CAVEAT EMPTOR VS SELLER DISCLOSURE IN RESIDENTIAL REAL PROPERTY CONVEYANCES

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Caveat emptor, qui ignorare non debuit quod jus alienum emit means to "Let a purchaser, who ought not be ignorant of the amount and nature of the interest which he is about to buy, exercise proper caution."[1] By the Nineteenth Century, this ancient English common law doctrine had become the dominant paradigm in U.S. jurisprudence governing real property transactions. As Supreme Court Justice David Davis observed in Barnard v. Kellogg,[2] "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."[3]

Since its genesis lay in an agrarian era, when farmland was the predominant form of property transfer, the rule presumed that buyers were just as well placed as sellers to uncover any defects with the land.[4] At a time when courts subscribed to the optimistic notion of equal knowledge and bargaining power between buyers and sellers, the idea was that a careful buyer could determine for himself the suitability of the land without the need for mandating any disclosures on sellers in an otherwise arm's-length transaction. Nor were courts eager at that time to serve as a conduit for disappointed buyers seeking legal redress for what essentially amounted to a bad bargain. Thus, absent any agreement to the contrary, "the vendor of land was not liable to his vendee, or a fortiori to any other person, for the condition of the land existing at the time of transfer."[5]

Historically, however, the strict application of this principle often left buyers unprotected where the property had latent defects, even in cases where those were known by the seller.[6] The classic illustration of this was provided in Swinton v. Whitinsville Savings Bank,[7] where the buyer alleged that the seller had failed to disclose termite infestation even though he was aware of the same and knew

that such infestation was not easily discoverable by the buyer. However, the court dismissed the case against the seller, holding that "the law has not yet … reached the point of imposing upon the frailties of human nature a standard so idealistic."[8] In this regard, one commentator lamented in the mid-1960s that:[9]

> As far as assurances of quality are concerned, our law offers greater protection to the purchaser of a seventy-nine-cent dog leash than it does to the purchaser of a 40,000-dollar house. If the dog leash is defective, the purchaser can get his many back and he may be able to recover damages if he loses his dog because of the defective leash. If the purchaser of the house is required to replace the heating unit two months after purchase, he probably has no recourse against the seller…the purchaser of a chattel from a merchant has the protection of the warranty of merchantable quality, which is implied in every sale by a merchant … [but] … no comparable implied warranty is recognized in the sale of real property.

However, the shift from an agricultural to an industrial economy in the twentieth century, coupled with the growth of complex building structures, led to a slow, yet inexorable, modification of this doctrine toward placing disclosure duties on sellers for latent property defects that were not reasonably discoverable by a buyer. As the Georgia Appeals Court pertinently observed in a 1977 decision upholding a judgment for fraud against the seller for failure to disclose defective sewage on the property, "the sale of farm acreage cum simple residence—the type of transaction to which caveat emptor originally addressed itself—is very different from the sale of a modern home, with complex plumbing, heating, air conditioning, and electrical systems."[10] See also, McDonald v. Mianecki,[11] (pressure to abandon or modify caveat emptor increased with post-World War II mass production of homes and resulting change in home buying practices).

Furthermore, the rise of consumer protection legislation beginning with Lyndon Johnson's The Great Society led to courts adopting an increasingly flexible approach toward this doctrine to reconcile it with modern day notions of consumer protection and fairness.[12] Thereafter, the California Appeals Court's landmark decision in Easton v. Strassburger[13]—which expanded seller disclosure requirements to include real estate brokers—spurred a wave of statutory enactments across several states beginning with the California Act that have substantially scaled back, and in some cases entirely uprooted, the original caveat emptor standard for residential real estate transactions.[14]

BUYER DUTY TO INVESTIGATE: SETTING THE STANDARD

Buyers of new property construction are generally protected by statutory implied warranty provisions and common law implied warranties of habitability and workmanship (see e.g. Virginia Code § 55-70.1). By contrast, buyers of used residential real estate do not have the benefit of statutory or common law warranties, but instead must seek redress under the common law of fraud and misrepresentation.

Generally, "a purchaser of real estate must discover for himself the true condition of the premises if he has information which would excite the suspicions of a reasonably prudent person." See Armentrout v. French.[15]

Thus, absent any fraud on the part of the seller, caveat emptor can be quite unforgiving on the buyer who fails to conduct a reasonable inspection and, as a consequence, does not discover any defects that such an inspection would or could have uncovered. See Roberts v. McCoy[16] (caveat emptor precludes recovery for a structural defect where: (i) the condition complained of is open to observation or discoverable upon reasonable inspection; (ii) the purchaser had the full and unimpeded opportunity to examine the premises; and (iii) there is no evidence of fraud on the part of the vendor).

CONTRACTUAL RISK ALLOCATION: 'AS IS' CLAUSES AND INSPECTION CONTINGENCIES.

Parties to a real estate transaction can use a variety of contractual disclaimers and contingencies to shield against liability and allocate transactional risks. While careful sellers often utilize 'as is' clauses

to obviate any disclosure requirements and protect against claims for nondisclosure of a certain defect, discerning buyers on the other hand mitigate such risks by using contingency clauses that allow them to void the contract in the event the inspection results are unsatisfactory.[17]

'As Is' Clauses

The effect of 'as is' clauses on the caveat emptor framework is often an issue of fact. The effect of an as is clause in a real estate purchase and sale contract is to require a buyer to exercise reasonable care before consummating the purchase. See AE Property Services,[18] LLC v. Emilija Sotonji ("An 'as is' sale indicates that the buyer has agreed to 'make his or her own appraisal' 'and accept the risk' of making the wrong decision"). An as is clause serves to negate any duty to disclose defects on the part of the seller, and shields the seller from any misrepresentation claims in cases of passive nondisclosure.[19]

The ultimate enforceability of such cases depends on, as elucidated by the Texas appellate court in Erwin v. Smiley,[20] the "the validity of the 'as is' agreement is determined in light of the sophistication of the parties, the terms of the 'as is' agreement, whether the 'as is' clause was freely negotiated, whether it was an arm's length transaction, and whether there was a knowing misrepresentation or concealment of a known fact." Note that an as is clause does not give the seller a license to actively misrepresent the quality or characteristics of the property, nor does is allow the seller to conceal defects that would otherwise be discoverable upon a reasonable inspection. As the Restatement Second of Contracts points out regarding such provisions: "A term unreasonably exempting a party from the legal consequences of a misrepresentation is unenforceable on grounds of public policy." (Section 196).

Buyer Inspection Contingencies

Buyers of used residential real estate can mitigate their risk by expressly contracting for an inspection contingency by a qualified professional, which allows buyers to void the contract if the inspection uncovers any unsatisfactory conditions regarding the property. However, such clauses can serve as a double-edged sword because certain cases acknowledge that the buyer is assumed to have borne the risk of loss by thoroughly investigating the property with the help of professionals. See Copland v. Nathaniel[21] (dismissing plaintiffs claims, in part, because were aware of a prior termite problem and treatment, conducted their own termite inspection, and accepted the property "as is," which means that the buyers undertook their own evaluation of the bargain and bore the risk of mistake in their evaluation). Simply put, those who make an independent investigation of the condition of the property are presumed to have relied upon the results of their inspection (compare below Colgan v. Washington).

SELLER DUTY TO DISCLOSE KNOWN LATENT MATERIAL DEFECTS

The theme underlying the nondisclosure variant of cases in caveat emptor jurisprudence is that the mere existence of a defect does not automatically impose a duty on the seller to disclose the same to the buyer. Rather, the modern trend of caveat emptor jurisprudence requires sellers to disclose known latent material defects with the premises that are not discoverable upon a reasonable inspection by the buyer. See Murphy v. McIntosh,[22] (vendor has a duty to disclose a termite infestation in the property known to him, but unknown to, and not readily observable upon reasonable inspection by, the purchaser).

Each aspect of such cases—knowledge of the seller, materiality of the defect, and whether it is latent—are typically issues of fact to be decided by a judge or a jury. A fact is material if "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question." Restatement (Second) of Torts § 538 (1989). The rationale for placing a duty on the seller in such cases is that the buyer is unable to rationally assess the true risk of the transaction, leaving them vulnerable if caveat emptor were strictly applied.

Note in this regard that the standards of practice established by the American Society of Home Inspectors explicitly note that the typical home inspector is not required to identify "concealed conditions, latent defects….", or determine "the

condition of systems and components that are not readily accessible." In other words, the standard pre-settlement home inspection in residential real estate transactions is primarily limited to the readily accessible and visually observable areas of the Property."[23] See ASHI Standards of Practice for Home Inspections and the Code of Ethics for the Home Inspection Profession, §§ 13.1.B.2.a; 13.2A.1.

Thus, careful buyers who contract for a home inspection contingency often do not realize the limited scope of such an inspection affords limited protection against latent defects, like in Murphy v. McIntosh above, where the termite damage was concealed behind drywall and under the foundation. Anything beyond the scope of the standard "visual" home inspection would require the buyer to specifically contract with the home inspector for an expanded inspection.

Conversely, it is well established that any fraud on the part of the seller—whether actively through misrepresentation and concealment, or passively by failing to disclose a known latent material defect—negates caveat emptor. See Rosner v. Bankers Standard Insurance Company[24] (no duty on seller to disclose any information concerning the premises, unless there is some conduct on the part of the seller or the seller's agent which constitutes active concealment). The law recognizes that in certain cases the seller's failure to disclose a certain condition about the property may be tantamount to concealment. Restatement (Second) Of Contracts § 160 (1981) (When Action is Equivalent to an Assertion (Concealment): "Action intended or known to be likely to prevent another from learning a fact is equivalent to an assertion that the fact does not exist").

As discussed above, these developments in caveat emptor jurisprudence illustrate a recognition by courts of the fact that buyers and sellers are often not equal players in the modern-day real estate marketplace. These cases acknowledge the reality that under certain circumstances a seller is uniquely placed to have superior information about defects affecting the market value of the property that a buyer may likely not be able to determine, even with professional assistance. As the Florida Supreme Court reasoned in affirming the lower court's award of rescission for the buyer for a defective roof in Johnson v. Davis:

> Modern concepts of justice and fair dealing have given our courts the opportunity and latitude to change legal precepts in order to conform to society's needs. Thus, the tendency of the more recent cases has been to restrict rather than extend the doctrine of caveat emptor. The law appears to be working toward the ultimate conclusion that full disclosure of all material facts must be made whenever elementary fair conduct demands it.[25]

Herein, one observes a fundamental reformulation of the assumption of equal knowledge and bargaining power between buyers and sellers that had hitherto been firmly embedded in caveat emptor jurisprudence.[26]

Latent vs. Patent Defects

An important feature of this analysis relates to the classification of the nature of the defect at issue in the litigation, which are primarily classified as either latent or patent (i.e. known, open or obvious) defects.

A latent defect is one "not manifest, but hidden or concealed, and not visible or apparent; a defect hidden from knowledge as well as from sight; specifically, a defect which reasonably careful inspection will not reveal; one which could not have been discovered by inspection."[27] Typical examples would include a termite infestation under the foundation, or mold behind drywall.

The nature of the defect carries significant importance if a buyer claims seller misrepresentation premised on a failure to disclose theory. Since 'reasonable and justifiable reliance' is one of the elements of fraud,[28] a buyer would have a difficult time establishing reliance if the defect was not latent, that is, the defect was "known, visible or obvious." Stated differently, a buyer cannot recover for defects that were "known, visible or obvious."[29]

A sub-class of these latent defect cases have addressed certain situations concerning non-physical defects. In such cases, if such a defect affects the

market value of the property, the buyer can likely state an actionable remedy in the event of seller nondisclosure or affirmative misrepresentations. See e.g. Reed v. King,[30] (reversing lower courts dismissal of plaintiffs claim for rescission on grounds that seller failed to disclose property had been scene of multiple axe murders earlier, and acknowledging that reputation and history do influence market value); Stambovsky v. Ackley,[31] (reversing lower courts dismissal of plaintiffs' rescission claim because seller failed to disclose house inhabited by poltergeists). In the wake of Reed and Stambovsky, more than half of the states have enacted "stigma statutes" limiting seller and broker liability for failure to disclose certain so-called psychological stigmas like HIV/AIDS in residential real estate transactions.[32] While a review of the patchwork of legislation on this issue is beyond the scope of this article, broadly speaking these classes of statutes protect sellers from claims fraudulent nondisclosure of psychological stigmas like homicides or felonies having occurred on the property (Md. Code Ann., Real Prop. §2-120), or if the occupants had HIV/AIDS (Ky. Rev. Stat. Ann. §207.250), and other "psychological stigmas."

Expansion of Seller's Duty to Disclose to Materially Adverse Off-Site Latent Defects

Whether the seller of real property must disclose materially adverse off-site conditions to the buyer is typically an issue of fact, but generally it can be stated that any affirmative misrepresentations by the seller regarding conditions *off* the property may result in liability as long as the off-site condition materially affects the value of the property, and the buyer relied on such representation. Cases of this variety include, but are not limited to, instances where the property is located close to a toxic landfill or is subject to periodic flooding.

Ultimately, however, the issue of seller liability for materially adverse off-site conditions that affect the value of the property centers on whether such condition was latent or patent (that is, known, open and obvious). See Williston on Contracts Sec. 50:35.[33] As long as the offsite condition affects the valuation of the property and is latent in nature, applicable case law on seller fraud in this respect draws no distinction between onsite versus offsite conditions.[34] See also Boykin v. Hermitage Realty,[35] (a broker who procured the sale of condominium units by misrepresenting that woods behind the units would remain undeveloped, could not rely on "purchasers equal access to documents of public record indicating that woods behind units was one of the proposed sites for playground" as a defense to a fraud claim); see also, Roberts v. James,[36] (seller induced purchaser to buy land with knowingly false promises of imminent future development in surrounding area, which did not occur and left land profitless. The fact that the seller had made no misstatements concerning the plot of property itself was irrelevant, since the promised development around the land was material to the buyer, and courts recognize the importance of location to land value).

Similarly, courts have recognized seller liability for fraud for failure to disclose adverse offsite conditions where the omission negatively affects the value of the property. In the landmark and controversial case of Strawn v. Canuso,[37] the New Jersey Supreme Court held a professional seller liable for fraud for his failure to disclose a toxic waste dump one half mile away from the property, which was leaking chemicals into the water and materially affecting its value. In cases dealing with seller non-disclosure for a flood-prone property, some decisions have emphasized whether such a condition was discoverable by a reasonable examination of the public record like local county regulations, or the county flood insurance rate map.[38]

One California case extended seller liability to failure to disclose the existence of neighbors who constituted a nuisance to the neighborhood. In Alexander v McKnight,[39] the plaintiffs sought an injunction against neighbors for violating the residential covenants, and engaging in other nuisance activities such as late-night basketball games, pouring motor oil on their roof, and operating a noisy tree trimming business from their house. The California Court of Appeals agreed with the trial court in recognizing a seller's duty to disclose off-site nuisances, specifically where California code required seller to disclose "neighborhood noise problems or other nuisances."

THE IMPACT OF MANDATORY DISCLOSURE STATUTES ON CAVEAT EMPTOR

In 1986, California became the first state to codify a comprehensive set of disclosure requirements upon both sellers and brokers of residential real estate in the California Act.[40] This was a direct legislative response to the California Court of Appeal's decision in Easton v. Strassburger,[41] which created a common law rule imposing an affirmative duty on brokers of residential real property to "conduct a reasonably competent and diligent inspection of the residential property … and to disclose to prospective purchasers all facts materially affecting the value or desirability of the property that such an investigation would reveal."[42] This landmark decision greatly expanded the disclosure duties not merely against sellers, but also their brokers in a real estate transaction, which provided the impetus for other states to follow with similar legislation, albeit not as comprehensive in scope.[43]

Thus, in the wake of the California Act, and other similar legislation enacted by other states, sellers of residential property may sometimes have disclosure obligations separate and apart from the contract. The nature and extent of the subjects covered under these disclosure statutes varies by state, with California arguably being on the pro-buyer end of the spectrum compared to Virginia. On the other hand, the New York Property Condition Disclosure Act (the "Act") N.Y. Real Prop. Law §§ 460-67 (effective March 1, 2002), requires the seller of residential real estate to deliver a 48-point disclosure statement to the buyers.[44]

AVOIDING PITFALLS OF CAVEAT EMPTOR: FROM RATIFICATION TO SETTLEMENT

From the seller's perspective, the goal is primarily to avoid any liability for fraud or breach of contract while maximizing the sale price of the property. On the other hand, buyers seek to allocate the risk of loss by bargaining for the inclusion of various contingencies in the contract, including a Home Inspection Contingency, which allows them to walk away from the deal prior to settlement if the results of such inspection reveal substantial defects with respect to the property.

For the reasons pointed out above, a careful buyer would be well advised to use any home inspection report primarily as a guide for evaluating whether to conduct further investigations, like hiring a structural engineer to inspect the foundation in the event that cracks are visible. Buyers tend to use the defects identified in the home inspection as leverage to negotiate a lower price. It is common for a seller to agree to make repairs in lieu of a price reduction, but such an approach could potentially backfire in the event that said repairs later prove to be insufficient for whatever reason. In such a case, the seller is likely exposing himself to a breach of contract, or maybe even a fraudulent concealment claim.

Arguably, a better approach for both parties in correcting defects identified in the home inspection report is to either have the seller provide a credit to the purchaser at closing or reserve seller proceeds for such repairs with agreed upon limitations. Seller may even want to encourage the buyer to hire his own licensed professional, such as a contractor, to make any necessary repairs, with a corresponding seller credit to be provided for the itemized expense at closing. In states such as Virginia, where the standard form Residential Sales Contract does not limit the buyer's liability to the earnest money deposit, a buyer may want to modify such clauses to preclude liability for additional damages and seller attorney fees.

In addition to undertaking a careful examination of the chain of title for the property, careful buyers may also want to obtain at least a boundary survey to ensure there are no encroachments, as it is not uncommon to see cases where a utility shed, or garden pavers have been constructed over neighboring property lines. In the event that such encroachments are discovered, then the settlement may have to be delayed until an appropriate easement is obtained, or other corrective action taken. Absent such action, an encroachment may affect the marketability of title if and when the buyer decides to sell the subject property in the future.

If a buyer is purchasing a condominium, townhouse or single-family home in a community organized under a homeowners association, then the buyer typically has a right to examine the managing

documents, budget and annual reports of the association (see e.g. The Virginia Condominium Act (the "Act"), Va. Code §§ 55.1-1900 through 55.1-1995). Mismanaged community associations can negatively impact the market value of the homes subject to its governance. Thus, those documents must be carefully examined to ensure proper capitalization of the association to handle maintenance expenses related to common elements.

CONCLUSION

As illustrated in this article, the original strict interpretation of the doctrine caveat emptor in residential real property conveyances has now been substantially watered down, both by case law and legislative schema, to encompass notions of fairness, justice and equity. The rise in mass production of homes in the post-World War II era, coupled with a wave of consumer protection legislation as part of Lyndon Johnson's The Great Society, impelled courts across the country to gradually carve out exceptions to the originalist interpretation of the doctrine, and impose disclosure duties on sellers for latent defects, and later for certain adverse offsite conditions.

After the Easton decision, the California Act represented the first attempt by individual states to address the unique challenges raised in residential property conveyances. Soon, many states followed with their own variant of legislative schemes designed to balance the respective duties of buyers and sellers in residential real property conveyances. The patchwork of state disclosure statutes varies in scope with respect to their disclosure duties on sellers. Nevertheless, caveat emptor remains a force to be reckoned with in residential real property conveyances.

Notes

1 See Herbert Broome, A Selection of Legal Maxims 528 (10th ed. 1939), cited in Dawn K. McGee, Note, "Potential Liability for Misrepresentations in Residential Real Estate Transactions: Let the Broker Beware," 16 Fordham Urb. L.J. 127, 129 n.8 (1988).

2 Barnard v. Kellogg, 77 U.S. (10 Wall.) 383, 388-89 (1870).

3 The rule originates from English common law with the case of, as some have suggested, Chandelor v. Lopus 79 Eng. Rep. 3, Cro. Jac. 4 (Ex. Ch. 1603).

4 Alan M. Weinberger, "Let the Buyer Be Well Informed? - Doubting the Demise of Caveat Emptor," 55 Md. L. Rev. 387, 396–97 (1996).

5 Restatement (Second) of Torts § 352 (1965) (comment a).

6 Paul G. Haskell, "The Case for an Implied Warranty of Quality in Sales of Real Property," 53 Geo. L.J . 633, 648 (1965) (urging courts to give purchasers of real property protection similar to that given to purchasers of chattels by adopting the implied warranty of merchantability).

7 Swinton v. Whitinsville Savings Bank, 42 N.E.2d 808 (1942).

8 Id. at 679.

9 Haskell, supra, at 633.

10 Wilhite v. Mays, 232 S.E.2d 141, 142-43 (Ga. 1976), aff'd, 235 S.E.2d 532 (1977).

11 McDonald v. Mianecki, 398 A.2d 1283, 1287 (N.J. 1979).

12 See The Washington Post, "The Great Society produced a number of laws to protect consumers, including truth-in-packaging requirements which Johnson said 'will mean that the American family will get full and fair value for every penny, dime and dollar that that family spends,' at a bill signing in November 1966. Also part of his suite of bills on consumer protection were the truth-in-lending for borrowers and meat and poultry laws to enhance food safety. It created the Consumer Product Safety Commission and the Child Safety Act to ensure that toys, medicine bottles and other products were safe for both children and adults," available at https://www.washingtonpost.com/wp-srv/special/national/great-society-at-50/

See also Alan M. Weinberger, "Let the Buyer Be Well Informed? - Doubting the Demise of Caveat Emptor," 55 Md. L. Rev. 387, 396–97 (1996). See also George Lefcoe, "Property Condition Disclosure Forms: How the Real Estate Industry Eased the Transition from Caveat Emptor to "Seller Tell All," 39 Real Prop. Prob. & Tr. J. 193, 198–99 (2004).

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

14 See Katherine A. Pancak et al., Residential Disclosure Laws: The Further Demise of Caveat Emptor, 24 Real Est. L.J. 291, 305 (1996).

15 Armentrout v. French, 258 S.E.2d 519, 524 (1979). See also London v. Courduff, 529 N.Y.S.2d 874 (2d Dep't 1988) (purchaser of real property has duty to satisfy self as to quality of bargain, pursuant to doctrine of caveat emptor in New York); see also Transcapital Bank v. Shadowbrook at Vero, LLC, 226 So. 3d 856 (Fla. 4th DCA 2017) (caveat emptor places the duty to examine and judge the value and condition of the property solely on the buyer and protects the seller from liability for any defects).

16 Roberts v. McCoy. 88 N.E.3d 422.

17 See Hewitt v. Kirk's Remodeling and Custom Homes, Inc., 310 P.3d 436 (2013), review denied, (June 20, 2014) (absent protections provided by contract or by law, buyers of real property take under the principle of caveat emptor).

18 AE Property Services, LLC v. Emilija Sotonji, No. 106967 2019-Ohio-786 (Eighth District Court of Appeals).

19 See also Holly Hill Holdings v. Lowman, 628 A.2d 1298, 1302, 1303 ('as is' clause in the agreement of sale barred

any claim for failure to disclose, as the purchasers knew the property had previously been used as a service station).

20 Erwin v. Smiley, 975 S.W.2d 335 (Tex App. 1998).

21 Copland v. Nathaniel, 624 N.Y.S.2d 514, 518.

22 Murphy v McIntosh, 99 SE2d 585 (1957).

23 See Section 2.2A in The Standard of Practice for Home Inspections and Code of Ethics of the American Society of Home Inspectors, by the American Society of Home Inspectors (ASHI) (March 1, 2014), also available at https://www.homeinspector.org/Resources/Standard-of-Practice/Download-ASHI-Standard-of-Practice

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24 Rosner v. Bankers Standard Insurance Company, 102 N.Y.S.3d 200 (2d Dep't 2019).

25 Johnson v. Davis, 480 So. 2d 625, 629 (Fla. 1986).

26 See Colgan v. Washington Realty Co., 879 S.W.2d 686 (Mo. Ct. App. 1994) (reversing the lower courts dismissal of buyers claim, holding that in many cases material information about defects with the property will be peculiarly within sellers knowledge and difficult for buyers to obtain).

27 Glens Falls Ins. Co. v. Long, 77 S.E.2d 457, 459 (1953); Trav-Co Ins. Co. v. Ward, 736 S.E.2d 321, 326 (2012).

28 The elements of fraud are: "(1) a false representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled, and (6) resulting damage to the party misled." Bryant v. Peckinpaugh, 241 Va. 172, 175, 400 S.E.2d 201, 203 (1991).

29 See Kuczmanski v. Gill, 302 S.E.2d 48, 50 (Va. 1983) (upholding denial of buyer claim for damages because the missing windows were an open and obvious defect which could have been discovered by even a cursory inspection); see also, Vaught v. Satterfield, 542 S.W.2d 502, 504 (Ark. 1976) (recognizing that in order to sustain alleged fraud in a failure to disclose case, the purchaser must prove that the defect was not observable).

30 Reed v. King, 193 Cal. Rptr. 130 (Ct. App. 1983).

31 Stambovsky v. Ackley, 572 N.Y.S.2d 672 (App. Div. 1991).

32 See discussion in Stuart C. Edmiston, "Secrets Worth Keeping: Toward A Principled Basis for Stigmatized Property Disclosure Statutes," 58 UCLA L. Rev. 281, 284 (2010).

The list includes Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nevada, New Hampshire, New Mexico, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and the District of Columbia.

33 "The determination centers on whether the flooding is ultimately determined to be a latent or patent defect. Thus, in some cases, it is the duty of the vendor to disclose latent flooding or drainage problems, including designation of the property as a wetland. In others, the flooding has been deemed sufficiently patent for the purchaser to have discovered without a duty of disclosure on the seller."

34 Note some cases finding a seller duty to disclose, regardless of materiality, if it poses a threat to health and safety. Farm Bureau Mut. Ins. Co. v. Wood, 418 N.W.2d 408, 411 (Mich. Ct. App. 1987); see also Anderson v. Harper, 622 A.2d 319, 323 (Pa. Super. Ct. 1993), appeal denied, 634 A.2d 222 (Pa. 1993).

35 See also Boykin v. Hermitage Realty, 360 S.E.2d 177 (Va. 1987).

36 Roberts v. James, 85 A. 244, 246 (N.J. 1912).

37 Strawn v. Canuso, 657 A.2d 428 (N.J. 1995). Superseded by Statute as Stated in International Union of Operating Engineers Local No. 68 Welfare Fund v. Merck & Co., Inc., N.J., September 6, 2007. New Residential Construction of Off-Site Conditions Disclosure Act, N.J. Stat. Ann. § 46:3C-1 to -12 (West Supp. 2001) (duty to disclose is to inform the buyer that lists of certain off-site conditions are available in the Municipal Clerk's office etc.).

38 See Clouse v Gordon, 445 S.E.2d 428 (N.C. App. 1994) 115 NC App 500, (no fraud for nondisclosure where property located in flood plain because it was matter of public record); see also Nelson v. Wiggs, 699 So. 2d 258 (Fla. Dist. Ct. App. 3d Dist. 1997), reh'g denied, (Oct. 8, 1997) and review denied, 705 So. 2d 570 (Fla. 1998) (no duty to disclose flood-prone nature of property as county regulations enacted to protect from seasonal flooding were available in the public record); Howard v. McFarland, 515 S.E.2d 629 (Ga. App. 1999) (no fraud for failure to disclose property located in flood plain because information available on county flood insurance rate map and creek was present near property).

39 Alexander v McKnight, 7 Cal App 4th 973 (1992, 4th Dist).

40 "Two statutes (collectively the "California Act") were enacted in response to Easton. The first is entitled "Article 1.5. Disclosures Upon Transfer of Residential Property" (the "Disclosure Article"). The second is entitled "Article 2. Duty to Prospective Purchaser of Residential Property" (the "Broker Duty Article"). The statutes are applicable to all sales and related transfers for value of residential real property or residential stock cooperatives containing four or fewer dwelling units. The Broker Duty Article, of course, only applies to such sales and transfers involving a licensed real estate broker. The California Act, unlike most of its progeny, applies to all sales of new or never occupied residences as well as to all resales." See Robert M. Washburn, "Residential Real Estate Condition Disclosure Legislation," 44 DePaul L. Rev. 381, 410 (1995).

41 Easton v. Strassburger, 199 Cal. Rptr. 383 (1984).

42 Id. at 390.

43 Since the California Act, 16 states enacted similar legislation that is not as extensive in scope as California. Thirty-three states require have no disclosure laws pertaining to sellers of residential real property, of which 28 have voluntary disclosure programs. Only five states have not enacted any laws on this subject. See Robert M. Washburn, Residential Real Estate Condition Disclosure Legislation, 44 DePaul L. Rev. 381, 410 (1995).

44 Philip Lucrezia, New York's Property Condition Disclosure Act: Extensive Loopholes Leave Buyers and Sellers of Residential Real Property Governed by the Common Law, 77 St. John's L. Rev. 401, 401–02 (2003).