokers' potential liability. In particular, this Article focuses on how courts construe and apply the "as is" clause and similar exculpatory clauses. This Article concludes that these clauses are, and should be, viewed with skepticism, and it suggests that courts should not enforce exculpatory clauses in residential real estate sales contracts unless the broker can prove that the disclaimers were actually agreed to by the purchasers and that the clauses adequately identify the qualities disclaimed. These requirements are necessary to ensure that purchasers genuinely understand and knowingly accept the risks purportedly allocated by such provisions.

II. THEORIES OF REAL ESTATE BROKER LIABILITY

A. *Historically Caveat Emptor Protected Brokers and Sellers*

1. The Rise of Caveat Emptor

Historically, the doctrine of caveat emptor protected sellers and their agents, including brokers, from liability to disappointed buyers. Caveat

11. U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: THE NATIONAL DATA BOOK 598, 600 (21st ed., Nos. 939 & 944, 2001).

12. *See The Residential Real Estate Brokerage Industry*, 1 FTC A STAFF REPORT BY THE L.A. REG'L OFFICE, 1, 8 (1983) (giving 81% statistic); *see also* BURKE, *supra* note 2, § 1.1, at 3 (estimating that brokers handle 90% of all home sales).

13. Association of Real Estate License Law Officials, DIGEST OF REAL ESTATE LICENSE LAWS AND CURRENT ISSUES (ed. 2000). The DIGEST OF REAL ESTATE LICENSE LAWS AND CURRENT ISSUES reports the number of licensed brokers and salespersons by state in 1999. *Id.* Based on those figures, in 1999 there were over 696,778 brokers and 1,468,481 salespersons in the United States. *See id.* (including data from all states except Minnesota).

14. *See* NAR Official Website, *at* http://www.realtor.org/realtororg. nsf/pages/HowtoJoin? (last visited Mar. 30, 2002). The "overwhelming majority" of active brokers and salespersons are members of the NAR. *See The Residential Real Estate Brokerage Industry*, 1 FTC, A STAFF REPORT BY THE L.A. REG'L OFFICE 15 (1983).

emptor, or "buyer beware,"[15] stood for the rule that a buyer of real property assumed the risk of defects in the property.[16] The complete maxim was: "caveat emptor, qui ignorare non debuit quod jus alienum emit," translated, "[l]et a purchaser beware, who ought not to be ignorant that he is purchasing the right of another,"[17] or by a second translation, "let the purchaser exercise proper caution, for he ought not be ignorant of the amount and nature of that person's interest which he is about to purchase."[18] Caveat emptor at one time included defects in both title and quality.[19] The buyer had no recourse against the seller unless the seller made covenants or contractual warranties concerning the property.

Until relatively recently, reflecting the United States' and England's agrarian roots, the greatest value of real property was the land itself, not the improvements on the land.[20] As a result, the quality of title to the land

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15. One historical authority defined "caveat emptor" as standing for the rule: "Let the purchaser take heed; that is, let him see to it, that the title he is buying is good. This is a rule of the common law, applicable to the sale and purchase of lands and other real estate." JOHN BOUVIER, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION; WITH REFERENCES TO THE CIVIL AND OTHER SYSTEMS OF FOREIGN LAW 212 (7th ed. 1857).

16. At common law, the rule applied to real and personal property. *See, e.g.*, Barnard v. Kellogg, 77 U.S. (10 Wall.) 383, 388-89 (1870) (discussing the rule as applied to sales of personal property); Blodget v. Brent, 3 F. Cas. 719, 720 (C.C.D.C. 1828) (No. 1,553) (applying the rule to real property); Stebbins v. Eddy, 22 F. Cas. 1192, 1195 (C.C.D. R.I. 1827) (No. 13,342) (applying the rule to real property); Hurst v. McNeil, 12 F. Cas. 1039, 1042 (C.C.D. Pa. 1804) (No. 6, 936) (applying the rule to real property); Seixas & Seixas v. Woods, 2 Cai. R. 48, 54 (N.Y. Sup. Ct. 1804) (applying the rule to sale of wood); Brock v. Philips, 2 Va. (1 Wash.) 68 (1795) (applying the rule to real property); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 264-65, 540-41 (2d ed. 1985) (discussing caveat emptor in America in the context of the history of commercial law and the sale of goods).

17. Spade v. Salvatorian Fathers, Mother of Savior Seminary, 189 A.2d 738, 744 (N.J. Sup. Ct. Law Div. 1963); *see also* Barnard v. Duncan, 38 Mo. 170, 187 (Mo. 1866) (stating a slightly different translation (quoting HERBERT BROOM, A SELECTION OF LEGAL MAXIMS, CLASSIFIED AND ILLUSTRATED 354 (1845))).

18. HERBERT BROOM, A SELECTION OF LEGAL MAXIMS, CLASSIFIED AND ILLUSTRATED 181 (1845).

19. *See* HERBERT BROOM, A SELECTION OF LEGAL MAXIMS, CLASSIFIED AND ILLUSTRATED 528 (10th ed. 1939) (stating that "*caveat emptor* applies, with certain specific restrictions, not only to the quality of, but also to the title to land which is sold"); BROOM, *supra* note 18, at 187 (discussing applicability of the rule to both quality and title of real property); 2 RICHARD WOODDESSON, LECTURES ON THE LAW OF ENGLAND 251 n.m (2d ed. 1834) (noting that caveat emptor "seems to have been originally applicable, not to the quality, but the title, of the goods sold"); *cf.* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 477-78 (4th ed. 1840) (discussing personal property and claiming that the rule applies to quality of goods, but fair price implies a warranty of title).

20. *See* Wilhite v. Mays, 232 S.E.2d 141, 142-43 (Ct. App. 1976), *aff'd*, 235 S.E.2d 532 (Ga. 1977) (observing that "the sale of farm acreage cum simple residence—the type of transaction to which caveat emptor originally addressed itself—is very different from the sale of a modern home,

and right to possession were frequently the basis of dispute rather than the condition of improvements on the land. In connection with leases, courts applied caveat emptor and found no implied warranty as to the fitness of the premises for habitation or other particular uses.[21] As society became more urban, disputes regarding the condition of improvements took on greater significance. Caveat emptor, however, continued to be the rule and denied recovery in most cases.

The origins of the doctrine of caveat emptor can be traced to early Roman law.[22] Ironically, Roman law ultimately rejected the doctrine[23] and instead opted for the rule of "caveat venditor" or "let the seller beware."[24] Caveat venditor implied a general warranty of quality in the law of all sales.[25] Professor Charles Sherman explained:

> In Roman law the seller warranted the thing sold, whether movable or immovable, to be free from latent defects or secret faults. If the buyer subsequently discovered in the thing sold a latent defect or vice, unknown to the seller, which renders it useless or unsuited to its purpose or diminished in value, he could elect either to sue for the annulment of the sale or to sue for a reduction of the price.[26]

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with complex plumbing, heating, air conditioning, and electrical systems, which is possibly built on ground considered unsuitable for construction until recent years").

21. *See* 1 EMORY WASHBURN, A TREATISE ON THE AMERICAN LAW OF REAL PROPERTY 357-58 (2d ed. 1864) (stating that "in the absence of fraud on the part of the lessor, there is no implied warranty that the premises are fit for the use for which the lessee requires them").

22. *See* JAMES MACKINTOSH, THE ROMAN LAW OF SALE WITH MODERN ILLUSTRATIONS: DIGEST XVIII.1 AND XIX.1 TRANSLATED WITH NOTES AND REFERENCES TO CASES AND THE SALE OF GOODS ACT 278 (2d ed. 1907) (noting that caveat emptor was the starting point for evolution of warranty and stating that "[t]he primitive law knew nothing of *implied* warranty of quality, and it is very doubtful if even express declarations . . . could be enforced"); WILLIAM L. BURDICK, THE PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW 445 (1938) (stating that in a contract for sale, under "the early law of Rome," the seller was liable only for fraud or breach of express warranty).

23. *See* Alan M. Weinberger, *Let the Buyer Be Well Informed? — Doubting the Demise of Caveat Emptor*, 55 MD. L. REV. 387, 391 & n.30 (1996); BURDICK, *supra* note 22, at 445 (noting seller's liability under implied warranty of quality). According to Professor Max Radin, "[t]he evil and cynical rule of *caveat emptor* was abrogated, in practice and in law, at Rome some time before the Christian era . . . ." MAX RADIN, HANDBOOK OF ROMAN LAW § 83, at 231 (1927).

24. According to Professor Walton Hamilton, the actual phrases "caveat emptor" and "caveat venditor" were not used in Roman Law. *See* Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133, 1156-57 (1931) (regarding caveat emptor, "[n]o Roman author whose works survive seems to have scribbled the two words down"); *id.* at 1158 & n.168 (concluding that there is no evidence of words "caveat emptor" in Roman law, and "the expression *caveat venditor* . . . is an invention of a modern scholarship").

25. 2 CHARLES PHINEAS SHERMAN, ROMAN LAW IN THE MODERN WORLD § 790, at 347 (1937).

26. *Id.* (footnotes omitted).

England and the United States, however, embraced the rule of caveat emptor. In the English common law, the phrase "caveat emptor" first appeared in print in 1534 in a text concerning horse trading.[27] Later, Sir Edward Coke applied the term caveat emptor early in the seventeenth century to landlord and tenant liability.[28] Although it did not use the words "caveat emptor," the famous case of *Chandelor v. Lopus*,[29] reported in 1603, is widely credited with originating the common law rule of caveat emptor.[30] In that case, the defendant goldsmith sold what he "affirmed" to be a "bezar-stone" to the plaintiff for a considerable sum.[31] A "bezar-stone" or "bezoar stone"[32] was a stone found in the stomach or intestines of certain animals, such as a goat, and was believed to have magical powers.[33] The plaintiff claimed that in fact the stone was not a bezar-stone and alleged breach of warranty.[34] The court found for the defendant because the defendant had merely "affirmed" but not "warranted" the

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27. In a discussion of "wartes" on a horse, the source stated: "if he be tame and have ben rydden upon, then *Caveat emptor*, beware the byer, for the byer hath bothe his eyen to se, and his handes to handell." MASTER FITZHERBERT, THE BOOK OF HUSBANDRY § 118 (Rev. Walter W. Skeat, M.A., ed., reprint 1882) (1534).

28. He wrote:

> Note, that by the Civil Law every man is bound to warrant the thing that he selleth or conveyeth, albeit there be no expresse Warranty, but the Common Law bindeth him not, unlesse there be a warrantie, either in Deed or in Law for *Caveat emptor*, as shall be said more at large in the chapter of Warrantie in the third booke.

1 SIR EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWES OF ENGLAND. OR, A COMMENTARIE UPON LITTLETON NOT THE NAME OF A LAWYER ONLY, BUT OF THE LAW IT SELFE § 145, at 102 (1st ed. 1628).

29. 79 Eng. Rep. 3 (Ex. Ch. 1603).

30. *See* McVeigh v. Messersmith, 16 F. Cas. 351 (C.C.D.C. 1837) (No. 8,931) (citing *Chandelor* in support of caveat emptor); Seixas & Seixas v. Woods, 2 Cai. R. 48, 53-54 (N.Y. Sup. Ct. 1804) (citing *Chandelor* as support for adopting rule of caveat emptor); Barnard v. Yates, 10 S.C.L. (1 Nott & McC.) 142, 147 (Const. Ct. S.C. 1818) (citing *Chandelor* as example of English rule of caveat emptor).

31. *Chandelor*, 79 Eng. Rep. at 3-4.

32. The cases use various spellings including "bezar-stone," "bezoar stone," and "bezer stone." *See id.* (using bezar-stone); *McVeigh*, 16 F. Cas. at 351 (using bezar stone); *Seixas & Seixas*, 2 Cai. R. at 52 (using bezoar stone); *see also* Note, 8 HARV. L. REV. 282, 283 (1894) (using bezer stone). The most popular spelling in the cases appears to be "bezoar stone." *See* 2 THE OXFORD ENGLISH DICTIONARY 163 (2d ed. 1989) (listing under entry "bezoar" nineteen different forms of the word).

33. Bezoar or bezoar-stone was believed to be a "counter-poison or antidote," "[a] calculus or concretion found in the stomach or intestines of some animals, chiefly ruminants, formed of concentric layers of animal matter deposited round some foreign substance, which serves as a nucleus." 2 THE OXFORD ENGLISH DICTIONARY 163 (2d ed. 1989).

34. *See Chandelor*, 79 Eng. Rep. at 4.

stone to be a bezar-stone.[35] The case was interpreted by later courts to mean that the fairness of the bargain was irrelevant unless there was a warranty.[36]

The doctrine of caveat emptor became well entrenched in American jurisprudence,[37] although it had its critics.[38] However, by the middle to late

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35. *Id.* The court, with one dissent, held:

> for the bare affirmation that it was a bezar-stone, without warranting it to be so, is no cause of action: and although he knew it to be no bezar-stone, it is not material; for every one in selling his wares will affirm that his wares are good, or the horse which he sells is sound; yet if he does not warrant them to be so, it is no cause of action.

Id.

36. Commentators have questioned whether *Chandelor* was actually good authority for caveat emptor. *See* P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 179 (1979) (questioning later interpretations of *Chandelor* as "highly suspect" and finding it "extraordinary that this case should have been regarded as laying the foundation of the later law of *caveat emptor*"); Hamilton, *supra* note 24, at 1167-68 ("It is not easy to extract the law of that day from the uncertain record of the case. . . . It is . . . the case recreated, rather than the case decided, which takes its place in history."). Lopus apparently successfully pled a second action alleging the goldsmith knowingly misrepresented the stone to be a "Bezers Stone." *See* Note, 8 HARV. L. REV. 282, 283-84 (1894) (discussing *Chandelor* and the subsequent opinion); Hamilton, *supra* note 24, at 1168 (discussing *Chandelor* and buyer's victory).

37. *See* Barnard v. Kellogg, 77 U.S. (10 Wall.) 383, 388-89 (1870) (stating, in a personal property case, "[o]f such universal acceptance is the doctrine of *caveat emptor* in this country, that the courts of all the States in the Union where the common law prevails, with one exception (South Carolina), sanction it"); Blodget v. Brent, 3 F. Cas. 719, 720 (C.C.D.C. 1828) (No. 1,553) (applying caveat emptor to preserve dower right in real property purchased by defendant); Stebbins v. Eddy, 22 F. Cas. 1192, 1195 (C.C.D. R.I. 1827) (No. 13,342) ("Where the sale [of land] is fair, and the parties are equally innocent, and the quantity is sold by estimation, . . . there is little, if any hardship, and much convenience in holding to the rule, caveat emptor."); Hurst v. McNeil, 12 F. Cas. 1039, 1042 (C.C.D. Pa. 1804) (No. 6,936) (stating that caveat emptor preserved the legal title of part owner of Penn's Manor over an innocent purchaser); Mason v. Evans, 1793 WL 453, at *5 (N.J. Sup. Ct. 1793) (Chetwood, J., concurring) (stating that defendant could not defend case to recover payment of a bond on ground that plaintiff did not have title to land sold to defendant as consideration for bond; caveat emptor applied); Seixas & Seixas v. Woods, 2 Cai. R. 48, 53-54 (N.Y. Sup. Ct. 1804) (involving sale of wood, maxim of caveat emptor applied; purchaser should have required a warranty if one was desired); Brock v. Philips, 2 Va. (1 Wash.) 68, 70 (1795) (applying caveat emptor, finding that purchaser of real property had no claim for defective title); *cf.* Waddill v. Chamberlayne, 1735 Va. LEXIS 3, at *1 (Va. 1735) (stating counsel argued for stay of judgment, relying on the doctrine of caveat emptor).

38. *See Seixas & Seixas*, 2 Cai. R. at 53 (noting Wooddesson's criticism of caveat emptor and his call for the more reasonable principle that a fair price implies a warranty); *Barnard*, 10 S.C.L. (1 Nott & McC.) at 147 (rejecting rule of caveat emptor and agreeing with Cooper that caveat emptor was "a disgrace to the law"); 1 THEOPHILUS PARSONS, THE LAW OF CONTRACTS 461 (3d ed. 1857) (noting that the rule "is apparently severe, and it sometimes works wrong and hardship" and that "it has been commented upon in terms of strong reproach, not only by the community, but by members of the legal profession"); THOMAS COOPER, THE INSTITUTES OF JUSTINIAN 556 (2d ed.

nineteenth century, caveat emptor in personal property cases began to give way to implied warranties. The courts first found the existence of an implied warranty of title to personal property.[39] Under the implied warranty of title, a seller of personal property impliedly warranted that the seller owned the chattel free and clear of encumbrances or any superior claims, unless circumstances or words indicated otherwise.[40] Although courts were willing to imply warranty of title, they initially continued to follow the rule of caveat emptor as it concerned quality of personal property.[41] Yet even in the area of warranties of quality, important exceptions or limitations to the rule of caveat emptor were widely recognized.[42] Beginning in the late nineteenth century and continuing into the twentieth century, caveat emptor gave way to implied warranties of merchantability and fitness for a particular purpose.[43] Today, the Uniform

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1841) (arguing that "[t]he rule of *caveat emptor,* ought to be changed into *caveat venditor.* It is a disgrace to the law that such a maxim should be adopted . . . ."); WOODDESSON, *supra* note 19, at 251 (calling caveat emptor, "a very unconscientious maxim" and noting "a more reasonable principle" of implied warranty).

39. *See* CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LAW OF SALES OF PERSONAL PROPERTY, INCLUDING THE LAW OF CHATTEL MORTGAGES § 185, at 264-65 (1891) (recognizing under early English rule, there was no implied warranty of title for personal property, but finding now "there are implied warranties of title in very many sales of personal property"); EDMUND H. BENNETT & SAMUEL C. BENNETT, BENJAMIN'S TREATISE ON THE LAW OF SALE OF PERSONAL PROPERTY; WITH REFERENCES TO THE AMERICAN DECISIONS AND TO THE FRENCH CODE AND CIVIL LAW § 639, at 630 (7th Am. ed. 1899) (noting that "[t]he exceptions have become the rule"; the new rule is that the seller warrants title unless facts and circumstances show otherwise); SAMUEL WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT § 216-18, at 286-90 (1909) (quoting § 13 of the Uniform Sales Act imposing implied warranties of title, and discussing history).

40. *See* FRANCIS B. TIFFANY, HANDBOOK OF THE LAW OF SALES § 76, at 242 (2d ed. 1908) (stating that seller impliedly warrants that he has title to goods "unless a contrary intention appears"). Some courts limited the implied warranty to cases in which the seller was in possession of the goods. *Id.; see also* BENNETT & BENNETT, *supra* note 39, § 641, at 631-32 (noting distinction between vendor in possession and vendor out of possession).

41. *See* BENNETT & BENNETT, *supra* note 39, § 644, at 633 (stating in 1899: "The maxim of the common law, *caveat emptor,* is the general rule applicable to sales, so far as quality is concerned."); TIFFANY, *supra* note 40, § 78, at 252 (stating that in 1908 caveat emptor was the general rule applicable to quality in sales of goods).

42. *See, e.g.,* Wright v. Hart, 18 Wend. 449, 453-56 (N.Y. 1837) (discussing exceptions: order from manufacturer for particular use, sale of provisions, sale with no opportunity to inspect, and sale by sample); TIFFANY, *supra* note 40, § 78, at 252 (noting implied warranties of fitness for particular purpose and fitness for consumption, and in goods bought by description); *id.* § 79, at 262 (noting implied warranty in sales by sample). One treatise stated: "The doctrine of *caveat emptor,* however, has so many limitations that it must be read in the light of what are sometimes called exceptions, but which are really independent rules and principles." BENNETT & BENNETT, *supra* note 39, at 682 n.13; *see also id.* at 683-93, nn.14-17 (discussing particular exceptions).

43. *See, e.g.,* Murchie v. Cornell, 29 N.E. 207, 207 (Mass. 1891) (stating in some circumstances, "the court properly may instruct the jury that the word means more than its bare

Commercial Code and state law impose implied warranties of title, merchantability, and fitness for a particular purpose in connection with the sale of goods in many circumstances.[44]

Developments in the law of real property did not follow the developments in the law of personal property. Caveat emptor continued to govern leases and sales of real property even after it was abandoned in connection with the sale of personal property.[45] Some commentators attribute the move away from caveat emptor in personal property to the rise of mass production of goods in the late nineteenth century and early twentieth century.[46] Also, changing commercial conditions placed greater distance between manufacturers and retail purchasers, and, at the same time, purchasers' expectations increased.[47] These same considerations did not apply immediately to real property. Under the common law, real property was considered unique, the antithesis of mass produced fungible items. Sales occurred directly between the seller and purchaser or between the seller's agent and purchaser. Frequently, an individual already owned a parcel of land and then hired a contractor to build on the land.[48] After World War II, however, mass production of houses began, and builder-developers sold new houses and land together, creating a new dynamic in

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definition in the dictionary, and calls for a merchantable article of that name"); BARKLEY CLARK & CHRISTOPHER SMITH, THE LAW OF PRODUCT WARRANTIES ¶ 1.01[2], at 1-4 (1984) (discussing history and adoption of the Uniform Sales Act and later the U.C.C.).

44. *See* U.C.C. §§ 2-312 to 2-315 (2001) (imposing warranty of title, implied warranty of merchantability, and implied warranty of fitness).

45. *See, e.g.*, Bonner v. Sikes, 727 S.W.2d 144, 146 (Ark. Ct. App. 1987) (noting implied warranties in sale of personal property, but caveat emptor in sale of real estate); McDonald v. Mianecki, 398 A.2d 1283, 1288 (N.J. 1979) (noting critically the different treatment of personal and real property); Bank One, Cincinnati v. Wait, 674 N.E.2d 752, 758 (Ohio Ct. App. 1996) (noting abolition of caveat emptor in personal property area, but remaining viability in real estate sales); RESTATEMENT (SECOND) OF TORTS § 352 cmt. a (1965) ("As to sales of land this rule has retained much of its original force, and the implied warranties which have grown up around the sale of chattels never have developed."); 7 SAMUEL WILLISTON & WALTER H.E. JAEGER, A TREATISE ON THE LAW OF CONTRACTS § 926, at 779 (3d ed. 1963) ("The doctrine of *caveat emptor* so far as the title of personal property is concerned is very nearly abolished, but in the law of real estate it is still in force."); Leo Bearman, Jr., *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541, 542 (1961) ("Though the ominous sounding doctrine of caveat emptor has all but disappeared from the purchase of chattels . . . it still clings tenaciously to the black letter law of sales of realty. . . ."); *see also* 1 MILTON R. FRIEDMAN, CONTRACTS AND CONVEYANCES OF REAL PROPERTY § 1.2(n), at 48 & n.2 (6th ed. 1998) (stating that in the ordinary sale of realty, caveat emptor "not only applies, it flourishes" and finding that it is still the general rule).

46. CLARK & SMITH, *supra* note 43, ¶ 1.01[2], at 1-4; Bearman, *supra* note 45, at 542; FRIEDMAN, *supra* note 45, at 265.

47. CLARK & SMITH, *supra* note 43, ¶ 1.01[2], at 1-4.

48. *See* E.F. Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 CORNELL L.Q. 835, 837 (1967).

the real estate market.[49] This mass production and changed market, coupled with changing attitudes,[50] gradually led to greater protections for purchasers and substantial erosion of caveat emptor.[51]

2. The Decline, But Not Fall, of Caveat Emptor

Caveat emptor in the sale of real property, depending upon the jurisdiction and the authority consulted, is alternatively (1) still the rule, (2) abandoned, or (3) still relevant, but partially abandoned. Most courts and commentators probably would agree that caveat emptor has been sharply limited but continues to play a role in real property sales in most jurisdictions.

a. Implied Warranty of Marketability and Title Covenants

Early on, courts began to imply in contracts for the sale of real property a duty to convey marketable title unless the contract provided otherwise.[52] This, in essence, was an implied warranty that the seller had good title to the real property.[53] The usefulness of this implied duty was limited to the

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49. *Id.*

50. Some attributed the broad acceptance of caveat emptor to laissez faire attitudes that dominated earlier times. *Id.* at 836.

51. *See* FRIEDMAN, *supra* note 45, § 1.2(n), at 71 (noting the "extraordinary number of new housing units built, often hurriedly, since about 1945," at times followed by poor results); Roberts, *supra* note 48, at 837 (noting transformation of housing industry after World War II; "the building industry outgrew the old notion that the builder was an artisan and took on all the color of a manufacturing enterprise"). The New Jersey Supreme Court explained the rationale this way:

> *Caveat emptor* developed when the buyer and seller were in an equal bargaining position and they could readily be expected to protect themselves in the deed. Buyers of mass produced development homes are not on an equal footing with the builder vendors and are no more able to protect themselves in the deed than are automobile purchasers in a position to protect themselves in the bill of sale.

Schipper v. Levitt & Sons, Inc., 207 A.2d 314, 326 (N.J. 1965).

52. *See* Wallach v. Riverside Bank, 100 N.E. 50, 51 (N.Y. 1912) ("agreement to make a good title is always implied in executory contracts for the sale of land"); Burwell v. Jackson, 9 N.Y. 535, 541-44 (1854) (finding implied covenant to convey good title in every contract for sale of land unless expressly provided otherwise in the contract); Goddin v. Mason, 55 Va. (14 Gratt.) 102, 117 (1858) (stating when sale of real estate is made without stipulations as to title, purchaser is entitled to clear title); WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY 775 (3d ed. 2000) ("It infers in every realty sale contract, unless a contrary intent appears, a covenant that the title transferred will be free of all reasonable risk of attack—in other words, that it will be marketable."). The requirements for marketable title may be defined by the contract or by local law and usually include some qualifications such as covenants of record and public utility easements.

53. One historic authority explained the right to marketable title this way:

period when the contract was executory because, under the doctrine of merger, after the deed conveyed the property, any contractual obligations were merged into the deed.[54] The purchaser's only remedies after conveyance were for fraud or based on warranties or covenants in the deed, not on any implied duties under the sales contract.

Warranties and covenants of title in transfer of real property have a long history in the common law.[55] As early as 1272, use of the Latin word "dedi" in a charter or deed implied a warranty of title by the grantor.[56] These early warranties had limitations, however, and by the end of the seventeenth century, title covenants were introduced as a substitute for warranties.[57] In America, deeds typically contained covenants of title. Eventually, warranty deeds,[58] distinguished from other deeds by inclusion of covenants of title, became the preferred method for conveying real property.[59] Under these covenants, the seller covenants, among other things, that he or she is the owner of the real property and has the right to convey the property.[60] These covenants provide some protection to

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> The right to a good title, is a right not growing out of the agreement between the parties, but given by the law,—the purchaser being entitled to have a clear title shown, not merely on the ground that it is stipulated for by the agreement: but on the footing of the principle growing out of the nature of the contract, that as the purchaser parts with good money, the vendor shall give in return an estate with a clear title.

S. Atkinson, *An Essay on Marketable or Doubtful Titles to Real Estate in Section 379, in* 20 THE LAW LIBRARY 168 (Thomas I. Wharton ed., 1838).

54. *See* STOEBUCK & WHITMAN, *supra* note 52, at 785 (discussing merger and noting that modern courts limit the merger doctrine to covenants concerning title, allowing other contract covenants to survive the deed); *see also* Pybus v. Grasso, 59 N.E.2d 289, 291 (Mass. 1945) (applying merger doctrine); Mason v. Loveless, 24 P.3d 997, 1002-03 (Utah Ct. App. 2001) (applying merger doctrine).

55. For the history and development of title covenants, see WILLIAM HENRY RAWLE, A PRACTICAL TREATISE ON THE LAW OF COVENANTS FOR TITLE (5th ed. 1887).

56. *See id.* at 2 (citing statute *de bigamis*); Burwell v. Jackson, 9 N.Y. 535, 541 (1854) ("Originally, the customary words of conveyance in a deed amounted to a warranty; as the word *dedi* in a feoffment, or *concessi* in a grant for years."); BLACK'S LAW DICTIONARY 421 (7th ed. 1999) (defining "dedi" and noting that word implies warranty of title).

57. RAWLE, *supra* note 55, at 11.

58. The form and effect of warranty deeds are defined by state statute and common law. *See, e.g.*, FLA. STAT. ANN. §§ 689.02-.03 (West 2002) (directing form and effect of warranty deed); MINN. STAT. ANN. § 507.07 (West 2002) (directing form and effect of warranty deed); N.H. REV. STAT. ANN. § 477:27 (2000) (directing form and effect of warranty deed).

59. RAWLE, *supra* note 55, at 11-12.

60. *See* 14 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 81A.06[2][a], [b], [d] (Michael Allan Wolf ed., 2000) (discussing covenants of seisin, right to convey, and warranty); *see also, e.g.*, NEB. REV. STAT. ANN. § 76-206 (Michie 1995) (stating covenant of seisin "shall be interpreted as a covenant that the grantor has good title to the very estate in quantity and quality

purchasers from title defects and ouster, and caveat emptor has no application to claims within the scope of the covenants.[61] Of course, title covenants, as their name implies, address defects in title but not defects in the quality of the real property.[62]

b. Implied Warranties of Habitability and Workmanship

In a significant departure from caveat emptor, courts now generally impose an implied warranty of habitability and an implied warranty of workmanship in sales of new homes by vendor-builders.[63] This departure from caveat emptor began as a limited exception in cases in which a purchaser contracted for the building of a house or bought a house under construction but not yet completed.[64] Later, courts extended the implied

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which he purports to convey").

61. The covenants of title are covenants: for seisin, for right to convey, against encumbrances, of warranty, for quiet enjoyment, and for further assurance. *See* STOEBUCK & WHITMAN, *supra* note 52, at 907-10. Which covenants of title are contained in a deed depend upon the express language of the deed and local law. *Id.* Use of certain words, by statute or common law, will invoke particular covenants. *See, e.g.*, FLA. STAT. ANN. §§ 689.02-.03 (West 2002) (directing form and effect of warranty deed); MINN. STAT. ANN. § 507.07 (West 2002) (directing form and effect of warranty deed); NEB. REV. STAT. ANN. § 76-206 (Michie 1996) (giving language necessary to invoke covenant of seisin); N.H. REV. STAT. ANN. § 477:27 (2000) (directing form and effect of warranty deed).

62. *See* STOEBUCK & WHITMAN, *supra* note 52, at 907.

63. For representative cases imposing implied warranties of workmanship and habitability in the purchase of new houses, see *Cochran v. Keeton*, 252 So. 2d 313 (Ala. 1971); *Wawak v. Stewart*, 449 S.W.2d 922 (Ark. 1970); *Carpenter v. Donohoe*, 388 P.2d 399 (Colo. 1964); *Gable v. Silver*, 258 So. 2d 11 (Dist. Ct. App.), *opinion adopted by* 264 So. 2d 418 (Fla. 1972); *Bethlahmy v. Bechtel*, 415 P.2d 698 (Idaho 1966); *Smith v. Old Warson Development* Co., 479 S.W.2d 795 (Mo. 1972); *McDonald v. Mianecki*, 398 A.2d 1283 (N.J. 1979); *De Roche v. Dame*, 430 N.Y.S.2d 390 (N.Y. App. Div. 1980); *Vanderschrier v. Aaron*, 140 N.E.2d 819 (Ohio Ct. App. 1957); *Jones v. Gatewood*, 381 P.2d 158 (Okla. 1963); *Yepsen v. Burgess*, 525 P.2d 1019 (Or. 1974); *Elderkin v. Gaster*, 288 A.2d 771 (Pa. 1972); *Waggoner v. Midwestern Development, Inc.*, 154 N.W.2d 803 (S.D. 1967); *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968); *Rothberg v. Olenik*, 262 A.2d 461 (Vt. 1970); *House v. Thornton*, 457 P.2d 199 (Wash. 1969); *Gamble v. Main*, 300 S.E.2d 110 (W.Va. 1983); *Tavares v. Horstman*, 542 P.2d 1275 (Wyo. 1975). Some states have imposed these implied warranties by statute. *See, e.g.*, CONN. GEN. STAT. ANN. § 47-118 (2001); MD. CODE ANN., Real Prop. § 10-203 (2001); VA. CODE ANN. § 55-70.01 (Michie 1995).

64. The leading case was an English case, *Miller v. Cannon Hill Estates, Ltd.*, 2 K.B. 113 (1931). In *Miller*, the court drew a sharp distinction between existing, unfurnished houses and houses to be built or under construction. *Id.* at 121. The court stated:

> The position is quite different when you contract with a builder or with the owners of a building estate in course of development that they shall build a house for you or that you shall buy a house which is then in the course of erection by them. There the whole object, as both parties know, is that there shall be erected a house in which the intended purchaser shall come to live. It is the very nature and essence of the transaction between the parties that he will have a house put up

warranties to cover all newly constructed houses, thus protecting purchasers of already completed newly constructed homes.[65] These new implied warranties are an important shift away from caveat emptor, but they are far from a complete abandonment of the doctrine. Often, the implied warranties are limited to the original purchasers of new homes and do not apply to subsequent purchasers[66] or to used homes.[67] The implied warranties only apply to builder-vendors, not the typical homeowner selling his or her house.[68] Caveat emptor also continues to control in cases of new non-residential buildings or investment properties.[69]

> there which is fit for him to come into as a dwelling-house. It is plain that in those circumstances there is an implication of law that the house shall be reasonably fit for the purpose for which it is required, that is for human dwelling.

Id.

65. *See, e.g.*, Carpenter v. Donohoe, 388 P.2d 399, 402 (Colo. 1964) (extending rule in *Miller* to "newly constructed buildings, completed at the time of contracting"). The court in *Carpenter* explained:

> That a different rule should apply to the purchaser of a house which is near completion than would apply to one who purchases a new house seems incongruous. To say that the former may rely on an implied warranty and the latter cannot is recognizing a distinction without a reasonable basis for it.

Id.

66. *See, e.g.*, Gillespie v. Plemmons, 849 P.2d 838, 840 (Colo. Ct. App. 1992) (limiting to first purchaser); Coburn v. Lenox Homes, Inc., 378 A.2d 599, 601 (Conn. 1977) (limiting to original purchaser); McCann v. Brody-Built Const. Co., 496 N.W.2d 349, 351 (Mich. Ct. App. 1992) ("Such warranties apply only to the first purchaser of a home."); Brown v. Fowler, 279 N.W.2d 907, 910 (S.D. 1979) (requiring privity with builder). *But see* Richards v. Powercraft Homes, Inc., 678 P.2d 427, 430 (Ariz. 1984) (extending warranties to protect subsequent purchasers); Barnes v. Mac Brown & Co., 342 N.E.2d 619, 620-21 (Ind. 1976) (extending warranties to protect second purchaser); Barlage v. Key Bank of Wyo., 892 P.2d 124, 126 (Wyo. 1995) (noting that implied warranty has been extended to remote purchasers).

67. *See* Hines v. Thornton, 913 S.W.2d 373, 375 (Mo. Ct. App. 1996) (applying implied warranties only to sale of new houses).

68. *See, e.g.*, Paukovitz v. Imperial Homes, Inc., 649 N.E.2d 473, 475 (Ill. App. Ct. 1995) ("plaintiff must prove that the defendant was the builder-vendor of the home"); Choung v. Iemma, 708 N.E.2d 7, 12 (Ind. Ct. App. 1999) (refusing to apply implied warranty against non-builder seller); *Barlage*, 892 P.2d at 126 (limiting implied warranty to sale of improved property by builder).

69. *See* Conklin v. Hurley, 428 So. 2d 654, 658-59 (Fla. 1983) (holding no implied warranties when purchasers of lot with defective seawall bought properties as investment for resale); Haskell Co. v. Lane Co., 612 So. 2d 669, 674 (Fla. 1st DCA 1993) (stating that caveat emptor continues to apply to sales of commercial properties); Hays v. Gilliam, 655 S.W.2d 158, 160-61 (Tenn. Ct. App. 1983) (refusing to find implied warranty of habitability in used apartment building); *cf.* Frickel v. Sunnyside Enters., Inc., 725 P.2d 422, 423 (Wash. 1986) (finding no implied warranty of habitability in commercial apartment transaction where apartments not built for resale and where contract had a disclaimer). *But see* Tusch Enters. v. Coffin, 740 P.2d 1022, 1032 (Idaho 1987)

Beginning in the early 1960s, courts also made a dramatic shift away from caveat emptor in the context of residential leases where they began to impose a warranty of habitability.[70] Again, however, caveat emptor continues to be the majority rule in commercial leases.[71]

c. Seller's Duty to Disclose Known Material Defects

In addition to title covenants and implied warranties in new homes and residential leases, many courts have gone a step further and impose a duty on all sellers of residential real estate to disclose known material defects

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(implied warranty of habitability extended to purchase of income-producing duplexes); Hodgson v. Chin, 403 A.2d 942, 945 (N.J. Super. Ct. App. Div. 1979) (finding implied warranty of reasonable workmanship and habitability in building consisting of two small stores and two apartments).

70. *See, e.g.*, Green v. Superior Court, 517 P.2d 1168, 1170 (Cal. 1974) (recognizing implied warranty of habitability in residential leases); Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1075 (D.C. Cir. 1970) (finding implied warranty of habitability in all leases of urban dwellings); Pines v. Perssion, 111 N.W.2d 409, 412-13 (Wis. 1961) (rejecting caveat emptor and implying warranty of habitability in residential leases); STOEBUCK & WHITMAN, *supra* note 52, § 6.38, at 299-301 (discussing implied warranties of habitability in leases). Many states have imposed by statute the equivalent of an implied warranty of habitability in residential leases. *See, e.g.*, N.Y. REAL PROP. LAW § 235-b (McKinney 2001) (imposing warranty of habitability); TEX. PROP. ANN. CODE §§ 92.051-.262 (Vernon 1995) (imposing duties on landlords and granting remedies to tenants); UTAH CODE ANN. §§ 57-22-1 to 57-22-6 (2000) (providing the Utah Fit Premises Act, imposing warranty of habitability); STOEBUCK & WHITMAN, *supra*, note 52, § 6.38, at 301 (discussing habitability statutes).

71. A majority of jurisdictions refuse to find an implied warranty of fitness for a particular purpose in commercial leases. *See, e.g.*, Sauve v. Winfree, 985 P.2d 997, 1001 (Alaska 1999) ("Only a few states—New Jersey, New York, California, and Texas—have moved toward recognizing an implied warranty of fitness or suitability in commercial leases."); Cho Mark Oriental Food v. K & K Int'l, 836 P.2d 1057, 1061 n.1 (Haw. 1992) (noting that "this court has never extended the theory [of implied warranties] to commercial leases," and observing that "[f]ew jurisdictions have done so"); Bd. of Dirs. of Bloomfield Club Recreation Ass'n v. Hoffman Group, Inc., 692 N.E.2d 825, 828 (Ill. App. Ct. 1998) ("implied warranty of habitability does not extend to commercial leases"); Chausse v. Coz, 540 N.E.2d 667, 669 (Mass. 1989) (finding no implied warranty of habitability in commercial lease); B.W.S. Invs. v. Mid-Am Restaurants, Inc., 459 N.W.2d 759, 763 (N.D. 1990) (adopting majority view, rejecting implied warranty in commercial lease); Truetried Serv. Co. v. Hager, 691 N.E.2d 1112, 1116 (Ohio Ct. App. 1997) (stating caveat emptor applies to commercial leases). For the minority rule, see *Davidow v. Inwood North Professional Group*, 747 S.W.2d 373, 377 (Tex. 1988).

in the property.[72] Following the leading case of *Lingsch v. Savage*,[73] the rule in California is

> where the seller knows of facts materially affecting the value or desirability of the property which are known or accessible only to him and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer.[74]

A breach of this common law duty of disclosure may result in either rescission or damages.[75] Courts imposing a duty of disclosure view nondisclosure of known material facts as actionable fraud.[76] One court held a builder-developer liable for nondisclosure of even off-site physical conditions materially affecting the property.[77]

Other jurisdictions, however, continue to apply caveat emptor and place no affirmative duty upon sellers to disclose defects.[78] All

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72. *See, e.g.*, Assilzadeh v. Cal. Fed. Bank, 98 Cal. Rptr. 2d 176, 182 (Cal. Ct. App. 2000) (noting duty to disclose); Johnson v. Davis, 480 So. 2d 625, 629 (Fla. 1985) (finding duty to disclose material facts); Flakus v. Schug, 329 N.W.2d 859, 863 (Neb. 1983) (stating there is a duty to disclose material facts in some circumstances), *overruled on other grounds*, Nielsen v. Adams, 388 N.W.2d 840, 846 (Neb. 1986); Weintraub v. Krobatsch, 317 A.2d 68, 74 (N.J. 1974) (holding seller could be liable for failure to disclose a known material fact); Thacker v. Tyree, 297 S.E.2d 885, 888 (W.Va. 1982) (finding duty to disclose latent defects); Green Spring Farms v. Spring Green Farm Assocs. Ltd., 492 N.W.2d 392, 396-97 (Wis. Ct. App. 1992) (rejecting caveat emptor in favor of "more enlightened rule").

73. 29 Cal. Rptr. 201 (Cal. Dist. Ct. App. 1963).

74. *Id.* at 204; *accord Assilzadeh*, 98 Cal. Rptr. 2d at 182; Shapiro v. Sutherland, 76 Cal. Rptr. 2d 101, 107 (Cal. Ct. App. 1998).

75. *See Assilzadeh*, 98 Cal. Rptr. 2d at 182; *Shapiro*, 76 Cal. Rptr. 2d at 107.

76. *See Johnson*, 480 So. 2d at 629 (finding failure to disclose was fraudulent concealment); Ben Farmer Realty Co. v. Woodard, 441 S.E.2d 421, 423 (Ga. Ct. App. 1994) (discussing passive concealment as fraud); Mulkey v. Waggoner, 338 S.E.2d 755, 756 (Ga. Ct. App. 1985) (discussing passive concealment as fraud).

77. *See* Strawn v. Canuso, 657 A.2d 420, 431 (N.J. 1995) (finding a failure to disclose existence of closed, nearby landfill containing hazardous waste actionable), *called into doubt* Nobrega v. Edison Glen Assocs., 772 A.2d 368, 373 (N.J. 2001); *cf.* Powell v. Wold, 362 S.E.2d 796, 799-800 (N.C. Ct. App. 1987) (holding, in an affirmative fraud case, real estate broker could be liable for failing to disclose that a major thoroughfare extension was planned near the property).

78. *See* Commercial Credit Corp. v. Lisenby, 579 So. 2d 1291, 1294 (Ala. 1991) ("Ordinarily, sellers of used residential property have no duty to disclose any defect[s] to a purchaser."); Mitchell v. Skubiak, 618 N.E.2d 1013, 1017 (Ill. App. Ct. 1993) ("a seller's silence in not disclosing defects, standing alone, does not give rise to a cause of action for misrepresentation"); M & D, Inc. v. W.B. McConkey, 585 N.W.2d 33, 36 (Mich. Ct. App. 1998) ("It is not enough . . . that the seller had knowledge of the defect and failed to disclose it; rather, the seller must make some type of misrepresentation."); Platzman v. Morris, 724 N.Y.S.2d 502, 504 (N.Y. App. Div. 2001) ("New York adheres to the doctrine of caveat emptor and [generally]

jurisdictions do require sellers to speak truthfully when they do speak and impose liability for active concealment of known material defects,[79] but, under this view, sellers generally are not liable for mere silence.[80]

d. Disclosures Required by Statute

Most jurisdictions, by statute, now impose mandatory duties of disclosure upon sellers.[81] Some courts view their respective statutes as a general abrogation of caveat emptor.[82] The requirements of these statutes vary: some require disclosures about specific areas; others are more general. These statutes are discussed in more detail below.[83] With the adoption of statutes requiring mandatory disclosures, the law has imposed greater duties on sellers and brokers and limited or eliminated the application of caveat emptor.

e. Caveat Emptor's Continuing Viability

Notwithstanding the modern changes to property law imposing new implied warranties, title covenants, duties to disclose, and statutory disclosure requirements, caveat emptor continues to hold a place in many real property transactions. Courts continue to speak the language of caveat emptor and invoke its authority. As noted above, the doctrine is still generally followed in sales of commercial real estate and commercial leases.[84] Many courts continue to apply the rule to patent or obvious

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imposes no duty on the seller to disclose any information concerning the premises . . . ."); Copland v. Nathaniel, 624 N.Y.S.2d 514, 519-22 (N.Y. Sup. Ct. 1995) (stating that generally caveat emptor applies; silence alone is insufficient for fraud).

79. *See, e.g.*, Kracl v. Loseke, 461 N.W.2d 67, 72 (Neb. 1990) (granting rescission where seller sheetrocked to conceal termite damage); Van Deusen v. Snead, 441 S.E.2d 207, 210 (Va. 1994) (holding concealment of foundation cracks with new mortar and placement of materials in front of cracks supported fraud claim); RESTATEMENT (SECOND) OF CONTRACTS § 160 cmt. b, illus. 1, 2 (1981) (concealing foundation cracks is misrepresentation).

80. There are exceptions to the general rule. For example, a seller may be liable for failure to disclose conditions known to the seller that pose an unreasonable risk of physical harm, see *Conahan v. Fisher*, 463 N.W.2d 118, 119 (Mich. Ct. App. 1990); *Copland*, 624 N.Y.S.2d at 521; RESTATMENT (SECOND) OF TORTS § 353 (1965), or where a special or fiduciary relationship exists between the seller and buyer, see *Commercial Credit Corp.*, 579 So. 2d at 1294.

81. *See infra* note 193.

82. *See* Parmely v. Hildebrand, 603 N.W.2d 713, 716 (S.D. 1999) ("In South Dakota, 'caveat emptor' is a doctrine of the past when it comes to transferring real property.").

83. *See infra* notes 193-236 and accompanying text.

84. *See supra* notes 69 & 71; *see also* Hearne v. Statesville Lodge No. 687, Loyal Order of Moose, Inc., 546 S.E.2d 414, 415-17 (N.C. Ct. App. 2001) (affirming summary judgment for defendant broker who allegedly represented that septic system would be adequate for new restaurant, noting that plaintiffs failed to investigate and protect their own interest and that parties were dealing at arm's length).

defects, those that should have been known or were reasonably discoverable by the purchaser.[85] The Ohio Supreme Court, in *Layman v. Binns*,[86] stated that caveat emptor applies subject to the following conditions: "(1) the defect must be open to observation or discoverable on reasonable inspection, (2) the purchaser must have an unimpeded opportunity to examine the property and (3) the vendor may not engage in fraud."[87] In *Layman*, the sellers knew of a defective basement wall which they attempted to remedy with steel beams.[88] The court held that the purchasers had no claim because the defective wall was open to observation, and the purchasers had an unhindered opportunity to examine it.[89] Some courts generally hold that silence does not support a finding of fraud.[90]

f. Caveat Emptor and Real Estate Brokers

It followed that so long as the seller had no duty to disclose defects in the property, the real estate broker, as an agent of the seller, had no duty to disclose defects either.[91] As sellers' common law duties increased, however, real estate brokers' duties also increased, and courts even began to impose duties of disclosure upon the real estate brokers, separate from, or in addition to, duties of the seller.[92] These duties were justified, at least

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85. *See Conahan*, 463 N.W.2d at 119 (holding caveat emptor applied, termite damage was not concealed and should have been discovered by purchasers and their inspector); Mackintosh v. Jack Matthews & Co., 855 P.2d 549, 553 (Nev. 1993) (holding that plaintiffs "are charged with all knowledge that they actually had, as well as any knowledge that would have been discovered by reasonable inquiry"); *Copland*, 624 N.Y.S.2d at 520-22 (holding caveat emptor defeated claim in which the seller had no duty to disclose prior treatment for termites and use of chemical); Eiland v. Coldwell Banker Hunter Realty, 702 N.E.2d 116, 123-24 (Ohio Ct. App. 1997) (finding no liability for leaky basement when purchasers had opportunity to inspect and had knowledge of some signs of problems).

86. 519 N.E.2d 642 (Ohio 1988).

87. *Id.* at 644.

88. *Id.*

89. *Id.* The dissent disagreed, arguing that the finder of fact could properly have "found that the structural defect . . . was not readily apparent upon reasonable inspection" by inexperienced purchasers, and therefore, the sellers did have a duty to disclose the defect. *Id.* at 645 (Locher, J., concurring in part, dissenting in part).

90. *See* Williamson v. Realty Champion, 551 So. 2d 1000, 1001-02 (Ala. 1989) (holding that caveat emptor applied in case with numerous defects); Ray v. Montgomery, 399 So. 2d 230, 233 (Ala. 1980) (holding no liability for termite damage and finding "no duty to disclose facts when information is not requested, and mere silence does not constitute fraud").

91. *See* Kezer v. Mark Stimson Assocs., 742 A.2d 898, 903 (Me. 1999) ("By common law sellers of real estate have no obligation to disclose property defects to buyers, and, as their agents, real estate brokers have all of the defenses as their principals that arise out of the transaction.") (citations omitted).

92. *Compare* Platzman v. Morris, 724 N.Y.S.2d 502, 504 (N.Y. App. Div. 2001) ("New York

in part, by the important role real estate brokers play, expectations and reliance of real estate purchasers, and recognition of real estate brokers as professionals possessing particular expertise and experience. Imposition of duties came to reflect expectations of the marketplace.

Traditionally, a real estate broker, as agent of the seller, owed fiduciary duties to the seller[93] but owed no special duties to purchasers and actually had duties not to disclose a seller's confidential information. The rule of caveat emptor meant that generally real estate brokers were not liable to purchasers for defects in the real estate.[94] As courts in the past few decades have moved away from caveat emptor, they have imposed liability upon real estate brokers for failure to make disclosures under various tort theories.

3. Affirmative Fraud as an Exception to Caveat Emptor

Even during its heyday, caveat emptor did not prevent liability for affirmative fraud by a seller or broker.[95] A broker, by virtue of his or her

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adheres to the doctrine of caveat emptor and [generally] imposes no duty on the seller to disclose any information concerning the premises . . . ."), *with* N.Y. REAL PROP. LAW § 443(4) (McKinney 2001) (providing that "[i]n dealings with the buyer, a seller's agent should . . . disclose all facts known to the agent materially affecting the value or desirability of property").

93. These duties are the duties of loyalty, full disclosure, good faith, and due care. *See* ARTHUR R. GAUDIO, REAL ESTATE BROKERAGE LAW § 262 (1987) (discussing broker's fiduciary duties).

94. *See* Cashion v. Ahmadi, 345 So. 2d 268, 271 (Ala. 1977) (applying rule of caveat emptor to broker); GAUDIO, *supra* note 93, § 292, at 345 (discussing caveat emptor's limitation on broker liability); Ronald Benton Brown & Thomas H. Thurlow III, *Buyers Beware: Statutes Shield Real Estate Brokers and Sellers Who Do Not Disclose That Properties Are Psychologically Tainted,* 49 OKLA. L. REV. 625, 625 (1996) (discussing caveat emptor's limitation on broker liability); Clarance E. Hagglund et al., *Caveat Misrepresenter: The Real Estate Agent's Liability to the Purchaser,* 5 HOFSTRA PROP. L.J. 381, 381-82 (1993) (discussing caveat emptor's limitation on broker liability).

95. According to one 1910 treatise:

> If in negotiating a contract in behalf of the principal the broker is guilty of fraud as to the other contracting party, he is liable to him therefor in damages. If a broker employed to sell property which is subject to incumbrances misrepresents or conceals the fact that the property is incumbered, he is liable to the purchaser in damages.

WALKER, *supra* note 4, § 315, at 215 (citations omitted); *see also* NATHAN T. FITCH, THE LAW OF REAL ESTATE AGENCY; HAVING A GENERAL APPLIATION TO PRINCIPALS, AGENTS AND THIRD PARTIES, AS DEDUCED FROM THE DECISIONS OF THE COURTS 67-75 (1881) (discussing liability of real estate agents for misrepresentations); BROOM, *supra* note 18, at 184 (distinguishing, in discussion of caveat emptor, cases of fraud; "where there is fraud, as in the case of wilful misrepresentation . . . the party guilty of that fraud is responsible to the party injured"). In *David v. Moore,* 79 P. 415 (Or. 1905), the court explained:

profession, is not relieved of the duties demanded generally of all individuals, and brokers have been held liable for fraud (or related torts) for affirmatively misrepresenting the property's size,[96] location,[97] suitability for intended use,[98] general condition,[99] extent of termite infestation,[100] connection to city sewer,[101] availability of water,[102] freedom from soil contamination,[103] compliance with building code,[104] zoning

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> This rule [caveat emptor] does not apply, however, to a case where the seller of real property makes representations in respect to matters of which the buyer has no knowledge, and no means at hand of obtaining knowledge. Where one assumes to have knowledge of a subject of which another may be ignorant, and knowingly makes false representations regarding it, . . . the party who makes such statements will not be heard to say that the person who took his word, and relied upon it, was guilty of such negligence as to be precluded from recovering compensation for injuries which were inflicted on him under cover of the falsehood.

Id. at 417 (citations omitted); *see* Pustelniak v. Vilimas, 185 N.E. 611, 612-14 (Ill. 1933) (setting aside sale of business property based on fraudulent statements by seller and broker regarding amount of sales and profits); Holst v. Stewart, 37 N.E. 755, 756 (Mass. 1894) (holding plaintiff purchaser could maintain fraud action against his own agent for misrepresenting running of nearby trains); Roberts v. Holliday, 74 N.W. 1034, 1035-36 (S.D. 1898) (holding broker liable for false representations concerning location of the property); Gunther v. Ullrich, 52 N.W. 88, 89-90 (Wis. 1892) (holding plaintiff purchaser entitled to damages against real estate agent for falsely representing location of lots purchased); *cf.* Thrams v. Block, 86 P.2d 938, 939 (N.M. 1938) (affirming rescission of sale contract on the basis of fraudulent statements made by broker). For examples of modern cases holding brokers liable for affirmative misrepresentations, see BURKE, *supra* note 2, § 8.2.3 & nn.6-13 (citing fraud cases in various circumstances).

96. *See* Zimmerman v. Northfield Real Estate, Inc., 510 N.E.2d 409, 413-14 (Ill. App. Ct. 1986) (misrepresenting lot size in multiple listing sheet); John v. Robbins, 764 F. Supp. 379, 385-87 (M.D.N.C. 1991) (misrepresenting square footage in multiple listing entry); Reda v. Sincaban, 426 N.W.2d 100, 102-03 (Wis. Ct. App. 1988) (misrepresenting lot size).

97. *See* Tri-Prof'l Realty, Inc. v. Hillenburg, 669 N.E.2d 1064, 1067 (Ind. Ct. App. 1996) (misrepresenting which property was for sale).

98. *See* Executive Dev., Inc. v. Smith, 557 So. 2d 1231, 1233 (Ala. 1990) (misrepresenting suitability of property for townhouse development could support fraud); Aiello v. Ed Saxe Real Estate, Inc., 499 A.2d 282, 284 (Pa. 1985) (finding fraudulent statements regarding suitability of soil for sewage system); Grube v. Daun, 496 N.W.2d 106, 114-15 (Wis. Ct. App. 1992) (misrepresenting suitability of property for use where subsurface water was contaminated).

99. *See* Clark v. Olson, 726 S.W.2d 718, 719-20 (Mo. 1987) (holding statement that house was in good condition could support fraud claim where house had foundation cracks and frame deformations).

100. *See* Godfrey v. Steinpress, 180 Cal. Rptr. 95, 99 (Cal. Ct. App. 1982) (finding statements minimizing extent of termite damage and infestation supported fraud); Smith v. Renaut, 564 A.2d 188, 192 (Pa. Super. Ct. 1989) (misrepresenting extent of termite damage).

101. *See* Johnson v. Brado, 783 P.2d 92, 93 (Wash. Ct. App. 1989) (misrepresenting that house was connected to city sewer).

102. *See* Strout Realty, Inc. v. Burghoff, 718 S.W.2d 469, 472 (Ark. Ct. App. 1986) (misrepresenting that good water was available).

103. *See* Sheehy v. Lipton Indus., Inc., 507 N.E.2d 781, 782 (Mass. App. Ct. 1987) (holding at summary judgment stage that fact finder could find misrepresentation against broker in

classification,[105] probability of rezoning,[106] the existence of appraisal at a stated value,[107] the state interest in acquiring property,[108] the condition of the property's title,[109] the experience and qualifications of the builder,[110] and that the deposit would be held in an escrow account.[111]

B. *Liability Under Agency Theories*

Among the earliest duties imposed on real estate brokers were those derived from principles of agency law. Traditionally, real estate brokers were agents of sellers.[112] Sometimes a purchaser would hire and pay a real estate broker to find a property to purchase, but those occasions were comparatively rare. Usually, when a potential purchaser contacted a real estate broker to help find a property, the law considered the broker a "subagent" of the listing broker; the listing broker was considered the seller's agent.[113] The subagent was paid a commission from the sale by the seller, not the purchaser.

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connection with statements regarding hazardous materials on the property).

104. *See* Dyer v. Johnson, 757 P.2d 178, 180 (Colo. Ct. App. 1988) (misrepresenting reconstruction in compliance with code).

105. *See* Barnes v. Lopez, 544 P.2d 694, 697 (Ariz. Ct. App. 1976) (holding that misrepresentation regarding zoning classification supported finding of fraud); Lepera v. Fuson, 613 N.E.2d 1060, 1066 (Ohio Ct. App. 1992) (holding that the misrepresentation that property could be used as two-family dwelling supported claim of fraud where broker knew such use violated zoning).

106. *See* Executive Dev., Inc. v. Smith, 557 So. 2d 1231, 1233-34 (Ala. 1990) (misrepresenting probability of rezoning property could support fraud).

107. *See Dyer*, 757 P.2d at 180 (misrepresenting existence of written appraisal for $220,000).

108. *See* Storage Servs. v. Oosterbaan, 262 Cal. Rptr. 689, 693, 697 (Cal. Ct. App. 1989) (misrepresenting that state had no interest in acquiring property).

109. Riehle v. Moore, 601 N.E.2d 365, 369 (Ind. Ct. App. 1992) (misrepresenting existence of clear title).

110. *See* Gennari v. Weichert Co. Realtors, 691 A.2d 350, 364-66 (N.J. 1997) (misrepresenting builder's experience and qualifications).

111. *See* Harrison v. Gibson, 534 So. 2d 257, 259 (Ala. 1988) (misrepresenting nature of account holding deposit).

112. *See* Snider v. State *ex rel* Okla. Real Estate Comm'n, 987 P.2d 1204, 1209 (Okla. 1999) ("In the traditional, historical relationship a real estate agent was the agent of the seller, and this agency did not extend to the buyer. . . ."); BURKE, *supra* note 2, § 2.1, at 27 (stating the broker is usually the vendor's agent).

113. *See* GAUDIO, *supra* note 93, § 218, at 284 (stating that the selling broker is considered subagent of listing broker); BURKE, *supra* note 2, § 1.5, at 9 ("selling broker usually becomes the subagent of the listing broker"). For a good discussion of agency and subagency relationships, see *Stortroen v. Beneficial Finance Co.*, 736 P.2d 391, 395-401 (Colo. 1987) (discussing broker's agency relationships and subagency). In this context, a real estate broker acting as a subagent is the agent of both the appointing agent and the principal. *Id.* at 396; *see also* RESTATEMENT (SECOND) OF AGENCY § 5 cmt. d (1958) (noting that subagent has fiduciary duties to both appointing agent and principal).

Real estate brokers, as agents, owe their principals fiduciary duties. Their fiduciary duties include the duty of good faith and loyalty, the duty of reasonable care, and the duty of disclosure.[114] In the words of one court,

> The relationship between a real estate broker and a property owner for whom the agent has by oral or written contract agreed to sell the owner's property is that of principal and agent. A real estate agent owes a fiduciary duty (1) to use reasonable care, skill, and diligence in procuring the greatest advantage to his client, and (2) to act honestly and in good faith, making full disclosures to his client of all material facts affecting his interests.[115]

Many early real estate broker cases involved sellers bringing claims (or defenses)[116] against their agents for breach of the agent's fiduciary duties by, for example, concealing or failing to communicate material information to the seller.[117] In the typical situation, the agency theory was not helpful to *purchasers* because brokers, as agents of the sellers, owed no fiduciary duties to the purchasers.

This problem was compounded by the fact that until very recently, purchasers did not understand that brokers were not working for them. In an often-cited Federal Trade Commission survey published in 1983, the data revealed that 72% of purchasers believed the "cooperating" broker[118] represented them and not the seller.[119] Since the 1983 survey, states have

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114. *See* BURKE, *supra* note 2, § 4.2, at 193 (discussing fiduciary duties); GAUDIO, *supra* note 93, § 262, at 315-16 (discussing fiduciary duties).

115. Vogt v. Town & Country Realty, 231 N.W.2d 496, 501 (Neb. 1975).

116. Many of the early cases were brought by brokers seeking commissions, and sellers responded with claims of breach of brokers' duties. *See, e.g.*, Edmonson v. Baker, 12 Ky. L. Rptr. 93, 93 (Ky. Super. 1890); Martin v. Bliss, 10 N.Y.S. 886, 887 (N.Y. Gen. Term 1890).

117. *See, e.g.*, Blanchard v. Jones, 101 Ind. 542, 551 (Ind. 1885) (noting defendant real estate agent's duty to communicate more advantageous offer to plaintiff, and holding defendant liable for double-dealing and deceitful concealment); *Edmonson*, 12 Ky. L. Rptr. at 93 (noting agent's duty to inform principal of pending negotiations and relieving principal from obligations of contract); *Martin*, 10 N.Y.S. at 888 (affirming dismissal of complaint by broker when broker attempted to talk seller down on price without disclosing that full price was offered by purchaser).

118. The broker hired by the seller to list the property is typically called the "listing broker." *See* GEORGE LEFCOE, REAL ESTATE TRANSACTIONS 22 (3d ed. 1999); *see also* CAL. CIV. CODE § 2079.13(f) (West 2001) (defining "listing agent"). The broker who is helping the purchaser locate a property, is often referred to as the "cooperating broker" or "selling broker." *See* GEORGE LEFCOE, *supra*, at 19; Joseph M. Grohman, *A Reassessment of the Selling Real Estate Broker's Agency Relationship with the Purchaser*, 61 ST. JOHN'S L. REV. 560, 560-61 (1987) (discussing types of brokers); *see also* CAL. CIV. CODE § 2079.13(n) (West 2001) (defining "selling agent").

119. FTC STAFF REPORT, *supra* note 12, at 69 (1983). Significantly, 82% of responding sellers also believed that cooperating broker was working for the purchaser. *Id.* at 67.

addressed this problem by legislation mandating agency disclosures[120] or by redefining agency relationships.[121] A large majority of states now require written disclosure of a real estate broker's agency relationship.[122] The industry also responded by changing its practices[123] to allow cooperating agents to separately represent purchasers.

Agency disclosure requirements are helpful but limited. They may encourage greater care by purchasers and less reliance on sellers' brokers, but agency disclosures do not encourage greater disclosure about the property itself. Changes to agency laws, adopted by some states, however, have provided more protections and potential remedies for purchasers. These new agency laws permit representation of the purchaser directly by the cooperating or selling agent[124] or allow dual representation of both the seller and purchaser.[125] Many statutes redefine agency duties for real estate brokers and impose upon all brokers duties to both purchasers and

120. *See* Snider v. State *ex rel* Okla. Real Estate Comm'n, 987 P.2d 1204, 1209 (Okla. 1999) (noting government survey and response by real estate commission requiring agency disclosure).

121. *See, e.g.*, ALASKA STAT. § 08.88.396 (Michie 2001); COLO. REV. STAT. § 12-61-808 (2001); CONN. GEN. STAT. § 20-325d (2001); D.C. CODE ANN. § 42-1703 (2001); FLA. STAT. ANN. § 475.278 (West 2001); IOWA CODE § 543B.55 (2002); ME. REV. STAT. ANN. tit. 32, § 13273 (West 2001); MD. CODE ANN. BUS. OCC. & PROF. § 17-530 (2001); MICH. COMP. LAWS ANN. § 339.2517 (West 2001); MINN. STAT. ANN. § 82.197 (West 2001); MO. REV. STAT. § 339.770 (2001); MONT. CODE ANN. § 37-51-314 (2001); N.M. STAT. ANN. § 61-29-10.2 (Michie 2001); N.Y. REAL PROP. LAW § 443 (Consol. 2001); OHIO REV. CODE ANN. § 4735.57 (Anderson 2001); OKLA. STAT. tit. 59, § 858-355 (2000); OR. REV. STAT. § 696.820 (1999); R.I. GEN. LAWS § 5-20.6-3 (2001). For a comprehensive list of jurisdictions with citations, see Katherine A. Pancak et al., *Real Estate Agency Reform: Meeting the Needs of Buyers, Sellers, and Brokers*, 25 REAL ESTATE L.J. 345, 373-77 (1997) (Table 1).

122. *See, e.g.*, CAL. CIV. CODE § 2079.17 (West 2001); FLA. STAT. ANN. § 475.278 (West. 2001); 225 ILL. COMP. STAT. ANN. 454/15-35 (West 2001); MICH. COMP. LAWS ANN. § 339.2517 (West Supp. 2001); N.Y. REAL PROP. LAW § 443 (Consol. 2001); OHIO REV. CODE ANN. § 4735.57 (Anderson 2001); TEX. PROP. CODE ANN. § 6573a (15c) (Vernon 2002).

123. One authority explained the change initiated by the NAR: "[T]he NAR recommended that subagency no longer be a condition for MLS participation. The formerly mandatory offer of subagency was replaced with a listing broker's offer of 'cooperation and compensation' to cooperating brokers." Pancak et al., *supra* note 121, at 352 (footnote omitted). The NAR reported in a 1993 survey that 65% of home buyers "either had knowledge or were informed of agency representation by the first contact with the agent with whom they were working." *Id.* at 353.

124. *See, e.g.*, MO. REV. STAT. § 339.740 (2001) (discussing duties of buyer's agents); OHIO REV. CODE ANN. § 4735.53(A) (West 2002) (identifying agency relationships); S.C. CODE ANN. § 40-57-137(A) (Law. Co-op. 2001) (listing acceptable agency relationships); S.D. CODIFIED LAW § 36-21A-131 (Michie 2001) (listing agency relationships).

125. *See, e.g.*, ALASKA STAT. § 08.88.396(c) (Michie 2001) (broker may act as agent for both); MINN. STAT. ANN. § 82.197 (West 2001) (requiring disclosure of dual agency, broker owes a fiduciary duty to both seller and buyer); OHIO REV. CODE ANN. § 4735.53(A)(3) (West 2002) (permitting dual agency); OR. REV. STAT. § 696.815(1) (1999) (stating that real estate licensee may represent both seller and buyer).

sellers.[126] In a typical statute, a seller's broker continues to have fiduciary duties to the seller, but also has specified duties to the buyer, such as the duty to deal fairly and the duty to disclose known material defects.[127] Some statutes permit a broker to enter a non-agency relationship with the parties and impose statutory duties owed to all parties.[128] Violations of these duties, imposed by statute, are the basis for revocation of licenses[129] and may be the basis for civil action by the injured party.[130]

C. *Modern Expansion of Broker Liability*

Today, brokers find themselves liable to purchasers of defective properties under several theories: fraud, breach of fiduciary duty, negligence, innocent misrepresentation, and specific statutory provisions. Claims for fraud are not limited to those grounds long accepted under the common law—affirmative misrepresentations and concealed facts; they now extend to material omissions.

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126. *See, e.g.*, ALA. CODE § 34-27-84 (2001) (identifying duties owed to all parties in real estate transaction); MO. REV. STAT. §§ 339.730, 339.740 (2001) (designating seller's and buyer's agents as limited agents and imposing duty to disclose known adverse material facts); NEB. REV. STAT. §§ 76-2417(3), 76-2418(1) (3)(a) (2001) (designating seller's and buyer's agents as limited agents and imposing duty to disclose known adverse material facts); OR. REV. STAT. §§ 696.805, 696.810 (1999) (identifying duties of brokers to both seller and buyer).

127. *E.g.*, ARIZ. ADMIN. CODE R4-28-1101(A), (B) (2000) (stating licensee owes a fiduciary duty to client, "shall also deal fairly with all other parties to a transaction," and has duty to disclose material defects); 225 ILL. COMP. STAT. ANN. 454/15-25(a) (West 2001) (imposing duty of disclosure to purchaser upon seller's broker); ME. REV. STAT. ANN. tit. 32, §§ 13273, 13274 (West 2002) (imposing duties to buyer on seller's agent, and to seller on buyer's agent); N.Y. REAL PROP. LAW § 443(4) (Consol. 2001) (imposing duties of reasonable care, good faith, and disclosure of known material facts on seller's agent in dealings with buyer).

128. *See* COLO. REV. STAT. § 12-61-802(6) (2001) (defining "transaction-broker"); *id.* § 12-61-807 (stating that transaction-broker is not agent for either party and outlining duties); FLA. STAT. ANN. § 475.278(2)(a) (West 2001) (authorizing and discussing duties of transaction broker); KAN. STAT. ANN. § 58-30,113 (2000) (stating that a transaction broker is not agent for either party and discussing duties); MO. REV. STAT. § 339.710(20) (2002) (defining transaction broker); S.D. CODIFIED LAWS § 36-21A-144 (Michie 2001) (discussing duties of a transaction broker).

129. *See, e.g.*, ALA. CODE § 34-27-88 (2001) (stating a violation actionable by Alabama Real Estate Commission); ARK. CODE ANN. § 17-42-312 (Michie 2001) (stating violations actionable by commission); COLO. REV. STAT. § 12-61-811 (2001) (stating violations actionable by commission); OR. REV. STAT. § 696.301 (1999) (identifying grounds for discipline).

130. *Cf., e.g.*, ALA. CODE § 34-27-34(a)(2) (2001) (imposing duties to any injured party); *id.* § 34-27-87 (stating statute supersedes common law if inconsistent); ME. REV. STAT. ANN. tit. 32, § 13276 (West 2002) (referring to injured party's cause of action under statute); MO. REV. STAT. § 339.840 (2001) (statute supersedes common law of agency, but does not limit civil actions for negligence, fraud, misrepresentation, or breach of contract); Aranki v. RKP Invs., Inc., 979 P.2d 534, 536 & n.1 (Ariz. Ct. App. 1999) (applying duty of fair dealing in administrative code to misrepresentation claims in purchaser's civil action).

1. Expansion of Fraud Liability to Include Omissions

The tort of fraud, also known as misrepresentation or deceit, requires an intentional misrepresentation of material fact.[131] Brokers and sellers, particularly in earlier cases, argued with some success that mere silence was not a misrepresentation.[132] Under this theory, neither a broker nor a seller committed fraud by remaining silent or failing to disclose known facts. As one noted authority observed, under this rule "the owner of a dwelling which he knows to be riddled with termites can unload it with impunity upon a buyer unaware, and go on his way rejoicing."[133]

The law, however, has increasingly allowed recovery in the face of otherwise fraudulent omissions through a series of broad and ever-expanding "exceptions" which permit a finding of fraud where a party had a duty to speak but failed to do so. Courts today recognize fraud based on nondisclosure, sometimes referred to as "fraud by silence."[134] Fraud based on nondisclosure is recognized in cases involving partial disclosures ("if the defendant does speak, he must disclose enough to prevent his words from being misleading");[135] when the parties have a confidential or fiduciary relationship;[136] "when the circumstances are such that the failure to disclose something would violate a standard requiring conformity to what the ordinary ethical person would have disclosed;"[137] when a

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131. The Restatement (Second) of Torts provides a complete statement of the rule:

> One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.

RESTATEMENT (SECOND) OF TORTS § 525 (1977).

132. DAN B. DOBBS, THE LAW OF TORTS § 481, at 1375 (2000) (stating traditional rule "that the bargainer is not ordinarily obliged to make affirmative revelations of known material facts").

133. PROSSER & KEETON ON THE LAW OF TORTS § 106, 738 (W. Page Keeton et al. eds., 5th ed. 1984) [hereinafter PROSSER & KEETON]; *see also* Swinton v. Whitinsville Sav. Bank, 42 N.E.2d 808, 808-09 (Mass. 1942) (holding seller not liable for failure to disclose termite infestation).

134. *See* Mahler v. Keenan Real Estate, Inc., 876 P.2d 609, 611 (Kan. 1994) (referring to claim of "fraud by silence"); France v. Chaprell Jeep-Eagle Dodge, Inc., 968 P.2d 844, 846 (Okla. Ct. App. 1998) (referring to claim of "fraud by silence"); DOBBS, *supra* note 132, § 481, at 1375 (referring to "fraud by silence").

135. RESTATEMENT (SECOND) OF TORTS § 551(2)(b) (1977); PROSSER & KEETON, *supra* note 133, § 106, at 738-39.

136. *See* RESTATEMENT (SECOND) OF TORTS § 551(2)(a) (1977); PROSSER & KEETON, *supra* note 133, § 106, at 738.

137. *See* PROSSER & KEETON, *supra* note 133, § 106, at 739; *cf.* RESTATEMENT (SECOND) OF TORTS § 551(2)(e) (1977).

previous representation is subsequently discovered to be untrue or misleading;[138] and when statutes impose a duty.[139]

The exceptions are of particular relevance to real estate brokers in the context of residential real estate sales. Hence, if the purchaser asks about termites and the broker answers, or if the broker volunteers information about termite damage, the broker has a duty to disclose the full extent of the damage.[140] Quite clearly, if the broker is the purchaser's agent, the broker, as a result of his or her fiduciary duties, has a duty to disclose material facts.[141] Even if the broker is the seller's agent, the broker in most states nonetheless has either a statutory or common law duty to disclose known material facts.[142] Today, the seller or the broker who knowingly sells the termite-infested house without disclosing to the purchaser may leave rejoicing, but the rejoicing ends when the complaint is served.

2. Negligence and Broker Malpractice Theory

The law has not stopped at expanding broker liability under a fraud theory. It has also imposed tort liability for misstatements or omissions under a negligence[143] or malpractice theory.[144] Several courts have

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138. *See* RESTATEMENT (SECOND) OF TORTS § 551(2)(c) (1977).

139. DOBBS, *supra* note 132, § 481, at 1375.

140. *See* Roberts v. C & S Sovran Credit Corp., 621 So. 2d 1294, 1297 (Ala. 1993) (noting if agent is questioned directly about defect, agent has duty to disclose); Fennell Realty Co. v. Martin, 529 So. 2d 1003, 1006 (Ala. 1988) (holding broker liable for failing to disclose heating and air conditioning unit problem after purchaser's direct inquiry); Lock v. Schreppler, 426 A.2d 856, 862 (Del. Super. Ct. 1981) ("Once [real estate agent] undertook to inform plaintiffs of the termite problem, he had a duty to fully inform the plaintiffs so as not to mislead them with inadequate information.").

141. *See* Bazal v. Rhines, 600 N.W.2d 327, 329 (Iowa Ct. App. 1999) (noting, in case brought by vendor against purchaser's agent, broker's duty to disclose existence of restrictive covenant to purchasers); *cf.* Van Deusen v. Snead, 441 S.E.2d 207, 211 (Va. 1994) (dismissing fraud claim, but sustaining a negligence claim and holding purchaser's real estate agents had a duty to disclose known structural defects).

142. *See, e.g.*, Zimmerman v. Northfield Real Estate, Inc., 510 N.E.2d 409, 413-14 (Ill. App. Ct. 1986) (holding brokers had duty to speak regarding known material information; brokers owe duty of good faith to purchasers even absent agency relationship); *Bazal*, 600 N.W.2d at 329 (finding duty to disclose material facts to buyers and sellers supported by NAR Code of Ethics); Gross v. Sussex Inc., 630 A.2d 1156, 1169-70 (Md. 1993) (finding that law places duty of good faith and fair dealing on broker in favor of all parties with whom broker deals); *see also infra* note 167 and accompanying text.

143. *See, e.g.*, Easton v. Strassburger, 199 Cal. Rptr. 383, 392 (Cal. Ct. App. 1984) (affirming judgment against broker on negligence claim); Gerard v. Peterson, 448 N.W.2d 699, 702 (Iowa Ct. App. 1989) (finding broker liable for negligence); Binette v. Dyer Library Ass'n, 688 A.2d 898, 904 (Me. 1996) (allowing plaintiffs to amend negligent misrepresentation claim against broker to allege negligence claim).

144. A cause of action for broker malpractice or professional negligence is another way of characterizing a claim for broker negligence. Malpractice, also referred to as professional

recognized the tort of negligent misrepresentation in the broker context.[145] For example, in *Cechovic v. Hardin & Associates, Inc.*,[146] the Montana Supreme Court affirmed a jury verdict for purchasers against a real estate agent and real estate broker for negligently misrepresenting property boundaries.[147] In *Gerard v. Peterson*,[148] the Iowa Court of Appeals held a real estate broker was negligent when he advised purchasers that a clause making their purchase contingent upon receiving financing was not necessary.[149] In *Newbern v. Mansbach*,[150] the Florida District Court of Appeals, held that a real estate broker could be found negligent for misrepresenting to the purchaser that the property was not located in a Coastal Barrier Resource Area.[151]

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negligence, is a type of negligence involving a standard of care based on the skill used in the particular profession and perhaps some different evidential requirements. The cases speak in terms of broker malpractice, professional negligence, and broker negligence. *See* Haldiman v. Gosnell Dev. Corp., 748 P.2d 1209, 1214 (Ariz. Ct. App. 1987) (characterizing claim against broker as claim for "real estate malpractice"); Lakeside, Inc. v. DeMetz, 621 N.E.2d 1149, 1150-51 (Ind. Ct. App. 1993) (discussing appropriate statute of limitations for real estate broker malpractice); Menzel v. Morse, 362 N.W.2d 465, 471 (Iowa 1985) (discussing plaintiff's broker negligence claim as malpractice); May v. ERA Landmark Real Estate, 15 P.3d 1179, 1188 (Mont. 2000) (discussing professional negligence claim against broker and holding expert testimony required to establish standard of care).

145. *See, e.g.*, John v. Robbins, 764 F. Supp. 379, 387 (M.D.N.C. 1991) (denying defendant broker's motion for summary judgment on negligent misrepresentation claim); Lombardo v. Albu, 14 P.3d 288, 290-91 (Ariz. 2000) (holding broker as agent is liable for negligent misrepresentation to third parties); Messler v. Phillips, 867 P.2d 128, 132 (Colo. Ct. App. 1993) (affirming judgment against broker on claim for negligent misrepresentation); Newbern v. Mansbach, 777 So. 2d 1044, 1045 (Fla. 1st DCA 2001) (reversing summary judgment for broker on negligent misrepresentation claim); ZIMMERMAN, 510 N.E.2d at 414-15 (finding complaint alleged claim for negligent misrepresentation against broker); Josephs v. Austin, 420 So. 2d 1181, 1185 (La. Ct. App. 1982) (affirming judgment against broker on negligent misrepresentation claim); *Gross*, 630 A.2d at 1170-71 (allowing negligent misrepresentation claim); Cechovic v. Hardin & Assocs., Inc., 902 P.2d 520, 522-23 (Mont. 1995) (affirming jury verdict for purchaser on negligent misrepresentation claim); Provost v. Miller, 473 A.2d 1162, 1164 (Vt. 1984) (remanding negligent misrepresentation claim for a new trial with proper instructions).

Not all courts recognize the tort of negligent misrepresentation. *See* S. County, Inc. v. First W. Loan Co., 871 S.W.2d 325, 326 (Ark. 1994) (refusing to recognize tort of negligent misrepresentation); *cf.* Trytko v. Hubbell, Inc., 28 F.3d 715, 721 (7th Cir. 1994) (stating, after discussing conflicting Indiana cases, that "courts have been divided as to whether Indiana recognizes the tort of negligent misrepresentation"); Duffin v. Idaho Crop Improvement Ass'n, 895 P.2d 1195, 1203 (Idaho 1995) (limiting tort of negligent misrepresentation to claims involving accountants).

146. 902 P.2d 520 (Mont. 1995).

147. *Id.* at 522-23.

148. 448 N.W.2d 699 (Iowa Ct. App. 1989).

149. *Id.* at 702-03.

150. 777 So. 2d 1044 (Fla. 1st DCA 2001).

151. *Id.* at 1046-47.

The tort of negligent misrepresentation is set forth in the Restatement (Second) of Torts:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.[152]

A real estate broker is one who in the course of his or her business supplies information for the guidance of others.[153] The Restatement requires that the broker "supply false information," but many courts, though not all, allow negligent misrepresentation by omission.[154] In *Binette v. Dyer Library Ass'n*,[155] the Supreme Judicial Court of Maine held that a jury could find a real estate broker negligent for failing to disclose the existence of a 3,000 gallon underground oil tank on the property sold to plaintiffs.[156] In *Zimmerman v. Northfield Real Estate, Inc.*,[157] the Appellate Court of Illinois reinstated a negligence claim where the broker allegedly failed to disclose a known flooding problem and accurate lot size.[158]

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152. RESTATEMENT (SECOND) OF TORTS § 552(1) (1977).

153. Zimmerman v. Northfield Real Estate, Inc., 510 N.E.2d 409, 415 (Ill. App. Ct. 1987) (holding "[r]ealtors are in the business of supplying such information").

154. *See* Matthews v. Kincaid, 746 P.2d 470, 471 (Alaska 1987) (stating that negligent misrepresentation requires a misrepresentation or omission of a fact); Alaface v. Nat'l Inv. Co., 892 P.2d 1375, 1387 n.3 (Ariz. Ct. App. 1994) ("Negligent misrepresentation may be by omission or nondisclosure of material facts. . . ."); Binette v. Dyer Library Ass'n, 688 A.2d 898, 903 (Me. 1996) (holding failure to disclose may constitute supplying false information to support negligent misrepresentation claim). *But see* Burman v. Richmond Homes Ltd., 821 P.2d 913, 919 (Colo. Ct. App. 1991) (stating that failure to make disclosure, not supplying false information, does not support claim of negligent misrepresentation); Arnona v. Smith, 749 So. 2d 63, 66 (Miss. 1999) (stating that negligent misrepresentation requires a misrepresentation or omission of a fact); Martin v. Ohio State Univ. Found., 742 N.E.2d 1198, 1209 (Ohio Ct. App. 2000) ("A negligent misrepresentation claim does not lie for omissions: there must be an affirmative false statement."); Hagans v. Woodruff, 830 S.W.2d 732, 736 (Tex. Ct. App. 1992) (stating that defendant must provide false information, and refusing to impose duty to investigate and disclose); Richey v. Patrick, 904 P.2d 798, 802 (Wyo. 1995) (rejecting theory of negligent misrepresentation based on nondisclosure of information, but finding potential liability under separate nondisclosure theory).

155. 688 A.2d 898 (Me. 1996).

156. *Id.* at 905.

157. 510 N.E.2d 409 (Ill. App. Ct. 1987).

158. *Id.* at 415. The broker had listed the property with an inaccurate lot size. *Id.* at 413-14. That allegation alleged an affirmative misrepresentation. *Id.* at 414.

Several courts have addressed claims against brokers using a malpractice theory,[159] and commentators have argued in favor of a malpractice approach.[160] These negligence-based claims, whether labeled negligence, negligent misrepresentation, or malpractice, have at their core the basic elements of negligence: duty, breach, cause in fact, legal cause, and damages. The duty may be articulated in different ways: the duty of care exercised by a reasonable and prudent person under the same or similar circumstances,[161] or the duty to exercise the skill and knowledge normally possessed by real estate brokers in good standing.[162] Indeed, the duty differs depending upon the nature of the parties involved; as noted above, the broker owes his principal fiduciary duties, greater duties than he owes to other parties to the transaction or the public generally. The standard of care is defined in part by industry practice,[163] industry

159. *See, e.g.*, Haldiman v. Gosnell Dev. Corp., 748 P.2d 1209, 1214 (Ariz. Ct. App. 1987) (characterizing claim against broker as claim for "real estate malpractice"); Lakeside, Inc. v. DeMetz, 621 N.E.2d 1149, 1150-51 (Ind. Ct. App. 1993) (discussing appropriate statute of limitations for real estate broker malpractice); Menzel v. Morse, 362 N.W.2d 465, 471 (Iowa 1985) (discussing plaintiff's broker negligence claim as malpractice); May v. ERA Landmark Real Estate, 15 P.3d 1179, 1188 (Mont. 2000) (discussing professional negligence claim against broker); Hulse v. First Am. Title Co., 33 P.3d 122, 140 (Wyo. 2001) (reaffirming existence of professional negligence claim against licensed real estate professionals). *But cf.* Tylle v. Zoucha, 412 N.W.2d 438, 441 (Neb. 1987) (holding that real estate brokerage was not profession and therefore claim not governed by statute of limitations for professional malpractice).

160. *See* GAUDIO, *supra* note 93, § 305, at 369 (stating that "[t]he time seems to be ripe, and courts have begun, to deal with brokers under the doctrine of malpractice" and discussing benefits of this approach).

161. *See* Tri-Prof'l Realty, Inc. v. Hillenburg, 669 N.E.2d 1064, 1068 (Ind. Ct. App. 1996) (imposing on real estate broker duty "to use reasonable care"); Binette v. Dyer Library Ass'n, 688 A.2d 398, 903 (Me. 1996) (characterizing broker's standard as "reasonable care"); Hoffman v. Connall, 736 P.2d 242, 243 (Wash. 1987) ("real estate broker is held to a standard of reasonable care").

162. *See Menzel*, 362 N.W.2d at 471 (stating standard of conduct); Gerard v. Peterson, 448 N.W.2d 699, 703 (Iowa Ct. App. 1989) (citing *Menzel*); RESTATEMENT (SECOND) OF TORTS § 299A (1965) (stating standard of conduct for professionals). Some courts have emphasized the "high standards" owed to the public by real estate brokers. *See, e.g.*, Johnson v. Geer Real Estate Co., 720 P.2d 660, 666 (Kan. 1986); McCarty v. Lincoln Green, Inc., 620 P.2d 1221, 1225 (Mont. 1980); Kelly v. Roussalis, 776 P.2d 1016, 1018-19 (Wyo. 1989).

163. *See, e.g.*, Easton v. Strassburger, 199 Cal. Rptr. 383, 389 (Cal. Ct. App. 1984) (stating that duty supported by fact that "many brokers customarily impose [the duty] upon themselves as an ethical matter").

standards,[164] state statutes and regulations,[165] and duties imposed by common law.[166]

A large majority of jurisdictions, either by statute or common law, impose a duty upon brokers to disclose known material defects in the property.[167] A few courts have gone further and impose upon the listing broker a duty to inspect the property listed for sale and to disclose material defects that the broker should have discovered in such an inspection. *Easton v. Strassburger*[168] is the leading case to impose such duty. *Easton* held:

> In sum, we hold that the duty of a real estate broker, representing the seller, to disclose facts . . . includes the affirmative duty to conduct a reasonably competent and diligent inspection of the residential property listed for sale

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164. *See, e.g., id.* at 389-90 (citing NAR Code of Ethics); *Menzel*, 362 N.W.2d at 472-73 (relying on Realtor's Code of Ethics found in Real Estate Manual).

165. *See, e.g.*, Lombardo v. Albu, 14 P.3d 288, 291-92 (Ariz. 2000) (finding real estate department regulation provided standard of conduct); *Geer Real Estate Co.*, 720 P.2d at 665 (finding that broker licensing statute established duty to disclose).

166. *See, e.g.*, Hopkins v. Fox & Lazo Realtors, 625 A.2d 1110, 1116-19 (N.J. 1993) (discussing and imposing broker's duties to injured open-house visitor).

167. *See, e.g.*, Williams v. Wells & Bennett Realtors, 61 Cal. Rptr. 2d 34, 37 (Cal. Ct. App. 1997) (holding broker has a duty to disclose known material facts); Cooper v. Jevne, 128 Cal. Rptr. 724, 727 (Cal. Ct. App. 1976) (holding broker has duty to disclose known material facts); Baumgarten v. Coppage, 15 P.3d 304, 307 (Colo. Ct. App. 2000) (citing statute and discussing broker's duty to disclose adverse material facts actually known by broker); Zimmerman v. Northfield Real Estate, Inc., 510 N.E.2d 409, 413-14 (Ill. App. Ct. 1987) (holding brokers had duty to speak regarding known material information); Bazal v. Rhines, 600 N.W.2d 327, 329 (Iowa Ct. App. 1999) (finding duty to disclose material facts); Binette v. Dyer Library Ass'n, 688 A.2d 898, 905 (Me. 1996) (citing regulations and stating that broker has duty to disclose known material defects); Weintraub v. Krobatsch, 317 A.2d 68, 74 (N.J. 1974) (noting rule that broker is liable for nondisclosure of defects known to him but unknown to buyer); Stebbins v. Wells, 766 A.2d 369, 373 (R.I. 2001) (holding broker had duty to disclose known deficient conditions); Teter v. Old Colony Co., 441 S.E.2d 728, 734-35 (W. Va. 1994) (agreeing that broker may be liable for failure to disclose known material defects); ARIZ. ADMIN. CODE R4-28-1101(A), (B) (2001) (stating licensee has duty to disclose material defects); FLA. STAT. ANN. § 475.278(4)(a) (West 2001) (discussing a duty to disclose to buyer all known material facts not readily observable); GA. CODE ANN. § 10-6A-5(b) (2001) (discussing a duty to disclose known adverse material facts); 225 ILL. COMP. STAT. ANN. 454/15-25 (a) (West 2002) (imposing duty of disclosure to purchaser upon seller's broker); IND. CODE ANN. § 25-34.1-10-10(d) (West 2001) (stating seller's broker must disclose to buyer adverse material facts); NEB. REV. STAT. §§ 76-2417(3)(a), 76-2418(3)(a) (2001) (stating that it must be disclosed in writing known, adverse, material facts); NEV. REV. STAT. ANN. § 645.252(1)(a) (West 2002) (discussing a duty to disclose any material facts which agent knows or should have known); N.Y. REAL PROP. LAW § 443(4) (Consol. 2002) (imposing duty of disclosure of known material facts); WIS. STAT. ANN. § 452.133(1)(c) (West 2002) (imposing duty to "[d]isclose to each party all material adverse facts that the broker knows and that the [other] party does not know").

168. 199 Cal. Rptr. 383 (Cal. Ct. App. 1984).

> and to disclose to prospective purchasers all facts materially affecting the value or desirability of the property that such an investigation would reveal.[169]

The California legislature, at the behest of real estate broker professional organizations,[170] responded to *Easton* by codifying but limiting the duty to inspect.[171] Although some jurisdictions have cited *Easton* with approval or imposed a duty to inspect,[172] most jurisdictions do not impose a duty to inspect.[173]

Easton is an example of broker liability in a negligent misrepresentation by omission case.[174] Negligent misrepresentation is significant because it eliminates the need to prove the intent required to succeed in a fraud claim.[175] At a minimum, a broker may be liable even if the broker had no intention to deceive and even if the broker had no actual knowledge of the defective condition. Thus, in *Easton*, the California

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169. *Id.* at 390 (footnote omitted).

170. *See* Robinson v. Grossman, 67 Cal. Rptr. 2d 380, 383 (Cal. Ct. App. 1997) (noting that legislature responded to *Easton* at the urging of the California Association of Realtors).

171. CAL. CIV. CODE §§ 2079-2079.6 (West 2002) (defining broker's duty to inspect); *id.* § 2079.12 (stating that intent of statute was "to codify and make precise the holding of *Easton*"); *see also Robinson*, 67 Cal. Rptr. 2d at 383-84 (discussing *Easton* and § 2079).

172. *See* WIS. ADMIN. CODE § RL 24.07 (2001) (imposing duty to inspect); Gouveia v. Citicorp Person-to-Person Fin. Ctr., Inc., 686 P.2d 262, 266 (N.M. Ct. App. 1984) ("[A] broker may have a duty to disclose defects that an inspection would reveal."); Secor v. Knight, 716 P.2d 790, 795 n.1 (Utah 1986) (citing, in dicta, *Easton's* holding with approval); Conell v. Coldwell Banker Premier Real Estate, Inc., 512 N.W.2d 239, 242 (Wis. Ct. App. 1994) (noting and discussing duty to inspect); Grube v. Daun, 496 N.W.2d 106, 113 (Wis. Ct. App. 1992) (stating that statute imposes duty to investigate).

173. *See* IND. CODE ANN. § 25-34.1-10-10(d) (Michie 2001) (providing no duty to inspect for buyer); KAN. STAT. ANN. § 58-30,106 (2001) (providing seller's agent has no duty to inspect); MONT. CODE ANN. § 37-51-313 (2001) (providing licensee has no duty to inspect); WASH. REV. CODE ANN. § 18.86.030(2) (West 2002) ("[A] licensee owes no duty to conduct an independent inspection of the property . . . ."); Aranki v. RKP Invs., Inc., 979 P.2d 534, 536 (Ariz. Ct. App. 1999) (holding that broker's duty to deal fairly does not include duty to investigate to discover defects); Harkala v. Wildwood Realty, Inc., 558 N.E.2d 195, 200 (Ill. App. Ct. 1990) (finding no duty to investigate for hidden or latent defects); Steptoe v. True, 38 S.W.3d 213, 219 (Tex. Ct. App. 2001) (holding no duty to inspect); Kubinsky v. Van Zandt Realtors, 811 S.W.2d 711, 715 (Tex. Ct. App. 1991) (rejecting *Easton* and finding no duty to inspect); Teter v. Old Colony Co., 441 S.E.2d 728, 736 (W. Va. 1994) (declining to find duty to inspect to uncover latent defects).

174. *See generally Easton*, 199 Cal. Rptr. at 383.

175. *See, e.g.*, Gross v. Sussex Inc., 630 A.2d 1156, 1162 (Md. 1993) (noting critical difference between fraud and negligent misrepresentation is intent requirement); *cf.* Van Deusen v. Snead, 441 S.E.2d 207, 211 (Va. 1994) (sustaining demurrer on fraud counts, but reversing judgment sustaining demurrer on negligence count where no intent alleged). A negligent misrepresentation claim may also differ from a fraud claim in the application of comparative negligence to a negligent misrepresentation claim. *See* Newbern v. Mansbach, 777 So. 2d 1044, 1045 (Fla. 1st DCA 2001).

Court of Appeals upheld a jury verdict finding a real estate broker negligent for failing to disclose to the purchaser that there were potential problems with the soil stability.[176] The broker was liable for failure to disclose defects because he should have discovered them through reasonable diligence even if the broker had no actual knowledge of the soil problems.[177]

Another case approving liability for negligent failure to disclose is *Van Deusen v. Snead.*[178] In *Van Deusen,* the Virginia Supreme Court held that a purchaser's real estate agent was not liable to the purchaser for fraud where there was no allegation of intent to mislead.[179] The real estate agent could be liable, however, under a negligence theory for failure to disclose a negative inspection report and a differential settlement problem.[180]

3. Liability for Innocent Misrepresentations

A few courts have imposed strict liability in some circumstances for even innocent misrepresentations, those representations that were neither fraudulently nor negligently made, but which nonetheless were false.[181] In a leading case, *Bevins v. Ballard,*[182] the Alaska Supreme Court found a broker liable to purchasers for innocently misrepresenting that an existing well on the property would provide an adequate water supply.[183] The broker, in supplying the information, had relied upon information supplied by the seller.[184] The court held that a broker may be liable where the broker serves as a conduit for the owner's misrepresentations.[185] The dissent in *Bevins* objected to making "the broker the 'insurer' of the seller's representation[s]" and argued that the broker should not have had a duty to independently verify information supplied by the seller unless the agent had reason to believe the information was false.[186] The majority in *Bevins*

176. *Easton,* 199 Cal. Rptr. at 386.

177. *Id.* at 387-90 (holding that "it need not be alleged or proved that the broker had actual knowledge of the material facts in issue").

178. 441 S.E.2d 207 (Va. 1994).

179. *Id.* at 211.

180. *Id.*

181. *See, e.g.,* Clarance E. Hagglund et al., *Caveat Misrepresenter: The Real Estate Agent's Liability to the Purchaser,* 5 HOFSTRA PROP. L.J. 381, 394-96 (1993) (discussing innocent misrepresentation theory); Linda S. Whitton, Note, *Realtor Liability for Innocent Misrepresentation and Undiscovered Defects: Balancing the Equities Between Broker and Buyer,* 20 VAL. U. L. REV. 255, 255-71 (1986) (discussing innocent misrepresentation theory).

182. 655 P.2d 757 (Alaska 1982), *superseded by statute recognized in* Amyot v. Luchini, 932 P.2d 244, 247 (Alaska 1997).

183. *Id.* at 763.

184. *Id.* at 759.

185. *Id.* at 762-63.

186. *Id.* at 763 (Connor, J., dissenting).

won the battle, but the dissenters won the war. *Bevins* has been superseded by a statute negating real estate agent liability for innocent misrepresentation in real estate transfers.[187]

Some courts have followed this distinct minority view finding liability for innocent misrepresentations in the real estate broker context.[188] Some of these decisions have looked to the Restatement (Second) of Torts (Restatement) in support of liability for innocent misrepresentations.[189] The Restatement directly addresses liability of sellers, but expressly leaves open the question of whether a misrepresentation by a broker should result in liability.[190] Some cases cited in support of liability for innocent misrepresentations are ambiguous because their facts and reasoning could equally support a finding of negligence.[191] Significantly, a number of courts has rejected innocent misrepresentation liability for brokers.[192]

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187. *See* ALASKA STAT. § 09.65.230 (Michie 2000) (stating that agents in real property transfers are not liable for innocent misrepresentation); *Amyot*, 932 P.2d at 247 (addressing claim against seller and holding disclosure statute "precludes claims of innocent misrepresentation as to residential property concerning conditions included in the mandatory disclosure form").

188. *See* Spargnapani v. Wright, 110 A.2d 82, 83-84 (D.C. 1954) (holding broker liable for misstatement regarding heating system even if made in good faith); Berryman v. Riegert, 175 N.W.2d 438, 441-42 (Minn. 1970) (holding broker's representations that lot was dry and had no water problems "fraudulent" even in the absence of intent to deceive or knowledge of falsity); Gennari v. Weichert Co. Realtors, 672 A.2d 1190, 1205 (N.J. Super. Ct. App. Div. 1996) (holding broker liable under Consumer Fraud Act for misrepresentations about builder's reputation without any knowledge or intent requirement); Gauerke v. Rozga, 332 N.W.2d 804, 805 (Wis. 1983) (holding broker strictly responsible for misstatements regarding acreage, amount of road, and river frontage); Reda v. Sincaban, 426 N.W.2d 100, 102-03 (Wis. Ct. App. 1988) (holding broker strictly responsible for misrepresenting lot size; negligence is irrelevant).

189. Section 552C (1) states:

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

RESTATEMENT (SECOND) OF TORTS § 552C(1) (1977).

190. *See id.* § 552C(1) cmt. g (noting that agents have been held liable in a few cases, but that the law is still developing).

191. *See* Sodal v. French, 531 P.2d 972, 973 (Colo. Ct. App. 1974) (holding agent liable for false statement regarding adequacy of water supply when that agent spoke without knowing the truth or falsity of the statement); Pumphrey v. Quillen, 135 N.E.2d 328, 329-32 (Ohio 1956) (holding false statements by broker indicating house was of "tile construction" supported fraud claim where broker made the statement as fact knowing he did not have sufficient information to justify the statement).

192. *See* Robinson v. Grossman, 67 Cal. Rptr. 2d 380, 385 (Cal. Ct. App. 1997) (holding broker had no duty to verify sellers' statements); Lyons v. Christ Episcopal Church, 389 N.E.2d 623, 625 (Ill. Ct. App. 1979) (holding no claim when broker falsely represented house was

III. STATUTORY EFFORTS TO LIMIT BROKER LIABILITY

A. *Residential Property Disclosure Acts*

1. Seller's Disclosure Obligations

Statutes requiring seller disclosures, now existing in more than half the states,[193] are part of an effort to encourage greater disclosure to purchasers early in the transaction with the hoped-for result of more equitably negotiated agreements and more satisfied parties (and hence fewer controversies). Many of these statutes were introduced and supported by real estate brokers concerned about their own potential liability to purchasers.[194] The real estate industry viewed these statutes as means to limit the liability of real estate brokers by imposing affirmative disclosure requirements upon sellers and limiting brokers' duties to investigate or disclose.

These statutes are sometimes referred to as "Residential Property Disclosure Acts" or by similar names.[195] Their disclosure requirements

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connected to city sewer when broker merely passed on seller's information); Nordstrom v. Miller, 605 P.2d 545, 550-51 (Kan. 1980) (holding broker not liable for false representations that land was irrigated where statements were made in good faith based on information from seller); Lopata v. Miller, 712 A.2d 24, 32-33 (Md. Ct. Spec. App. 1998) (rejecting strict liability for broker's innocent, affirmative misrepresentations regarding lot size); Bortz v. Noon, 729 A.2d 555, 564-65 (Pa. 1999) (rejecting tort liability for innocent misrepresentation made by broker concerning septic tank test); Hoffman v. Connall, 736 P.2d 242, 246 (Wash. 1987) (holding real estate broker not liable for innocent misrepresentations).

193. *See* Katherine A. Pancak et al., *Residential Disclosure Laws: The Further Demise of Caveat Emptor*, 24 REAL EST. L.J. 291, 298-99 (1996) (reporting that a little more than half the states have enacted mandatory seller disclosure legislation). For examples of such statutes, see, e.g., CAL. CIV. CODE §§ 1102-1102.17 (West 2001); CONN. GEN. STAT. ANN. § 20-327b (West 2001); DEL. CODE ANN. tit. 6, §§ 2570-2578 (2001); 765 ILL. COMP. STAT. ANN. 77/1-77/99 (West 2001); MISS. CODE ANN. §§ 89-1-501 to 89-1-523 (2001); NEB. REV. STAT. ANN. § 76-2,120 (Michie 2001); N.C. GEN. STAT. § 47E-4 (2000); OR. REV. STAT. §§ 105.465-.490 (1999); TENN. CODE ANN. §§ 66-5-201 to 66-5-210 (West 2001); TEX. PROP. CODE ANN. § 5.008 (Vernon 2002); VA. CODE ANN. § 55-519 (Michie 2001).

194. *See* James D. Lawlor, *Seller Beware: Burden of Disclosing Defects Shifting to Sellers*, 78 A.B.A. J. 90, 90 (1992) (noting that NAR "spearhead[ed] a drive for mandatory seller disclosure," and noting pressure from state associations of real estate brokers as well); Pancak et al., *supra* note 193, at 310 ("Statutory seller disclosure legislation is largely the result of the real estate brokerage community's attempt to limit the expansion of a broker's duty to the buyer to inspect and disclose."); Robert M. Washburn, *Residential Real Estate Condition Disclosure Legislation*, 44 DEPAUL L. REV. 381, 436 (1995) (stating that NAR "has been the primary impetus behind the passage of the Prevailing Disclosure Act").

195. 765 ILL. COMP. STAT. ANN. 77/1 (West 2001) (Residential Real Property Disclosure Act); N.C. GEN. STAT. § 47E (2000) (Residential Property Disclosure Act); TENN. CODE ANN. § 66-5-210

vary, but they typically only apply to specified sales of residential property.[196] Some statutes exclude residential sales not involving an agent or broker[197] or sales of new residential properties.[198] Some allow sellers to make a general disclaimer rather than provide the disclosure statement,[199] or they permit purchasers to waive the right to the disclosure.[200]

The extent of the required disclosure varies. Often the statutes are quite specific about the areas that must be disclosed and the level of detail required. Several states, either in the statute itself or by regulation, provide the actual disclosure form that must be used by sellers.[201] For example, the

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(2001) (Tennessee Residential Property Disclosure Act); VA. CODE ANN. § 55-517 (Michie 2001) (see title to Chapter 27, Virginia Residential Property Disclosure Act); *cf.* 765 DEL. CODE ANN. tit. 6, §§ 2570-2578 (2001) (Buyer Property Protection Act).

196. *See, e.g.*, CAL. CIV. CODE § 1102 (West 2001) (stating that it applies to real property with one to four dwelling units on it); *id.* § 1102.2 (stating that the statute is not applicable to certain specified transfers of real property); 765 ILL. COMP. STAT. ANN. 77/5 (West 2001) (defining "residential real property"); *id.* § 77/10 (stating that the statute applies only to residential real property); TEX. PROP. CODE ANN. § 5.008(a) (Vernon 2002) (stating that it is applicable only to residential real property comprising not more than one dwelling unit). *But see* N.H. REV. STAT. ANN. § 477:4-c (2000) (imposing limited disclosures applicable to any property containing a building).

197. *See* KY. REV. STAT. ANN. § 324.360 (Banks-Baldwin 2001) (applying to sales involving real estate licensee who receives compensation); MISS. CODE ANN. § 89-1-501 (2001) (applying only to sales involving real estate broker or salesperson); OKLA. STAT. tit. 60, § 832(2) (2000) (providing that disclosure statement only required if seller is represented by broker or if requested by purchaser).

198. *See, e.g.*, 765 ILL. COMP. STAT. ANN. 77/15(9) (West 2001) (stating that it is not applicable to newly constructed residential real property); TEX. PROP. CODE ANN. § 5.008(e)(10) (Vernon 2002) (stating that it is not applicable to new residences).

199. *See, e.g.*, MD. CODE ANN., REAL PROP. § 10-702(b)(1) (2001) (requiring disclosure statement *or* disclaimer statement); OR. REV. STAT. § 105.465(b)(2) (1999) (requiring disclosure statement *or* disclaimer statement); TENN. CODE ANN. § 66-5-202 (2001) (requiring disclosure statement *or* disclaimer statement); VA. CODE ANN. § 55-519 (Michie 2001) (requiring disclosure statement *or* disclaimer statement).

200. *See, e.g.*, NEV. REV. STAT. ANN. § 113.130(3) (Michie 2001) (stating that a purchaser may waive in writing the right to receive disclosure); WIS. STAT. § 709.08 (2001) (stating that a buyer may waive in writing the right to receive disclosure).

201. *See, e.g.*, CAL. CIV. CODE § 1102.6 (Deering 2001) (providing disclosure form in statute); 765 ILL. COMP. STAT. ANN. 77/35 (West 2001) (providing disclosure form in statute); MISS. CODE ANN. § 89-1-509 (2001) (providing disclosure form in statute); OR. REV. STAT. § 105.465 (1999) (providing disclosure form in statute); TENN. CODE ANN. § 66-5-210 (2001) (providing disclosure form in statute); TEX. PROP. CODE ANN. § 5.008(b) (Vernon 2002) (providing disclosure form in statute); *see also* CONN. GEN. STAT. § 20-327b(d)(1) (West 2001) (requiring Commission of Consumer Protection to create a form); DEL. CODE ANN. tit. 6, § 2578 (2001) (requiring real estate commission to develop a standard form); N.C. GEN. STAT. § 47E-4(b) (2000) (requiring real estate commission to develop a standard disclosure statement); VA. CODE ANN. § 55-519 (Michie 2001) (requiring real estate board to provide form); Pancak et al., *supra* note 193, at 321-32 (reproducing in appendix Connecticut disclosure form promulgated by regulations and Washington's disclosure form).

Illinois disclosure report form requires disclosure of: known problems with flooding, leaks in the basement, foundation cracks, leaks in the roof or ceilings, drinking water, radon, asbestos, lead paint, lead pipes, lead in the soil, subsidence, settlement, earth stability, termites or other wood boring insects; known defects in the walls, floors, electrical system, plumbing, well, heating system, air conditioning, fireplace, septic or sanitary sewer system; existence of underground fuel storage tanks, boundary disputes; the fact of location in flood plain; and receipt of notices of violation of law relating to the property.[202]

The Maine statute is an example of a statute that is both specific and general. It requires specific disclosures concerning private water supply, insulation, private waste disposal systems, and hazardous materials, but in sweeping and general language requires disclosure of "[a]ny known defects."[203] An example of a more general disclosure requirement is the Hawaii statute which defines the required disclosure statement as:

> [A] written statement prepared by the seller or at the seller's direction, that purports to fully and accurately disclose all material facts relating to the residential real property being offered for sale that:
> (1) are within the knowledge or control of the seller;
> (2) can be observed from visible, accessible areas; or
> (3) are required to be disclosed under section 508D-15.[204]

Some statutes mandate disclosures in only a few narrow areas.[205]

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202. 765 ILL. COMP. STAT. ANN. 77/35 (West 2001).

203. *See* ME. REV. STAT. ANN. tit. 33, § 173 (West 2001). The Maine requirements can be very specific. For example, concerning water supply, the statute requires:

> [T]he seller of residential real property shall provide to the purchaser a property disclosure statement containing the following information:
> 1. WATER SUPPLY SYSTEM. The type of system used to supply water to the property. If the property has a private water supply, the seller shall disclose:
> A. The type of system;
> B. The location of the system;
> C. Any malfunctions of the system;
> D. The date of the most recent water test, if any; and
> E. Whether the seller has experienced a problem such as an unsatisfactory water test or a water test with notations . . . .

Id.

204. HAW. REV. STAT. ANN. § 508D-1 (Michie 2001).

205. *See, e.g.*, MONT. CODE ANN. § 75-3-606(2) (2001) (requiring seller to disclose any radon testing); N.H. REV. STAT. ANN. § 477:4-c (2000) (requiring disclosures concerning water supply and sewage system).

Although the statutes impose duties upon sellers, they also provide protection to sellers. Under some statutes, the seller is only required to reveal known problems[206] or answer in good faith,[207] and the seller may not be obligated "to make any specific investigation or inquiry in an effort to complete the disclosure statement."[208] Usually the statutes or the disclosure forms explicitly state that the disclosure statement is not a warranty by the seller and "is not a substitute for inspections either by the individual purchasers or by a professional home inspector."[209] Significantly, the statutes usually also impose a short statute of limitations.[210]

Failure to make the required disclosures may give the purchasers the option to rescind the sales contract without penalty.[211] The purchaser may sue for damages based on intentionally false statements made in the disclosure or failure to provide disclosures.[212]

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206. *See, e.g.*, 765 ILL. COMP. STAT. ANN. 77/25(a), (b) (West 2001) (providing that a seller is not liable if the seller had no knowledge of an inaccuracy in the report; duty to disclose if seller has actual knowledge); VA. CODE ANN. § 55-521 (Michie 2001) (providing that a seller is not liable if the seller had no knowledge of an inaccuracy in the report; duty to disclose if seller has actual knowledge); WIS. STAT. § 709.07 (2001) (providing that a seller is not liable if the seller had no knowledge of an inaccuracy in the report); *cf.* NEB. REV. STAT. ANN. § 76-2,120(5) (Michie 2001) (requiring that notice be completed to the best of seller's belief and knowledge; if information is unknown, seller should indicate that fact); TEX. PROP. CODE ANN. § 5.008(d) (Vernon 2001) (requiring that notice be completed to best of the seller's belief and knowledge; if information is unknown, seller should indicate that fact).

207. CAL. CIV. CODE § 1102.7 (Deering 2001) (providing that disclosures must be made in good faith); TENN. CODE ANN. § 66-5-201 (2001) (providing that disclosures must be made in good faith); WIS. STAT. § 709.06 (2001) (providing that disclosures must be made in good faith).

208. 765 ILL. COMP. STAT. ANN. 77/25(c) (West 2001); *accord* VA. CODE ANN. § 55-519(a)(2) (Michie 2001).

209. TENN. CODE ANN. § 66-5-201 (2001); *see also, e.g.*, CAL. CIV. CODE § 1102.6 (Deering 2001) (providing that a disclosure statement is neither a warranty of any kind nor a substitute for inspections or warranties); NEB. REV. STAT. ANN. § 76-2,120(3)(e)-(f) (Michie 2001) (providing that a disclosure statement is neither a warranty nor a substitute for inspection or warranty); NEV. REV. STAT. ANN. § 113.140(2) (Michie 2001) (stating that a completed disclosure form is not a warranty); TEX. PROP. CODE ANN. § 5.008 (Vernon 2002) (stating that a completed disclosure form is not a substitute for inspections or warranties); WIS. STAT. § 709.03 (2001) (stating that a completed disclosure form is not a warranty of any kind, and not a substitute for inspection).

210. *See, e.g.*, HAW. REV. STAT. ANN. § 508D-17 (Michie 2001) (providing a two year limitation); 765 ILL. COMP. STAT. ANN. 77/60 (West 2001) (providing a one year limitation); NEV. REV. STAT. ANN. § 113.150(4) (2001) (providing a limitation of the later of one year from discovery or two years from conveyance); VA. CODE ANN. § 55-524(c) (Michie 2001) (providing a one year limitation).

211. *See, e.g.*, 765 ILL. COMP. STAT. ANN. 77/55 (West 2001) (providing right to terminate contract); VA. CODE ANN. §§ 55-520(B), 55-524(B)(2) (Michie 2001) (providing right to terminate contract).

212. *See, e.g.*, CAL. CIV. CODE § 1102.13 (Deering 2001) (providing for damages); 765 ILL. COMP. STAT. ANN. 77/55 (West 2001) (providing for damages and attorney's fees); NEB. REV. STAT. ANN. § 76-2,120(11) (Michie 2001) (providing for damages and attorney's fees); NEV. REV.

2. Impact of Disclosure Acts on Brokers' Duties

Statutes imposing mandatory seller disclosures both directly and indirectly impact broker duties and liability. Many of the statutes expand broker liability but only in narrowly defined ways. Often they impose a duty upon the broker to inform the seller and the buyer about their respective duties and rights under the statute.[213] Also, they may require the broker to verify receipt of the disclosure statement by the buyer.[214] At least one statute requires that the broker make disclosures regarding condition of the property on the same disclosure form with the seller.[215] These additional burdens on a broker are modest in comparison to the limitations on broker liability that the statutes afford.

Many statutes expressly provide that the disclosures are made by the seller and not by the seller's agents.[216] The clear purpose of these provisions is to limit brokers' liability for misstatements made by sellers in the disclosure statement. To establish fraud, a plaintiff must show that the defendant made a misstatement or had a duty to speak but failed to do so.[217] If statements in the disclosure statement are made by the seller, not the broker, then any misstatements in the disclosure statement are not the broker's misstatements.[218] Some statutes are even more explicit; they provide that the seller's agent is not liable for any errors, inaccuracies, or omissions in the disclosure statement unless the agent has knowledge of the error, inaccuracy, or omission.[219]

STAT. ANN. § 113.150(4) (Michie 2001) (allowing treble damages, costs, and attorney's fees for known undisclosed defects); VA. CODE ANN. § 55-524(B)(1) (Michie 2001) (providing for damages). For illustrative cases, see *Woods v. Pence*, 708 N.E.2d 563, 564-65 (Ill. Ct. App. 1999) (providing that the plaintiff stated claim against seller who falsely stated in disclosure statement that there were no water leakage problems); *Bohm v. DMA Partnership*, 607 N.W.2d 212, 215 (Neb. Ct. App. 2000) (providing that the purchaser stated a claim against seller for failure to provide disclosure statement disclosing known water damage).

213. *See, e.g.*, VA. CODE ANN. § 55-523 (Michie 2001) (creating duty to inform owners and purchasers of rights and obligations under statute).

214. *See* CAL. CIV. CODE § 1102.12 (Deering 2001); HAW. REV. STAT. ANN. § 508D-7(b) (Michie 2001).

215. *See* CAL. CIV. CODE § 1102.6 (Deering 2001).

216. *See, e.g.*, NEB. REV. STAT. ANN. § 76-2,120(3)(i) (Michie 2001); VA. CODE ANN. § 55-510(A)(2) (Michie 2001); *cf.* TEX. PROP. CODE ANN. § 5.008(b) (Vernon 2002) (providing that a seller's disclosure "is not a warranty of any kind by . . . seller's agents").

217. *See* Robert M. Washburn, *Residential Real Estate Condition Disclosure Legislation*, 44 DEPAUL L. REV. 381, 387-88 (1995).

218. *See id.*

219. *See, e.g.*, NEB. REV. STAT. ANN. § 76-2,120(9) (Michie 2001); *see also* TENN. CODE ANN. § 66-5-206 (2001) (providing licensee not liable except for intentional fraud or failure to "disclose adverse facts of which licensee has actual knowledge or notice"); VA. CODE ANN. § 55-523 (Michie 2001) (providing licensee not liable for violations under this chapter or failure to disclose any

A broker generally has a duty to disclose any misstatements in the disclosure statement that the broker has knowledge of. This requirement may be express or implied in the statute[220] or may be rooted in the broker's professional duty to disclose known adverse material facts.[221] The statutes also often expressly allow the seller's agent to "reveal the completed form and its contents to any purchaser or potential purchaser of the residential property."[222]

Some jurisdictions provide similar protection to brokers in real estate broker licensing or related provisions. Alabama's Real Estate Consumer's Agency and Disclosure Act, for example, provides that:

> A licensee shall not be liable for providing false information to a party in a real estate transaction if the false information was provided to the licensee by a client of the licensee or by a customer or by another licensee unless the licensee knows or should have known that the information was false.[223]

The mandatory seller disclosures benefit brokers indirectly too. They document disclosures that were made to the buyers and may forestall contrived or imagined claims that conditions were not disclosed. They may also prevent unhappy purchasers from successfully claiming reasonable reliance on a broker's representations where those representations were contrary to the seller's disclosures. In *Buchanan v. Geneva Chervenic Realty*,[224] the Ohio Court of Appeals affirmed summary judgment for a defendant real estate company.[225] The plaintiff home purchaser alleged that

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information regarding the real property).

220. *See, e.g.*, HAW. REV. STAT. ANN. § 508D-7(c) (Michie 2001) ("If the seller's agent is or becomes aware of any material facts inconsistent with or contradictory to the disclosure statement or the inspection report of a third party provided by the seller, the seller's agent shall disclose these facts to the seller, the buyer, and their agents."); Bohm v. DMA P'ship, 607 N.W.2d 212, 220 (Neb. Ct. App. 2000) (holding no claim against agent unless agent knew seller made knowing misrepresentations on disclosure statement).

221. *See supra* note 165 and accompanying text (noting duty of disclosure imposed on brokers).

222. NEV. REV. STAT. ANN. § 113.120 (Michie 2001); *see, e.g.*, NEB. REV. STAT. ANN. § 76-2,120(3)(h) (Michie 2001).

223. ALA. CODE § 34-27-86(b) (2001); *accord, e.g.*, D.C. CODE ANN. § 42-1703(a)(2) (2001) (providing that seller's agent not liable to buyer for unknowingly providing false information if information was provided by seller); ME. REV. STAT. ANN. tit. 32, § 13273(2)(A) (West 2001) (providing that seller's agent not liable to buyer for unknowingly providing false information that was provided by seller); Robinson v. Grossman, 67 Cal. Rptr. 2d 380, 385 (Ct. App. 1997) (construing Cal. Civil Code § 2079, finding no duty for broker to independently verify or disclaim the accuracy of seller's representations); *cf.* IND. CODE ANN. § 25-34.1-10-10(d) (Michie 2001) (providing that there is no duty to verify accuracy of statements made by seller).

224. 685 N.E.2d 265 (Ohio Ct. App. 1996).

225. *Id.* at 266.

the real estate agent failed to disclose and made misleading statements about a water problem in the basement and pet damage.[226] The court found that the water problem was not a latent defect, and the real estate company had no duty to disclose when the buyer had notice of water problems from the seller's disclosure form.[227] Moreover, accepting allegations of the agent's false and misleading statements as true, the court affirmed summary judgment for the defendant because there could be no justifiable reliance in view of the seller's disclosure of information, home inspection report, and plaintiff's own inspections.[228]

B. *Limiting Liability for Nondisclosure of Psychologically Impacted Properties*

State legislatures also have been active in limiting sellers' and brokers' duties to disclose certain types of facts. A majority of jurisdictions[229] have adopted some type of "shield" law addressing sales of psychologically impacted property.[230] Psychologically impacted properties may include properties whose occupants were infected with AIDS, were murdered, committed suicide, or were victims of crime.[231] Section 55-524 of the Virginia Residential Property Disclosure Act, is an example and provides as follows:

> Notwithstanding any other provision of this chapter or any other statute or regulation, no cause of action shall arise against an owner or a real estate licensee for failure to disclose that an occupant of the subject real property, whether or not such real property is subject to this chapter, was afflicted with human immunodeficiency virus (HIV) or that the real property was the site of:
>
> 1. An act or occurrence which had no effect on the physical structure of the real property, its physical environment, or the improvements located thereon; or
>
> 2. A homicide, felony, or suicide.[232]

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226. *Id.* at 267.

227. *Id.* at 268.

228. *Id.* at 270.

229. *See* Ronald Benton Brown & Thomas H. Thurlow III, *Buyers Beware: Statutes Shield Real Estate Brokers and Sellers Who Do Not Disclose That Properties Are Psychologically Tainted*, 49 OKLA. L. REV. 625, 628-44 (1996) (citing twenty-nine states with such laws).

230. *See id.*

231. Paula C. Murray, *AIDS, Ghosts, Murder: Must Real Estate Brokers and Sellers Disclose?*, 27 WAKE FOREST L. REV. 689 (1992).

232. VA. CODE ANN. § 55-524(A) (Michie 2001); *accord, e.g.*, TENN. CODE ANN. § 66-5-207 (2001).

Some statutes expressly include deaths on the property by natural causes as covered psychological impact.[233] These shield statutes usually protect real estate brokers as well as sellers,[234] although a few address only broker liability without addressing seller liability.[235]

The law governing real estate broker liability progressed from limited liability theories based on caveat emptor and agency principles to expansive liability based in some cases on even innocent misrepresentations. In the last two decades, statutes increasingly have defined real estate brokers' duties and liabilities. In some cases these statutes have halted or even retreated from evolving common law theories expanding broker liability. Disputes involving brokers now require review of mandatory disclosure acts, professional licensing statutes (including related regulations), other real property statutes, and local common law.

IV. CONTRACTUAL EFFORTS TO LIMIT BROKER LIABILITY: THE "AS IS" CLAUSE

A. *Contractual Efforts to Limit Liability*

Real estate brokers have turned to contract law to limit their increasing risk of liability.[236] These provisions may appear in the real estate purchase agreement, as a separate document at or prior to closing, or in other

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233. The Texas provision is an example of a statute that includes death by natural causes. It states:

> A seller or seller's agent shall have no duty to make a disclosure or release information related to whether a death by natural causes, suicide, or accident unrelated to the condition of the property occurred on the property or whether a previous occupant had, may have had, has, or may have AIDS, HIV related illnesses, or HIV infection.

TEX. PROP. CODE ANN. § 5.008(c) (Vernon 2002); *see also* N.Y. REAL PROP. LAW § 443-a(1) (Consol. 2001) (providing that occupant with HIV or property which was the "site of a homicide, suicide, or other death by accidental or natural causes," or any felony, does not constitute a material defect).

234. *E.g.*, VA. CODE ANN. § 55-524(A) (Michie 2001) ("[N]o cause of action shall arise against an owner or a real estate licensee for failure to disclose . . . ."); TEX. PROP. CODE ANN. § 5.008(c) (Vernon 2002) ("A seller or seller's agent shall have no duty to make a disclosure. . . .").

235. *See* 225 ILL. COMP. STAT. ANN. 454/15-20 (West 2001) ("No cause of action shall arise against a licensee for the failure to disclose. . . .").

236. Sellers, who are usually codefendants with brokers, have also sought refuge behind the "as is" clause. *See* Frank J. Wozniak, Annotation, *Construction and Effect of Provision in Contract for Sale of Realty by Which Purchaser Agrees to Take Property As Is or in Its Existing Condition*, 8 ALR 5th 312 (1992) (discussing and gathering cases involving the "as is" clause). This Article focuses on the effectiveness of the "as is" clause to protect brokers, although some of the same considerations are applicable to sellers.

collateral documents.[237] Brokers use various types of provisions to limit their liability: the "as is" clause, a non-reliance clause, a release or waiver clause, and a merger or integration clause. Regardless of the form they take, the provisions share the same basic objective—to place the risk of any defects in the quality of the property upon the purchaser.

The "as is" clause states that the buyer takes the property "as is," in its current condition.[238] The import of the "as is" clause is that the purchasers get what they paid for and nothing less; the purchasers accept the risk and are on notice that there might be defects in the condition of the property. In short, the brokers, who provide these form contracts, and their sellers, are saying: "Attention purchasers, we have no responsibility for the condition of the property, and you can't sue us when you later decide that the property is not perfect." Some provisions add waiver and release language to the "as is" provision. For example, one such clause stated: "Furthermore, it is understood that I/we are accepting the property in 'as is' condition and realize that in so doing I/we waive any rights to object or claim against the seller or his agent regarding the condition of the premises."[239] Many contracts also contain language boldly proclaiming

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237. *See, e.g.*, VA. CODE ANN. § 55-519 (Michie 2001) (providing for residential property disclaimer statement in form promulgated by Real Estate Board); Choung v. Iemma, 708 N.E.2d 7, 9-10 (Ind. Ct. App. 1999) (involving a purchase agreement and later land contract); Brooks v. Holmes, 413 N.W.2d 688, 689 (Mich. Ct. App. 1987) (involving a closing agreement); Crase v. Hahn, 754 So. 2d 471, 472-74 (Miss. Ct. App. 1999) (involving a purchase agreement, disclosure statement, and property inspection letter); Bando v. Achenbaum, 651 N.Y.S.2d 74, 76 (N.Y. App. Div. 1996) (involving a sale contract); Dawson v. Tindell, 733 P.2d 407, 409 (Okla. 1987) (involving a closing release).

238. For examples of contract language with "as is" provision, see *Commercial Credit Corp. v. Lisenby*, 579 So. 2d 1291, 1294 (Ala. 1991) (involving a document that stated that purchasers had "inspected the property and accept it in its present condition"); *Assilzadeh v. California Federal Bank*, 98 Cal. Rptr. 2d 176, 180 (Ct. App. 2000) ("Subject property is being sold in its present 'As Is' condition."); *Choung*, 708 N.E.2d at 10 ("This property purchased in AS IN NOW CONDITION . . . ."); *Hamtil v. J.C. Nichols Real Estate*, 22 Kan. App. 2d 809, 811 (Kan. Ct. App. 1996) ("Subject to any inspections allowed under my contract . . . I agree to purchase the property in its present condition only, without warranties or guarantees of any kind by seller or any realtor concerning the condition or value of the property.") (original in uppercase); *Crase*, 754 So. 2d at 473 ("The property is being purchased 'as is' and 'where is'. . . ."); *Atkins v. Kirkpatrick*, 823 S.W.2d 547, 551 (Tenn. Ct. App. 1991) ("This property is purchased 'as is' and neither Seller nor agent nor Broker(s) makes or implies any warranties as to the condition of the premises."); *Fletcher v. Edwards*, 26 S.W.3d 66, 75 (Tex. Ct. App. 2000) ("they accept[ed] the property in its 'AS IS' conditions [sic]") (alteration in original); *Grube v. Daun*, 496 N.W.2d 106, 111 (Wis. Ct. App. 1992) ("Buyer is buying the property in a[n] as is condition without any warranties.").

239. *Crase*, 754 So. 2d at 474 (involving language in signed property inspection letter) (original in uppercase); *see also, e.g., Dawson*, 733 P.2d at 409 ("[T]he purchasers waive all claims, rights and demands against the sellers to repair, replace or remedy any defects and release sellers, [realtors], their agents, employees, representatives, sub-agents, and co-brokers from any liability whatsoever."); *Fletcher*, 26 S.W.3d at 75 (stating "[p]urchasers release and hold [brokers] harmless

non-reliance by the purchaser on the broker's representations. An example of this type of provision states: "Purchaser is not relying upon any representations of the Seller or Seller's agents or sub-agents as to any condition which Purchaser deems to be material to Purchaser's decision to purchase this property."[240] Perhaps even more specific are "independent investigation" clauses:

> The Purchaser agrees and represents that said Purchaser has conducted an independent investigation and inspection of said land and premises, and has entered into this Contract in full reliance thereon, and that there are no other agreements, verbal or otherwise, modifying or affecting the terms hereof, and that Purchaser is not relying on oral representations made by Seller or Seller's agent.[241]

Many contracts combine aspects of these various provisions. A New York form sales contract, for example, includes an "as is" provision, non-reliance provision, and independent investigations provision.[242] Efforts to

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from any and all liability in regard to [any warranties or representations]").

240. Snyder v. Lovercheck, 992 P.2d 1079, 1083 (Wyo. 1999); *see also* Reeves v. Porter, 521 So. 2d 963; 966 (Ala. 1988) (stating that purchaser "agrees that neither the Seller nor any real estate agents involved in this transaction have made any representations . . . upon which he, or she, has relied"); Ben Farmer Realty Co. v. Woodward, 441 S.E.2d 421, 424 (Ga. Ct. App. 1994) ("Purchaser acknowledges that [she] has not relied upon the advice or representations, if any, by Broker (or agents of Broker) relating to . . . the structural condition of the property . . . .") (alterations and omission in original); *Hamtil*, 923 P.2d at 515 ("I state that no important representations concerning the condition of the property are being relied upon by me except as disclosed above or as fully set forth as follows . . . ."); Bowman v. Meadow Ridge, Inc., 615 A.2d 755, 757 (Pa. Super. Ct. 1992) ("In entering into this Agreement, Buyer has not relied upon any representation, claim, advertising, promotional activity, brochure or plan of any kind made by Seller or Seller's agents of employees unless expressly incorporated or stated in this Agreement."); Sundown, Inc. v. Pearson Real Estate Co., 8 P.3d 324, 332 (Wyo. 2000) (involving issues similar to *Snyder*).

241. Parkhill v. Fuselier, 632 P.2d 1132, 1134 (Mont. 1981).

242. *See* 14 POWELL, *supra* note 60, at App 81D-9. The residential sales contract, prepared by various bar associations and others, states:

> 12. Condition of Property. Purchaser acknowledges and represents that Purchaser is fully aware of the physical condition and state of repair of the Premises and of all other property included in this sale, based on Purchaser's own inspection and investigation thereof, and that Purchaser is entering into this contract based solely upon such inspection and investigation and not upon any information, data, statements or representations, written or oral, as to the physical condition, state of repair, use, cost of operation or any other matter related to the Premises or the other property included in the sale, given or made by Seller or its representatives, and shall accept the same "as is" in their present condition and state of repair. . . .

limit liability may also rely upon the integration or merger clause on the theory that representations or commitments, not included in the contract, are not part of the agreement.[243]

B. *Effect of the "As Is" and Related Clauses*

Notwithstanding these seemingly clear and broad provisions, courts have construed them narrowly and limited their application. The effect of these provisions turns on the nature of the claim alleged and the knowledge and situation of the purchaser. A purchaser has a number of possible claims against a broker: intentional misrepresentation, negligent misrepresentation, innocent misrepresentation, negligence/malpractice, breach of fiduciary duties, or violation of specific statutory requirements.

Courts, almost to the point of unanimity, agree that these contractual provisions do not preclude claims for intentional misrepresentation.[244] The

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Id.

243. *See, e.g.*, Reeves v. Porter, 521 So. 2d 963, 966 (Ala. 1988) ("This contract states the entire agreement between the parties and merges in this agreement all statements, representations, and conditions heretofore made, and any other agreements not incorporated herein are void and of no force and effect."); *Bowman*, 615 A.2d at 757 ("This is the entire Agreement between the parties, and there are no other terms, obligations, covenants, representations, statements or conditions, oral or otherwise, of any kind whatsoever which are not herein referred to or incorporated.").

244. *See, e.g.*, Wilson v. Century 21 Great W. Realty, 18 Cal. Rptr. 2d 779, 782 (Cal. Ct. App. 1993) ("'As is' language in a realty sales contract does not shield a seller or his agent from liability for affirmative or . . . negative fraud."); Rayner v. Wise Realty Co., 504 So. 2d 1361, 1364 (Fla. 1st DCA 1987) (holding "as is" provision does not bar a claim for fraudulent nondisclosure); Sheehy v. Lipton Indus., Inc., 507 N.E.2d 781, 784 (Mass. App. Ct. 1987) (stating "as is" clause is not an automatic defense to fraud); Gibb v. Citicorp Mortgage, Inc., 518 N.W.2d 910, 918 (Neb. 1994) (holding "as is" and merger clauses do not relieve real estate agent from responsibility for fraudulent representations); MacKintosh v. Jack Matthew & Co., 855 P.2d 549, 551-52 (Nev. 1993) (stating "as is" clause does not shield one who makes affirmative false representations); Gouveia v. Citicorp Person-To-Person Fin. Ctr., Inc., 686 P.2d 262, 268 (N.M. Ct. App. 1984) (holding broker could be liable for alleged misrepresentation that property was in "all top shape" even though agreement contained "as is" clause); Dygert v. Leonard, 525 N.Y.S.2d 436, 438 (N.Y. App. Div. 1988) (finding "as is" and merger clauses are not shields from claims of fraud in the inducement of the contract); Black v. Cosentino, 689 N.E.2d 1001, 1003 (Ohio Ct. App. 1996) (reaffirming that "'as is' clause cannot be relied upon to bar a claim for fraudulent misrepresentation or fraudulent concealment"); Fletcher v. Edwards, 26 S.W.3d 66, 75 (Tex. Ct. App. 2000) ("such an agreement will not bind a buyer who is induced to enter the agreement because of fraudulent representation"); Silva v. Stevens, 589 A.2d 852, 862 (Vt. 1991) (stating clause does not as a matter of law defeat fraud claim); *Snyder*, 992 P.2d at 1085 (stating merger clause does not preclude fraud claim); *see also* Leatherwood, Inc. v. Baker, 619 So. 2d 1273, 1276 (Ala. 1992) (Hornsby, C.J., dissenting) (noting that large majority of states hold that "as is" provision does not insulate vendor from liability for fraud and listing cases). *But see id.* at 1275 (reversing jury verdict and holding no fraud or negligence liability in part because of "as is" clause).

impact of these provisions on negligent misrepresentation, innocent misrepresentation, and negligence claims is less clear, but many courts hold that these claims also survive.[245] Some courts limit the reach of such clauses to contractual warranty claims[246] or to representations concerning condition of the property, not including size or other characteristics.[247] Some courts limit the effect of "as is" clauses to visible or obvious defects and exclude concealed or latent conditions.[248] Courts also have disregarded general disclaimers in cases of dangerous defects known to the broker.[249] A few courts have refused to extend contractual protections to a broker based on the real estate sales contract where the broker was not a party to the contract,[250] but most courts permit the broker to claim the benefits of such provisions.[251]

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245. *See* Limoge v. People's Trust Co., 719 A.2d 888, 891 (Vt. 1998) (holding "as is" clause does not defeat negligent misrepresentation claim); *Silva*, 589 A.2d at 862 (stating that "as is" clause does not exclude tort liability including negligence and strict liability claims); Grube v. Daun, 496 N.W.2d 106, 117-18 (Wis. Ct. App. 1992) (holding neither misrepresentation nor negligence cases barred by "as is" clause); *cf. Dygert*, 525 N.Y.S.2d at 438 (allowing plaintiff to allege innocent misrepresentation and mutual mistake even though contract contained "as is" and "merger" clauses).

246. *See Silva*, 589 A.2d at 862 (stating "as is" language means no implied warranties and does not address tort liability at all); *Grube*, 496 N.W.2d at 116-17 (implying that the clause is limited to the warranty context); *see also* Prudential Ins. Co. v. Jefferson Assocs., Ltd., 896 S.W.2d 156, 166 (Tex. 1995) (Cornyn, J., concurring) (arguing that "as is" clause automatically bars only implied warranties).

247. Draisner v. Scholsberg, 57 A.2d 202, 203 (D.C. 1948) (holding that "as is" clause "referred only to the state of repairs of the property" and "had nothing to do with the number of rooms in the house"); Zoda v. Eckert, Inc., 674 P.2d 195, 199 (Wash. Ct. App. 1983) (finding clause that stated purchasers "accept said property *in regards to condition* . . . as is" applied only to condition and not lot size of the property or existence of heat pump).

248. *See* Katz v. Dept. of Real Estate, 158 Cal. Rptr. 766, 769 (Cal. Ct. App. 1979) (providing that "as is" provision does not protect against liability for passive concealment); Lingsch v. Savage, 29 Cal. Rptr. 201, 209 (Cal. Ct. App. 1963) (holding "as is" provision means "buyer takes the property in the condition visible to or observable by him," but does not reach facts not within the buyer's reach); Mulkey v. Waggoner, 338 S.E.2d 755, 757 (Ga. Ct. App. 1985) (stating that "as is" clause applies to obvious or reasonably discernable defects, not those that could not be detected by observation).

249. *See* Fennell Realty Co. v. Martin, 529 So. 2d 1003, 1004-06 (Ala. 1988) (holding agent had duty to disclose dangerous condition of furnace notwithstanding "as is" clause).

250. *See* Rodgers v. Johnson, 557 So. 2d 1136, 1140 (La. Ct. App. 1990) (holding broker and agents who were not parties to sales contract were not protected by the exculpatory provision); Menking v. Larson, 199 N.W. 823, 825 (Neb. 1924) (referring to a non-reliance clause and holding that the agent could not "shield himself from his wrongdoing by such a clause in the contract of his principal"); Wittenberg v. Robinov, 173 N.E.2d 868, 869 (N.Y. 1961) (holding broker, as nonparty to contract, was not entitled to the benefits of a disclaimer in the sales contract).

251. *See* Bowman v. Meadow Ridge, Inc., 615 A.2d 755, 757-58 (Pa. Super. Ct. 1992) (permitting defense based on integration clause even though the broker was not a party to the sales agreement); Fletcher v. Edwards, 26 S.W.3d 66, 76 (Tex. Ct. App. 2000) (holding that the agent of a party to "as is" agreement could assert the agreement as defense); *cf.* Aranki v. RKP Invs., Inc.,

Although the impact of the "as is" clause is limited and somewhat unpredictable, these clauses are relevant and determinative in many cases.[252] "As is" or other exculpatory clauses in many cases prevent reasonable reliance by the purchaser,[253] a necessary element of a misrepresentation claim and potentially relevant to causation in a negligence claim.[254] The "as is" clause may also defeat tort claims based on non-disclosure,[255] contract claims,[256] and negligence claims.[257] An express release may bar all claims.[258]

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979 P.2d 534, 538 (Ariz. Ct. App. 1999) (finding release provisions ineffective as non-negotiated terms and seeing "no reason why the nature of the exculpatory clauses should vary depending upon whether [defendants] are parties or third party beneficiaries"). Contracts may also attempt to make a broker a party to the real estate purchase contract. *See* THERON R. NELSON & THOMAS A. POTTER, REAL ESTATE LAW: CONCEPTS AND APPLICATIONS 337-38 (1994) (reproducing sample purchase contract with provision stating, "The broker(s) named herein, join(s) in this agreement and become(s) a party hereto . . . .").

252. *See, e.g.*, Conahan v. Fisher, 463 N.W.2d 118, 119 (Mich. Ct. App. 1990) ("Generally, the buyer bears the risk of loss under an 'as is' contract unless the seller fails to disclose concealed defects known to him.").

253. *See, e.g.*, Haygood v. Burl Pounders Realty, Inc., 571 So. 2d 1086, 1089 (Ala. 1990) (holding that it was not possible to rely on the representations made by the broker in view of "as is" statement and "no reliance" clause); Assilzadeh v. Cal. Fed. Bank, 98 Cal. Rptr. 2d 176, 187 (Cal. Ct. App. 2000) (holding that purchaser's knowledge, including understanding that unit was sold "as is," prevented reasonable reliance on broker's opinion); Ben Farmer Realty Co. v. Woodard, 441 S.E.2d 421, 424 (Ga. Ct. App. 1994) (holding the broker not liable for concealment where the purchaser knew she was buying the house in "as is" condition and knew of major defects; she failed to exercise due diligence); Bando v. Achenbaum, 651 N.Y.S.2d 74, 76 (N.Y. App. Div. 1996) (holding clause disclaiming reliance inconsistent with fraudulent misrepresentation claim); *Bowman*, 615 A.2d at 758 (holding integration and no reliance clause destroys allegations of reliance); Sundown, Inc. v. Pearson Real Estate Co., 8 P.3d 324, 332 (Wyo. 2000) (holding "nonreliance" clause defeated claim for negligent misrepresentation); Snyder v. Lovercheck, 992 P.2d 1079, 1089 (Wyo. 1999) (holding "nonreliance" clause defeated claim for negligent misrepresentation).

254. *See* Pennington v. Braxley, 480 S.E.2d 357, 360 (Ga. Ct. App. 1997) (holding reliance necessary to prove proximate cause in malpractice claim); Prudential Ins. Co. v. Jefferson Assocs., Ltd., 896 S.W.2d 156, 161 (Tex. 1995) (involving seller's liability, holding "as is" agreement negates the causation element essential to a negligence claim); *Fletcher*, 26 S.W.3d at 75 (holding "as is" agreement negates the causation element essential to a negligence claim).

255. *See* Choung v. Iemma, 708 N.E.2d 7, 15 (Ind. Ct. App. 1999) (holding that "as is" clause and waiver negated any duty to disclose the fact that the house was relocated to a new foundation); Grube v. Daun, 496 N.W.2d 106, 117 (Wis. Ct. App. 1992) (suggesting "as is" clause may protect agent from claims premised on nondisclosure).

256. *See* Crase v. Hahn, 754 So. 2d 471, 473-75 (Miss. Ct. App. 1999) (holding neither seller nor brokers liable for breach of contract, express warranty, or negligence where purchaser signed contract, disclosure statement, and inspection letter, each containing "as is" provision).

257. *See id.* at 475 (finding no liability under negligence claim).

258. *See* Brooks v. Holmes, 413 N.W.2d 688, 689 (Mich. Ct. App. 1987) (holding an express release barred fraud, misrepresentation, and negligence claims against real estate broker and agent).

Even courts which limit the effect of an "as is" or related clause generally hold that the clause is evidence of whether a purchaser in fact reasonably relied upon a broker misrepresentation or omission.[259] Thus, if purchasers sign a contract stating that they have not relied upon any representations of the broker, the clause, as a matter of law, may not bar a misrepresentation claim, but it is some evidence that in fact the purchasers did not rely.[260] At bottom, as a review of the published cases demonstrates, plaintiffs' victories against real estate brokers are relatively infrequent, and often exculpatory clauses play some part in the outcome.

C. *The Problem With "As Is" Provisions*

"As is" and similar provisions pose a problem for residential real estate purchasers. Purchasers do not insert "as is" or non-reliance provisions in the contract, brokers do. Purchasers often do not carefully review their real estate purchase agreements or do not possess the understanding necessary to ascertain the impact of such provisions. Consider the family who is relocating to a new city and makes a house hunting trip. The purchasers may have a few days to investigate the area, locate suitable houses, agree on a particular house, and settle on a price. With luck, by the fourth or fifth day of the trip, the purchasers find a suitable property and make a signed offer. The seller may immediately accept the offer or reject it. If the offer is rejected, there may follow a day or two of negotiation followed by an agreement.[261] The exhausted and exasperated purchasers who sign the agreement want nothing more than to get out of town, secure in the knowledge that they will not be living on the streets when they return with their household goods and family.

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259. *See* Cruse v. Coldwell Banker/Graben Real Estate, Inc., 667 So. 2d 714, 717 (Ala. 1995) (holding that "as is" agreement created a jury question as to whether purchasers reasonably relied upon misrepresentation); Sheehy v. Lipton Indus., Inc., 507 N.E.2d 781, 784 (Mass. Ct. App. 1987) (agreeing that exculpatory clauses may have evidential value on the questions of representations made and reliance); Gibb v. Citicorp Mortgages, Inc., 518 N.W.2d 910, 918 (Neb. 1994) (holding "as is" relevant in determining reliance, but not controlling); *Prudential Ins. Co.*, 896 S.W.2d at 166-67 (Cornyn, J., concurring) (arguing that "as is" clause is relevant to the issue of causation); Silva v. Stevens, 589 A.2d 852, 863 (Vt. 1991) (stating that "as is" clause is relevant to whether representations were made and if there was reasonable reliance); *Grube*, 496 N.W.2d at 117 (noting that "exculpatory clause still may have evidentiary value for the purpose of showing that no representations were relied upon").

260. *See, e.g.*, Limoge v. People's Trust Co., 719 A.2d 888, 891 (Vt. 1998) ("The weight to be given the clause in determining whether there was a misrepresentation and whether there was justifiable reliance is to be decided by the fact-finder.").

261. *See, e.g.*, Kezer v. Mark Stimson Assocs., 742 A.2d 898, 900 (Me. 1999) (noting that purchasers viewed property and paid deposit on March 16, between March 16 and March 18 exchanged offers and counteroffers, and signed agreement on March 18).

The purchasers often first see the house and review and sign the offer to purchase on the same day.[262] This timetable does not leave much time for careful review and consideration of what later becomes a contract upon acceptance by the seller. Often the purchasers do not read the contract word for word. A real estate agent may briefly explain some of the contract provisions to the purchasers, but after receiving assurances and compliments on finding such a great deal, the purchasers sign the contract. In some cases, the purchasers may even initial the "as is" provision.

Unfortunately, the purchasers may never read the "as is" clause or other disclaimer. By the time the purchasers get to the point of signing a contract, they feel like they have run a marathon, and they lack the energy or will to carefully scrutinize the purchase contract. Even if the purchasers do carefully review the contract, they may quickly become overwhelmed by the length and technicality of the contract language.[263]

Those conscientious purchasers who do carefully read the contract may not appreciate the legal implications of the "as is" clause and other disclaimers.[264] The drafters of these contracts recognize these problems

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262. *See, e.g.*, Loken v. Century 21-Award Properties, 42 Cal. Rptr. 2d 683, 685 (Cal. Ct. App. 1995) (noting purchaser viewed property and on same day made written offer to seller); Menzel v. Morse, 362 N.W.2d 465, 467 (Iowa 1985) (noting that after two fifteen minute visits on the same day, purchasers made an offer); Myers v. McHenry, 580 A.2d 860, 861-62 (Pa. Super. Ct. 1990) (noting that purchasers looked at the home, real estate agent drafted the contract, and seller accepted the offer on the same day); Fletcher v. Edwards, 26 S.W.3d 66, 71 (Tex. Ct. App. 2000) (noting that purchasers were shown the lot and signed the real estate contract on the same day); *Silva*, 589 A.2d at 855 (noting purchasers visited the property and immediately thereafter went to the broker's office and signed the sales agreement); *cf.* Richey v. Patrick, 904 P.2d 798, 799 (Wyo. 1995) (noting that purchasers visited the home and made an offer the next day).

263. For examples of real estate purchase contracts, see the form promulgated by the Texas Real Estate Commission, *available at* www.propertysites.com/resource/header.php3; the form approved by the Utah Real Estate Commission, *available at* www.commerce.utah.gov/dre/forms/.html and a New York form sales contract found at 14 POWELL, *supra* note 60, at App 81D-9.

264. Purchasers often do not understand the full import of "as is" or other exculpatory provisions. In *Haygood v. Burl Pounders Realty, Inc.*, 571 So. 2d 1086 (Ala. 1990), a purchaser explained how she understood an "as is" provision:

> I signed this statement when [the seller, who was also a realtor,] asked me to come over to her house prior to the closing. When she pointed it out to me I asked her what it meant. She said "This is just in case an appliance tears up so that y'all can't come back against us." Based upon that explanation from her I signed the statement.

Id. at 1088. In that case, plaintiffs purchased a used residence with a full basement after inquiring of the sellers, one of whom was a realtor, about whether the basement leaked. *Id.* at 1087-88. Sellers assured them that the basement was well constructed and did not leak. *Id.* at 1088. The plaintiffs purchased the house on March 31st and in July the basement of the house collapsed. *Id.* at 1087.

and the risk that technical or obscure provisions may be held unenforceable. They have responded by inserting into purchase contracts warnings that the purchaser should consult an attorney.[265] The problem with such warnings is that many people do not have a lawyer nor are they interested in adding another layer of expense to the real estate transaction.[266]

Hiring a lawyer to review the contract also involves delay. Purchasers may be told that the deal must be done "today" or the property will be sold to someone else, the price will increase, or favorable interest rates will be lost (or fill in some other sales pressure line). The sense of urgency and timing then discourage careful review of the provisions and any consultation with attorneys. Rightfully or wrongfully, many purchasers may simply rely upon the integrity of the broker providing the form and the fact that many forms are "approved" by respective real estate commissions or other groups.

Even in less rushed situations, residential home purchasers, who vary greatly in their education and experience, usually have not been involved in many real estate sales. The whole process may be new to them. Even those who have purchased homes before may not have done so recently or may be in a different area where practices differ from the purchaser's prior experience. The purchasers are vulnerable. Not unreasonably, they do rely upon sellers, who usually have thorough knowledge of the property, and real estate brokers, who by their profession hold themselves out as experts (notwithstanding later disclaimers of any expertise).

Of course, sellers and brokers have interests to be protected too. Freedom of contract,[267] certainty in enforcement of those contracts,[268] and

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In *Massey v. Weeks Realty Co.*, 511 So. 2d 171 (Ala. 1987), a case involving substantial termite damage, a purchaser understood the "as is" provision to mean "that if he 'found that the pipes were inefficient or the roof had a leak in it or such as this, that that was my obligation to replace those type things.'" *Id.* at 173.

In *Perrett v. Dollard*, 338 S.E.2d 56 (Ga. Ct. App. 1985), in the context of a partially finished house, a real estate broker stated that he understood the particular "as is" provision at issue "to apply only to that unfinished portion of the house, and not to the house as a whole." *Id.* at 57. The court held that the "as is" clause was not ambiguous on its face and was not so limited. *Id.*

265. *See* Texas One to Four Family Residential Contract (Resale), Promulgated by the Texas Real Estate Commission (10/29/2001), ¶ 24 (entitled "Consult Your Attorney"), *available at* http://www.trec.state.tx.usformsrulespubs/forms/forms-contracts.asp; Norman H. Wright, *Residential Real Estate*, 6 NEB. LEGAL FORMS 1, 12 (1994) (stating, in Nebraska Purchase Agreement, "[t]his is a legally binding contract. If not understood, seek legal advice.").

266. Of course, if a lawyer does review the purchase agreement, the probability of enforcing the disclaimers dramatically increases. In such cases a court, properly so, may believe that the purchaser was fully informed about the implication of the provisions and in fact agreed to accept the risk. *See* Hamtil v. J.C. Nichols Real Estate, 923 P.2d 513, 517 (Kan. Ct. App. 1996) (enforcing disclaimer where purchaser's attorney reviewed and revised contract).

267. *See* Grube v. Daun, 496 N.W.2d 106, 117 (Wis. Ct. App. 1992) (noting contract law

limitation of potential future liabilities are important considerations. No property is perfect, and neither the prior owner nor the real estate brokers should be an insurer of the condition of the property. The parties need to be able to confidently move forward with the assurance that the deal is done and settled. This peace of mind allows the parties to rely upon the completed transaction in making other decisions and entering new transactions. The "as is" clause and other related provisions address these needs by allocating risks. Clear, consistently enforced rules help to avoid the expense and delay of litigation.

D. *Courts Should Sharply Limit Enforceability of "As Is" Clauses*

Mandatory seller disclosures and real estate brokers' duty of candor, whether imposed by statute or common law, provide significant protection to purchasers of residential property. These advances should not be threatened by non-negotiated, contractual disclaimers, inserted not by the parties to the contract, but by real estate brokers. Judicial skepticism of these provisions is warranted.

1. Brokers Have a Duty to Disclose Known Defects

The law should and does begin with the premise that a real estate broker, as a licensed professional, has a duty of disclosure to potential purchasers, regardless of whom the broker represents.[269] This duty should be to disclose material property defects of which the broker is aware, or reasonably should have been aware, but should not require an independent inspection of the property by the broker.[270] Purchasers reasonably should expect brokers to be honest and forthright, but should not be permitted to shift to brokers the responsibilities that purchasers can most effectively do for themselves.[271] Requiring purchasers to arrange for their own

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interest of freedom of contract).

268. *See id.* (noting interest in protecting justifiable expectations and security of transactions).

269. *See supra* notes 127 & 167 and accompanying text.

270. *See supra* note 173 and accompanying text.

271. Courts require purchasers to protect themselves by inspecting the premises. *See, e.g., Hamtil*, 923 P.2d at 516 (enforcing "as is" clause where purchasers inspected property on multiple occasions, had own inspectors, and were represented by attorney); Conahan v. Fisher, 463 N.W.2d 118, 119 (Mich. Ct. App. 1990) (holding buyer with proper inspection could have discovered termite infestation); Bando v. Achenbaum, 651 N.Y.S.2d 74, 76 (N.Y. App. Div. 1996) (holding that purchaser could have discovered extent of termite damage through exercise of reasonable diligence); Dawson v. Tindell, 733 P.2d 407, 408-09 (Okla. 1987) (holding realtor not liable where purchaser should have known of defects from own inspection). Where the ability to inspect is impaired, courts often excuse the failure to inspect. *See, e.g.*, Draisner v. Scholsberg, 57 A.2d 202, 202-03 (D.C. 1948) (holding a purchaser entitled to rely upon an agent's misrepresentation of the number of rooms where the purchaser was unable to inspect a locked house); Glanski v. Ervine, 409

inspections minimizes any confusion over loyalty, communication of the results, or the scope of the particular inspection.

2. The "As Is" Clause Should Be Negotiated or Actually Agreed To

The existence of an "as is" or similar limiting clause should not limit brokers' duty of disclosure in residential real estate sales unless the broker can prove that the disclaimer was a negotiated term or actually agreed to by the purchasers.[272] This requirement ensures that the purchaser in fact did enter the contractual provision knowingly and voluntarily.[273] Courts should begin with a rebuttable presumption that such clauses were not actually understood or agreed to by the purchasers. This presumption comports more closely with the practical realities experienced by purchasers, who often give little attention to such provisions.

To determine whether the parties actually negotiated and agreed to the clause as part of the parties' bargain, a court should consider:

- who prepared or drafted the contract;[274]
- whether the clause was part of a printed form contract;[275]
- whether the parties actually communicated about or discussed the particular clause;[276]
- whether the purchaser specifically reviewed or understood the clause;[277]

A.2d 425, 429 n.4 (Pa. Super. Ct. 1979) (holding "as is" clause requires purchaser to make a reasonable investigation, but noting that debris in the cellar and poor lighting conditions prevented a reasonable inspection); Prudential Ins. Co. v. Jefferson Assocs., Ltd., 896 S.W.2d 156, 162 (Tex. 1995) (holding, in case against seller, the purchaser was not bound by "as is" agreement if the inspection was impaired or obstructed by seller).

272. *See, e.g., Hamtil*, 923 P.2d at 516 (stating provisions entered knowingly and voluntarily are enforceable); Olmsted v. Mulder, 863 P.2d 1355, 1359 (Wash. Ct. App. 1993) (holding "disclaimer must be explicitly negotiated or bargained for").

273. *See Hamtil*, 923 P.2d at 516.

274. *See* Parkhill v. Fuselier, 632 P.2d 1132, 1134-35 (Mont. 1981) (noting that contract was prepared by an attorney for the realtors).

275. *See* Aranki v. RKP Invs., Inc., 979 P.2d 534, 537-38 (Ariz. Ct. App. 1999) (noting that exculpatory clauses were on page six of a standard form contract); *Prudential Ins. Co.*, 896 S.W.2d at 162 (holding that an exculpatory clause may be enforceable where it is an important part of the basis of the bargain and not a "boiler-plate" provision).

276. *See Aranki*, 979 P.2d at 537-38 (holding exculpatory clauses did not immuhize purchaser's agent and broker because the clauses were not negotiated terms); *Hamtil*, 923 P.2d at 516 (enforcing disclaimer where purchaser's attorney wrote "any?" in lines provided for representations upon which purchaser relied); *Olmsted*, 863 P.2d at 1359 (holding "as is" clause bargained for where purchaser discussed provision with his agent).

277. *See* Assilzadeh v. Cal. Fed. Bank, 98 Cal. Rptr. 2d 176, 187 (Cal. Ct. App. 2000) (holding that purchaser understood that the unit was purchased in "as is" condition; therefore purchaser had a duty to investigate); Ben Farmer Realty Co. v. Woodard, 441 S.E.2d 421, 424 (Ga. Ct. App. 1994) (holding that the broker was not liable for passive concealment when the purchaser knew and

- whether the purchaser signed or initialed the clause;[278]
- whether the provision was conspicuous;[279]
- whether the provision appeared repeatedly in multiple documents;[280]
- whether the provision specifically sets forth the qualities being disclaimed;[281]
- whether the purchaser was represented by legal counsel who reviewed the provision;[282] and
- the purchaser's sophistication and bargaining power.[283]

It should not be enough that a broker reviewed the contract language with the purchasers and pointed out the provision. There should be some explanation of the provision and acknowledgment by the purchaser.

Courts should give careful consideration to the specificity of the clause[284] and be particularly scrutinizing of boiler-plate, one-size-fits-all

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understood she was purchasing the house in its "as is" condition with many major defects); Crase v. Hahn, 754 So. 2d 471, 475 (Miss. Ct. App. 1999) (noting that the purchaser's own agent read "as is" clause to the purchaser, and the purchaser acknowledged that she understood it); Omernik v. Bushman, 444 N.W.2d 409, 411 (Wis. Ct. App. 1989) (enforcing, in a seller liability case, an "as is" clause where purchasers read and understood the clause).

278. *See Aranki*, 979 P.2d at 538 (noting parties did not initial provision).

279. The sale of goods provides a useful analogy. The U.C.C. allows exclusion of warranties of fitness of goods by use of "expressions like 'as is', 'with all faults' or other language" which call the buyer's attention to the exclusion. *See* UCC § 2-316(3)(a) (2001). The "as is" or similar clause, must be conspicuous or presented in such a way that a reasonable person would have noticed the disclaimer. *See* 18 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 52:84, at 495-96 (4th ed. 2001) (discussing conspicuousness requirement for § 2-316(3)). Whether a clause is conspicuous may depend upon the size, color, or type of print, or location of the clause. *Id.* § 52:82, at 477-78 (discussing conspicuousness requirement).

280. *See* Larsen v. Carlene Langford & Assocs., Inc., 41 S.W.3d 245, 252 (Tex. Ct. App. 2001) (noting that "as is" clause was contained in two separate, signed documents).

281. *See Olmsted*, 863 P.2d at 1359 (holding "as is" clause not effective because "it fail[ed] to set forth with particularity the qualities and characteristics being disclaimed").

282. Parkhill v. Fuselier, 632 P.2d 1132, 1134-35 (Mont. 1981) (noting that purchasers were not represented by an attorney).

283. *See* Prudential Ins. Co. v. Jefferson Assocs., Ltd., 896 S.W.2d 156, 162 (Tex. 1995) (holding whether parties are in relatively equal bargaining positions is significant); *Larsen*, 41 S.W.3d at 252 (enforcing "as is" clause where purchaser was knowledgeable and sophisticated in real estate business); Fletcher v. Edwards, 26 S.W.3d 66, 77 (Tex. Ct. App. 2000) (holding no judgment as a matter of law because plaintiffs were not represented by counsel and not sophisticated business players).

284. *See* Rice v. Patterson Realtors, 857 P.2d 71, 74 (Okla. 1993) (enforcing "explicit waiver relating to the flood history"); *Olmsted*, 863 P.2d at 1359 (holding "as is" clause not effective because "it fail[ed] to set forth with particularity the qualities and characteristics being disclaimed"); Grube v. Daun, 496 N.W.2d 106, 117 (Wis. Ct. App. 1992) (recognizing that tort disclaimers not honored "unless the disclaimer is specific as to the tort it wishes to disclaim[,]" and refusing to enforce "as is" clause against negligence and misrepresentation claims); *cf.* Glanski v. Ervine, 409 A.2d 425, 429, 430 n.4 (Pa. Super. Ct. 1979) (noting that "as is" clause did not

provisions stating that the purchaser buys the property "as is" or that the purchaser has not relied upon any representations made by seller's agents. Although the generality of a provision need not be fatal to enforcement of a provision, a provision that is specific to the particular facts of a sale is more likely to be the product of deliberation or consideration than the standard, one-size-fits-all provision, included routinely in contracts. Not only are general provisions more likely to be unnoticed and non-negotiated, but equally problematic, they may be misunderstood. An example of a specific provision that is likely to be understood is: "If Buyer fails to: (i) investigate the flood and water history and water risk to the Property, (ii) have the engineering inspection made, or (iii) deliver such notice in the manner specified, Buyer accepts the flood and water history and water risk attendant to the Property . . . ."[285] This provision points specifically to the type of risks disclaimed.

A more general "as is" provision should be enforced if the provision identifies specific circumstances necessitating the "as is" provision. For example, language disclosing that the dwelling has been unoccupied for several years and suffers from numerous defects should support an "as is" clause even though the clause is not specific about the defects disclaimed. In this or similar circumstances, the purchaser knows that defects do exist, many of which may be unknown to the seller and broker. If the provision was negotiated and agreed to, the specificity adequately puts purchasers on notice that they need to do their own investigation or they bear the risk. In the face of this type of specific information, reliance generally would not be reasonable. Also, there may be so many defects that to catalogue all the defects would be burdensome and could risk obscuring more material defects. A rule of non-liability in these cases would avoid unnecessary litigation.

If the provision is found to be negotiated and actually agreed to, it should bar all claims against the listing broker, or other seller's broker, within the scope of the provision,[286] except intentional misrepresentation claims. Where a party, by intentional fraud, induces another to make an

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specifically address termite damage).

285. Rice v. Patterson Realtors, 857 P.2d 71, 72 n.1 (Okla. 1993). Another example of a specific clause is: "[P]urchaser acknowledges that [she] has not relied upon the advice or representations, if any, by Broker (or agents of Broker) relating to . . . the structural condition of the property . . . ." Ben Farmer Realty Co. v. Woodard, 441 S.E.2d 421, 424 (Ga. Ct. App. 1994) (alterations in original). What qualifies as a "structural condition," however, might itself be ambiguous and would be strictly construed.

286. A provision by its terms may disclaim only specific risks or types of claims. *See, e.g.*, Limoge v. People's Trust Co., 719 A.2d 888, 889 (Vt. 1998) (noting that the disclaimer applied only to structures, heating and cooling, water supply, sewage disposal systems, and appliances, not to boundaries or lot size).

agreement, the agreement is voidable.[287] Intentional fraud should continue to be a basis for rescinding the agreement or avoiding the provision.

3. Claims Against Purchaser's Agents Should Be Unaffected by the "As Is" Clause

Claims against a purchaser's own agent should be unaffected by these provisions in sales contracts or related documents. The agent owes fiduciary duties to the purchaser.[288] Any contractual limitations on the liability of a purchaser's agent's should be explicitly identified in an agreement specifically between the agent and the purchaser and not slipped into the sales agreement between the seller and purchaser. The purchaser's agent, who often provides or drafts the sales contract, is not a party to the sales contract and should not be a third-party beneficiary of such a contract. The purchaser and purchaser's agent did not negotiate between themselves the term located in the sale agreement, nor is there any consideration between them to support such a provision. A purchaser would not expect to find a term limiting the purchaser's own agent's liability in a contract between the seller and purchaser. Nor has the seller insisted upon inclusion of a term intended to benefit the purchaser's agent.

Aranki v. RKP Investments, Inc.,[289] illustrates the problem. In *Aranki,* purchasers of a single family residence brought a negligent misrepresentation claim against their own broker for failure to discover and disclose the defective condition of the house, permitting plaintiffs to waive warranties and to purchase the property "as is," and for advice regarding extent of the defects.[290] The broker and agent argued that the purchasers had waived their tort claims under the exculpatory clauses in the purchase contract, and the trial court agreed.[291] The exculpatory clauses "released 'all brokers . . . from any and all liability and responsibility regarding the condition' of the property" and included an independent investigations provision.[292] The Arizona Court of Appeals reversed the trial court noting that the provisions were included on page six of a seven page standard form purchase contract drafted by the Arizona Association of Realtors (of which the defendants were members) and was provided and filled out by the defendants.[293] The court held that the release provisions

287. RESTATEMENT (SECOND) OF CONTRACTS § 164(1) (1981) (noting that a contract induced by fraud is voidable).

288. *See* BURKE, *supra* note 2, §§ 7.2-.5 (discussing fiduciary duties of real estate agents).

289. 979 P.2d 534 (Ariz. Ct. App. 1999).

290. *Id.* at 535-36.

291. *Id.* at 536.

292. *Id.* at 537.

293. *Id.* at 537-38.

did not appear to be negotiated terms and therefore were not enforceable.[294]

4. Proving the Merits of Plaintiff's Claims

If a court determines that an "as is" or other disclaimer was not negotiated or actually agreed to or was not readily comprehensible, the provision should not bar any claim against a real estate broker. The claim, however, must still be established on its merits. The presence of such clauses may continue to be relevant evidence on the issues of reasonable reliance or the fact of misrepresentation, but they would not shield the defendants as a matter of law. The same factors explored in determining whether the provision was actually agreed to, noted above, may continue to be relevant evidence. This approach is consistent with much of the current case law.

Although declining to enforce "as is" clauses could result in purchasers taking less care in their purchases, diminished enforcement of disclaimers would not affect other incentives that encourage purchasers to exercise care. Any claims against real estate brokers must still be proved, point by point, on the merits. Issues regarding scienter,[295] what representations were made,[296] materiality, and reasonable reliance[297] all continue to protect real estate brokers. Most purchasers do not intend to bring lawsuits with attendant delays, risks, and uncertainties. Most purchasers are not happy to discover unexpected problems after a sale that require often disruptive remediation, even if those remediations are paid for by others.

V. CONCLUSION

The law as it concerns real estate broker liability to real estate purchasers has matured from almost blanket immunity under the common law principle of caveat emptor to liability under various theories rooted in duties of open and honest disclosure. Courts have found liability based on intentional misrepresentation, negligent misrepresentation, innocent misrepresentation, malpractice, breach of fiduciary duties, and violation of specific statutory requirements. Perhaps most alarming to real estate

294. *Id.* at 538.

295. *See, e.g.*, Bortz v. Noon, 729 A.2d 555, 563 (Pa. 1999) (holding broker not liable because, although representations were wrong, agent lacked intent and was not negligent).

296. *See, e.g.*, Black v. Cosentino, 689 N.E.2d 1001, 1004 (Ohio Ct. App. 1996) (finding no claim where realtor did not make any representations concerning condition of the property).

297. *See, e.g.*, Alfa Realty, Inc. v. Ball, 733 So. 2d 423, 425 (Ala. Civ. App. 1998) (reversing jury verdict and holding no reliance on broker's representations about the roof where plaintiff hired engineer to inspect roof); Atkins v. Kirkpatrick, 823 S.W.2d 547, 552 (Tenn. Ct. App. 1991) (finding no proof of plaintiffs' reliance and noting that plaintiffs conducted their own investigation).

brokers, some courts have imposed a duty to inspect and liability for even non-negligent misrepresentations. State legislatures have responded to concerns of consumers and real estate brokers in the form of disclosure acts and legislation defining real estate brokers' duties.

Use of the "as is" and similar exculpatory clauses in real estate sales contracts in an effort to stave off real estate broker liability has met with limited success. Most courts are skeptical of such provisions and limit their application. Nonetheless, in many cases these provisions have been held relevant if not controlling. The problem with these provisions is that they are usually not negotiated terms but instead are unilaterally included by sellers or real estate brokers, and purchasers often have only limited understanding or awareness of the provisions. Courts should presume that such provisions are not part of the parties' agreement unless the real estate broker can establish that in fact the provisions were negotiated or actually agreed to and that the provisions are adequately clear regarding the qualities being disclaimed. These safeguards help to ensure that the provisions were in fact part of the purchaser's understanding and agreement.