FOR SALE: TWO-BEDROOM HOME WITH SPACIOUS KITCHEN, WALK-IN CLOSET, AND PERVERT NEXT DOOR

In just the past three years, New Jersey experienced two significant developments in its statutory and common law. The first was the October 1994 passage by the Legislature of a set of statutes,[1] popularly known as "Megan's Law,"[2] requiring sex offenders released into the community to register their presence in that community with local police departments.[3] For the most dangerous of these sex offenders, information about their presence will also be released to the community at large.[4] The second such development was an April 1995 decision of the New Jersey Supreme Court requiring certain home sellers to disclose conditions near the home, but off the property itself, which materially affect a home's value.[5]

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[1] *See* N.J. STAT. ANN. §§ 2C:7-1 to -11 (West 1995 & Supp. 1996).

[2] The law's popular name comes from Megan Kanka, a New Jersey girl who was allegedly killed by a paroled sex offender living in her neighborhood. *See* Sheila A. Campbell, Note, *Battling Sex Offenders: Is Megan's Law an Effective Means of Achieving Public Safety?*, 19 SETON HALL LEG. J. 519, 519 n.3 (1995). After this tragic murder, Megan's mother, Maureen Kanka, began a successful nationwide campaign for laws that would require released sex offenders to register with the local police and/or disclose the fact that they were living in a particular community. *See* Robert Schwaneberg, *Megan's Law May Force Home Sellers to Notify Buyers About Sex Offenders*, STAR-LEDGER, July 22, 1996, at 1. In addition to the New Jersey provisions, a key amendment to the federal sex-offender disclosure laws is also known as "Megan's Law." *See* Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345 (codified at 42 U.S.C.A. § 14071(d) (West Supp. 1997)).

[3] *See* §§ 2C:7-1 to -11. There is considerable conflict among courts about the validity of these laws, but treatment of that issue is not within the scope of this Comment. *Compare* Doe v. Poritz, 142 N.J. 1, 111, 662 A.2d 367, 423 (1995) (upholding the constitutionality of the registration and disclosure provisions of the sex-offender statutes) *with* Artway v. Attorney Gen., 876 F. Supp. 666, 692 (D.N.J. 1995) (holding the notification and disclosure provisions unconstitutional), *aff'd in part, vacated in part*, 81 F.3d 1235 (3d Cir. 1996). For additional discussion of the terms and policy considerations of Megan's Law, see generally Campbell, *supra* note 2, at 527-58.

[4] *See Doe*, 142 N.J. at 22, 662 A.2d at 378 (citing N.J. STAT. ANN. § 2C:7-8(c) (West 1995)).

[5] *See* Strawn v. Canuso, 140 N.J. 43, 60, 657 A.2d 420, 428 (1995). This decision, however, was largely abrogated by subsequent legislation. *See* N.J. STAT. ANN. §§ 46:3C-1 to -12 (West Supp. 1996). Still, it is a notable decision because it explicitly recognized a duty of some home sellers to disclose *off-site*, as opposed to on-site, conditions affecting a property's value. *See Strawn*, 140 N.J. at 60, 657 A.2d at 428; *see infra* notes 89-131 & 161-80 and accompanying text (discussing in detail the case and legisla-

At first blush, these two developments may seem unrelated. Upon further analysis, however, they create an interesting and novel legal issue: whether a home seller, who is notified of the presence of a sex offender near the home, will be required to notify buyers of this fact. This issue has recently become the subject of considerable discussion in the real estate community.[6] It will probably continue to be studied because all fifty states and the federal government have enacted sex-offender registration laws,[7] and many contain provisions for notifying the community of the presence of a sex offender.[8] Moreover, courts and legislatures nationwide are expanding a home seller's disclosure duties to include material off-site conditions.[9] The interaction of these legal developments is the subject of this Comment.

Whether or not statutes like Megan's Law are thought to be wise, it is important to consider the very real costs of such a law in the real estate context. Accordingly, this Comment considers the effect of sex-offender laws that require community notification[10] on the legal responsibilities of

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tive revisions).

[6] *See, e.g.*, Schwaneberg, *supra* note 2, at 1 (providing an overview of the effects of expanding disclosure duties); Dana Coleman, *Realtors Solicit Sex Offender Reports from Sellers*, N.J. LAW., Aug. 12, 1996, at 5 (explaining steps that brokerage agencies have taken in response to Megan's Law and the expansive duties to disclose); Michael Booth, *Megan's Law Disclosures Proposed*, N.J. L.J., Feb. 24, 1997, at 1 (explaining a proposed regulation for disclosure of sex-offender information by New Jersey brokers); Jay Romano, *Warning to Sellers: Let the Buyer Be Aware*, N.Y. TIMES, Sept. 1, 1996, § 9, at 1 (explaining steps that brokerage agencies have taken in response to Megan's Law and the expansive duties to disclose); Li Wang & David Newhouse, *Megan's Law Fails to Protect N.J. Home Buyers*, TIMES (Trenton, N.J.), Mar. 9, 1997, at 1 (explaining that prospective home buyers in New Jersey cannot get neighborhood sex-offender information until after they move in).

[7] *See* 42 U.S.C.A. § 14071 (West 1995 & Supp. 1997); People v. Ross, 646 N.Y.S.2d 249, 250 n.1 (Sup. Ct. 1996) (compiling the laws of all 50 states on sex-offender registration and disclosure).

[8] *See* Joel B. Rudin, *Megan's Law—Can It Stop Sexual Predators—And at What Cost to Constitutional Rights?*, CRIM. JUST., at 3, 4 (Fall 1996). At present, not all of the states' laws contain provisions requiring disclosure, as distinct from notification. *See id.* at 4. This state of affairs is likely to change soon because the federal government requires states to release information about sex offenders if that information is "relevant . . . [and] necessary to protect the public concerning a specific person required to register under" the federal statute. 42 U.S.C.A. § 14071(d)(3) (West 1995); *see also* Rudin, *supra*, at 4 ("Given the incentive provided by Congress [the states without a public notification provision] can be expected to enact such a law during the next two years."). States failing to do so may lose certain federal law enforcement grants. *See* 42 U.S.C.A. § 14071(f)(2)(A).

[9] *See, e.g.*, CAL. CIV. CODE § 1102.6 (West Supp. 1996) (requiring disclosure of neighborhood noise problems and other nuisances).

[10] Only those states whose laws require community notification will be affected by this duty to disclose because it will only be in those states where home sellers will generally *know* of the presence of an offender. This is because a duty to disclose in the case of home sellers typically arises only when the seller fails to disclose a material fact that is

home sellers in that community. To accomplish this, Part I of this Comment gives some general history about the rise and fall of the doctrine of caveat emptor in the United States, and how this principle was first applied and then discarded in the area of real estate transactions. More specifically, it will explain how the law imposed an implied warranty of fitness on home sellers, as well as a duty on home sellers to disclose material conditions on the site of the property itself. Part II then explains how the law evolved to require the disclosure not only of on-site material defects, but off-site ones as well. Part III studies statutory modifications and codifications of the seller's duty to disclose. Finally, Part IV suggests a legal framework for deciding the issue of whether a home seller must disclose the presence of a sex offender to a buyer. Moreover, it demonstrates how the purposes of sex-offender disclosure statutes like Megan's Law mirror the purposes of real estate disclosure laws and why there is good reason to require home sellers to disclose the presence of sex offenders in the neighborhood of the home.

I. THE RISE AND FALL OF CAVEAT EMPTOR

A. Historical Overview

Until the turn of the century, the doctrine of caveat emptor[11] was pervasive in many areas of the law. The doctrine began as a legal principle in sixteenth century England.[12] Although initially covering only personal property, the caveat emptor rule was eventually extended to include transactions in real property.[13] From the beginning, American law accepted this rule,[14] which imposed all risk of loss in a transaction on

known, as the court specifically held in *Lingsch v. Savage*. *See* 29 Cal. Rptr. 201, 204 (Dist. Ct. App. 1963). If a home seller is unaware of the presence of a sex offender, a duty to disclose generally cannot be imposed on such a seller.

[11] *See* BLACK'S LAW DICTIONARY 222 (6th ed. 1990) (defining caveat emptor as "[l]et the buyer beware"). The full expression is "[c]aveat *emptor, qui ignorare non debuit quod jus alienum emit*," meaning "[l]et a purchaser, who ought not be ignorant of the amount and nature of the interest which he is about to buy, exercise proper caution." Alan M. Weinberger, *Let the Buyer Be Well Informed?—Doubting the Demise of Caveat Emptor*, 55 MD. L. REV. 387, 388 n.5 (1996).

[12] *See* Nicola W. Palmieri, *Good Faith Disclosures Required During Precontractual Negotiations*, 24 SETON HALL L. REV. 70, 110 & n.134 (1993). Caveat emptor is sometimes presumed to be an ancient doctrine because it is a Latin term. *See id.* at 110. Nevertheless, in Roman times, and even continuing through to the Middle Ages, concepts of good faith and fair dealing and deference to customers' wishes were the norm in commercial dealings. *See id.* at 80-83, 110-11. Christian religious doctrine of the Middle Ages also rejected caveat emptor as a principle of commercial dealing and encouraged truth and honesty in business dealings. *See id.* at 110.

[13] *See id.* at 114-15.

[14] *See* Laidlaw v. Organ, 15 U.S. (2 Wheat.) 178 (1817). Caveat emptor was first

buyers of both goods and real property; it was quickly adopted in almost all the states.[15] Caveat emptor was a default rule, but buyers nevertheless retained an opportunity to try to bargain for further protections such as an express warranty.[16] Indeed, sellers would not get the protections of caveat emptor where they had furnished an express warranty.[17] Nor were these legal protections extended where the seller was guilty of fraud through affirmative misrepresentations.[18]

Eventually, the "laissez-faire polic[y]" embodied in caveat emptor ceded to both common-law and statutory policies that created greater protections for buyers.[19] Courts began to abrogate caveat emptor principles in the sale of personal property and chattels, and eventually, in real property sales as well.[20] The abrogation of caveat emptor, therefore, meant that real property sellers were under a duty to deliver satisfactory goods to the buyer or, at least, reveal any shortcomings in the property. Thus, the erosion of this doctrine has meant ever-increasing protections for buyers of real property, and ever-increasing liabilities for sellers.[21]

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acknowledged by the Supreme Court in *Laidlaw*. *See id.* American norms of individualism and the concept of 'Manifest Destiny' have been posited as explanations for adopting caveat emptor into American law. *See* Palmieri, *supra* note 12, at 111, 112. As one author explained the ethic, "[h]ow could a man [fend] for himself on the frontier unless he could survive in the marts of commerce?" Charles T. LeViness, *Caveat Emptor Versus Caveat Venditor*, 7 MD. L. REV. 177, 184 (1943).

[15] *See* Barnard v. Kellogg, 77 U.S. (10 Wall.) 383, 388-89 (1870) ("Of 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.").

[16] *See* Robert M. Washburn, *Residential Real Estate Condition Disclosure Legislation*, 44 DEPAUL L. REV. 381, 385 (1995) (citing *Barnard*, 77 U.S. (10 Wall.) at 388).

[17] *See id.*

[18] *See id.* Thus, this Comment will not address situations in which there is an affirmative misrepresentation by the seller of real property, but instead, will focus on situations where there is a failure to disclose. Affirmative misrepresentation in any transaction, including those involving real estate, may be actionable under the tort of deceit or fraudulent misrepresentation. *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 105, at 728 (5th ed. 1984). The tort requires proof that (1) the defendant made a false representation of fact; (2) the defendant had knowledge that the statement was false; (3) the defendant intended to induce another to act on the statement; (4) the other party justifiably relied on the statement; and (5) damage to the other party resulted. *See id.*

[19] Palmieri, *supra* note 12, at 112 & n.146.

[20] *See infra* notes 28-43 and accompanying text. Ironically, it took longer for the law to extend protections to buyers of real estate as opposed to personal property: the "law offer[ed] greater protection to the purchaser of a seventy-nine cent dog leash than it d[id] to the purchaser of a 40,000-dollar house." Paul G. Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633, 633 (1965).

[21] *See* 12 THOMPSON ON REAL PROPERTY, THOMAS EDITION § 99.06(a)(3), at 49 & n.76.2 (David A. Thomas ed., Supp. 1995). This decline in caveat emptor principles may be attributed to greater home ownership and mobility among middle-class Americans. *See id.* Greater sales of used homes eliminated the traditional equality in bargain-

Therefore, today, the law prohibits more than affirmative fraud; instead, "the withholding of information may be equated with, and given the same legal effect as, fraudulent misrepresentation."[22]

B. *The Abolition of Caveat Emptor in Real Estate Transactions*

For the real estate buyer, the modern law has moved far beyond the meager protections available in earlier times.[23] By refining and adopting the common law, courts were the initial impetus for recognizing greater protections for buyers and lessors of real property.[24] More recently, legislative bodies have also participated in this process by either codifying or abrogating the common-law decisions of courts or by creating new causes of action.[25] This Part focuses on the purposes and reasoning that motivated the creation of the implied warranty of quality and habitability and the creation of the duty to disclose defects in the property itself.

1. The implied warranty of quality and habitability

Using doctrines of property and contract law, courts began to extend implied warranties of quality and habitability to sellers of new, as opposed to used, homes.[26] Generally, this common-law principle provides that a new home must be built in a workmanlike manner and be reasonably fit for its intended use.[27] New Jersey adopted this principle in

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ing power between home buyers and sellers, which was one of the "pillars" of the caveat emptor doctrine. *See id.* Additionally, the elimination of caveat emptor in commercial transactions and its replacement with the good faith requirements of the Uniform Commercial Code (UCC) also influenced real property transactions. *See id.*

[22] Weinberger, *supra* note 11, at 400 (footnote omitted).

[23] *Cf.* Robert M. Morgan, *The Expansion of the Common Law Duty of Disclosure in Real Estate Transactions: It's Not Just for Sellers Anymore*, 68 FLA. B.J. 28, 28 (Feb. 1994); John H. Scheid, Jr., Note, *Mandatory Disclosure Law: A Statute for Illinois*, 27 J. MARSHALL L. REV. 155, 159-63 (1993).

[24] *See, e.g.*, Michaels v. Brookchester, Inc., 26 N.J. 379, 382, 140 A.2d 199, 201 (1958) (explaining the abolition of caveat emptor principles in cases involving the lease of real property).

[25] *See infra* notes 132-80 (explaining the codification of common-law disclosure duties).

[26] *See* Cato v. Lowder Realty Co., 630 So. 2d 378, 382 (Ala. 1993).

[27] *See* 12 THOMPSON ON REAL PROPERTY, *supra* note 21, § 99.06(a)(2)(A), at 244 (1994). Most states recognize this doctrine, calling it a warranty of either quality, habitability, workmanship, or fitness. *See id.* at 244-46. The rule imposes liability on the builder of a home, and sometimes the vendor as well for new homes, if the home is built in an unworkmanlike manner or is unsuitable for habitation. *See id.* at 245. The doctrine has been adopted in many states. *See* Sims v. Lewis, 374 So. 2d 298, 303 (Ala. 1979); Richards v. Powercraft Homes, Inc., 678 P.2d 427, 429 (Ariz. 1984); Wawak v. Stewart, 449 S.W.2d 922, 923 (Ark. 1970); Pollard v. Saxe & Yolles Dev. Co., 525 P.2d 88, 91 (Cal. 1974); Carpenter v. Donohoe, 388 P.2d 399, 402 (Colo. 1964); Vernali v. Centrella, 266 A.2d 200, 201 (Conn. Super. Ct. 1970); Berman v. Watergate W., Inc., 391 A.2d 1351, 1359 (D.C. 1978); Hesson v. Walmsley Constr. Co., 422 So. 2d 943, 944-45

McDonald v. Mianecki, with the New Jersey Supreme Court recognizing that an implied warranty of workmanship and habitability attaches whenever a builder constructs and sells a new house.[28] The rule applies not just to large developers, but to smaller businesses that build houses commercially.[29]

In reaching this decision, the *McDonald* court first reviewed some of the history of caveat emptor, explaining that purchasing land could be seen as a "game of chance" in the nineteenth century.[30] At that time, the court continued, home buyers were not entirely without legal protections because homes were individually constructed, and therefore, a cause of action would lie against an architect or a builder for defective construction.[31] The court explained that, during the housing boom occasioned by the end of World War II, home buyers lacked the remedies available to earlier buyers, because the individual artisans who had designed and built homes in the past were replaced by larger home-development companies.[32] In that era, the court explained that the law considered the builders of homes to be manufacturers, and hence, the rule of caveat emptor still applied to such sales.[33]

Rejecting this view, however, the justices held that it was unsound policy to continue the application of caveat emptor in such circum-

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(Fla. Dist. Ct. App. 1982); Bethlahmy v. Bechtel, 415 P.2d 698, 710-11 (Idaho 1966); Conyers v. Molloy, 364 N.E.2d 986, 988 (Ill. App. Ct. 1977); Theis v. Heuer, 280 N.E.2d 300, 303 (Ind. 1972); Kirk v. Ridgway, 373 N.W.2d 491, 493-96 (Iowa 1985); McFeeters v. Renollet, 500 P.2d 47, 51 (Kan. 1972); Borden v. Litchford, 619 S.W.2d 715, 717 (Ky. Ct. App. 1981); Banville v. Huckins, 407 A.2d 294, 297 (Me. 1979); Weeks v. Slavick Builders, Inc., 180 N.W.2d 503, 506 (Mich. Ct. App.), *aff'd sub nom.* Weeks v. Slavik Builders, Inc., 181 N.W.2d 271 (Mich. 1970); Smith v. Old Warson Dev. Co., 479 S.W.2d 795, 796 (Mo. 1972); Ruane v. Cardinal Realty, Inc., 358 A.2d 412, 413 (N.H. 1976); De Roche v. Dame, 430 N.Y.S.2d 390, 392 (App. Div. 1980); Hartley v. Ballou, 209 S.E.2d 776, 783 (N.C. 1974); Tibbs v. National Homes Constr. Corp., 369 N.E.2d 1218, 1226 (Ohio Ct. App. 1977); Jeanguneat v. Jackie Hames Constr. Co., 576 P.2d 761, 764 (Okla. 1978); Forbes v. Mercado, 583 P.2d 552, 553 (Or. 1978); Elderkin v. Gaster, 288 A.2d 771, 777 (Pa. 1972); Terlinde v. Neely, 271 S.E.2d 768, 769 (S.C. 1980); Waggoner v. Midwestern Dev., Inc., 154 N.W.2d 803, 809 (S.D. 1967); Humber v. Morton, 426 S.W.2d 554, 555 (Tex. 1968); Rothberg v. Olenik, 262 A.2d 461, 467 (Vt. 1970); House v. Thornton, 457 P.2d 199, 204 (Wash. 1969). *See generally* Timothy Davis, *The Illusive Warranty of Workmanlike Performance: Constructing a Conceptual Framework*, 72 NEB. L. REV. 981 (1993) (explaining the current law of implied warranties for home construction and suggesting alternatives).

[28] *See* McDonald v. Mianecki, 79 N.J. 275, 293, 398 A.2d 1283, 1292 (1979). The court left open the question of whether, under New Jersey law, such a warranty would apply to the sale of used homes. *See id.* at 295 n.5, 398 A.2d at 1293 n.5.

[29] *See id.* at 293-94, 398 A.2d at 1292.

[30] *See id.* at 283, 398 A.2d at 1287.

[31] *See id.* at 284, 398 A.2d at 1287.

[32] *See id.*

[33] *See McDonald*, 79 N.J. at 293, 398 A.2d at 1287.

stances.[34] The court explained that the adoption of the Uniform Commercial Code abolished caveat emptor with respect to most purchases of goods.[35] Moreover, as support for its decision, the court looked to the abolition of caveat emptor in other states, as well as the then-recent adoption of the statutory protections for new home buyers in New Jersey.[36] The court held that in light of all these factors, continued application of caveat emptor principles would be an anachronism.[37] Finally, the *McDonald* court clearly held that the first owner of the home had these enforceable warranty rights against the builder, but did not explain whether subsequent buyers of that property would have such rights.[38]

McDonald was a decision under the common law of New Jersey, yet the court took note that the Legislature had adopted statutory protections akin to the warranty of quality and habitability two years before the decision.[39] Besides this New Jersey law, the *McDonald* court also mentioned the 1975 adoption of section 2-309 of the Uniform Land Transactions Act by the National Conference of Commissioners on Uniform State Laws.[40] This model rule codified the implied warranties that many states

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[34] *See id.* at 287-88, 398 A.2d at 1289.

[35] *See id.* at 284, 398 A.2d at 1288; *see also* U.C.C. §§ 2-314, 2-315, 1A U.L.A. 212, 380 (1989).

[36] *See McDonald*, 79 N.J. at 285-87, 398 A.2d at 1288-89. In reaching this decision, the court found that there was great inequality between the bargaining positions of a typical family home purchaser and a typical seller of homes. *See id.* at 289, 398 A.2d at 1290.

[37] *See id.* at 290, 398 A.2d at 1290.

[38] *See id.* at 295 n.5, 398 A.2d at 1293 n.5. The law division extended these rights to subsequent buyers in *Hermes v. Staiano*. *See* 181 N.J. Super. 424, 432, 437 A.2d 925, 929 (Law Div. 1981).

[39] *See McDonald*, 79 N.J. at 287, 398 A.2d at 1289; *see also* N.J. STAT. ANN. §§ 46:3B-1 to -20 (West 1989 & Supp. 1996). Because the events giving rise to the *McDonald* case arose before the adoption of the statutory protections in 1977, the court apparently could not rely on the statute to give the home purchasers the remedy they sought. *See id.*

In 1977, New Jersey adopted the New Home Warranty and Builders' Registration Act to provide statutory protections to home buyers. *See* ch. 453, 1977 N.J. Laws 1620. The act requires any "individual corporation, or partnership or other business organization[ ]" engaged in the construction of new homes to give warranties to initial owners of new homes and their successors in title. N.J. STAT. ANN. § 46:3B-2(f) (West Supp. 1996). It mandates a one-year warranty for certain workmanship and material defects, a one-year warranty for installation of plumbing, electrical, heating, and cooling systems, and a 10-year warranty for "major construction defects." *See id.* § 46:3B-3(b) (West 1989). The act also provides for registration of builders of new homes and for the creation of a fund to provide for home buyers' claims against insolvent builders. *See id.* §§ 46:3B-5, -7. Finally, the act maintains any common-law remedies that a buyer may have against a seller, but requires the buyer to elect a remedy either under the common law or the act. *See id.* § 46:3B-9.

[40] *See McDonald*, 79 N.J. at 286, 398 A.2d at 1288-89; *see also* UNIFORM LAND

had already adopted, stating that a seller "in the business of selling real estate impliedly warrants that the real estate is suitable for the ordinary uses of real estate of its type."[41] Although no state has accepted the Uniform Land Transactions Act in its entirety,[42] legislation akin to section 2-309, which codifies the warranty of habitability, has been passed by some states.[43] Thus, *McDonald* is but one illustration of how the common law and statutory law developed under each other's influence, and therefore, how a home buyer's implied warranty of quality protections flow from both common-law and statutory sources. This theme of dual protection from common-law and statutory sources will be seen again in the next Section—the duty to disclose on-site defects in the property.

2. Duty to disclose on-site defects

Unlike the cases involving the implied warranty of quality, the cases developing the duty to disclose on-site defects did not deal exclusively with defects in construction, but rather with latent conditions of the property that either developed after construction or were unrelated to construction.[44] In addition, the implied-warranty cases impose strict liability on the seller or builder of a home for defects in construction, while the duty-to-disclose cases impose liability for failing to disclose defects that were known or should have been known by prior owners.[45] In a sense,

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TRANSACTIONS ACT § 2-309, 13 U.L.A. 533-35 (1986).

[41] UNIFORM LAND TRANSACTIONS ACT § 2-309(b), 13 U.L.A. 533. Additionally, for improvements on the real estate that occurred two years or less before sale, which would encompass most new home construction, the implied warranty also requires that the improvement be free of defective materials, comply with applicable law, be engineered in a sound manner, and be constructed in a workmanlike manner. *See id.* Finally, a seller is required to warrant that the existing use of the property does not violate applicable law at the time of the sale. *See id.* § 2-309(c), 13 U.L.A. 533-34.

Section 2-309 is a relatively broad provision because the liability it imposes attaches to both residential and commercial property, and includes both new real estate as well as old real estate. *See id.* cmt. 1, 13 U.L.A. 534. Nevertheless, it excludes both real estate brokers and individual homeowner-sellers who are not "in the business" of selling real estate from liability. *See id.*

[42] *See* UNIFORM LAND TRANSACTIONS ACT, 13 U.L.A. 469-624 (1986 & Supp. 1996).

[43] In addition to the New Jersey home warranty statute, N.J. STAT. ANN. §§ 46:3B-1 to -20 (West 1989 & Supp. 1996), similar legislation has been passed in Connecticut and Maryland. *See* CONN. GEN. STAT. ANN. §§ 47-116 to -121 (West 1995); MD. CODE ANN., REAL PROP. §§ 10-201 to -205 (1996).

[44] *See, e.g.*, Schnell v. Gustafson, 638 P.2d 850, 851 (Colo. Ct. App. 1981) (radon in soil); Johnson v. Davis, 480 So. 2d 625, 626 (Fla. 1985) (leaky roof); Thacker v. Tyree, 297 S.E.2d 885, 886 (W. Va. 1982) (cracked foundation); *see also* Washburn, *supra* note 16, at 389-90 & nn.57-80 (collecting cases involving on-site defects). In *Lingsch v. Savage*, the California court cited cases involving houses being built on filled land and houses being built in violation of zoning or building regulations as examples of "material" defects. *See* 29 Cal. Rptr. 201, 205 (Dist. Ct. App. 1963).

[45] *Compare* Frona M. Powell & Jane P. Mallor, *The Case for an Implied Warranty of*

then, this latter category of cases is more akin to the law of fraud than the law of warranty. Finally, the courts deciding warranty cases imposed liability only on owners of developed property, while some disclosure cases imposed liability on owners of either improved or unimproved land, or both.[46]

As in other areas of the law, the duty to disclose defects on property went through an evolution from the prevalence of caveat emptor to broad disclosure duties. The unfairness of caveat emptor principles was starkly illustrated in *Swinton v. Whitinsville Savings Bank*.[47] In *Swinton*, the purchaser sued the seller, alleging that the seller failed to disclose the fact that a home was infested with termites.[48] The Massachusetts Supreme Judicial Court affirmed the dismissal of the complaint, stating that the seller had made no affirmative misrepresentations.[49] Because there was no "duty to speak" in an arms-length transaction such as the one at issue, the court held that the law imposed no liability, despite the "certain appeal to the moral sense" that the case presented.[50]

Swinton, however, was decided in 1942.[51] Soon after that, many courts began to hold that a seller owed a duty to a buyer to disclose defects on the site of the property or in the structure of the property, thus changing the prior law.[52] The landmark case of *Lingsch v. Savage* set

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Quality in Sales of Commercial Real Estate, 68 WASH. U. L.Q. 305, 312 (1990) (stating that "[t]he warranty imposes a form of strict liability on the builder; the complaining party need not establish negligence") *with Lingsch*, 29 Cal. Rptr. at 204 (holding that a duty to disclose arises only when a seller fails to disclose a *known* material fact).

[46] *See, e.g.*, Pruitt v. Morrow, 342 S.E.2d 400, 401 (S.C. 1986) (noting that South Carolina law precluded an action based on breach of warranty if the land was undeveloped, but that the State did impose liability for failing to disclose defects on both developed and undeveloped land).

[47] *See* 42 N.E.2d 808 (Mass. 1942).

[48] *See id.* at 808.

[49] *See id.* at 808, 809.

[50] *Id.*

[51] *See id.* at 808.

[52] *See* Hill v. Jones, 725 P.2d 1115, 1117-19 (Ariz. Ct. App. 1986); Vaught v. Satterfield, 542 S.W.2d 502, 504 (Ark. 1976); Cohen v. Vivian, 349 P.2d 366, 367-68 (Colo. 1960); Wedig v. Brinster, 469 A.2d 783, 788 (Conn. App. Ct. 1983); Wilhite v. Mays, 235 S.E.2d 532, 533 (Ga. 1977); Loghry v. Capel, 132 N.W.2d 417, 419 (Iowa 1965); Jenkins v. McCormick, 339 P.2d 8, 11 (Kan. 1959); Kaze v. Compton, 283 S.W.2d 204, 207-08 (Ky. 1955); Maguire v. Masino, 325 So. 2d 844, 847 (La. Ct. App. 1975); Williams v. Benson, 141 N.W.2d 650, 656 (Mich. Ct. App. 1966); Mackintosh v. Jack Matthews & Co., 855 P.2d 549, 552-53 (Nev. 1993); Bursey v. Clement, 387 A.2d 346, 348 (N.H. 1978); Snell v. Cornehl, 466 P.2d 94, 95 (N.M. 1970); Brooks v. Ervin Constr. Co., 116 S.E.2d 454, 457 (N.C. 1960); Holcomb v. Zinke, 365 N.W.2d 507, 511-12 (N.D. 1985); Miles v. McSwegin, 388 N.E.2d 1367, 1369 (Ohio 1979); Shane v. Hoffmann, 324 A.2d 532, 536 (Pa. Super. Ct. 1974); Lawson v. Citizens & S. Nat'l Bank, 193 S.E.2d 124, 126 (S.C. 1972); Ware v. Scott, 257 S.E.2d 855, 857 (Va. 1979); Obde v. Schlemeyer, 353 P.2d 672, 674-75 (Wash. 1960); Thacker v. Tyree, 297 S.E.2d

forth the general rule about a seller's nondisclosure.[53] The court stated that a seller would be liable for failing to disclose material facts affecting property value where the seller, but not the buyer, knew of these facts.[54] The *Lingsch* court went on to explain that in addition to proving these elements, the plaintiff also must prove that the defendant intended to, and actually did, induce action by the buyer because of the nondisclosure.[55] In addition, the plaintiff must establish the existence of damages.[56]

As illustrated, many states have adopted an affirmative duty to disclose, although the specifics of this duty vary by jurisdiction.[57] Among the more common variations are whether the duty to disclose applies simply to new homes, or to used ones as well.[58] Similarly, some states apply the duty only when the property in question is residential, not commercial or industrial.[59] Other variations may include imposing li-

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885, 888 (W. Va. 1982); Ollerman v. O'Rourke Co., 288 N.W.2d 95, 107 (Wis. 1980); Silva v. Stevens, 589 A.2d 852, 857 (Vt. 1991).

But see Cashion v. Ahmadi, 345 So. 2d 268, 270-71 (Ala. 1977) (specifically declining to adopt a duty to disclose); Dee v. Peters, 591 N.E.2d 115, 116 (Ill. App. Ct. 1992) (holding that silence alone is insufficient to justify liability, at least in the sale of used homes).

[53] *See* 29 Cal. Rptr. 201, 204 (Dist. Ct. App. 1963).

[54] *See id.* More precisely, the court set forth the following standard:

> 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.

Id. (citations omitted).

[55] *See id.* at 206.

[56] *See id.*

[57] *See supra* note 52 (listing cases adopting a duty to disclose known defects).

[58] *Compare* Johnson v. Davis, 480 So. 2d 625, 629 (Fla. 1985) (clarifying that, in Florida, "[t]his duty is equally applicable to all forms of real property, new and used") *with* N.J. STAT. ANN. § 46:3C-8 (West Supp. 1996) (providing that only sellers of "newly constructed residential real estate" are subject to disclosure duties).

[59] *See* Haskell Co. v. Lane Co., 612 So. 2d 669, 674 (Fla. Dist. Ct. App. 1993). In *Haskell*, the issue was whether a defect in the roof of a commercial building subjected the builder to any liability for the defect. *See id.* at 670. There was no suggestion that the builder actively concealed, or affirmatively misrepresented, the defect. *See id.* at 671. Rather, the buyer sought damages on a theory of negligence in construction of the building and in failing to disclose the defect. *See id.* at 670. Thus, albeit reluctantly, the court dismissed the claim, finding no basis to hold the builder liable on either an implied warranty of quality or other theory. *See id.* at 674-76. In sum, the doctrine of caveat emptor still applies in Florida commercial sales and leases. *See id.* at 674-75.

See generally Frona M. Powell, *The Seller's Duty to Disclose in Sales of Commercial Property*, 28 AM. BUS. L.J. 245 (1990) (discussing the circumstances in which legal protections generally available for buyers may or may not be available for commercial buyers).

ability only on those "in the business" of home sales, such as developers and brokers, while not imposing liability on individual sellers.[60]

Following *Lingsch* and its progeny in other states, New Jersey eventually adopted the rule that a seller of a home has a duty to disclose known on-site defects to the buyer in *Weintraub v. Krobatsch*.[61] In *Weintraub*, the purchasers signed a contract for the sale of a home but subsequently found that the home was infested with cockroaches.[62] The court rejected the seller's contention that there was no "duty to speak" or otherwise inform the buyers about the defects in the home, stating that such a theory was inconsistent with modern standards of good faith and fair dealing.[63] Accordingly, the court held that if a seller was aware of a significant or "material" defect in a home and willfully failed to disclose that defect, such circumstances would justify rescission of the contract.[64]

The *Weintraub* court also articulated a reasonable person, rather than subjective, standard to determine the materiality of a given concealment.[65] Indeed, in a failure-to-disclose case, proof of the materiality of a particular defect is an indispensable element of a buyer's case,[66] and the decision on whether a given defect is material is fact-sensitive.[67] The *Weintraub* court clarified that a finder of fact is to make this decision.[68]

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[60] *See* Strawn v. Canuso, 140 N.J. 43, 59, 657 A.2d 420, 428 (1995); *see also infra* notes 85-129 and accompanying text (discussing the New Jersey court's distinction between *on-site* and *off-site* defects in *Strawn*).

[61] 64 N.J. 445, 455, 317 A.2d 68, 74 (1974).

[62] *See id.* at 447-48, 317 A.2d at 70.

[63] *See id.* at 450, 317 A.2d at 71.

[64] *See id.* at 455, 317 A.2d at 74.

[65] *See id.* The court explained that "[m]inor conditions which ordinary sellers and purchasers would reasonably disregard as of little or no materiality . . . would clearly not call for judicial intervention." *Id.*; *see also* TSC Indust. v. Northway, Inc., 426 U.S. 438, 445 (1976) ("The question of materiality, it is universally agreed, is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor."). *But see* Ross R. Hartog, Note, *The Psychological Impact of AIDS on Real Property and a Real Estate Broker's Duty to Disclose*, 36 ARIZ. L. REV. 757, 763 (1994) ("Materiality is a *subjective* standard linked entirely with the personality of each individual purchaser." (footnote omitted) (emphasis added)). For a collection of cases in which a defect was found to be "material," see Washburn, *supra* note 16, at 389-90 & nn.57-80.

[66] *See Weintraub*, 64 N.J. at 455-56, 317 A.2d at 74; *see also* Reed v. King, 193 Cal. Rptr. 130, 131-32 (Ct. App. 1983). The *Reed* court held that a plaintiff must present "competent evidence" to a trial court that a defect "has a significant and measurable effect on market value." *Id.* at 133. The court also stated that this evidence must prove that a plaintiff suffered "objective tangible harm" in the form of decreased market value. *See id.* at 134.

[67] *See Weintraub*, 64 N.J. at 455, 317 A.2d at 74.

[68] *See id.*

The fact that courts require an actionable defect to be "material" is not as daunting a requirement for a buyer to prove as it might seem, evidenced by the cases in which courts have dealt with "stigmatized" property.[69] The courts, although treating cases involving nonphysical "stigmas" differently than traditional cases in which physical defects exist, still have imposed liability in certain cases because houses with "stigmas" attached to them will suffer a reduction in their market value.[70] For example, in *Reed v. King*, a California court found that the seller was under a duty to inform the buyer that the house had been the site of a mass murder several years before.[71] The court stressed that the house's past reduced its value, making the defect a "material" one that a seller must disclose to a buyer.[72]

Another court has found that the existence of ghosts or poltergeists in a home is a material defect that requires disclosure.[73] Similarly, significant debate has occurred on the question of whether a previous occupant with Acquired Immune Deficiency Syndrome (AIDS) is a material defect requiring disclosure.[74] The point, however, is that although the

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[69] In *Strawn v. Canuso*, the court defined "stigmatized" property as property affected by a nonphysical, psychological, or emotional event that has affected its value. *See* 140 N.J. 43, 58 n.1, 657 A.2d 420, 427 n.1 (1995).

[70] *See* Suzanne Gordon, *'Stigmatized Houses' Where Crime Strikes, Sometimes Teardown Is the Only Answer*, CHI. TRIB., June 3, 1995, § 4, at 14. The article lists several properties where infamous crimes took place and where the property values decreased, including: the home of Megan Kanka, the New Jersey girl whose murder inspired the sex-offender disclosure laws; the California home where actress Sharon Tate and others were killed by Charles Manson and his followers; and the home where Nicole Brown Simpson, the spouse of professional football player O.J. Simpson, was murdered. *See id.* *See generally* Timothy J. Muldowney & Kendall W. Harrison, *Stigma Damages: Property Damage and the Fear of Risk*, 62 DEF. COUNS. J. 525 (1995) (reviewing case law on stigmatic injury, especially injury caused by on- and off-site environmental contamination).

[71] *See* 193 Cal. Rptr. 130, 133 (Ct. App. 1983).

[72] *See id.* The court expressed concern that an undisclosed irrational or insubstantial fact that might "disquiet the enjoyment of some segment of the buying public" might lead to needless litigation. *Id.* at 132. The court added, however, that if the reputation of a house led to a meaningful and measurable effect on its market value, the court would find that such a nondisclosure was "material," thus justifying rescission of the sale. *See id.* at 133. The court, therefore, reversed the dismissal of the complaint, suggesting that the plaintiff would prevail at trial if she proved an actual reduction in the market value of the home. *See id.* at 133-34.

[73] *See* Stambovsky v. Ackley, 572 N.Y.S.2d 672, 677 (App. Div. 1991).

[74] *See generally* Florise R. Neville-Ewell, *Residential Real Estate Transactions: The AIDS Influence*, 5 HOFSTRA PROP. L.J. 301 (1993) (illustrating four distinct types of statutory schemes regarding a seller's disclosure duties where a home's prior occupant had AIDS); Michael Adam Burger & Lourdes I. Reyes Rosa, Note, *Your Money and Your Life! AIDS and Real Estate Disclosure Statutes*, 5 HOFSTRA PROP. L.J. 349 (1993) (explaining the interaction between state statutes concerning a home seller's duty to disclose and federal statutory and constitutional law). California law suggests that there is a

law is reluctant to compensate a buyer for stigma-based damage,[75] a buyer can still prevail in some circumstances.[76]

In addition to the materiality question, another major difficulty that buyers face is proving that the defect was latent, i.e., that it was not readily observable by a buyer.[77] Courts are reluctant to let a buyer recover where a defect in a home was obvious.[78] Moreover, where the defect is readily ascertainable from the public records, a court may be willing to hold that such a defect is an obvious one.[79] Under these circumstances, a buyer's case will be hurt, but it will not necessarily be dismissed.[80] Thus, some tribunals require a buyer to engage in some investigation of the transaction by adhering to caveat emptor principles when a buyer fails to exercise due diligence in inspecting the property[81] or records affecting it.[82]

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cause of action when a home seller fails to disclose that a prior occupant has AIDS, provided there is a "direct inquiry" by a buyer. *See* CAL. CIV. CODE § 1710.2(d) (West Supp. 1996). In contrast, there is an argument that the Federal Fair Housing Act prohibits either home sellers or their real estate agents from revealing that a previous occupant of the home had AIDS. *See* Burger & Rosa, *supra*, at 358-62; *see also* Federal Fair Housing Act, 42 U.S.C. §§ 3601-3631 (1988).

[75] *See, e.g.*, Berry v. Armstrong Rubber Co., 780 F. Supp. 1097, 1103, 1104 (S.D. Miss. 1991) (denying stigma-based damages to plaintiff whose homesite was contaminated by hazardous chemicals), *aff'd*, 989 F.2d 822, 829 (5th Cir. 1993); *see also* CONN. GEN. STAT. ANN. § 20-329dd (West Supp. 1996) (immunizing a property seller for not disclosing that a murder, suicide, or felony took place on the property or that a prior owner of the home had AIDS).

[76] *See supra* notes 69-74 and accompanying text (reviewing cases where a buyer prevailed in a suit for stigma-based damages).

[77] *See, e.g.*, Layman v. Binns, 519 N.E.2d 642, 644 (Ohio 1988). The court asserted that caveat emptor "remain[ed] a viable rule of law" in some real property transactions. *Id.* at 643. The court held that where defective conditions on the property are observable and discoverable, the seller does not engage in any active concealment or fraud, and the purchaser has a full opportunity to inspect the property, caveat emptor still applies and, therefore, buyers have no legitimate complaint for failing to discover such conditions. *See id.* at 644-45.

[78] *See, e.g., id.* at 644. Additionally,

> Where a defective condition is open to observation or otherwise reasonably discoverable . . . the seller may be protected by the doctrine of caveat emptor unless, of course, there is evidence of fraud. Either constructive notice or actual knowledge of the defective condition is a defense to [a] buyer's claim.

Weinberger, *supra* note 11, at 404-05 (footnotes omitted).

[79] *See, e.g.*, Blaine v. J.E. Jones Constr. Co., 841 S.W.2d. 703 (Mo. Ct. App. 1992) (discussing nondisclosure claim by home buyer).

[80] *See id.* at 709 (explaining that "[p]ublic record of an undisclosed fact may not necessarily negate a party's duty to disclose," though it is one factor that may point to not requiring disclosure).

[81] *See id.*; *Layman*, 519 N.E.2d at 644.

[82] *See Blaine*, 841 S.W.2d at 709.

Despite these hurdles that a buyer must overcome to recover against a seller for failing to disclose known but latent defects *on the site* of the property, there is still a substantial body of law protecting such buyers.[83] However, the cases that led to this development in practically every state had one interesting thing in common—none explicitly limited its holding to *on-site* defects of the property.[84] Rather, the unifying theme in these cases, if any, was that the seller had to disclose *material* defects.[85] It was not unthinkable, in any of these states, that such a duty would extend to *material, off-site* defects as well. In fact, the law of nuisance has always contemplated that some conditions on property affect persons and land off-site and has provided a remedy for property owners injured by such conditions.[86] Moreover, federal environmental law consistently imposes liability on owners of toxic waste facilities whose actions affect property off the site itself.[87] In sum, the law recognizes that a condition off the site of the property may actually impact the property itself. Thus, it would be no great leap for a court or a legislature to conclude that a condition off the site of a piece of property could materially affect its

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[83] *See supra* note 52. Procedurally, such cases, like all cases involving a failure to disclose, might come to court when a buyer becomes aware of an off-site condition that impairs the market value of their land and seeks rescission of the sale and/or reimbursement for the misrepresentation. *See, e.g,* Strawn v. Canuso, 140 N.J. 43, 657 A.2d 420 (1995). Alternatively, a case may come to court when a contract of sale has been executed, but the buyer refuses to complete the transaction upon learning of the defect; in such a case, the seller or its broker may be the plaintiff seeking specific performance of the contract together with the payment of the broker's fee. *See, e.g.,* Weintraub v. Krobatsch, 64 N.J. 445, 317 A.2d 68 (1974).

[84] *See supra* note 52 (listing cases adopting a duty to disclose on-site defects).

[85] *See* Weinberger, *supra* note 11, at 406-07. Of course, most of the cases in which the duty to disclose arose were cases involving on-site defects. *See supra* note 52. The point, however, is that the courts did not explicitly limit their holdings to cases involving this category of defects. As the *Strawn* court made clear, "[a] 'material fact' is not confined to conditions on the premises." 140 N.J. at 60, 657 A.2d at 429.

[86] *See* BLACK'S LAW DICTIONARY 1065 (6th ed. 1990). Nuisance is defined as "that activity which arises from unreasonable, unwarranted or unlawful use by a person of his own property, working obstruction or injury to the right of another." *Id.* The law of nuisance, then, is triggered when an *off-site* condition impacts on a particular piece of property. *See id.*

[87] *See* Mark P. Fitzsimmons & Jeffrey K. Sherwood, *The Real Estate Lawyer's Primer (and More) to Superfund: The Environmental Hazards of Real Estate Transactions*, 22 REAL PROP. PROB. & TR. J. 765, 772 (1988).

> The focus on hazardous waste created by CERCLA also has spawned a number of private, more traditional damage suits. An increasing number of individuals who reside near industrial establishments or disposal sites have filed suit and alleged significant personal injury and property damage resulting from hazardous substances migrating offsite. The plaintiffs have been successful in many of these cases.

Id.

value. Indeed, New Jersey did so in *Strawn v. Canuso*,[88] which is discussed in the next Part.

II. THE EXTENSION OF THE DUTY TO DISCLOSE TO OFF-SITE DEFECTS AND CONDITIONS

In *Strawn v. Canuso*, the New Jersey Supreme Court had occasion to deal with the issue of off-site disclosures, as they related to a hazardous landfill.[89] From 1966 to 1978, the landfill, known as the Buzby Landfill, received large quantities of hazardous industrial and chemical wastes.[90] Eventually, these wastes escaped from the landfill site because it lacked a liner or cap to contain the waste and ultimately contaminated a nearby lake and groundwater in the vicinity.[91] State and local authorities became aware of the nature of the hazard at the Buzby Landfill but were also aware that the construction of a housing development nearby was under consideration.[92]

In the early to mid-1980s, several of the *Strawn* defendants carried through their plans to develop property near the landfill into residential housing.[93] From 1984 to 1987, several families purchased housing in the development, never having been told by the developers or their brokers about the nearby landfill.[94] Eventually, twenty-six families commenced a class action suit, on behalf of themselves and over 150 other families who also bought houses in the development.[95] The suit named the developers, their corporations, and the real estate brokerage firm that sold the properties as defendants.[96]

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[88] 140 N.J. 43, 657 A.2d 420 (1995), *aff'g* 271 N.J. Super. 88, 638 A.2d 141 (App. Div. 1994). For additional discussion of liability for off-site conditions, see Colin Campbell, Annotation, *Liability of Vendor or Real-Estate Broker for Failure to Disclose Information Concerning Off-Site Conditions Affecting Value of Property*, 41 A.L.R.5th 157 (1996).

[89] *See Strawn*, 140 N.J. at 48-49, 657 A.2d at 423. The landfill was located in Voorhees Township, New Jersey, a suburb of Philadelphia. *See id.* at 49, 657 A.2d at 423.

[90] *See id.*

[91] *See id.* at 49-50, 657 A.2d at 423.

[92] *See id.* at 50, 657 A.2d at 423. The court cited an Environmental Protection Agency report from May 1980 that warned that the housing development being considered adjacent to the site "'has all the potential of developing into a future Love Canal if construction is permitted.'" *Id.*

[93] *See* Strawn v. Canuso, 271 N.J. Super. 88, 95, 638 A.2d 141, 144 (App. Div. 1994). The development was called the "Woods of Voorhees and Las Brisas." *See id.* at 94, 638 A.2d at 144. A real estate broker, Fox & Lazo, Inc., conducted the sales activities for the defendants. *See id.*

[94] *See Strawn*, 140 N.J. at 49-50, 657 A.2d at 423-24.

[95] *See id.* at 49, 51, 657 A.2d at 423, 424.

[96] *See id.* at 49, 657 A.2d at 423.

The trial judge initially denied the motion for class certification.[97] Thereafter, the judge classified the claims of the parties into two groups. One group, consisting of seven families, filed claims based only on common-law fraud, misrepresentation, and concealment, alleging only that the defendants failed to disclose material facts to them.[98] Another group, consisting of nineteen families, alleged that the defendants made affirmative misrepresentations to them.[99] In the trial court's view, this latter group was entitled to proceed to a trial on these claims, in addition to claims based on New Jersey's Consumer Fraud Act.[100] In contrast, the court granted summary judgment in favor of the defendants and against the former group, which alleged only a failure to disclose, opining that there was no duty on the part of a seller to disclose defects on another's nearby property.[101]

The appellate division reversed the trial court's dismissal of the claims that were based solely on nondisclosure.[102] In an opinion authored by then-Judge Coleman,[103] the court, after explaining the facts of the case, reviewed the history of the duty to disclose in New Jersey.[104] Judge Coleman acknowledged that more modern ideas such as "justice and fair dealing" have supplanted the older principles, such as caveat emptor, applicable to real estate transactions.[105] Indeed, current law prohibited more than just affirmative fraud; New Jersey also recognized a cause of action for failing to disclose defects involving real property.[106]

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[97] *See id.* at 51, 657 A.2d at 424. The supreme court stated that the trial judge found that common questions of law and fact did not predominate in this action. *See id.* On appeal, the supreme court suggested that the actions should proceed as a class action, but left the final decision and the specifics of that decision up to the trial court. *See id.* at 68-69, 657 A.2d at 432-33.

[98] *See id.* at 52, 657 A.2d at 424.

[99] *See Strawn*, 140 N.J. at 52, 657 A.2d at 424.

[100] *See id.*, 657 A.2d at 424; *see also* N.J. STAT. ANN. §§ 56:8-1 to -80 (West 1989 & Supp. 1996).

[101] *See Strawn*, 140 N.J. at 52, 657 A.2d at 424.

[102] *See* Strawn v. Canuso, 271 N.J. Super. 88, 88, 100-07, 638 A.2d 141, 141, 147-50, 153 (App. Div. 1994).

[103] Judges Levy and Thomas joined the unanimous ruling of the appeals court. *See id.* at 93, 638 A.2d at 144. Judge Coleman took office as an Associate Justice of the New Jersey Supreme Court on December 16, 1994, *see* MANUAL OF THE LEGISLATURE OF NEW JERSEY 504 (1996), and did not participate in the disposition of *Strawn* in the supreme court. *See Strawn*, 140 N.J. at 69, 657 A.2d at 433.

[104] *See Strawn*, 271 N.J. Super. at 100-02, 638 A.2d at 147-48.

[105] *Id.* at 100-01, 638 A.2d at 147 (citing Weintraub v. Krobatsch, 64 N.J. 445, 456, 317 A.2d 68, 75 (1974)).

[106] *See id.* The prohibition against affirmative fraud in land transactions dates back over 75 years. *See id.* at 101, 63 A.2d at 147 (citing Landriani v. Lake Mohawk Country Club, 26 N.J. Super. 157, 160-61, 97 A.2d 511, 512 (App. Div. 1953); Curtiss-Warner Corp. v. Thirkettle, 101 N.J. Eq. 279, 280, 137 A. 408, 408 (N.J. 1927); Roberts v.

The question presented, then, was whether the holding of the *Weintraub* court—that there was a duty to disclose *on-site* hazards—should be extended to *off-site* hazards.[107] The appellate division ruled that *Weintraub*'s holding should, in fact, be extended.[108] Relying on cases from other states that found a duty to disclose off-site hazards,[109] as well as the disclosure required under California law,[110] the court found that there was a duty to disclose off-site conditions materially affecting property value where the seller, but not the buyers, knew of these conditions.[111]

James, 83 N.J.L. 492, 493-94, 85 A. 244, 244 (N.J. 1912)). In addition to these decisions, the court cited a modern shift in ethical attitudes supporting the recognition of a cause of action for nondisclosure as well as affirmative fraud. *See id.* at 102, 103, 638 A.2d at 148; RESTATEMENT (SECOND) OF TORTS § 551 (1977).

[107] *See Strawn*, 271 N.J. Super. at 94, 638 A.2d at 144.

[108] *See id.* at 104, 638 A.2d at 149. The court found support for its ruling in *Tobin v. Paparone Construction Co.*, where a court imposed liability on a developer for failing to disclose the pending construction of a tennis court on adjacent property, which might be viewed as a form of off-site defect. *See id.* at 102, 638 A.2d at 148 (citing Tobin v. Paparone Constr. Co., 137 N.J. Super. 518, 526, 349 A.2d 574, 580 (Law Div. 1975)).

The result in *Tobin*, however, could very well be different in other jurisdictions. *See* Blaine v. J.E. Jones Constr. Co., 841 S.W.2d 703, 707-09 (Mo. Ct. App. 1992). *Blaine* involved a homeowner who sued a residential subdivider, alleging that the subdivider had a duty to disclose that when the Blaines purchased their property, the subdivider was about to construct an "offending apartment complex" nearby. *See id.* at 707. The *Blaine* court conceded that the intent "to build apartments on nearby property could have an effect on a reasonable buyer's decision to buy a house." *Id.* at 708. Despite this, the court refused to impose liability, finding that the planned development was a mere "extrinsic fact" and that there was not a true failure to disclose, because public zoning records hinted at the fact that the apartment complex was contemplated. *See id.* at 708, 709.

[109] *See Strawn*, 271 N.J. Super. at 103-04, 638 A.2d at 148-49. The *Strawn* court explained that *O'Leary v. Industrial Park Corp.* imposed liability on a seller where the seller failed to disclose the existence of a well that supplied municipal water off the site of the property. *See id.* at 103, 638 A.2d at 148 (citing O'Leary v. Industrial Park Corp., 542 A.2d 333, 337 (Conn. App. Ct. 1988)). In *O'Leary*, the plaintiff buyer purchased the property, intending to use it to store herbicides and fertilizer. *See* 542 A.2d at 334. After the purchase, however, the buyer was unable to use it for such purposes because the appropriate permits were denied due to concerns of contaminating the nearby well. *See id.* at 335. Under such circumstances, the court held that the seller had a duty to speak about the off-site well because it was material in the context of this transaction. *See id.* at 337.

Another case cited by the *Strawn* court was *Coral Gables, Inc. v. Mayer*, in which a court imposed liability on a seller for failing to disclose an "obnoxious" business development off the site of the property. *See Strawn*, 271 N.J. Super. at 104, 638 A.2d at 149 (citing Coral Gables, Inc. v. Mayer, 271 N.Y.S. 662, 664 (App. Div. 1934)).

[110] *See Strawn*, 271 N.J. Super. at 103, 638 A.2d at 148; *see also* CAL. CIV. CODE §§ 1102-1102.15 (West Supp. 1996); *supra* notes 71 & 72 and accompanying text (discussing California case law); *infra* notes 145-60 and accompanying text (discussing California cases and statutory disclosure provisions).

[111] *Strawn*, 271 N.J. Super. at 104, 638 A.2d at 149. The court defined the duty as follows:

> a duty to disclose the existence of off-site conditions, which (1) are unknown to the buyers, (2) are known or should have been known to the

Continuing, the court imposed this duty only on two classes of persons: (1) developer-sellers of multi-home developments and (2) brokers and agents who represent them.[112]

The court also found that the real estate broker defendants violated their duties under applicable administrative regulations to disclose all material information about property sales to both purchaser and seller.[113] Furthermore, the court ruled in favor of the plaintiffs on their New Jersey Consumer Fraud Act claims.[114] The court thus reversed and remanded the case for further proceedings.[115]

The defendants appealed to the New Jersey Supreme Court, which granted leave to appeal.[116] In an opinion by Justice O'Hern, the court unanimously affirmed the appellate division.[117] The court first sketched the decline of caveat emptor principles in New Jersey and declared that "'*[c]aveat emptor*, the early rule, no longer prevails in New Jersey.'"[118] The court illustrated how other states, through both statutory and common-law developments, gradually imposed increasing duties on the sellers of homes and their brokers to disclose facts known to them that materially affect the value of the property.[119] Moreover, the court stated that in California, New Mexico, and Utah, courts required more than a duty to disclose *known* defects in the property; those courts imposed an

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> seller and/or its broker, and (3) based on reasonable foreseeability, might materially affect the value or the desirability of the property involved in the transaction.

Id.

[112] *See id.*

[113] *See id.* at 106, 638 A.2d at 150; *see also* N.J. ADMIN. CODE tit. 11, § 5-1.23(b) (1996) (providing that a real estate broker "shall reveal all information material to any transaction to his client or principal and when appropriate, to any other party").

[114] *See Strawn*, 271 N.J. Super. at 107-09, 638 A.2d at 150-51 (citing N.J. STAT. ANN. § 56:8-2 (West 1989)). The court noted that the specific terms of the act forbad the knowing concealment of material facts in the sale of real estate. *See id.* at 108, 638 A.2d at 151. As such, the court found that the plaintiffs' allegations came within the scope of the act to make even real estate developers and their brokers liable for violations. *See id.* at 109, 638 A.2d at 151. The court also commented that because the defendants in the case were promoting the advantages of living in a wooded area, with its attendant quality of life, the developer's nondisclosure of the landfill's presence heightened the fraudulent aspects of the developer's conduct. *See id.* at 105, 638 A.2d at 149.

[115] *See id.* at 110-11, 638 A.2d at 152. After the supreme court affirmed the remand order, the *Strawn* plaintiffs settled with the defendants, receiving $2,975,000 in cash plus $231,000 worth of discount coupons for later use. *See* Strawn v. Canuso, 297 N.J. Super. 57, 60, 687 A.2d 778, 779 (App. Div. 1997).

[116] *See* Incollingno v. Canuso, 137 N.J. 303, 645 A.2d 134 (1994).

[117] *See* Strawn v. Canuso, 140 N.J. 43, 69, 657 A.2d 421, 433 (1995).

[118] *Id.* at 56, 657 A.2d at 426 (quoting Berman v. Gurwicz, 189 N.J. Super. 89, 93, 458 A.2d 1311, 1313 (Ch. Div. 1981), *aff'd*, 189 N.J. Super. 549, 458 A.2d 1289 (App. Div. 1983)).

[119] *See id.* at 56-58, 657 A.2d at 426-28.

affirmative duty on sellers to investigate for defects.[120] In addition, the court noted that certain states had statutory disclosure duties as well.[121] Because New Jersey had no such legislation, the court interpreted common-law precedent to define the limits of the duty to disclose.[122]

The court viewed the precedents involving the abrogation of caveat emptor principles as being grounded first, in the disparity in bargaining power between a professional seller of real estate and a casual buyer, and second, in the difference in access to relevant information that each of those parties have.[123] Thus, the court stated the holding was limited to "professional sellers of residential housing . . . and the brokers representing them."[124] Moreover, drawing on New Jersey's statutes as a source for this common-law decision, the court noted that New Jersey's Consumer Fraud Act applied only to persons "in the business" of selling houses, and not casual sellers.[125] Accordingly, the court opined that it would be unwarranted to extend the common-law liability to casual sellers of property as well.[126] The court also carved out another significant exclusion to its holding by indicating that, absent a specific inquiry from the buyer, the seller had no obligation to disclose "the changing nature of a neighborhood, the presence of a group home, or the existence of a school in decline."[127]

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[120] *See id.* at 58, 657 A.2d at 428 (citing Sarah Waldstein, *A Toxic Nightmare on Elm Street: Negligence and the Real Estate Broker's Duty in Selling Previously Contaminated Residential Property*, 15 B.C. ENVTL. AFF. L. REV. 547, 551 (1988)).

[121] *See id.*

[122] *See Strawn*, 140 N.J. at 58-59, 657 A.2d at 428.

[123] *See id.* at 59, 657 A.2d at 428. *Strawn*'s holding clearly rests more on the second ground, disparity in bargaining power, than on the first ground, disparity in information, *see id.*, because it is plain that a seller of a home, especially one who has lived in an area for a long time, would clearly have significant and superior information about a neighborhood than many buyers would. Yet, the *Strawn* opinion does not require the casual seller of a home to make disclosures of off-site conditions. *See id.*

[124] *Id.* The court reasoned that in commercial transactions, the purchaser would probably be a business entity, and thus, there was less risk that the purchaser would be at a great disadvantage compared to the seller. *See id.* at 59-60, 657 A.2d at 428. Similarly, the court noted that if a home was sold by an individual homeowner-seller, the individual would probably have less of an advantage, and the risk of disparity was similarly low. *See id.*

[125] *See id.*, 657 A.2d at 428-29.

[126] *See id.* at 60, 657 A.2d at 429.

[127] *Strawn*, 140 N.J. at 64, 657 A.2d at 431. During oral argument, the court had been cautioned that an unduly broad decision might require a seller to disclose sex offenders in the neighborhood. *See* Kathy Barrett Carter, *Court Puts New-Home Onus in Seller's Back Yard—Justices Rule Builders and Realtors Must Disclose Off-Site Problems*, STAR-LEDGER, Apr. 26, 1995, at 20. As discussed *infra* note 217, the exclusion created by the court suggests that the court would be unwilling to require a home seller to disclose the presence of a sex offender.

To summarize the holding in *Strawn*, the court held that (1) the duty to disclose material off-site defects protects purchasers of *residential* housing, not commercial property and (2) the duty extends only to builder-developers and their brokers, not to casual home sellers.[128] Thus, the *Strawn* holding, which relates to off-site defects, provides less protection to buyers than the *Weintraub* holding concerning on-site defects, which imposed a duty to disclose on *all* sellers, however small.[129]

The court, perhaps aware that this standard might provide for less-than-clear guidance to professional home sellers, then invited the Legislature to codify this judicially imposed duty, as it had done in passing the New Home Warranty and Builders' Registration Act.[130] Soon thereafter, the New Jersey Legislature took the court up on its offer, defining and limiting the duty to disclose by statute, as many other states have done.[131] Accordingly, Part III examines the statutory duty to disclose, not only in New Jersey, but elsewhere as well.

III. STATUTORY CODIFICATION OF DISCLOSURE DUTIES

Although there is some federal law mandating the disclosure of defects when real estate is sold,[132] the overwhelming source of such disclo-

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[128] *See Strawn*, 140 N.J. at 65, 657 A.2d at 431. The court stated:

> [A] builder-developer of residential real estate or a broker representing it is not only liable to a purchaser for affirmative and intentional misrepresentation, but is also liable for nondisclosure of off-site physical conditions known to it and unknown and not readily observable by the buyer if the existence of those conditions is of sufficient materiality to affect the habitability, use, or enjoyment of the property and, therefore, render the property substantially less desirable or valuable to the objectively reasonable buyer.

Id. (footnote omitted).

[129] *See supra* notes 61-68 and accompanying text.

[130] *See Strawn*, 140 N.J. at 65, 657 A.2d 431; *supra* note 39 and accompanying text (discussing New Jersey's New Home Warranty and Builders Registration Act, N.J. STAT. ANN. §§ 46:3B-1 to -20 (West 1989 & Supp. 1996)).

[131] *See infra* notes 162-80 and accompanying text.

[132] *See, e.g.*, The Interstate Land Sales Full Disclosure Act (ILSFDA), 15 U.S.C. §§ 1701-1720 (1994). The ILSFDA is a complex statute and is only applicable to certain developers who sell certain unimproved subdivision lots. *See id.* §§ 1702-1704. The ILSFDA has two main purposes: (1) to ensure that consumers know all relevant facts before purchasing a subdivision lot and (2) "'to prohibit and punish fraud' in the land sale industry." Pierce v. Apple Valley, Inc., 597 F. Supp. 1480, 1484 (S.D. Ohio 1984) (citation omitted). Among the anti-fraud provisions of the ILSFDA are certain mandatory disclosure provisions. *See* 15 U.S.C. § 1703(a). It also provides a private cause of action for any person who is defrauded. *See id.* § 1709. *See generally* Albert D. Johnston, Comment, *A Handbook to the Interstate Land Sales Full Disclosure Act*, 27 ARK. L. REV. 65 (1973) (explaining the scope, requirements, and enforcement of the ILSFDA).

Additionally, the federal government also recently acted to protect purchasers of real estate by requiring that every purchaser or lessee of a home built before 1978 be pro-

sure obligations is the states. The states have done so through modifications of warranty laws and, sometimes, through generally applicable consumer protection laws.[133] More specifically, many states have passed statutory duties of disclosure. Depending on the state, such statutes have increased, diminished, or clarified a seller's duty to disclose defects imposed by the common law.

In many states, the relatively vague requirement of case law that required sellers, and often their brokers, to disclose "material" defects in real property sales, prompted these disclosure statutes.[134] Although "materiality" is an objective standard, sellers and brokers were nevertheless uncertain of their legal obligations to disclose defects.[135] To both clarify their duties and limit their liability, brokers sought the protection of explicit statutory disclosure laws to define what they must tell buy-

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vided with a copy of a lead hazard pamphlet prepared by the United States Environmental Protection Agency. *See* 42 U.S.C. § 4852d(a)(1)(A) (1994). Every seller or landlord—whether in the business of home sales or not—must provide this disclosure. *See id.* § 4852d(a)(2) ("*every* contract . . . shall contain a Lead Warning Statement" (emphasis added)).

[133] *See* Elizabeth A. Dalberth, Comment, *Unfair and Deceptive Acts and Practices in Real Estate Transactions: The Duty to Disclose Off-Site Environmental Hazards*, 97 DICK. L. REV. 153, 153 (1992). Just as the *Strawn* court did with New Jersey's Consumer Fraud Act, other courts have interpreted general state consumer protection statutes to provide a cause of action against sellers who use fraudulent and deceptive practices in the sale of real estate, which may include nondisclosure of material facts. *See id.* at 166-69. However, not every state's general consumer fraud statute applies to real estate transactions. *See id.* at 153 n.5. In addition, some states' consumer fraud statutes only impose liability on persons "in the business" of home sales. *See id.* at 162 n.73. In others, all persons, including those making isolated sales of homes, could be found liable. *See id.* Another variation is found in those states that only impose liability where the buyer is not a commercial entity, or where the property in question is residential housing. *See id.* at 163 n.76 (citing George v. United Ky. Bank, 753 F.2d 50 (6th Cir. 1985)). The difference in the way states treat these transactions may be attributed to the fact that consumer protection statutes are generally adopted to protect individual consumers from unscrupulous practices by commercial entities. *See id.* at 153, 157. Consumer fraud statutes seek to remedy the imbalance in bargaining power that exists, and indeed, it is the imbalance that animates policy decisions to extend protection to buyers. *See id.* at 157.

[134] *See* Strawn v. Canuso, 140 N.J. 43, 657 A.2d 420 (1995); Lingsch v. Savage, 29 Cal. Rptr. 201 (Dist. Ct. App. 1963); *supra* notes 52-55 and accompanying text (discussing *Lingsch*); *supra* at notes 89-130 and accompanying text (discussing *Strawn*).

As of early 1996, other states that have passed real property disclosure legislation include Alaska, California, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Maryland, Michigan, Mississippi, Nebraska, New Hampshire, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Virginia, Washington, and Wisconsin. *See* Weinberger, *supra* note 11, at 414 & n.187.

[135] *See* Weinberger, *supra* note 11, at 389 n.14 (stating that judicial decisions that abolished the doctrine of caveat emptor in real estate transactions substitute "fuzzy ambiguity for well-defined rules of decision [so that property sellers] no longer have a clear sense of their legal rights and obligations" (citation omitted)).

ers.[136] Over time, lobbying efforts of the National Association of Realtors and state brokerage associations have resulted in state laws that codify disclosure duties of both sellers and brokers in real estate transactions.[137]

These disclosure statutes have, first, imposed on sellers a duty to comprehensively list everything they know about enumerated defects concerning a property.[138] Second, the statutes protect sellers and their brokers from liability because the statutes limit what a seller must disclose.[139] Third, these laws eliminate the buyers' opportunity to claim that they have not been informed of certain defects.[140] Another perceived effect of full-disclosure laws is the reduction of the market value of properties offered for sale.[141] Finally, the adoption of statutory disclosure may also inhibit further development and expansion of the common law concerning duties to disclose.[142]

The scope of a statutory duty to disclose varies broadly by jurisdiction.[143] The state that offers maximum disclosure to the buyer is probably California, because it mandates the disclosure of the greatest number

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[136] *See id.* at 419-21 ("It is no secret that the real estate sales industry was the principal intended beneficiary of state disclosure laws." (footnote omitted)); Steven C. Tyszka, *Remnants of the Doctrine of Caveat Emptor May Remain Despite Enactment of Michigan's Seller Disclosure Act*, 41 WAYNE L. REV. 1497, 1507 (1994).

[137] *See* Weinberger, *supra* note 11, at 420-21; Tyszka, *supra* note 136, at 1507.

[138] *See* Weinberger, *supra* note 11, at 414.

[139] *See id.* at 414, 415.

[140] *Cf.* Carolyn L. Mueller, *Ohio Revised Code Section 5302.30: Real Property Transferor Disclosure—A Form Without Substance*, 19 U. DAYTON L. REV. 783, 787 (1994) (stating that the disclosure forms are "intended to lessen the likelihood of disputes occurring after the property has been transferred and to provide a paper trail should litigation follow").

[141] *See* Ann Sumwalt, *Tell It Like It Is—If You're a Home Seller, It's Vital You Disclose Every Flaw in the House—And the Neighborhood*, L.A. TIMES, Apr. 2, 1995, § K, at 1 ("[D]isclosure laws may be having unintended consequences. For example, home sales prices are often discounted to account for problems that now must be disclosed . . . ."); *infra* note 211 (critiquing the conclusion that disclosure laws have general economic effects).

[142] *See* Weinberger, *supra* note 11, at 415 ("Disclosure laws thereby constitute a brake on the erosion of the doctrine of caveat emptor.").

[143] *See* Washburn, *supra* note 16, at 407-28 (surveying disclosure obligations in Alaska, California, New Hampshire, Kentucky, Maine, Virginia, and Wisconsin). For example, the scope and timing of disclosure, consequences of nondisclosure, and procedural steps to be taken in preparing the disclosure vary greatly from state to state. *See id.* (discussing some of these differences).

For additional scholarship on specific disclosure laws, see generally Tyszka, *supra* note 136 (discussing the Michigan disclosure law), Mueller, *supra* note 140 (detailing and critiquing the provisions of the Ohio disclosure statute), and Scheid, *supra* note 23 (detailing and commenting on the Illinois disclosure statute).

of items.[144] Accordingly, California's law will now be examined and then contrasted with the laws existing in other states.

A. *California's Disclosure Law*

In 1987, a comprehensive statute took effect in California, dealing with a seller's duty to disclose information in a real estate transaction.[145] The statute applies to most real estate transactions, including sales, exchanges, and installment land contracts.[146] Still, the statute excludes certain types of transfers, such as mortgage foreclosure sales, transfers between co-owners and spouses and certain related individuals, transfers pursuant to a divorce decree, and transfers to and from a governmental entity.[147] In addition, sales of lots and homes in subdivisions are excluded because the law requires a much more comprehensive report for those types of sales.[148]

The statute requires that a written disclosure form be provided to all buyers as soon as possible before closing.[149] If a buyer has made a formal offer to purchase property, but has not received the disclosure statement at the time of the offer, the buyer may cancel the offer after receipt of the statement.[150] The form of the disclosure is provided by statute.[151] It requires the seller to inform the buyer of a great number of potential defects in the property, including on-site defects,[152] off-site defects,[153]

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[144] *Compare* CAL. CIV. CODE §§ 1102-1102.15 (West Supp. 1996) *with* N.J. STAT. ANN. §§ 46:3C-1 to -12 (West Supp. 1996).

[145] *See* CAL. CIV. CODE §§ 1102-1102.15.

[146] *See id.* § 1102.

[147] *See id.* § 1102.2.

[148] *See id.* § 1102.2(a); CAL. BUS. & PROF. CODE §§ 11010, 11018 (West 1987 & Supp. 1996). When a developer is constructing a new subdivision, California law requires comprehensive filings and approvals from the Real Estate Commission, in addition to detailed disclosures to prospective customers. *See id.* Thus, purchasers in such subdivisions receive much more detailed information than other purchasers. *Compare id. with* CAL. CIV. CODE §§ 1102-1102.15.

[149] *See* CAL. CIV. CODE § 1102.3(a).

[150] *See id.* § 1102.3(b). The cancellation must be made within three days after in-person delivery of the disclosure or five days after mailing. *See id.*

[151] *See id.* § 1102.6.

[152] *See id.* On the site itself, the seller must disclose whether or not a list of 39 appliances and other amenities are in operating condition, as well as the source of water and gas supplies for the house. *See id.*

The seller must list any defects in interior walls, ceilings, floors, exterior walls, insulation, roof, windows, doors, foundation, slab, driveways, sidewalks, walls and fences, and the electrical, plumbing, sewer, and septic systems. *See id.*

Finally, the seller must also disclose environmental hazards; additions or modifications that do not comply with building codes or zoning regulations; major damage to the property "from fire, earthquake, floods, or landslides;" zoning violations, nonconforming uses, and violations of "setback" requirements; covenants and restrictions on the prop-

and other problems dealing with boundaries or legal relations with others.[154] The seller's disclosure, however, is intended to be neither a warranty nor part of the contract of sale.[155] But, if a seller fails to disclose a particular defect, or otherwise fails to comply with the disclosure law, the seller is liable for actual damages suffered by the buyer.[156]

One especially noteworthy case interpreting the California law is *Alexander v. McKnight*.[157] In *Alexander*, a California appeals court recognized that under its disclosure laws, a home seller has a duty to inform a buyer about off-site conditions in the neighborhood.[158] The neighbors of the plaintiff homeowners carried on various activities that created excessive noise in the neighborhood.[159] The court recognized that if the plaintiffs sold their houses, they would have to disclose the presence of these unwelcome, "noisy" neighbors under the California disclosure law.[160]

B. New Jersey's Approach to Sellers' Duties to Disclose Off-Site Conditions

In contrast to California's broad statutory disclosure duties, New Jersey law concerning off-site disclosure duties offers far fewer protections to home buyers. While *Strawn* was pending in the Supreme Court, Assemblyman George Geist introduced Assembly Bill 2646,[161] which, in contrast to the disclosure mandated by the appellate division's *Strawn* ruling, would seriously limit a home buyer's right to information about off-site conditions.[162] Additionally, a similar bill was introduced in the

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erty's use; lawsuits dealing with the property and its uses; and notices of abatements or other citations. *See id.*

[153] *See id.* Off the site, the seller must disclose neighborhood noise problems or other nuisances. *See id.*

[154] *See* CAL. CIV. CODE § 1102.6. The seller must also disclose common walls and fences with adjacent property; encroachments, easements, etc.; settling and soil problems; whether there are any common areas owned with other individuals; and any lawsuits affecting them. *See id.*

[155] *See id.*

[156] *See id.* § 1102.13. In relevant part, the statute provides that "any person who willfully or negligently violates or fails to perform any duty prescribed by any provision of this article shall be liable in the amount of actual damages suffered by a transferee." *Id.* In *Saunders v. Taylor*, the court interpreted this provision as allowing a buyer to recover out-of-pocket damages, instead of damages calculated by the "'benefit of the bargain'" rule. *See* 50 Cal. Rptr. 2d 395, 397-98 (Ct. App. 1996).

[157] 9 Cal. Rptr. 2d 453 (Ct. App. 1992)

[158] *See id.* at 455.

[159] *See id.* at 456.

[160] *See id.*

[161] A. 2646, 206th Leg., 2d Sess. (N.J. 1995).

[162] *See* Tom Hester, *Pollution Disclosure Bill Hits Home Buyer Snag*, STAR-LEDGER, May 16, 1995, at 13. The bill moved quickly through the Legislature, passing the Assembly on June 26, 1995. *See* NEW JERSEY LEGISLATIVE INDEX, Jan. 9, 1996, at 119. A

State Senate.[163] Eventually, the Assembly Bill, with some amendments, was signed into law as the New Residential Construction Off-Site Conditions Disclosure Act (Act) on September 12, 1995.[164]

The statute essentially follows the Supreme Court's view on the categories of sellers to whom the disclosure duties apply. The Supreme Court's decision in *Strawn* was not particularly broad in terms of who was subject to liability because *no* sellers of used homes or *casual* sellers of new homes are subject to the provisions of the *Strawn* decision.[165] Rather, *Strawn* explicitly stated that the holding was limited to housing that was both new and residential.[166] Thus, following the limitations in *Strawn*, the Legislature provided that only builders of newly constructed properties or structures that will be used as the purchaser's residence, as well as the real estate brokers representing such builders, are subject to the statute's disclosure provisions.[167] The Act and this discussion refer to these categories collectively as "sellers."[168]

The stated purpose of the Act is to define all of the disclosure duties applicable to sellers of new residential housing.[169] To that end, the Act first contemplates the creation of a rather limited list of off-site hazards within each municipality, collected by obtaining information from various sources.[170] Once the information is collected, the clerk of each munici-

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slightly amended version passed the Senate that same day, and three days later, on June 29, 1995, the Assembly approved the amendments and sent the bill to the Governor for final approval. *See id.*

[163] S. 2062, 206th Leg., 2d Sess. (N.J. 1995).

[164] *See* New Residential Construction Off-Site Conditions Disclosure Act, ch. 253, 1995 N.J. Sess. Laws 803 (West) (codified at N.J. STAT. ANN. §§ 46:3C-1 to -12 (West Supp. 1996)). The legislation was effective immediately, except for the provisions granting immunity to brokers and builders. *See* § 14, 1995 N.J. Sess. Laws at 807. Those immunity provisions were made retroactive to April 25, 1995, the date of the ruling in *Strawn*. *See* §§ 10, 14, 1995 N.J. Sess. Laws at 806, 807.

[165] *See* Strawn v. Canuso, 140 N.J. 43, 65, 657 A.2d 420, 431 (1995).

[166] *See id.*

[167] *See* N.J. STAT. ANN. §§ 46:3C-3, -8. Builders are defined as "any individual, corporation, partnership or other business organizations engaged in the construction of new homes." *Id.* § 46:3B-2 (West 1989 & Supp. 1996). The statute applies to real estate brokers, salespersons, and broker-salespersons, each of which is defined in the statute. *See id.* The term "broker" is used in this Comment to refer to all three categories of individuals.

[168] *See id.* § 46:3C-3 (West Supp. 1996).

[169] *See id.* § 46:3C-1. In the statement accompanying the bill at introduction, Assemblyman Geist asserted that the *Strawn* opinion "offered little guidance" on the extent of the duty to disclose off-site hazards. A. 2646, 206th Leg., 2d Sess. (N.J. 1995) (statement of Assemblyman Geist). Because of this, the bill was intended to comprehensively define the duty and specify what actions were necessary to fulfill the duty. *See id.*

[170] *See* N.J. STAT. ANN. § 46:3C-6. First, the Commissioner of Environmental Protection (Commissioner) is required to provide each municipal clerk with a list of certain sites. *See id.* These are (1) national Superfund toxic waste sites, toxic waste dumps

pality must receive a list of potential off-site hazards in the municipality and make this list available for public inspection.[171]

Upon the execution of a contract of sale for a new house, the seller must notify the purchaser of her right to go to the municipal clerk of any municipality within one-half mile of the property and inspect the list kept by each municipal clerk.[172] The Act mandates the precise form of notice that the seller must furnish to the buyer.[173] The Act further provides that the purchaser may cancel the contract within five business days from the execution of the contract.[174]

The keystone of the legislation, however, is the provision that once the seller has provided the statutory notice to the buyer, the seller is absolutely immune from liability for failing to disclose off-site conditions of any character.[175] The seller's immunity attaches even if (1) the municipal clerk does not have the documentation needed to compile the list; (2) the municipal clerk fails to furnish the list as required by law; or (3) there is

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which have been made a priority for cleanups by the federal government under 42 U.S.C. §§ 9601-9675 (1994); (2) New Jersey hazardous discharge sites, known hazardous discharge sites designated by New Jersey's Department of Environmental Protection under N.J. STAT. ANN. §§ 58:10-23.15 to -23.19 (West 1992); and (3) sanitary landfills within that municipality defined in N.J. STAT. ANN. § 13:1E-3 (West 1991). *See id.* § 46:3C-3. The Commissioner is required to furnish the first of these lists by September 12, 1996, one year after the law's effective date, and subsequent updated lists, if necessary, by August 31 of each subsequent year. *See id.* § 46:3C-6.

In addition to the list furnished by the Commissioner, every person who owns, maintains, or leases certain facilities must notify the municipal clerk of the existence of any of their operations within the municipality. *See id.* § 46:3C-5. The list of facilities thus included are: (1) overhead electric lines with a 240,000 or more volt capacity; (2) electrical transformer substations; (3) underground gas transmission lines; (4) certain large sewer pump stations; and (5) public wastewater treatment facilities. *See id.* §§ 46:3C-3, -5.

There also appears to be an oversight in drafting the legislation. The law also lists airport safety zones, defined in N.J. STAT. ANN. § 6:1-82 (West 1996), as one of the off-site conditions that must be disclosed. *See id.* § 46:3C-3. Nevertheless, it does not specify how municipal clerks are to receive notice of such zones. The other eight enumerated off-site conditions are to be disclosed to the municipal clerk by the Commissioner of Environmental Protection or the operator of the facility, yet there are no comparable provisions regarding the airport safety zones. *See id.* §§ 46:3C-5, -6.

[171] *See id.* § 46:3C-4. In the initial version of the legislation, the municipal clerks were required to "compile and maintain" the lists rather than just merely receiving them and making them available. A. 2646 § 4, 206th Leg., 2d Sess. (N.J. 1995). In addition, the Assembly Bill called for the municipal clerks to keep maps of hazard locations, in addition to the lists that the enacted version of the law requires. *See id.* The map provision was not included in the statute as ultimately approved. *See* N.J. STAT. ANN. § 46:3C-6.

[172] *See* N.J. STAT. ANN. § 46:3C-8.

[173] *See id.*

[174] *See id.* § 46:3C-9. Apparently, the cancellation can be for any reason, whether or not it is related to the disclosure from the municipal list. *See id.*

[175] *See id.* § 46:3C-10(a).

any error or omission in the list.[176] Therefore, even if the seller has actual knowledge of off-site defects and actual knowledge that they are not in the municipal clerk's list, the seller has no liability for failing to disclose those conditions.[177]

The statute does not end there with its generous provisions for the seller. Sellers were not liable, nor was a list of hazards kept at the municipal clerks' offices, for the approximately one year it took for full implementation of the Act.[178] Moreover, the retroactivity provisions of the legislation have the effect of stopping any lawsuit for failing to disclose off-site conditions filed after the *Strawn* decision, despite the fact that the decision was rendered more than four months before the legislation was approved.[179]

Likewise, the statute does not give the buyer any meaningful recourse against the municipality. A municipality that makes the lists available to purchasers is only liable for damages under the Act if (1) the municipality is in possession of information or a reasonable person would conclude that it was in possession of the information *and* (2) the municipality knowingly or intentionally withholds the information.[180]

The result of the *Strawn* decision and the subsequent legislative reaction to it has left New Jersey home buyers with comparatively few protections against sellers who do not disclose off-site hazards. To sum up the law in New Jersey: (1) buyers of new homes have an implied warranty of quality and habitability, provided both by case law and

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[176] *See id.*

[177] *See* N.J. STAT. ANN. § 46:3C-10(a), -10(b).

[178] *See id.* § 46:3C-10. The immunity provisions for this one-year interim period provided for immunity notwithstanding the fact that the lists "have not been, or are yet not required to be submitted." *Id.*; *see also id.* § 46:3C-5(b), -6(b) (providing that the Commissioner and operators of hazardous facilities need not furnish information to municipal clerks until one year after the effective date of the Act, or September 12, 1996).

[179] *See id.* § 46:3C-10(c). The section provides that no seller is liable for failing to disclose off-site conditions "except in any specific cases in which there has been an action filed in the Superior Court prior to April 25, 1995, [the date of the Supreme Court's *Strawn* decision,] or in which the Appellate Division of the Superior Court or the Supreme Court has issued a decision prior to the effective date of this act [September 12, 1995]." *Id.* In other words, the claims of the *Strawn* plaintiffs may remain active, and any actions filed after the *Strawn* decision must be dismissed.

[180] *See id.* § 46:3C-12. The statute, however, does not address the liability of municipalities that completely fail to make these lists available. In any event, any suit against a municipality would probably be limited by the provisions of the New Jersey Tort Claims Act. *See id.* §§ 59:1-1 to :12-3 (West 1992 & Supp. 1996). For a recent case discussing a municipality's liabilities when an employee furnished erroneous information about a parcel of real estate, see *Simon v. National Comm. Bank*, 282 N.J. Super. 447, 454-59, 660 A.2d 558, 560-64 (App. Div. 1995).

statutory law;[181] (2) successors in title to new homes retain the advantages of these warranties;[182] (3) buyers of used homes are protected from fraudulent nondisclosures about on-site conditions under the *Weintraub* rule;[183] (4) buyers of used homes have *no* protection from nondisclosure of off-site conditions;[184] and (5) buyers of new homes are only protected to the limited extent of the new statute.[185]

C. *Other Variations of Statutory Disclosure Duties*

Between the two extremes in statutory disclosure, illustrated by the California and New Jersey laws, are the provisions in a number of other states.[186] For example, Ohio's disclosure law contains a list of items that must be disclosed, but these disclosures are limited to physical, as opposed to psychological or stigmatic, defects that exist *on* the property itself.[187] Another example is the Michigan statute, which requires disclosure of more than just on-site physical defects, listing area environmental concerns as one of the items that must be disclosed.[188] Thus, in each different state with a disclosure law, there are variations on the enumerated items that must be disclosed.

In addition, each disclosure law may vary in its catchall provision. Many states' disclosure legislation contain a relatively broad catchall provision requiring a seller to disclose "any other material defects affecting th[e] property or its value that a prospective buyer should know."[189] In others, a catchall provision exists, but is more limited in scope.[190] Finally, some states have no catchall provision at all.[191]

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[181] *See supra* notes 28-39 and accompanying text.

[182] *See* Hermes v. Staiano, 181 N.J. Super. 424, 432, 437 A.2d 925, 929 (Law Div. 1981).

[183] *See supra* notes 61-68 and accompanying text.

[184] *See supra* note 167 and accompanying text.

[185] *See supra* notes 162-80 and accompanying text.

[186] *See supra* notes 134 & 143 (listing the states with home-seller disclosure laws and providing an overview of their differences).

[187] *See* Mueller, *supra* note 140, at 824.

[188] *See* Tyszka, *supra* note 136, at 1500 n.15.

[189] Katherine A. Pancak et al., *Residential Disclosure Laws: The Further Demise of Caveat Emptor*, 24 REAL EST. L.J. 291, 305 (1996) (footnote omitted). *See, e.g.*, IND. CODE ANN. § 25-34.1-10-10(3)(C) (West Supp. 1996) (providing that seller's broker must disclose "adverse material facts or risks actually known by the broker"); MISS. CODE ANN. § 89-1-509 (Supp. 1996) ("Please state any other facts, information or problems . . . relating to this property that would be of concern to a buyer"); Washburn, *supra* note 16, at 426 (noting that Delaware, Maine, Maryland, New Hampshire, and Rhode Island also require disclosure of "*any* other known material defects" (emphasis added)).

[190] *See, e.g.*, Mueller, *supra* note 140, app. 834. Ohio's catchall provision, as interpreted by its Department of Commerce, the agency responsible for enforcement of the

Because no state has a provision explicitly requiring a home seller to disclose the presence of a sex offender, evaluating the list of enumerated disclosures is of no help in answering the question posed by this Comment. Instead, one must examine the catchall provision, if any. It is this analysis that is more helpful in deciding whether a home seller must disclose the presence of a sex offender.

In those jurisdictions that have a broad catchall provision, it is likely that disclosure of a nearby sex offender will be required. In those with a limited provision, the answer to the question will turn on whether a duty to disclose can fairly be inferred from interpreting all provisions in the statute. In those with no catchall provision, disclosure will most likely not be required. Finally, in states with no statutory duty to disclose at all, there will likely be common law requiring disclosure of material defects. In such states, a strong case can be made for requiring disclosure. The next Part expands upon these concepts.

IV. CONCLUSION: APPLICATION OF THE ANALYSIS FOR DUTY TO DISCLOSE OFF-SITE CONDITIONS TO THE CASE OF KNOWN SEX OFFENDERS LIVING IN THE NEIGHBORHOOD

Up to this point, this Comment has shown that courts and legislatures have significantly abrogated the rule of caveat emptor in real estate transactions. Against this background, this Comment now considers whether courts would recognize a cause of action for the failure of a seller, a landlord,[192] a seller's attorney,[193] or real estate broker[194] to dis-

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law, requires disclosure only of *physical, on-site* conditions. *See id.* Likewise, Virginia's catchall provision is limited to the "physical condition of the property." *See* Washburn, *supra* note 16, at 417.

[191] *See supra* notes 162-80 (discussing New Jersey's disclosure statute, which lacks a catchall provision). This further illustrates that New Jersey's statute is one of the narrowest in the country.

[192] *See, e.g.*, Michaels v. Brookchester, Inc., 26 N.J. 379, 382, 140 A.2d 199, 201 (1958). Plainly, the rule of caveat emptor has been abrogated in the case of leases. *See id.* This rule, however, does not establish that tenants, as distinguished from buyers, will be the beneficiaries of a duty to disclose off-site conditions generally or sex offenders particularly. The development of this aspect of the law is uncertain at best.

[193] *See* Petrillo v. Bachenberg, 139 N.J. 472, 488, 655 A.2d 1354, 1355 (1995). In *Petrillo*, a property seller's attorney provided a report to the buyer concerning percolation tests on the soil of the property. *See id.* at 487, 655 A.2d at 1361. The report, however, did not disclose that the subject property had passed only two of 30 percolation tests administered. *See id.* at 475, 655 A.2d at 1355. The court found that the attorney could be sued for this misrepresentation. *See id.* at 488, 655 A.2d at 1362. The court held that the attorney's actions in providing the report were an attempt "to induce a prospective purchaser to buy the property." *Id.* at 486, 655 A.2d at 1361. As such, the attorney assumed a duty to the buyer "to provide reliable information regarding the percolation tests." *Id.* at 487, 655 A.2d at 1361. Having failed to do so, the attorney could be liable for this misrepresentation, upon which the buyer relied. *See id.* Thus, *Petrillo* confirms

close that a sex offender lives in the neighborhood where the home in question is being sold. The prime proponent of Megan's Law, Maureen Kanka, has publicly stated her view that once a resident knows of a sex offender living nearby, it becomes that resident's moral obligation to notify newcomers.[195] To reiterate, this question may arise in any state which, as part of its sex-offender laws, has provisions requiring community notification of a sex offender's place of residence.[196]

Whether any courts would extend such a duty is, of course, a matter of speculation. Some real estate law experts have suggested that courts will extend such a duty.[197] Yet, the answer under current law is far from clear. When the sex-offender laws were passed, real estate brokers considered the consequences of these laws, but did not express public op-

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that an attorney who is involved in the sale of real property may be liable for failing to disclose material information about the property, just as a seller might be. *See id.* at 478, 655 A.2d at 1357.

[194] *See* Pancak et al., *supra* note 189, at 293-94. Typically, real estate brokers have the same or greater obligations and potential liabilities as the sellers they represent in terms of their legal duties to disclose material defects in the property. *See id.* Indeed, brokers, who are the legal agents of sellers in many real estate transactions, are frequently targeted by disappointed buyers who sue. *See* Mueller, *supra* note 140, at 786 & n.17. A major reason for this is that brokers are more likely than individual sellers to be able to pay a judgment because they often are insured against such liability. *See id.* Indeed, some states impose greater obligations on the broker than on the individual seller, such as affirmatively requiring a broker to inspect the subject property. *See* Pancak et al., *supra* note 189, at 295-97 & nn.19-29.

Because brokers were targeted so frequently in lawsuits by buyers who alleged nondisclosure of material facts, they have been the impetus for legislation limiting their liability. *See supra* notes 136-37 and accompanying text. Moreover, brokers would probably protest the imposition of a duty to disclose the presence of a sex offender. *See* Booth, *supra* note 6, at 13 (quoting the counsel for a major brokerage firm who asserts that brokers have "a lot of concerns . . . that should be addressed before they are required to start telling buyers about sex offenders in the neighborhood")

[195] *See* Schwaneberg, *supra* note 2, at 1.

[196] Although all 50 states currently have sex-offender registration laws, not all of these laws include community notification provisions. *See* Rudin, *supra* note 8, at 4. Nevertheless, it is highly likely that *all* states will soon have notification provisions. *See id.* Thus, the legal issue discussed in this Comment will probably be confronted in all 50 states.

Indeed, according to one news account, the problem discussed in this Comment has already occurred at least once. *See* Mike Barnicle, *Held Hostage by a Rapist*, BOSTON GLOBE, Oct. 12, 1995, at 25. A Massachusetts family was advised that under the State's law, they would have to disclose to potential buyers that a convicted rapist was living next door. *See id.* The family reported that as a result of this, they were unable to sell their home. *See id.*

[197] *See* Schwaneberg, *supra* note 2, at 1 (stating the view of one real estate attorney that "in the very near future," the law will likely develop to require a seller to disclose the existence of a sex offender); *see also* Bradley Inman, *Can Sex Offenders Affect Home Sales?*, SACRAMENTO BEE, Sept. 8, 1996, at H1, *available in* 1996 WL 3315398 (expressing the view of a California real estate law expert that although the law is unclear, disclosure would be favored).

position to them, probably due to political pressures.[198] With the enactment of these laws, however, their consequences must now be confronted by home builders, real estate brokers, and individual homeowners alike.

A. *Legal Framework Under Current Law for Deciding Whether a Seller Must Disclose the Presence of a Sex Offender*

To date, there has been no reported decision addressing the question of whether a home seller must disclose the presence of a nearby sex offender. Perhaps the closest analogy can be found in *Van Camp v. Bradford*,[199] where an Ohio trial court held that a residential home seller had a duty to inform a buyer, even in the absence of an inquiry, that two rapes had occurred at the house in question shortly before the sale and that three other rapes had recently occurred in the neighborhood.[200]

Van Camp, however, does not definitively answer the question posed by this Comment. Under the facts of that case, there had actually been crimes committed in the neighborhood.[201] The court there did not hold that a seller had to disclose the presence of a *criminal*, but rather, the presence of actual *crime* in the neighborhood. Moreover, there were overtones of affirmative misrepresentations in *Van Camp*, instead of a mere failure to disclose.[202] Nevertheless, it is noteworthy that the court recognized that the risk of crime could be a material fact that had to be disclosed by a seller.

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[198] *See* Leslie Haggin, *A Tainted History May Haunt That House*, SUNDAY RECORD, (Hackensack, N.J.), Oct. 23, 1994, § R, at 1 (discussing brokers' concerns about liability for disclosing the presence of sex offenders under Megan's Law, but stating that they would not oppose the legislation because "[t]hat's like being against mom and apple pie").

[199] 623 N.E.2d 731 (Ohio Ct. of Common Pleas 1993).

[200] *See id.* at 734. In *Van Camp*, the plaintiff buyer was a single mother with a teenage daughter. *See id.* at 740. During the discussions for the purchase of the home, the sellers never informed her of the rapes that had occurred at the home and in the neighborhood. *See id.* at 734. Moreover, the sellers maintained their silence about the rapes even after the plaintiff asked why there were bars on the basement windows. *See id.* In fact, the sellers replied that "there was currently no problem with the residence." *Id.* This silence in the face of an inquiry greatly troubled the court, which stated that the inquiry triggered an obligation on the part of the seller to tell the truth. *See id.* at 740. In fact, the court stated that the result would not necessarily be the same "had there been no evidence to indicate that the plaintiff had solicited information regarding the safety of the residence." *Id.* In light of these facts, the court denied the seller's motion for summary judgment, holding that the occurrence of rapes on and near the subject property was a material fact in connection with the sale of the property. *See id.*

After this ruling, the case was then set for trial. *See id.* at 741. A jury then awarded the plaintiff the sum of $10,000. Telephone Interview with F. Harrison Green, Esq., Attorney for Plaintiff (Jan. 14, 1997).

[201] *See Van Camp*, 623 N.E.2d at 734.

[202] *See id.* at 740.

Taking a divergent view, the Attorney General of Louisiana has opined that there is no obligation to disclose the presence of a sex offender to potential home purchasers.[203] In 1994, a Louisiana state representative asked the attorney general of that State for a legal opinion on whether a property owner who received notice of a nearby sex offender pursuant to Louisiana's version of Megan's Law[204] had to disclose the existence of that offender to a buyer.[205] The attorney general's reply, without analysis, was simply that "there are currently no provisions" that would require a seller to disclose the presence of a sex offender to a buyer.[206] The attorney general cautioned, however, that if asked, a buyer must reply truthfully, because to do otherwise would be a form of fraud.[207] The attorney general was also asked whether there were any provisions for compensating homeowners who suffered a reduction in their property's value after the disclosure of the presence of a sex offender.[208] The response to this question was the same—"there are currently no provisions" requiring it.[209]

At some point in the not-too-distant future, a court will probably be presented with a case in which a home buyer sues the seller of a home for failing to disclose that a sex offender lives in the neighborhood of the home. Thus, this Comment will now illustrate a possible legal framework to decide whether to impose liability not when a seller tells an outright lie, but instead fails to disclose this fact.

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[203] La. Att'y Gen. Op. No. 94-332, Sept. 2, 1994, *available in* 1994 WL 553070.

[204] *See* ch. 962, 1992 La. Acts 2602-2609 (West Supp. 1996) (codified at LA. REV. STAT. ANN. § 15:574.4(H); LA. CODE CRIM. PROC. ANN. art. 895 (H) (West Supp. 1996)).

[205] *See* La. Att'y Gen. Op. No. 94-332, Sept. 2, 1994, *available in* 1994 WL 553070.

[206] *Id.* The question to the attorney general, posed by State Representative Suzanne Mayfield Krieger, was whether sellers or brokers who list a particular property would be required to disclose whether a sex offender lived within three blocks of the home in question. *See id.*

[207] *See id.*

[208] *See id.* Representative Kreiger's inquiry highlights another important consequence of disclosure to a community that a sex offender lives in the neighborhood: reduction in the market value of homes there. Irrespective of whether a state imposes a duty to disclose on the part of a seller, it is likely that property values will decline. See *supra* note 141 and *infra* note 211 and accompanying text, in support of the theory that such a decline would take place.

If property values decline, it is not unlikely that a homeowner will petition for a reassessment and reduction of a property's assessed value. If a reduction in property value is granted, the result will be lower property tax collections for government entities that are funded through property taxation. Thus, this potential loss of both property value and the reduction in governmental revenues is another of the social costs that statutes like Megan's Law impose.

[209] La. Att'y Gen. Op. No. 94-332, Sept. 2, 1994, *available in* 1994 WL 553070.

1. Materiality

A court faced with such a question will probably first consider whether a sex offender's presence is a fact material to the transaction. Courts that have defined materiality stress that conditions that significantly reduce the market value of a home are material facts that must be disclosed.[210] Real estate experts seem to indicate that the presence of a sex offender in a neighborhood, just as any other off-site defect, will decrease the fair market value of a home.[211] Accordingly, courts will probably recognize the presence of a sex offender as a material fact.[212]

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[210] *See, e.g.*, Reed v. King, 193 Cal. Rptr. 130, 133 (Ct. App. 1993) (defining "material facts" as those that have a meaningful and measurable effect on market value).

[211] *See* James Ahearn, *When Your Prospective Neighbor Is a Sex Offender*, RECORD, (Hackensack, N.J.), July 24, 1996, at NJ-7.

> How big an impact would that have on housing values? Five percent? Ten percent? More? For some buyers, like childless couples, the presence of a sex offender nearby will be seen as distasteful, but not a deal-stopper. For parents of young children, however, the information will often put the kibosh on the purchase. They will look elsewhere.

Id.; *see also* Christopher Combs, *Notification Required if Sex Offender Moves to Neighborhood*, ARIZ. REPUBLIC, Aug. 3, 1996, at EV7, *available in* 1996 WL 7727667.

> If there is any community notification under Megan's Law, the property values of homes neighboring that of convicted sex offenders, and even the property values of entire subdivisions, could be significantly impacted.

Id. Thus, the market value of a particular home will be driven down when a sex offender moves in nearby and a home seller must disclose that fact to a buyer. Additionally, disclosure laws are thought to drive down market prices generally on all homes. *See* Sumwalt, *supra* note 141, at 1.

This theory—that disclosure laws generally depress market value—may not be entirely sound and only holds true assuming that most homes for sale have a serious number of disclosable flaws. For example, consider two states: one with full disclosure laws, which are strictly enforced, and one without such protections. The purchase of a home carries with it a greater risk in the state without the disclosure laws, and a buyer will probably pay less, knowing of the risk factor involved. Thus, in such a state, overall market values will probably be lower. As Professor Weinberger explained, "purchasers of property without benefit of enforceable warranties of quality made allowance for the risk that articles might not be sound by bidding prices down . . . . [P]rices [were] already discounted to reflect the level of risk being assumed by purchasers." Weinberger, *supra* note 11, at 392.

In contrast, in a state with full disclosure laws, a buyer presented with a home with a "clean bill of health" may gladly pay more for that guarantee if the buyer knows that guarantee is meaningful and enforceable in light of strong disclosure laws in that state. Naturally, a specific home with disclosed defects will probably be discounted. In this type of regime, however, the *overall* market values will *not* be lower; there will simply be shifting of values from some properties, or some areas, to others. Further analysis as to whether disclosure laws inflate or depress overall market prices is beyond the scope of this paper. Nevertheless, even though disclosure laws *may* affect the overall real estate market, specific homes with disclosed defects *will* plainly lose value.

[212] *See* Booth, *supra* note 6, at 13 ("[S]ex offenders may at some point be considered an 'off-site condition' that may affect someone's decision to buy the property.").

2. Did the seller owe a duty to the buyer?

After finding that such a fact is "material" to the transaction, the court will next have to consider whether the disclosure of this fact was among the duties that the seller owed to the buyer. To answer this question, the court will probably look to the real property disclosure statute of the jurisdiction.[213] No state specifically requires the disclosure of a sex offender in the neighborhood, and therefore, if a court is to find such a requirement, it will do so by implying such a duty from other provisions of the disclosure statute. As outlined above, in a state like California, which specifically requires the disclosure of adverse neighborhood conditions, the answer to this question will be easy, and a court will probably find such a duty to exist.[214] In other states that lack a specific requirement of disclosure but include a broad catchall provision, the result will probably be the same. As discussed above, states with broad catchall provisions require a seller to disclose "any" material defects in the property. The statute creates the duty, and therefore, a court would probably enforce it in such a situation.[215] Finally, in states that either have a narrow catchall provision or lack one all together, courts will

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[213] *See supra* notes 137-91 and accompanying text (comparing disclosure statutes in various jurisdictions).

[214] *See* CAL. CIV. CODE § 1102.6 (West Supp. 1996). California's comprehensive statutory disclosure includes an explicit requirement to disclose "neighborhood noise problems or other nuisances," as well as a catchall requirement to disclose all material conditions. *Id.*

> The specification of items for disclosure in this article does not limit or abridge any obligation for disclosure created by any other provision of law or which may exist in order to avoid fraud, misrepresentation, or deceit in the transfer transaction.

Id. § 1102.8. Because California law already recognizes a seller's duty to disclose facts material to the transaction, *see* Lingsch v. Savage, 29 Cal. Rptr. 201, 204 (Dist. Ct. App. 1963), the law points to the recognition of a duty to disclose the presence of a sex offender if this presence is found to be material.

California's decisional law also supports this conclusion. In *Alexander v. McKnight*, the court recognized a duty to disclose neighbors who were noisy. *See* 9 Cal. Rptr. 2d 453, 456 (Ct. App. 1992). It is not much of a stretch to require disclosure of neighbors who are sex offenders, and indeed, California real estate experts have already suggested it. *See* Sumwalt, *supra* note 141, at 1. The columnist urges sellers to disclose not only on-site defects, but also criminal activity in the area. *See id.* The columnist noted that "no longer is it enough to tell prospective purchasers about the crack in the foundation, sellers must also tell them about the crack house down the street." *Id.* The article also urges sellers to err on the side of disclosure and inform a seller if, hypothetically, there were "five burglaries on [the] street." *Id.*

[215] *See supra* note 189 and accompanying text (discussing the broad catchall provisions in some states).

probably find that no duty exists.[216] Based on New Jersey's statutory and common law, it is likely that no duty will be found in New Jersey.[217]

In contrast, for states that lack disclosure statutes, the common law usually imposes on a seller a duty to disclose *material* defects in the property.[218] Assuming that courts in these states do not limit their holdings to on-site defects,[219] the existing case law requiring disclosure of material defects furnishes ample precedent for holding that a duty to disclose the presence of a sex offender to the buyer exists.

3. The availability of information to the buyer

As discussed above, courts sometimes adhere to the rule of caveat emptor where a home buyer could have discovered information about a home but failed to do so. For example, in *Blaine v. J.E. Jones Construction Co.*, the plaintiff alleged a failure to disclose certain information contained in public records.[220] The court held that the presence of the information in the public records undermined the plaintiff's claim that the information was kept from them.[221] Thus, although "public record of an undisclosed fact may not necessarily negate a party's duty to disclose," it is one factor that may point to not requiring disclosure.[222]

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[216] *See supra* notes 190, 191 and accompanying text.

[217] *See* The New Residential Construction Off-Site Condition Disclosure Act, N.J. STAT. ANN. §§ 46:3C-1 to -12 (West Supp. 1996). The statute does not list sex offenders as a condition that must be disclosed. *See* § 46:3C-10. Moreover, a seller is absolutely immune once the seller informs the buyer of her right to inspect the municipal lists, whether or not the list is complete. *See id.* Even if the Act had not been passed, some of the discussion in *Strawn* itself strongly suggests that the presence of a sex offender in the neighborhood was not one of the conditions that needed to be disclosed. *See* Strawn v. Canuso, 140 N.J. 43, 64, 657 A.2d. 420, 431 (1995). The court ruled that "transient social conditions in the community that arguably affect the value of property" such as "the changing nature of a neighborhood, the presence of a group home, or the existence of a school in decline" need not be disclosed." *Id.*

This language may be read as a response to the concern raised during oral argument that an unduly broad decision might require a seller to disclose sex offenders in the neighborhood and as an expression of the court's view that the presence of a sex offender need not be disclosed. *See* Carter, *supra* note 127, at 20.

[218] *See supra* note 52 (listing jurisdictions that initially adopted disclosure duties through case law).

[219] As discussed previously, there is good reason to think that in states with only a common-law duty of disclosure, there should be little or no distinction between material on-site and material off-site defects in the property. *See supra* notes 85-88 and accompanying text.

[220] *See* 841 S.W.2d 703, 708 (Mo. Ct. App. 1992); *see also supra* note 108 (discussing the facts of *Blaine*).

[221] *See Blaine*, 841 S.W.2d at 708.

[222] *Id.* at 709. *But see* O'Leary v. Industrial Park Corp., 542 A.2d 333, 337 (Conn. App. 1988) (finding that in a lawsuit involving a failure to disclose an off-site defect, the fact that maps detailing the defect were found in the town hall did "not shield . . . [the

If the sex-offender disclosure law of a particular state provides that information on sex offenders be kept for public inspection at, for example, a police station,[223] a buyer who sues claiming that a seller failed to disclose this will run into serious difficulties, if the tribunal follows the rationale of *Blaine* relating to nondisclosed defects found in public records.[224] Not all states, however, mandate that such information be regularly maintained in the public records.[225] For example, New Jersey's Megan's Law calls for notification to the community when certain dangerous sex offenders begin residing in a community, but it does *not* appear to require keeping the information generally available on a permanent basis.[226] Thus, whether information about a sex offender was publicly available, and the legal significance that a court attaches to this availability, may also control the outcome of a case in which a buyer alleges the failure of a seller to disclose the presence of a sex offender.

4. Summary

For a buyer to prevail on a claim that a seller failed to disclose the presence of a sex offender known to the seller, the buyer must establish that the seller had a duty to disclose this latent, material fact and failed to disclose it.[227] Moreover, the buyer must show that the seller, by not disclosing, intended to induce, and actually did induce, action by the buyer, resulting in damages.[228] If the buyer who was not told about a nearby sex offender is able to prove these elements, under the framework suggested herein, the buyer should be able to recover. Remedies for

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seller] from accountability for . . . mak[ing] false representations to another's damage").

[223] *See, e.g.*, N.Y. CORRECT. LAW § 168-q (McKinney Supp. 1997). New York's offender disclosure law provides that a copy of a sex offenders' directory with relevant regional information "shall annually be distributed to the offices of local village, town or city police departments for purposes of public access." *Id.*

[224] *See Blaine*, 841 S.W.2d at 708-09.

[225] *Compare* N.Y. CORRECT. LAW § 168-q (requiring New York records be kept for "public access") *with* GUIDELINES FOR LAW ENFORCEMENT FOR NOTIFICATION TO LOCAL OFFICIALS AND/OR THE COMMUNITY OF THE ENTRY OF A SEX OFFENDER INTO THE COMMUNITY (June 1, 1996) [hereinafter GUIDELINES] (stating that New Jersey records are "for the sole use of law enforcement agencies").

[226] *See* GUIDELINES, *supra* note 225. The Guidelines, promulgated by the Attorney General of New Jersey, provide that when a sex offender is deemed dangerous enough to warrant community notification of the offender's presence there, the prosecutor is required to "notify . . . members of the public likely to encounter the [offender]." *Id.* at 10. Such records, however, are not to be kept for public inspection once the initial notification is made. *See id.* at 16. The Guidelines stipulate that prosecutors and local police are to keep notebooks on resident sex offenders but these notebooks are "for the sole use of law enforcement agencies." *Id.*

[227] *See, e.g.*, Lingsch v. Savage, 29 Cal. Rptr. 201, 204 (Dist. Ct. App. 1963).

[228] *See id.*

such a buyer may include the rescission of the transaction,[229] compensatory damages represented by the difference of the price paid and the home's value with the information disclosed, or punitive damages and/or a statutory penalty in some instances.[230]

B. The Special Case of Real Estate Brokers

As discussed above, real estate brokers frequently have disclosure duties even broader than those of the sellers they represent. Thus, sellers' brokers may have to disclose the presence of a sex offender to a buyer even if their clients do not.[231] For example, New Jersey's regulations governing real estate brokers impose on such brokers a duty to disclose "all information material to any transaction" to both the broker's client as well as the other party to the transaction "when appropriate."[232] Thus, if information about a sex offender in the neighborhood should come into a broker's possession, there is a strong argument that the broker must disclose it.[233] In addition to disclosure duties, these professionals also have an affirmative duty "to ascertain all pertinent information concerning [the] property."[234] Whether the presence of a sex offender would be deemed "pertinent" or not is a matter of speculation, but for the reasons set forth above in Part IV.A.1 of this Comment, discussing the materiality of a particular condition, there is good reason to think that it will be found "pertinent."[235]

The potentially broader liability for brokers is also evidenced by California law, which imposes stringent requirements on real estate brokers.[236] California imposes on a broker, as distinct from a seller, an affirmative duty "to conduct a reasonably competent and diligent visual in-

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[229] *See* Weintraub v. Krobatsch, 64 N.J. 445, 455, 317 A.2d 68, 74 (1974).

[230] Pancak et al., *supra* note 189, at 309 & nn.62-65.

[231] *See* Coleman, *supra* note 6, at 5 (stating that one brokerage firm is engaging in the collection of information about sex offenders in light of ambiguity in the New Jersey administrative regulations governing brokers). Indeed, the recent actions of some brokers may suggest their fear that the law imposes on them a duty to disclose, irrespective of whatever duties sellers may have. *See id.*

[232] N.J. ADMIN. CODE. tit. 11, § 5-1.23(b) (1996). As this Comment goes to press, there is a proposal to amend this administrative regulation to require real estate brokers to inform buyers that the county prosecutor keeps information on sex offenders. *See* Booth, *supra* note 6, at 13. This amendment will not change a broker's obligation to disclose 'pertinent information.' Moreover, the amendment itself will not meaningfully help any home buyer because the county prosecutor is forbidden to let the public see the permanent notebook on sex offenders kept in the office. *See* GUIDELINES, *supra* note 225, at 16.

[233] *See id.*

[234] *Id.*

[235] *See supra* notes 210-11 and accompanying text.

[236] *See* CAL. CIV. CODE § 2079 (West Supp. 1996).

spection of the property . . . and to disclose . . . all facts materially affecting the value or desirability of the property that such an investigation would reveal."[237] Thus, it is likely that California brokers would also be subject to a duty to investigate and disclose the presence of sex offenders.[238] Again, the duties of brokers may be broader than those of sellers, but the scope of the duty varies by jurisdiction.

C. *The Purposes of Sex Offender Disclosure Laws Also Support a Seller's Duty to Disclose the Existence of a Sex Offender*

The results of a case in which a buyer sues a seller or a broker for failing to disclose the existence of a nearby sex offender will probably vary by jurisdiction, as set forth above. Nevertheless, a review of public policy and general trends in the law supports the proposition that sellers should have to disclose this fact to buyers in all jurisdictions. The policy considerations behind disclosure laws for sex offenders and for defects in real estate mirror one another. Thus, courts should not, and probably will not, ignore the powerful similarities behind these two public policies.

In the real estate context, courts that have extended a common-law duty to disclose conditions have done so as a matter of *protecting* the consumer, i.e., the public. This is especially true given the greater protection of residential home buyers, as distinguished from commercial buyers.[239] This broad expansion of the rights of residential home buyers' "right to know" is consistent with the recognition of residents' "right to know" of the presence of a sex offender in the community.[240]

In ruling on challenges to the validity of the community notification provisions of sex-offender laws, courts have consistently recognized that at least one of the purposes of such laws is the protection of society.[241]

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[237] *Id.*

[238] *See generally* Sumwalt, *supra* note 141, at 1 (suggesting that both brokers and sellers have a duty to disclose).

[239] *See, e.g.*, Haskell Co. v. Lane Co., 612 So. 2d 669, 675 (Fla. App. 1993) (holding that Florida law governing disclosure of material defects applies to residential but not commercial real estate transactions).

[240] *See* Doe v. Poritz, 142 N.J. 1, 13, 662 A.2d 367, 373 (1995) (stating that sex-offender community notification laws "represent . . . the conclusion that society has the right to know of their presence").

[241] *See* Artway v. Attorney Gen., 876 F. Supp. 666, 691 (D.N.J. 1995) (noting that one of the legislative purposes was punishment, but there is an alternative purpose of "protect[ing] the public by increasing community awareness of the risk involved in having a neighbor with a high proclivity toward sexual offense"), *aff'd in part, vacated in part*, 81 F.3d 1235 (3d Cir. 1996); Opinion of the Justices, 668 N.E.2d 738, 739 (Mass. 1996) (commenting that the purpose of Massachusetts disclosure law is to "protect the public" and furnish "'additional information . . . about sex offenders'"); *Doe*, 142 N.J. at

This policy justification—the protection of individual members of the public—is precisely the same as the policy justification articulated for requiring home sellers to tell all material information about the home they know.[242] What the Florida Supreme Court stated in *Johnson v. Davis* cannot be stressed enough—the general trend of law appears headed "toward the ultimate conclusion that full disclosure of all material facts must be made whenever elementary fair conduct demands it."[243]

The bulk of this Comment has traced the ever-expanding duty to disclose in the real estate context in virtually every state, illustrating that the trend of the law is toward more disclosure, not less, in the sale of real estate. By the same token, the passage of Megan's Law type legislation in every state demonstrates that the trend of legislatures nationwide is toward more disclosure, not less, about sex offenders. In weighing a homeowner's concern about decreased property values versus the public's right to information, legislators nationwide have already decided which of these two interests is more important—the disclosure of information about sex offenders. In sum, just as the *Johnson* court found that it was "fair conduct" to disclose defects in real estate, despite harm to a seller's pecuniary interests, these legislatures are deeming it "fair conduct" that residents of a given neighborhood be told of the presence of a sex offender, despite harm to nearby homeowners' pecuniary interests.

In light of this determination of policy, it seems to be just as fair to require residents of the neighborhood to tell potential newcomers what the government has previously told them. This harmony between the reasons for disclosing real estate defects and the reasons for disclosing sex offenders should prompt courts to hold that a home seller must notify a buyer of the presence of a sex offender near the home being sold.

For these same public policy reasons, if courts are not willing to impose a duty on sellers to disclose the presence of sex offenders, then legislatures should strongly consider doing so.[244] It would be anomalous

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73, 662 A.2d at 404 ("The legislative intent, based on the history of the legislation and the recitals in the laws themselves, is clearly and totally remedial . . . . [The laws] were designed simply and solely to enable the public to protect itself . . . ."); *In re* B.G., 289 N.J. Super. 361, 372, 674 A.2d 178, 184 (App. Div. 1996) ("[T]he [disclosure] laws are designed not to punish the criminals, but to protect society."); State v. Ward, 869 P.2d 1062, 1071 (Wash. 1994) (stating that the "overriding purpose of the [Washington disclosure laws] is to protect the public").

[242] *See* Strawn v. Canuso, 140 N.J. 43, 52, 657 A.2d 420, 424-25 (1995); Weintraub v. Krobatsch, 64 N.J. 445, 456, 317 A.2d 68, 75 (1974).

[243] 480 So. 2d 625, 628 (Fla. 1985).

[244] *See* Scheid, *supra* note 23, at 191 & n.216. Scheid urges that the Illinois Legislature should adopt a rule "requir[ing] disclosure of the safety of the neighborhood." *Id.* Scheid argues that

> [t]he safety of any given locality is difficult to ascertain from a visual examination. In addition, an out-of-state buyer will have no notion as to a

for legislators to trumpet their concerns about disclosure, community notification, and protection of the public without ensuring that as many people as possible are told about such offenders living in their community. If residents at one given moment in time are told, there is no principled reason to distinguish them from other residents who move in later; each should have the same right to information about a nearby sex offender. To ensure that this information is transmitted, one choice is to leave the information at a police station or town hall for public view. The better way to accomplish this goal of transmitting the information, however, is to impose an affirmative duty on the home seller to tell the buyer. Such a requirement is entirely consistent with public policy as it exists today, and deserves consideration by courts and legislatures.

Flavio L. Komuves

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neighborhood's safety. Requiring disclosure of criminal activity in the area will justifiably aid all buyers.

Id. n.216. In addition, newspaper editorial writers support the right of home buyers to obtain information about sex offenders. *See, e.g.*, Editorial, *Megan's Law's Tangles*, STAR-LEDGER, Mar. 23, 1997, at § 10, at 2 ("[I]f it's crucial for the neighbors to know whether there's a sex offender on the block, why isn't it just as critical for people to know if they plan to move onto the block?").