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# The Duty to Disclose Geologic Hazards in Real Estate Transactions

Denis Binder\*

## INTRODUCTION

Every year witnesses the widespread destruction of property, the limited loss of life, and the infliction of personal injuries during "natural disasters." Many times homes are located in areas geologically unsuitable for habitation. As a result, the residents may be surprised to learn they live in areas facing natural risks, such as avalanches, erosion, fires, floods, hurricanes, landslides, mudslides, tornadoes and volcanoes. Had they only known, the occupants claim, they would not have purchased homes in these vulnerable areas. Therefore, the purchasers contend, the sellers should be liable for failure to disclose the risks to them prior to the purchase.<sup>1</sup>

Such a claim would historically be met by the seemingly hallowed defense of caveat emptor, commonly translated as "let the buyer beware." Caveat emptor stood as a bulwark against suits by purchasers based upon a failure to disclose. Under caveat emptor, the seller has no duty to disclose facts unknown to the purchaser; silence is golden. The purchaser would be left without a legal remedy against the seller or the broker.

The thesis of this article is that caveat emptor no longer precludes relief. The last half of the twentieth century has witnessed a virtual collapse in fact, if not in legal theory, of caveat emptor.<sup>2</sup> The duty to disclose in real estate transactions has undergone a well-documented metamorphosis from caveat emptor to a quasi-caveat vendor. It is fair to state the Property law rule of caveat emptor has been superseded by the Tort law doctrine of a duty to disclose.<sup>3</sup>

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<sup>1</sup> One commentator referred to the litigation, which follows landslides in California, as the "California landslide litigation syndrome." Bob Risley, *Landslide Peril and Homeowner's Insurance in California*, 40 UCLA L. REV. 1145, 1148 (1993).

<sup>2</sup> Cf. *Hill v. Jones*, 725 P.2d 1115, 1118 (Ariz. Ct. App. 1986).

<sup>3</sup> Cf. GRANT GILMORE, *THE DEATH OF CONTRACTS* (Ronald K.L. Collins ed., 2d ed. 1995).

It is also the thesis of this article that natural risks—be it a tornado in Kansas, a blizzard in New York, a volcano in Washington, or an earthquake in California—are foreseeable: foreseeable both in fact and in law. Our purpose is not to debate the desirability of building in geologically fragile areas. The assumption is that society, through the political process, has approved such construction. Rather, the purpose of the article is to posit the premise that the seller, and the seller's agent, owe a duty to disclose to the purchaser all material geologic hazards of which they know or reasonably should know.

This article will look at the history of the caveat emptor doctrine, the exceptions that have developed to it, and the foreseeability of geologic hazards.

#### HISTORY OF CAVEAT EMPTOR

The phrase "caveat emptor" is of Latin derivation. Thus, one could reasonably assume the doctrine harkens back to ancient Roman law. Yet, in an exhaustive, historical survey, Professor Hamilton traces the phrase to the sixteenth century in a case involving horse trading.<sup>4</sup> The phrase may sound of Roman law, but the origin lies in the common law developed in the late sixteenth century English trading society.<sup>5</sup>

Rationales behind the principle included the premise that the parties to the transaction possessed equal bargaining power, skill and experience. Both parties were equally able to discover the conditions of the land and property.<sup>6</sup> The gist of caveat emptor was that the parties must look out for themselves. Thus, if a purchaser wanted protection, the purchaser should bargain for an express warranty.

In the famous 1873 case of *Peek v. Gurney*,<sup>7</sup> Lord Cairns firmly stated the standard:

[M]ere nondisclosure of material facts, however morally censurable . . . , would, in my opinion, form no ground for an action in the nature of misrepresentation.<sup>8</sup>

The high point of caveat emptor in the United States came in the late nineteenth century. Indeed, the Supreme Court acknowledged in 1870 that the doctrine had been accepted in all but one jurisdiction.<sup>9</sup> The doctrine tied into the contemporary political

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4 Walter H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133, 1164 (1931) (hereinafter Hamilton).

5 *Id.* at 1156-57, 1187.

6 See, e.g., Jane P. Mallor, *Extension of the Implied Warranty of Habitability to Purchasers of Used Homes*, 20 AM. BUS. L.J. 361, 363 (1982).

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

8 *Id.* at 403.

9 *Bernard v. Kellogg*, 77 U.S. (10 Wall.) 383, 388 (1870).

philosophy of "laissez faire."<sup>10</sup> Since the government assiduously avoided regulating commerce in general, leaving the parties where they lay in real estate transactions fit into the general approach.<sup>11</sup>

The classic caveat emptor decision in the United States is the famous 1942 case of *Swinton v. Whitensville Savings Bank*,<sup>12</sup> where the seller failed to disclose to the purchaser that the house was infested with termites. The court held the seller had no duty to voluntarily disclose any facts. There was no allegation of false or misleading statements, or even the uttering of a half-truth. The basic allegation was a "mere failure to disclose."<sup>13</sup> The court reasoned:

If the defendant is liable on this declaration, every seller is liable who fails to disclose any non-apparent defect known to him in the subject of the sale which naturally reduces its value and which the buyer fails to discover. Similarly, it would seem that every buyer would be liable who fails to disclose any non-apparent virtue known to him in the subject of the purchase which materially enhances its value and of which the seller is ignorant.<sup>14</sup>

The court was unwilling to impose upon the frailties of human nature such an idealistic standard.<sup>15</sup> The *Swinton* case has been followed in several decisions.<sup>16</sup> Another example of caveat emptor is *Mercer v. Meinel*,<sup>17</sup> where the Illinois Supreme Court held a vendor was not liable for personal injuries caused by the failure to install a gas heater in compliance with a municipal ordinance.

The strength of caveat emptor can further be illustrated by a 1983 Virginia case, *Kuczanski v. Gill*.<sup>18</sup> The purchasers discovered, after moving in, the floors of both bathrooms had rotted away, a toilet was supported from underneath by cinder blocks, gutters did not work properly, and many storm windows were

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<sup>10</sup> Hamilton, *supra* note 4, at 1183-84, 1187.

<sup>11</sup> *Id.* at 1184. One court traced caveat emptor to the "attitude of rugged individualism reflected in the business economy and the law of the 19th century." Ollerman v. O'Rourke Co., Inc. 288 N.W.2d 95, 101 (Wash. 1980).

<sup>12</sup> 42 N.E.2d 808 (Mass. 1942).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* Massachusetts subsequently enacted a Consumer Protection Act, which applies to real estate brokers. MASS. GEN. LAWS ANN. ch. 93A, § 2(a).

<sup>15</sup> *Id.* at 808-9.

<sup>16</sup> See, e.g., *Gegeas v. Sherrill*, 147 A.2d 223 (Md. 1958) (termite infestation); *Stevens v. Bouchard*, 532 A.2d 1028 (Me. 1987); *London v. Courdaff*, 529 N.Y.S.2d 874 (App. Div. 1988); *Oates v. JAG, Inc.*, 311 S.E.2d 369 (N.C. App. 1984); *Nei v. Burley*, 446 N.E.2d. 674 (Mass. 1983).

<sup>17</sup> 125 N.E. 288 (1919).

<sup>18</sup> 302 S.E.2d 48 (Va. 1983). See also *Traverse v. Long*, 135 N.E.2d 256, 259 (Ohio 1956), where the Ohio Supreme Court held caveat emptor applied if the condition complained of is open to observation, or discoverable upon reasonable inspection, the purchaser had the unimpeded opportunity to examine the premises, and there was no fraud on the part of the vendor.

missing. The purchasers were in a position to discover the problem, but had failed to look. The sellers made no affirmative misrepresentations. Consequently, the purchasers were denied relief.

Contrary to the attention afforded the *Swinton* case, the high-water mark of caveat emptor was actually short-lived. Indeed, it had already developed serious leaks long before 1942. For example, the Washington Supreme Court recognized caveat emptor in 1895,<sup>19</sup> but by 1909 acknowledged the trend to restrict, rather than expand, the doctrine.<sup>20</sup>

In a 1922 case, the Kentucky Court of Appeals acknowledged the rule of caveat emptor, but recognized that it could be relaxed when the seller did something to prevent the prospective purchaser from making a thorough examination to ascertain the property's value, or when the purchaser had no reasonable opportunity to visit and examine the property due to its great distance from the parties to the transaction.<sup>21</sup> In 1926, California held the doctrine was inapplicable to nonjudicial foreclosure sales.<sup>22</sup>

By 1936, Dean Keeton recognized a trend away from nondisclosure: "[I]t would seem that the object of the law in these cases should be to impose on parties to the transactions a duty to speak whenever justice, equity, and fair dealing demand it."<sup>23</sup> Dean Keeton posited that Lord Cairns may well have been expressing nineteenth century law, as shaped by an individualistic philosophy based on freedom of contract, in which morality was not relevant.<sup>24</sup>

In 1941, one year before the Massachusetts opinion in *Swinton*, two California appellate courts held a vendor has a duty to disclose to the purchaser that the lot was on fill. The vendor is bound to disclose facts which, though known to the vendor, are not visible to the purchaser, and the vendor realizes the facts are not within the reach of diligent attention and observation of the vendor.<sup>25</sup>

In 1955 Dean Prosser wrote:

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<sup>19</sup> *Washington Central Imp. Co. v. Newlands*, 39 P. 366, 367 (Wash. 1895) ("[I]t seems to us that parties must exercise ordinary business sense and the faculties which are given to them for the purpose of transacting business, and that they cannot call upon the law to stand in loco parentis to them in the ordinary transactions of business and their ordinary dealings with their fellow men.").

<sup>20</sup> *Woody v. Benton Water Co.*, 102 P. 1054, 1056 (Wash. 1909).

<sup>21</sup> *Osborne v. Howard*, 242 S.W. 852 (Ky. 1922).

<sup>22</sup> *Mitchell v. California-Pacific Title Ins. Co.*, 248 P. 1035 (Cal. 1926).

<sup>23</sup> W. Page Keeton, *Fraud-Concealment and Nondisclosure*, 15 TEX. L. REV. 1, 31 (1936).

<sup>24</sup> *Id.*

<sup>25</sup> *Rothstein v. Janss Investment Co.*, 113 P.2d 465, 467 (Cal. Ct. App. 1941); *Clauser v. Taylor*, 112 P.2d 661, 662 (Cal. Ct. App. 1941).

The law appears to be working toward the ultimate conclusion that full disclosure of all material facts must be made wherever elementary fair conduct demands it.<sup>26</sup>

Even though it held against the purchasers on the facts in a case of termite infestation, the Washington Supreme Court stated in 1966 that caveat emptor is not rigidly applied to the complete exclusion of any moral and legal obligations to disclose material facts not readily apparent upon reasonable inspection by the purchaser.<sup>27</sup> Other courts followed the approach of using modern concepts of justice.<sup>28</sup> Professor Freyfogle, in a 1985 article,<sup>29</sup> recognized that California and Colorado took the lead in imposing duties on sellers to disclose matters materially affecting the value of property. This requirement includes disclosure of soil conditions and matters wholly external to the property.<sup>30</sup>

The decline in the caveat emptor doctrine reflects a change in societal mores, whereby the goal of consumer protection has replaced laissez-faire.<sup>31</sup> Professor Roberts noted that caveat emptor did not adversely affect the typical buyer of a new house during the nineteenth century because the then-typical house owner was a middle class purchaser who purchased the lot, and then hired an architect to design the house.<sup>32</sup>

This scenario changed in post-World War II America with the mass-production of homes during the suburbanization of America.<sup>33</sup> Courts accordingly recognized caveat emptor no longer

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26 WILLIAM L. PROSSER, *THE LAW OF TORTS* 535 (2d ed. 1955). Dean Prosser referred to *Swinton*, and its ilk, as "surely singularly unappetizing cases." W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS*, 738 (5th ed. 1984).

27 *Hughes v. Stusser*, 415 P.2d 89 (Wash. 1986).

28 See, e.g., *Bethahmy v. Bechtel*, 415 P.2d 698, 706 (Idaho 1966) (courts are moving to a rule which would "impose on parties to a transaction a duty to speak whenever justice, equity, and fair dealing demand it"); *Johnson v. Davis*, 480 So. 2d 625, 628 (Fla. 1985) ("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."); *Obde v. Schlemeyer*, 353 P.2d 672, 675 (Wash. 1960) (a duty to disclose "whenever justice, equity and fair dealing demand it").

29 Eric T. Freyfogle, *Real Estate Sales and the New Implied Warranty of Lawful Use*, 71 CORNELL L. REV. 1 (1985).

30 *Id.* at 25.

31 *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733, 735 (Wyo. 1979); E. F. Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 CORNELL L.Q. 835, 836-7 (1967).

32 Roberts, *supra* note 31, at 836 n.1 (1967).

33 As one court acknowledged:

The rule of caveat emptor . . . apparently worked well in agricultural societies, as evidenced by its centuries of acceptance. However, 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, which is possibly built on ground considered unsuitable for construction until recent years.

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

served the realities of the market place.<sup>34</sup> In the 1974 termite infestation case of *Weintraub v. Krobatsch*,<sup>35</sup> the New Jersey Supreme Court acknowledged that even in property law, the focus is now on the "modern concepts of justice and fair dealing."<sup>36</sup> *Swinton* did not represent this court's sense of justice or fair dealing.<sup>37</sup> Even in real estate transactions, the law should be based on current notions of what is "right and just."<sup>38</sup> Finally, Justice O'Hearn in 1996 quoted precedence for a unanimous New Jersey Supreme Court in *Strawn v. Canuso*, in stating caveat emptor no longer prevails in New Jersey.<sup>39</sup> Some courts advocate full disclosure of all material facts whenever elementary fair conduct demands it.<sup>40</sup>

The apparent severity of caveat emptor was early tempered by exceptions for fraud<sup>41</sup> and express warranty.<sup>42</sup> More recently, exceptions have been created for negligent misrepresentation<sup>43</sup> and latent defects. Standard remedies include a choice of rescission or damages.<sup>44</sup> The common remedies for fraud,<sup>45</sup> fraudulent concealment,<sup>46</sup> innocent misrepresentation,<sup>47</sup> and material misrepresentation<sup>48</sup> are rescission<sup>49</sup> or damages. The concept of fraud, as developed by the courts, is very expansive.

## FRAUD

Fraud may consist of an untrue statement or concealment of a material fact, accompanied by an intent to deceive.<sup>50</sup> Clearly,

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<sup>34</sup> See, e.g., *Chandler v. Madsen*, 642 P.2d 1028, 1031 (Mont. 1982).

<sup>35</sup> 317 A.2d 68 (N.J. 1974). Sellers, as in *Weintraub*, often tried to rely on *Swinton* in arguing no duty existed to disclose insect infestations. Usually they met with judicial disapproval. See, e.g., *Obde v. Schlemeyer*, 353 P.2d 60 (Wash. 1974).

<sup>36</sup> *Id.* at 75.

<sup>37</sup> *Id.* at 71.

<sup>38</sup> *Id.*; See also *Schipper v. Levitt & Sons, Inc.*, 207 A.2d 314, 325 (N.J. 1965).

<sup>39</sup> 657 A.2d 420, 426, (N.J. 1996) (citing *Berman v. Gurwicz*, 458 A.2d 1311, 1313 (Ch. Div. 1981)).

<sup>40</sup> *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985).

<sup>41</sup> *Brooks v. Ervin Construction Co.*, 116 S.E.2d 454, 457 (N.C. 1960); *Bernard v. Kellogg*, 77 U.S. 383, 388 (1870); *Averilla v. Boyer*, 87 S.E.2d 259 (W. Va. 1915).

<sup>42</sup> *Bernard v. Kellogg*, 77 U.S. 383, 388 (1870). See generally *Hamilton*, *supra* note 4, at 1173.

<sup>43</sup> See, e.g., *Lyons v. Christ Episcopal Church*, 389 N.E.2d 623, 625 (Ill. App. Ct. 1979).

<sup>44</sup> See, e.g., *Gibb v. Citicorp Mortgage, Inc.*, 518 N.W.2d 910 (Neb. 1994) (termites).

<sup>45</sup> *Krall v. Loseke*, 461 N.W.2d 67 (Neb. 1990) (termites).

<sup>46</sup> *Id.*

<sup>47</sup> See *Miller v. Bare*, 457 F. Supp. 1359, 1361 (W.D. Pa. 1978) (boundaries) (citing *La Course v. Kiesel*, 77 A.2d 877, 879-80 (Pa. 1951)); *Cousineau v. Walker*, 613 P.2d 608 (Alaska 1980).

<sup>48</sup> *Mertens v. Wolfboro National Bank*, 402 A.2d 1335 (N.H. 1979).

<sup>49</sup> *Gordon v. Tafe*, 428 A.2d 892 (N.H. 1981); *Clauser v. Taylor*, 112 P.2d 661, 662 (Cal. Ct. App. 1941) (affirming the rescission of a transaction to sell property when the buyer was not informed that the property was filled).

<sup>50</sup> See, e.g., *Chapman v. Hosek*, 475 N.E.2d 593, 598 (Ill. App. Ct. 1985).

fraud includes intentional misrepresentations of a material fact.<sup>51</sup> Thus, statements such as telling the purchaser the property is on a solid lot rather than on nineteen feet of fill constitutes fraud.<sup>52</sup> Fraud can consist of misrepresentations regarding flooding,<sup>53</sup> termite infestations,<sup>54</sup> or soil conditions.<sup>55</sup> A cause of action lies in fraud when the broker fails to disclose that the property flooded. Liability was not precluded even though the information about the flooding was in the public record, and the buyer could have obtained it.<sup>56</sup> Denying the existence of a water problem similarly constitutes fraud.<sup>57</sup> A fraudulent misrepresentation cause of action may also exist with respect to off-site conditions that affect the value of the land involved in the transaction. For example, New York has held the failure to inform the purchaser of an obnoxious business development constitutes fraud.<sup>58</sup>

A claim for fraudulent misrepresentation does not have to be based on defendant's knowing the statement was false, but that the representation was made recklessly and without belief in its truth.<sup>59</sup> A fraudulent misstatement may nullify the defense of caveat emptor even when the misrepresentation occurred after the signing of the purchase and sale agreement, but prior to execution of the contract by conveyance of the property.<sup>60</sup>

Short of fraud in these circumstances, liability might still exist based upon a theory of negligent misrepresentation.<sup>61</sup>

Fraud also consists of fraudulent concealment, such as covering over a defect.<sup>62</sup> Thus, fraud exists when the seller suppresses

51 Reliance by a purchaser upon a positive, false, material misrepresentation allows the purchaser to recover. *Burkett v. J.A. Thompson & Sons*, 310 P.2d 56, 58 (Cal. App. 1957). See also *RESTATEMENT (SECOND) OF TORTS*, § 525 (1989).

52 *Rothstein v. Janss Invest. Corp.*, 113 P.2d 465 (Cal. Ct. App. 1941); See also *Lengyel v. Lint*, 280 S.E.2d 66 (W. Va. 1981) (fraudulent misrepresentation as to the quality and type of house and the size of the lot).

53 *Burkett v. J.A. Thompson & Son*, 310 P.2d 56, 58 (Cal. Ct. App. 1957) (vendor liable for misrepresentation that house was built on original soil rather than fill); *Long v. Brownstone Real Estate Co.*, 484 A.2d 126, 128 (Pa. Super. Ct. 1984) (seller had a duty to disclose since buyer was falsely informed the house had never experienced flooding).

54 *Horner v. Ahern*, 153 S.E.2d 216 (Va. 1967); *Lyons v. McDonald*, 501 N.E.2d 1079 (Ind. Ct. App. 1986); *May v. Hopkinson*, 347 S.E.2d 508 (S.C. Ct. App. 1986); *Lynn v. Taylor*, 642 P.2d 131 (Kan. Ct. App. 1982).

55 *Krause v. Miller*, 300 P.2d 855 (Cal. Ct. App. 1956).

56 *Chapman v. Hosek*, 475 N.E.2d 593 (Ill. App. Ct. 1985).

57 *Davis v. Sellers*, 443 S.E.2d 879 (N.C. Ct. App. 1994).

58 *Coral Gables, Inc. v. Mayer*, 271 N.Y.S. 662 (N.Y. App. Div. 1934).

59 See, e.g., *Roberts v. James*, 85 A. 244 (N.J. Ct. Err. & App. 1912); *O'Leary v. Industrial Park Corp.*, 542 A.2d 333, 336 (Conn. Ct. App. 1988); *Ollerman v. O'Rourke*, 288 N.W.2d 95, 107 (Wis. 1980).

60 *Johnson v. Davis*, 480 So. 2d 625, 627 (Fla. 1985).

61 *Powell v. Wold*, 362 S.E.2d 796 (N.C. Ct. App. 1987).

62 *THE RESTATEMENT (SECOND) OF TORTS* § 555 covers fraudulent concealment:

One party to a transaction who by concealment or other action intentionally prevents the other from acquiring material information is subject to the same liability to the other, for pecuniary loss as though he had stated the nonexistence of the matter that the other was thus prevented from discovering.

a serious problem with the property which the purchaser would have no reason to suspect.<sup>63</sup> For example, fraudulent concealment can deal with the salinity of the soil.<sup>64</sup> When the potential purchaser asks a question, there is a duty to answer truthfully. Caveat emptor is not a defense to fraudulent concealment.<sup>65</sup>

More significantly, fraud may be based on mere nondisclosure: "silent fraud." Actionable fraud or misrepresentations may exist through concealment or failure to disclose a hidden condition or a material fact where a duty of disclosure exists.<sup>66</sup> Silent fraud has a long heritage. For example, in 1886 the Michigan Supreme Court stated "a fraud arising from the suppression of the truth is as prejudicial as that which springs from the assertion of a falsehood."<sup>67</sup> A 1924 Nebraska case, *O'Shea v. Morris*,<sup>68</sup> held the failure to disclose nonownership of an adjacent vacant lot, upon which the seller's improvements extended, was fraudulent. Failure to disclose known facts, coupled with a request or circumstances which require a duty to speak, may form the essence of fraudulent misrepresentation.<sup>69</sup> In other words, caveat emptor is inapplicable when passive concealment exists.<sup>70</sup>

A purchaser may justifiably rely upon the knowledge, skill and expertise of the vendor.<sup>71</sup> Accordingly, the purchaser should have a reasonable expectation of honesty in the marketplace. The vendor should therefore disclose material facts of which it is aware, and which otherwise are not readily discoverable.<sup>72</sup> The purpose behind this rule is to protect the purchaser, who is in a poor position to discover conditions which are not readily discoverable.<sup>73</sup>

Even if no duty to disclose otherwise exists, a seller must answer truthfully any questions from the buyer, and not engage in partial disclosures. If the seller starts to disclose, he must disclose fully so that the purchaser is not misled by the partial disclosures.<sup>74</sup> A cause of action may exist for misrepresentation even if the seller is acting under an honest mistake without any intent to

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<sup>63</sup> *Burkett v. J.A. Thompson and Sons*, 310 P.2d 56, 58 (Cal. Ct. App. 1957). For example, fraudulent concealment may consist of masking, by deodorizers, the strong odor of dog urine permeating most of the carpets in the house. *Campbell v. Booth*, 526 S.W.2d 167 (Tex. Civ. App. 1975).

<sup>64</sup> *Griffith v. Byers Construction Co. of Kansas, Inc.*, 510 P.2d 198 (Kan. 1973).

<sup>65</sup> *Loghry v. Capel*, 132 N.W.2d 417 (Iowa 1965).

<sup>66</sup> *Kaze v. Compton*, 283 S.W.2d 204, 207 (Ky. 1955).

<sup>67</sup> *Tompkins v. Hollister*, 27 N.W. 651 (Mich. 1886).

<sup>68</sup> 198 N.W. 866 (Neb. 1924).

<sup>69</sup> *O'Leary v. Industrial Park Corp.*, 542 A.2d 333, 337 (Conn. Ct. App. 1988).

<sup>70</sup> *Holcombe v. Zinke*, 365 N.W.2d 507 (N.D. 1985).

<sup>71</sup> *Ollerman v. O'Rourke, Inc.*, 288 N.W.2d 95, 107 (Wis. 1980).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Beirman v. Richmond Homes, Ltd.*, 821 P.2d 913 (Colo. Ct. App. 1991); *Catucci v. Ouellette*, 592 A.2d 962 (Conn. Ct. App. 1991); *Nei v. Burley*, 446 N.E.2d 674 (Mass. 1983).

discuss the quality or quantity of the land.<sup>75</sup> Thus, even innocent misrepresentations may render the seller liable to the purchaser.<sup>76</sup>

#### LATENT DEFECT

A more recent exception to caveat emptor is the duty to disclose latent defects, known to the seller, and which substantially affect the value or habitability of the property, but which are unknown to the purchaser, and would not be discovered by a reasonably diligent inspection.<sup>77</sup> The *Restatement (Second) of Torts* § 353 provides:

- (1) a vendor of land who conceals or fails to disclose to his vendee any condition, whether natural or artificial, which involves unreasonable risk to persons on the land, is subject to liability to the vendee and others . . . , if
  - (a) the vendee does not know or have reason to know of the condition or the risk involved, and
  - (b) the vendor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to believe that the vendee will not discover the condition or realize the risk.<sup>78</sup>

One court listed the following elements as persuasive on the duty to disclose known facts:

- (1) the condition is latent and not readily observable by the purchaser;
- (2) the purchaser acts upon the reasonable assumption that the condition does (or does not) exist;
- (3) the vendor has special knowledge or means of knowledge not available to the purchaser; and
- (4) the existence of the condition is material to the transaction.<sup>79</sup>

Liability for the nondisclosure may extend to both the seller and the seller's broker.<sup>80</sup> The Florida Supreme Court extends the duty to all forms of real property, new and used.<sup>81</sup> The duty to disclose latent defects is especially well established in cases involving termite infestations,<sup>82</sup> soil defects,<sup>83</sup> and construction on filled land.<sup>84</sup>

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<sup>75</sup> *Tennant v. Lawton*, 615 P.2d 1305 (Wash. Ct. App. 1980).

<sup>76</sup> *Cousineau v. Walker*, 613 P.2d 608 (Alaska 1980); *Soursby v. Hankin*, 763 P.2d 725 (Or. 1988).

<sup>77</sup> *Miles v. McSwegin*, 388 N.E.2d 1367 (Ohio 1979); *Thacker v. Tyree*, 297 S.E.2d 885, 888 (W. Va. 1982); *Lingsch v. Savage*, 29 Cal. Rptr. 201 (Ct. App. 1963).

<sup>78</sup> *RESTATEMENT (SECOND) OF TORTS* § 353 (1977).

<sup>79</sup> *Ollerman v. O'Rourke Co., Inc.*, 288 N.W.2d 95, 106 (Wis. 1980).

<sup>80</sup> *Miles v. McSwegin*, 388 N.E.2d 1367 (Ohio 1979). Even if not specifically asked, there may be a duty to describe the possibility of termites. *Obde v. Schlemeyer*, 353 P.2d 672 (Wash. 1960).

<sup>81</sup> *Johnson v. Davis*, 480 So. 2d 625, 629 (Fla. 1985).

<sup>82</sup> *Miles v. McSwegin*, 388 N.E.2d 1367 (Ohio 1979); *Hill v. Jones*, 725 P.2d 1115, 1120 (Ariz. Ct. App. 1986); *Godfrey v. Steinpress*, 180 Cal. Rptr. 95 (Ct. App. 1982); *Lingsch v.*

In addition, for some courts, the nondisclosure of a material fact may constitute fraud<sup>85</sup> or deceit.<sup>86</sup>

### IMPLIED WARRANTY OF HABITABILITY

The implied warranty of habitability in the sale of homes has become a well-recognized exception to the rule of caveat emptor.<sup>87</sup> The essence of the warranty is that the seller will transfer to the purchaser a house suitable for habitation.<sup>88</sup> The development of this implied warranty has been breathtaking.<sup>89</sup> The mass production of housing had become analogous to the manufacture and marketing of chattels. Yet, as late as 1965, Professor Haskell found that, except for Louisiana, Colorado, and New Jersey in new construction, there was in essence no implied warranty of "merchantability" in the sale of real property.<sup>90</sup>

Warranties to protect the purchaser of personal property developed early in the twentieth century. The resulting difference in the treatment of personalty and realty resulted in Professor Haskell noticing the law "offer[ed] greater protection to the purchaser

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Savage, 29 Cal. Rptr. 201, 207 (Ct. App. 1963). Recovery may be based upon theories of fraud, *Lyons v. McDonald*, 501 N.E.2d 1079, 1081 (Ind. Ct. App. 1986); *Lynn v. Taylor*, 642 P.2d 131, 135 (Kan. Ct. App. 1982); *Horner v. Ahern*, 153 S.E.2d 216, 221-22 (Va. 1967); consumer fraud and deceptive business practices statutes, *Soniat v. Johnson-Rast & Hays*, 626 So. 2d 1256, 1258 (Ala. 1993) (failure to fully produce evidence of old termite damage); *Warren v. LeMay*, 491 N.E.2d 464, 473 (Ill. App. Ct. 1986); and fraudulent concealment, *Obde v. Schlemeyer*, 353 P.2d 672, 676 (Wash. 1960). In addition to the standard recovery of damages, a court might grant rescission in an appropriate case. See, e.g., *Gordon v. Tafe*, 428 A.2d 892, 894 (N.H. 1981) (upholding rescission following discovery that house was infested by termites); *Weintraub v. Krobatsch*, 317 A.2d 68, 74 (N.J. 1974) (reversing summary judgment against rescission where defendant vendor failed to disclose roach infestation).

<sup>83</sup> *Loghry v. Capel*, 132 N.W.2d 417, 419 (Iowa 1965); *Cohen v. Vivian*, 349 P.2d 366, 367 (Colo. 1960); *Hills v. Jones*, 725 P.2d 1115 (Ariz. Ct. App. 1986); *Brauchitsch v. Cravens*, 604 P.2d 379 (Okla. Ct. App. 1979); *Sorrell v. Young*, 491 P.2d 1312, 1315-16 (Wash. Ct. App. 1971) (even if purchaser might make an inspection of the property).

<sup>84</sup> See, e.g., *Clauser v. Taylor*, 112 P.2d 661, 662 (Cal. Ct. App. 1941); *Loghry v. Capel*, 132 N.W.2d 417, 419 (Iowa 1965) ("One who sells real estate knowing of a soil defect, patent to him, latent to the purchaser, is required to disclose the soil defect.").

<sup>85</sup> *Loghry v. Capel*, 132 N.W.2d 417, 419 (Iowa 1965); *Cohen v. Vivian*, 349 P.2d 366, 367 (Colo. 1960); *Hills v. Jones*, 725 P.2d 1115 (Ariz. Ct. App. 1986).

<sup>86</sup> *Lingsch v. Savage*, 29 Cal. Rptr. 201 (Ct. App. 1963).

<sup>87</sup> See *Conklin v. Hurley*, 428 So. 2d 654, 656 n.2 (Fla. 1983), and the cases cited therein.

<sup>88</sup> *Chandler v. Madsen*, 642 P.2d 1028, 1031 (Mont. 1982); *Yepsen v. Burgess*, 525 P.2d 1019, 1022 (Or. 1974).

<sup>89</sup> Changes in property laws have traditionally developed slowly. The adoption of the implied warranty of habitability to home contractors is a phenomenon of the late 1950s and early 1960s. Case Note, *Gupta v. Ritter Homes, Inc.: Extending the Implied Warranty of Habitability to Subsequent Purchasers - An Honorable Result Based on Unsound Theory*, 35 BAYLOR L. REV. 670, 674 (1983).

<sup>90</sup> Paul G. Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633 (1965).

of a seventy-nine cent dog leash than it [did] to the purchaser of a \$40,000 house."<sup>91</sup>

The leading decision establishing the implied warranty is the 1965 New Jersey case of *Schipper v. Levitt & Sons, Inc.*<sup>92</sup> A child was severely burned by a defective hot water heater. Defendant pioneered the mass production of homes after World War II. The New Jersey Supreme Court expressly rejected caveat emptor as a defense by a builder/vendor:

Caveat emptor developed when the buyer and seller were in an equal bargaining position and they could readily be expected to protect themselves in the deed. Buyers of mass produced development homes are not in an equal footing with the builder vendors and are no more able to protect themselves in the deed than are automobile purchasers in a position to protect themselves in the bill of sale.<sup>93</sup>

New Jersey subsequently extended *Schipper* to a small-scale builder of new homes in *McDonald v. Miannecki*.<sup>94</sup> The *McDonald* opinion echoed the themes of Professor Haskell and the *Schipper* case by recognizing the purchase of a home is often the most important transaction of a lifetime for the average family.<sup>95</sup> In addition, the parties often possess a disproportionality of bargaining power since the average buyer lacks the skill and expertise necessary to make an adequate inspection.<sup>96</sup> The developer will often possess superior bargaining power, a greater expertise in assessing the risks as well as the expertise necessary to construct a livable dwelling.<sup>97</sup> The *Schipper* case was quickly followed by other jurisdictions,<sup>98</sup> and is now widely adopted in the United States.<sup>99</sup>

For many courts, a key factor in adopting the implied warranty of habitability is that the purchaser may justifiably rely upon the knowledge, skill and expertise of the vendor.<sup>100</sup> Purchas-

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<sup>91</sup> *Id.*

<sup>92</sup> 207 A.2d 314 (N.J. 1965). The trend actually began in the 1957 Ohio case of *Vanderschrier v. Aaron*, 140 N.E.2d 819 (Ohio 1957), which held the builders of a home owe to the purchaser an implied warranty that the dwelling is fit for human habitation.

<sup>93</sup> *Id.* at 326.

<sup>94</sup> 398 A.2d 1283 (N.J. 1979).

<sup>95</sup> *Id.* at 1292.

<sup>96</sup> *Id.* at 1289.

<sup>97</sup> *Id.* at 1290.

<sup>98</sup> See, e.g., *Waggoner v. Midwestern Development, Inc.*, 154 N.W.2d 803 (S.D. 1967); *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968); *Rutledge v. Dodenhoff*, 175 S.E.2d 792 (S.C. 1970).

<sup>99</sup> See, e.g., *Crawley v. Terhune*, 437 S.W.2d 743 (Ky. 1969).

<sup>100</sup> *Briarcliffe W. Townhouse Owners Ass'n v. Wiseman Constr. Co.*, 454 N.E.2d 363, 365 (Ill. App. Ct. 1983); *DeRoche v. Dame*, 430 N.Y.S.2d, 390 (App. Div.), *app. dismissed* 413 N.E.2d 366 (1980). See generally Eric T. Freyfogle, *Real Estate Sales and the Implied Warranty of Lawful Use*, 71 CORNELL L. REV. 1, 19 (1985) (discussing the superiority of the seller's knowledge concerning a property's characteristics and limitations over that of the buyer).

ers of homes, just as purchasers of chattels, expect the purchase to be free of defects. The ordinary purchaser is unable to detect flaws in the construction of modern homes.<sup>101</sup> Similarly, purchasers may often not recognize natural conditions which pose a threat, such as unstable slopes.<sup>102</sup> On the other hand, a reasonable builder should make a site inspection before building and discover the dangers of the area.<sup>103</sup> In addition, the typical family purchasing a house must often do so within tight time constraints imposed by career demands,<sup>104</sup> and thus may not have time to thoroughly inspect the house and its surrounding areas.

The builder/vendor is in a better position to guard against defects in the home, and, if necessary, to protect against potential but unknown defects in the site.<sup>105</sup> Indeed, the developer has the opportunity to examine the suitability of the site for development, the expertise to assess its suitability, and the ability to utilize appropriate construction methods to make it safe for habitation. Liability is also premised upon the superior knowledge, skill and expertise of the developer in the construction of a house.<sup>106</sup>

In reality, the warranty of habitability substantially overlaps basic tort concepts of negligence. For example, builders should use reasonable care in designing and constructing a house on inadequately compacted earth, which results in land subsidence,<sup>107</sup> or upon unstable and filled ground, containing an underground spring, without providing adequate drainage, resulting in landslide damage.<sup>108</sup> The common law corollary to the implied warranty of habitability is that a reasonable builder has to ascertain the soil conditions and water table of a construction site.<sup>109</sup> Failure to provide a safe location for a residential structure may constitute negligence.<sup>110</sup> The builder has a duty to use reasonable care to determine whether lots are fit for their intended use.<sup>111</sup> In short, the developer has a duty to select a safe site for construction.<sup>112</sup>

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101 *Conklin v. Hurley*, 428 So. 2d 654, 658 (Fla. 1983).

102 *Id.* at 1289. See also *ABC Builders, Inc. v. Phillips*, 632 P.2d 925, 932 (Wyo. 1981).

103 *Id.* at 938.

104 *Conklin v. Hurley*, 428 So. 2d 654, 659 (Fla. 1983).

105 *Elderkin v. Gaster*, 288 A.2d 771, 777 (Pa. 1972).

106 *George v. Leach*, 313 S.E.2d 920, 923 (N.C. Ct. App. 1984).

107 *Sabella v. Wisler*, 27 Cal. Rptr. 689 (Cal. 1963).

108 *Conolley v. Bull*, 65 Cal. Rptr. 689, 697 (Ct. App. 1968); *House v. Thornton*, 457 P.2d 199, 204 (Wash. 1969).

109 See, e.g., *McFeeters v. Renollet*, 500 P.2d 47, 53 (Kan. 1972); *Baranowski v. Stratting*, 250 N.W.2d 744 (Mich. Ct. App. 1977); *Conolley v. Bull*, 65 Cal. Rptr. 689 (Ct. App. 1968).

110 *ABC Builders, Inc. v. Phillips*, 632 P.2d 925, 938 (Wyo. 1981).

111 *Beri, Inc. v. Salishan Properties, Inc.*, 580 P.2d 173, 176 (Or. 1978).

112 *ABC Builders, Inc.*, 632 P.2d at 935.

Similarly, in *Conolley v. Bull*,<sup>113</sup> the California Court of Appeals held a real estate developer liable for building a house on sloping ground. A neighbor had previously warned the developer that a slide had occurred on his property some time earlier, and provided the developer with an engineer's report indicating that underground movement of subsurface water caused slides to occur in the area. A landslide subsequently occurred, resulting in the near loss of the house. The developer was held liable in negligence for failure to carefully investigate the soil conditions before building on hillside lots. For such a cause of action based on negligence, such as negligent construction, caveat emptor would not be a defense.<sup>114</sup>

The duty of reasonable care will often include soil bearing tests.<sup>115</sup> The stability of the foundation is vital to a dwelling.<sup>116</sup> Core drillings and engineering studies can detect slope instability.<sup>117</sup> Similarly, special testing should be performed on lands fronting on inland lakes because the soil is often unsuitable for supporting structures.<sup>118</sup>

An additional reason for adapting the implied warranty of habitability is to encourage developers to utilize due care in siting and construction. In a 1968 decision rejecting caveat emptor in the sale of a new home, the Texas Supreme Court reasoned:

The caveat emptor rule as applied to new houses is an anachronism patently out of harmony with modern home-buying practices. It does a disservice not only to the ordinary prudent purchaser, but to the industry itself by lending encouragement to the unscrupulous, fly-by-night operator and purveyor of shoddy work.<sup>119</sup>

Thus, in creating an implied warranty of habitability, the question is not one of fault or wrongdoing, but which of two innocent parties is in a better position to prevent the harm.<sup>120</sup> The practical effect of the implied warranty of habitability is often to impose strict liability on the builder.<sup>121</sup> The purpose is to protect the purchaser, who cannot protect himself, such as being unable to dig up the ground to inspect the sewage system.<sup>122</sup>

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113 65 Cal. Rptr. 689 (Ct. App. 1968).

114 *Sabella v. Wisler*, 377 P.2d 889, 893 (Cal. 1963).

115 *Baranoski v. Strating*, 250 N.W.2d 744, 747 (Mich. Ct. App. 1977).

116 *House v. Thorton*, 457 P.2d 199, 203 (Wash. 1969).

117 *See, e.g., ABC Builders, Inc. v. Phillips*, 632 P.2d 925, 932 (Wyo. 1981).

118 *Id.*

119 *Hummer v. Morton*, 426 S.W.2d 554, 562 (Tex. 1968).

120 *Chandler v. Madsen*, 642 P.2d 1028, 1032 (Mont. 1982).

121 *See Schipper v. Levitt & Sons, Inc.*, 207 A.2d 314 (N.J. 1965); *Patitucci v. Drelich*, 379 A.2d 297 (N.J. Super. Ct. 1977) (inadequate septic sewage system).

122 *Patitucci v. Drelich*, 379 A.2d 297 (N.J. Super. Ct. 1977).

Breach of warranty is established by proof of a defect which substantially impairs the enjoyment of the residence,<sup>123</sup> such as the lack of a potable water supply,<sup>124</sup> insect infestations,<sup>125</sup> or a septic tank or system placed in a high water table.<sup>126</sup>

Furthermore, the implied warranty of habitability covers not only structural defects in the building, but also extends to the unsuitable nature of the site.<sup>127</sup> Liability thereby exists for conditions underlying the property, such as a filled-in quarry,<sup>128</sup> or sanitary landfill and garbage dump.<sup>129</sup> The unsuitability of the site on which the house is built constitutes a breach of warranty.<sup>130</sup> Implied warranties also include the septic system.<sup>131</sup> A duty thereby exists to disclose these conditions to the purchaser.<sup>132</sup>

In *Village Development Co. v. Filice*,<sup>133</sup> the Nevada Supreme Court held the developers liable for failing to warn the buyer of a lot in the Lake Tahoe basin of the risks associated with the lot being in the floodplain of a mountain stream. The opinion relied upon the *Restatement (Second) of Torts* § 353 because the developer had knowledge of the risks involved, but the purchaser could neither discover the condition nor realize the risk.

In *Strawn v. Canuso*,<sup>134</sup> the New Jersey Supreme Court held a duty exists for builder-developers to disclose off-site conditions to purchasers. The developer knew of the existence of a nearby hazardous waste landfill, but refused to disclose the information to prospective purchasers. The court stated in a critical passage:

We hold that 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 existence of those conditions is of sufficient materiality to affect the habitability, use, or enjoyment of the property and therefore, render

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123 *Waggoner Construction Co. v. Noonan*, 403 N.E.2d 1144, 1148 (Ind. 1980).

124 *Elderkin v. Gaster*, 288 A.2d 771 (Pa. 1972); *McDonald v. Miannecki*, 398 A.2d 1283 (N.J. 1979); *Lyon v. Ward*, 221 S.E.2d 727 (N.C. Ct. App. 1976).

125 *Weintraub v. Krobatsu*, 317 A.2d 68 (N.J. 1974); *Oble v. Schlemeyer*, 353 P.2d 672 (Wash. 1960).

126 *Rutledge v. Dodenhoff*, 175 S.E.2d 792 (S.C. 1970).

127 *Elderkin v. Gaster*, 288 A.2d 771 (Pa. 1972); *Jordan v. Talaga*, 532 N.E.2d 1174, 1183 (Ind. Ct. App. 1989); *Hesson v. Walmsley Constr. Co.*, 422 So. 2d 943, 944 (Fla. Dist. Ct. App. 1982); *Lehmann v. Arnold*, 484 N.E.2d 473, 476-77 (Ill. App. Ct. 1985).

128 *Sabella v. Wisler*, 27 Cal. Rptr. 689 (Cal. 1963) (no compaction of the filled-in pit).

129 *Westwood Development Co. v. Sponge*, 342 S.W.2d 623 (Tex. Civ. App. 1961).

130 See *Lehmann v. Arnold*, 484 N.E.2d 473, 476 (Ill. App. Ct. 1985).

131 *George v. Veach*, 313 S.E.2d 920 (N.C. Ct. App. 1984).

132 See, e.g., *Sorrell v. Young*, 491 P.2d 1312 (Wash. Ct. App. 1954) (lot was developed on fill).

133 526 P.2d 83 (Nev. 1974).

134 657 A.2d 420 (N.J. 1995).

the property substantially less desirable or valuable to the objectively reasonable buyer.<sup>135</sup>

*Strawn* deals with professional builders and their brokers, who possess a level of sophistication that most home buyers lack.<sup>136</sup> With that knowledge, the sellers "have a duty to disclose to home buyers the location of off-site physical conditions that an objectively reasonable and informed buyer would deem material to the transaction."<sup>137</sup> Critical to the reasoning in *Strawn* are two factors: the difference in bargaining power between the professional seller of residential real estate and the purchaser of the housing, and the differences in access to information between the seller and the buyer.<sup>138</sup>

The duration of the builder-developer implicit warranty of fitness for habitation is measured by "reasonableness."<sup>139</sup> Some states have taken the implied warranty of habitability to the next level and imposed a standard of strict liability upon builders.<sup>140</sup>

#### PRIVITY OF CONTRACT AND SUCCESSOR PURCHASERS

Once the warranty of habitability was widely accepted, the next issue became whether the warranty would run with the property, or be limited to the purchaser who lies in privity of contract. The warranty was soon extended to subsequent purchasers.<sup>141</sup> Privity of contract is no longer a limitation on recovery.

In 1977, the Connecticut Supreme Court allowed a subsequent purchaser to bring a negligence suit against the builder for the failure of a septic system.<sup>142</sup> Privity was not a limitation on recovery because the cause of action lay in Tort and not Contract.<sup>143</sup> The Connecticut case has been widely followed.<sup>144</sup>

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<sup>135</sup> *Id.* at 431.

<sup>136</sup> *Id.* at 432.

<sup>137</sup> *Id.* The court also stated: "[I]t is reasonable to extend to . . . professionals a . . . duty to disclose off-site conditions that materially affect the value or desirability of the property." *Id.* at 428.

<sup>138</sup> *Id.*

<sup>139</sup> *Wagner Construction Co. v. Noonan*, 403 N.E.2d 1144, 1148 (Ind. 1980).

<sup>140</sup> *See, e.g., Krieger v. Eichler Homes, Inc.*, 74 Cal. Rptr. 749 (Ct. App. 1969). An appellate tribunal has recognized emotional distress as an additional remedy in construction defect cases. *Salka v. Dean Homes of Beverly Hills, Inc.*, 22 Cal. Rptr. 2d 902 (Ct. App. 1993) (case involved flooding due to construction on a defective foundation).

<sup>141</sup> *See, e.g., Moxley v. Laramie Builders, Inc.*, 600 P.2d 733 (Wyo. 1979); *Barnes v. Mac Brown & Co.*, 342 N.E.2d 619 (Ind. 1976); *Gupta v. Ritter Homes, Inc.*, 646 S.W.2d 168 (Tex. 1983).

<sup>142</sup> *Coburn v. Lenox Homes, Inc.*, 378 A.2d 599 (Conn. 1977).

<sup>143</sup> *Id.* at 602. *But see Real Estate Marketing, Inc. v. Franz*, 885 S.W.2d 921 (Ky. 1994).

<sup>144</sup> *Lempke v. Dagenais*, 547 A.2d 290 (N.H. 1988) (overruling a decision decided just two years earlier); *Ellis v. Robert C. Morris, Inc.*, 513 A.2d 951 (N.H. 1986); *Steinberg v. Coda Robertson Constr. Co.*, 440 P.2d 798 (N.M. 1968); *Oates v. JAG, Inc.*, 333 S.E.2d 222 (N.C. 1985); *Leigh v. Wadsworth*, 361 P.2d 849 (Okla. 1961); *Terlinde v. Neely*, 271 S.E.2d 768 (S.C. 1980); *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733 (Wyo. 1979).

Other courts have extended strict liability protection to subsequent purchasers.<sup>145</sup> The mass production and sale of homes was analogized to the mass production and sale of automobiles.<sup>146</sup> Courts have also utilized other theories to circumvent the ancient privity limitations. For example, in a cause of action in Tort, such as for misrepresentation, privity of contract is not a shield.<sup>147</sup> A false representation may consist of the failure to disclose a material fact which should have been disclosed.<sup>148</sup> Similarly, a cause of action for fraudulent concealment may extend to subsequent purchasers.<sup>149</sup>

### BROKER LIABILITY

Assuming caveat emptor protects the vendor, a purchaser might seek to hold the broker liable instead. Brokers face a conflict because they have a fiduciary duty to their principal, the owner, to use their best efforts to sell the property at the highest price. In addition, their commission is usually a percentage of the sale price. Disclosure to a potential purchaser of information that could delay the sale, or lower the sale price, could arguably result in a breach of the broker's duty, as well as a reduction in the sales commission. Thus, in the short-run, the broker's self-interest is to maximize the sales price by minimizing the negatives. However, the broker's duty is not unbridled and must be fulfilled in compliance with legal requirements. For example, the broker will be liable for fraud or misrepresentation in consummating a sale.

Nevertheless, brokers, as well as sellers, were protected by the defense of caveat emptor.<sup>150</sup> However, the caveat emptor defense of brokers disintegrated rapidly in the second half of the twentieth century. Indeed, as one commentator remarked:

Broker liability has increased at nearly an exponential rate as many state courts and consumer protection statutes require a broker to disclose any information that materially relates to a buyer's decision to purchase property.<sup>151</sup>

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<sup>145</sup> *Blagg v. Fred Hunt Co., Inc.*, 612 S.W.2d 321 (Ark. 1981); *Kreigler v. Eichler Homes, Inc.*, 74 Cal. Rptr. 749 (Ct. App. 1969).

<sup>146</sup> *Id.* at 324.

<sup>147</sup> *Schnell v. Gustafson*, 638 P.2d 850, 852 (Colo. Ct. App. 1981) (failure to disclose uranium mine tailings under the house).

<sup>148</sup> *Id.*

<sup>149</sup> *Barnhouse v. City of Pinole*, 183 Cal. Rptr. 881, 893-94 (Ct. App. 1982).

<sup>150</sup> *See, e.g., Traverse v. Long*, 135 N.E.2d 256 (Ohio 1956).

<sup>151</sup> Paula C. Williams, *Aids, Ghosts, Murder: Must Real Estate Brokers and Sellers Disclose*, 27 WAKE FOREST L. REV. 689 (1992). In reality, brokers are subject to at least the same rules of disclosure as are imposed upon sellers. *See, e.g., Cooper v. Jevne*, 128 Cal. Rptr. 725 (Ct. App. 1976); *Rayner v. Wise Realty Co.*, 504 So. 2d 1361 (Fla. Ct. App. 1987); *Miles v. McSwegin*, 388 N.E.2d 1367 (Ohio 1979); *Lock v. Schreppler*, 426 A.2d 856 (Del. Super. Ct. 1981).

Real estate brokers are often held liable on a variety of theories, including fraud, negligent misrepresentation, innocent misrepresentation, negligence,<sup>152</sup> and consumer fraud and protection statutes.<sup>153</sup>

While we think of a cause of action for fraud being based upon an intentional misrepresentation of a material fact, a case of fraudulent representation may lie against a broker if the broker makes representations without knowledge as to the truth or falsity of the representations.<sup>154</sup> Even half-truths, or partial disclosures, may give rise to liability by a broker.<sup>155</sup> A broker also has a duty to answer truthfully the questions asked by a prospective purchaser.<sup>156</sup>

A broker can be liable for misrepresenting the acreage and amount of road and river frontage of rental property.<sup>157</sup> Liability can be based upon strict liability if the speaker professes, or implies, personal knowledge.<sup>158</sup>

Listing brokers know, or should know, their descriptions will be relied upon by others. Thus, a duty is owed to all those who rely on the listing characterizations. Consequently, if the broker fails to exercise reasonable care in gaining knowledge of defects in the listed property, a cause of action may exist for negligent misrepresentation.<sup>159</sup> If the broker has actual knowledge of a defect, the cause of action may lie in fraud.<sup>160</sup> If negligent misrepresentation is the cause of action, then it is unwise for brokers to communicate or volunteer unverified material information that turns out

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<sup>152</sup> *Easton v. Strassberger*, 199 Cal. Rptr. 383 (Ct. App. 1984); *Gouveia v. Citicorp Person-to-Person Fin. Center*, 686 P.2d 262 (N.M. Ct. App. 1984); *Secor v. Knight*, 716 P.2d 790 (Utah 1986).

<sup>153</sup> See, e.g., *Warren v. Le May*, 491 N.E.2d 464 (Ill. App. Ct. 1986).

<sup>154</sup> The Ohio Supreme Court has reasoned that where one asserts a fact, when he has insufficient information to justify it, he may be found to have the intent to deceive. *Pumphrey v. Quillen*, 135 N.E.2d 328, 330 (Ohio 1956); see also *Luikart v. Miller*, 48 S.W.2d 867 (Mo. 1932); *Mertens v. Wolfeboro Nat. Bank*, 402 A.2d 1335 (N.H. 1974); see also *Spargnapani v. Wright*, 110 A.2d 82 (D.C. Mun. Ct. App. 1954); *Ackmann v. Keeney-Joelle Real Estate Co.*, 401 S.W.2d 483 (Mo. 1966).

<sup>155</sup> See, e.g., *Revitz v. Terrell*, 572 So. 2d 996 (Fla. Ct. App. 1990); *Fennell Realty Co. v. Martin*, 529 So. 2d 1003, 1005 (Ala. 1988).

<sup>156</sup> *Bevins v. Ballard*, 655 P.2d 757 (Alaska 1982); *Fennell Realty Co. v. Martin*, 529 So. 2d 1003, 1005 (Ala. 1988).

<sup>157</sup> *Gauerke v. Rozga*, 332 N.W.2d 804 (Wis. 1983).

<sup>158</sup> *Id.* at 804.

<sup>159</sup> *Gouveia v. Citicorp Person-to-Person Financial Ctr., Inc.*, 686 P.2d 262, 265-66 (N.M. Ct. App. 1984). Section 552 of the RESTATEMENT is critical:

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

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

<sup>160</sup> *Gouveia*, *supra* note 159, at 266.

to be incorrect.<sup>161</sup> Liability may lie for negligent misrepresentation even if the belief is sincere or honest.<sup>162</sup>

Pursuant to the *Restatement (Second) of Torts*,<sup>163</sup> a broker may even be liable for innocent misrepresentations of material facts relied upon by the purchaser.<sup>164</sup> The purchaser has a right to rely upon representations made by the broker.<sup>165</sup> Indeed, the loss should fall on the innocent defendant rather than the innocent victim, who justifiably relied upon the misrepresentation.<sup>166</sup>

A broker also has a duty to disclose material facts of which the broker is aware or should have been aware.<sup>167</sup> Thus, a real estate broker may owe a duty to a prospective buyer of residential property to disclose any material defect which might affect the purchaser's decision to buy the property.<sup>168</sup>

The broker's duty of disclosure may be the same as the seller's. The seller and broker may in turn be jointly and severally liable to the purchaser for the full amount of damages.<sup>169</sup> In addition, if the material misrepresentation is made by the agent, the purchaser has a right of rescission.<sup>170</sup>

### *EASTON V. STRASSBERGER*

The leading case involving a duty to disclose off-site conditions on real estate brokers is the California appellate decision in *Easton v. Strassberger*.<sup>171</sup> The buyer purchased a 3,000 square foot house on an acre of land for \$170,000. Shortly after the close

161 See, e.g., *Tennant v. Lawton*, 615 P.2d 1305 (Wash. Ct. App. 1980); *Mertens v. Wolfboro Nat. Bank*, 402 A.2d 1335 (N.H. 1979); see also *Bevins v. Ballard*, 655 P.2d 752 (Alaska 1982).

162 *Rodgers v. Johnson*, 557 So. 2d 1136 (La. Ct. App. 1990).

163 THE RESTATEMENT (SECOND) OF TORTS § 552C(1) provides:

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

164 See, e.g., *Bevins v. Ballard*, 655 P.2d 757 (Alaska 1982); *Spargnapani v. Wright*, 110 A.2d 82 (D.C. Mun. App. Ct. 1954); *Buzzaro v. Bolger*, 453 N.E.2d 1129 (Ill. App. Ct. 1983); *Berryman v. Riegert*, 175 N.W.2d 438 (Minn. 1970); *Polk Terrace, Inc. v. Harper*, 386 S.W.2d 588 (Tex. Civ. App. 1965); *Dugan v. Jones*, 615 P.2d 1239 (Utah 1980); *Bergmueller v. Minnick*, 383 S.E.2d 722 (Va. 1989); *Gauerke v. Rozga*, 332 N.W.2d 804 (Wis. 1983); *Reda v. Sincaban*, 426 N.W.2d 100 (Wis. Ct. App. 1988); *app. denied* 430 N.W.2d 918 (Wis. 1988).

165 *Berryman v. Riegert*, 175 N.W.2d 438, 442-43 (Minn. 1970).

166 *Id.*

167 *Johnson v. Geer Real Estate Co.*, 720 P.2d 660 (Kan. 1986); *Connor v. Merrill Lynch Realty, Inc.*, 581 N.E.2d 196, 201 (Ill. App. Ct. 1981); *Roberts v. Estate of Babbagallo*, 531 A.2d 1125 (Pa. Super. Ct. 1987) (urea foam formaldehyde insulation.)

168 *De Candia v. Barry*, 1989 Mass. App. Div. 92, 94-95 (1989).

169 *Lingsch v. Savage*, 29 Cal. Rptr. 201, 205 (Ct. App. 1963).

170 RESTATEMENT (SECOND) OF AGENCY § 259.

171 199 Cal. Rptr. 383 (Ct. App. 1984).

of escrow, a massive earth movement damaged the property.<sup>172</sup> The sellers had concealed from the buyers and agents two slides over the preceding three years.<sup>173</sup> The slides occurred because portions of the property were on fill that had not been properly engineered and compacted. The house was appraised at \$170,000 in undamaged condition, but only \$20,000 with the damage. The estimated costs of repair were as high as \$213,000.<sup>174</sup> The brokers had inspected the property, but did not notice the slides. However, sufficient clues, "red flags," were available that should have alerted the brokers of the soil problems.<sup>175</sup>

The broker was held liable for negligence. The purchaser did not have to show either intentional misrepresentation or fraudulent concealment, but simple negligence. The court held a broker has a duty to not only disclose known facts, but also to conduct a reasonably diligent inspection of the property:

[W]e hold that the duty of a real estate broker representing the seller, to disclose facts . . . includes the affirmative duty to conduct a reasonably competent and diligent inspection of the residential property listed for sale and to declare to prospective purchasers all facts materially affecting the value or desirability of the property that such an investigation would reveal.<sup>176</sup>

The court recognized policy arguments for invoking a duty of inspection on the broker. First, the court acknowledged the policy from earlier California cases to protect the buyer from unethical brokers and sellers, and to ensure the buyer is provided sufficient accurate information to make an informed decision.<sup>177</sup> In addition, the law should not create a disincentive for seller's broker to make a diligent inspection.<sup>178</sup> The broker is also most frequently the best situated party to obtain and provide the most reliable information on the property.<sup>179</sup>

*Easton* was followed by a few jurisdictions.<sup>180</sup> For example, the Minnesota Supreme Court held a broker had a duty to investigate whether there had been a problem from water seepage into

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<sup>172</sup> *Id.* at 385.

<sup>173</sup> *Id.* at 386.

<sup>174</sup> *Id.* at 385.

<sup>175</sup> These clues included netting on a slope by the house, and uneven floors in the guest house. *Id.* at 386.

<sup>176</sup> *Id.* at 390.

<sup>177</sup> *Id.* at 388.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> See, e.g., *Gouveia v. Citicorp Person-to-Person Fin. Center*, 686 P.2d 262 (N.M. Ct. App. 1984); *Secor v. Knight*, 716 P.2d 790 (Utah 1986). See also *Gauerke v. Rozga*, 332 N.W.2d 804 (Wis. 1983).

the home or property. Such information should be available to an experienced real estate broker.<sup>181</sup>

#### LEGISLATIVE RESPONSE TO *EASTON*

The California legislature subsequently clarified the broker's duty of inspection and disclosure for dwellings of one to four units:<sup>182</sup>

It is the duty of a real estate broker . . . to conduct a reasonably competent and diligent visual inspection of the property offered for sale and to disclose to that prospective purchaser all facts materially affecting the value or desirability of the property that such an investigation would reveal . . . .<sup>183</sup>

The inspection need not include areas that are reasonably and normally inaccessible to such an inspection.<sup>184</sup> The requisite standard of care is that which "a reasonably prudent real estate licensee would exercise and is measured by the degree of knowledge through education, experience, and examination, required to obtain a license. . . ."<sup>185</sup>

#### STATUTORY CONSTRAINTS ON CAVEAT EMPTOR

Caveat emptor also has been severely limited through legislative enactments that require disclosures of specified conditions such as asbestos,<sup>186</sup> lead paint,<sup>187</sup> termites,<sup>188</sup> septic systems,<sup>189</sup> the presence of smoke detectors, and toxic contamination.<sup>190</sup> Many states have also enacted more general disclosure laws.

California led the way in 1985 by enacting the country's first Homeowner Disclosure Act.<sup>191</sup> The California statute requires both the seller and any brokers involved in the transaction to sign the prescribed disclosure form. The brokers must certify they have conducted a reasonably competent and diligent visual in-

<sup>181</sup> *Berryman v. Riegert*, 175 N.W.2d 438 (Minn. 1970); *see also*, *Sawyer v. Tildahl*, 148 N.W.2d 131 (Minn. 1967); *Long v. Brownstone Real Estate Co.*, 484 A.2d 126 (Pa. Super. Ct. 1984).

<sup>182</sup> CAL. CIV. CODE § 2079.1 (West 1998).

<sup>183</sup> *Id.* § 2079.

<sup>184</sup> *Id.* § 2079.3.

<sup>185</sup> *Id.* § 2079.2.

<sup>186</sup> *See, e.g.*, CAL. CIV. CODE § 1102-6(c)(1) (Deering Supp. 1997). A cause of action lies in fraud when the broker failed to disclose that the property was subject to flooding. *Chapman v. Hosek*, 475 N.E.2d 593 (Ill. App. Ct. 1985).

<sup>187</sup> *See* 40 C.F.R. § 745 (1997).

<sup>188</sup> *See, e.g.*, FLA. STAT. § 482.226(1) (1998).

<sup>189</sup> Massachusetts enacted a statute, commonly referred to as Title V, which requires homeowners with septic systems to meet new inspection standards before they can sell or expand their houses. MASS. REGS. CODE tit. 310, § 15.00 *et seq.* (1997).

<sup>190</sup> *See, e.g.*, CAL. HEALTH & SAFETY CODE § 25359.7(a) (1997); CONN. GEN. STAT. §§ 22a-134a-d, 22a-452a (1998).

<sup>191</sup> This statute was enacted after the California Court of Appeals decision in *Easton v. Strassberger*. *See* notes 171-180, *supra*, and accompanying text.

spection of the accessible areas of the property.<sup>192</sup> The statute also codifies the disclosure form to be completed by the seller and delivered to the purchaser.<sup>193</sup>

Under the California statute, the seller must disclose known existing defects in fixtures and appliances on the property,<sup>194</sup> known defects in the structure of the home,<sup>195</sup> defects in the property or matters affecting the property,<sup>196</sup> and neighborhood noise problems or other nuisances.<sup>197</sup> The seller must answer "yes" or "no" to a series of questions. If an answer is "yes," then the seller must explain the circumstances. A significant limitation in the statute is that the disclosure requirement applies only to past or existing damage from external geologic causes. The statute does not require disclosure of prospective threats.<sup>198</sup>

The California Court of Appeals in *Alexander v. McKnight*<sup>199</sup> recognized the purpose of the statute requires it to "be liberally interpreted so that a buyer will be fully informed on matters affecting the value of the property to be purchased."<sup>200</sup> The court noted the earlier *Reed v. King*<sup>201</sup> decision to the effect that "the failure to disclose a negative fact when it can reasonably be said to have a foreseeably depressive affect [*sic*] on the value of property is tortious."<sup>202</sup> The court uttered this strong statement about caveat emptor: "If anything, the concept of 'let the buyer beware' is an anachronism in California having little or no application in real estate law."<sup>203</sup>

In light of California's concern over earthquakes, special disclosure rules govern seismic risks:

A person who is acting as an agent for a seller of real property which is located within a seismic hazard zone . . . or the seller if he or she is acting without an agent, shall disclose to any prospective purchaser the fact that the property is located within a seismic hazard zone . . . .<sup>204</sup>

The disclosure duty may be satisfied through the real estate transfer disclaimer statement, the local option real estate transfer dis-

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<sup>192</sup> CAL. CIV. CODE § 1102.6 (1998).

<sup>193</sup> *Id.*

<sup>194</sup> The required information includes fill, settling from any cause, flooding, drainage, or grading problems, and any major damage caused by fire, earthquake, floods or landslides. *Id.* § 1102.6(c)(6)-(9).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* § 1102.5.

<sup>199</sup> 9 Cal. Rptr. 3d 453 (Ct. App. 1992).

<sup>200</sup> *Id.* at 455.

<sup>201</sup> 193 Cal. Rptr. 130 (Ct. App. 1983).

<sup>202</sup> 9 Cal. Rptr. 3d at 456.

<sup>203</sup> *Id.*

<sup>204</sup> CAL. PUB. RES. CODE § 2694(a) (1993).

claimer statement, or the real estate contract and receipt for deposit.<sup>205</sup> California followed up in 1990 by legislatively creating a statewide seismic hazard and technical advisory program.<sup>206</sup>

A critical provision of the statute provides that, when information on a seismic hazard zone is "reasonably available," the seller, or agent acting for the seller, shall disclose to a prospective purchaser that the property is located within a seismic hazard zone.<sup>207</sup> The phrase "reasonably available" is defined to mean "that for any county that includes areas covered by seismic hazard maps, a notice is posted at the offices of the county recorder, county assessor, and county planning commission identifying the location of the maps and the effective date of the notice."<sup>208</sup>

Many states have followed the California model in enacting homeowner disclosure laws.<sup>209</sup> These disclosure laws now provide the standards and procedures of disclosure in real estate transactions in many states.

The statutes commonly require the seller to provide a detailed description of the condition of the property, including known physical defects in homes, and cover items such as water supply, sewage system, basement/crawl space, structural components, mechanical systems, insect infestation, presence of hazardous substances, code violations, and underground storage tanks. Flooding, drainage, settling or grading problems are often covered by the statutes.

The gist of the statutory scheme is fairly uniform, but variations exist as to the form, the required disclosures, the liability of brokers, and the possibility of a disclaimer. Some states, like California, prescribe the disclosure form.<sup>210</sup> Many provide for an update if a condition changes before the close.<sup>211</sup> The purpose and effect of the property disclosure statutes are that brokers "know" the property they are selling.

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<sup>205</sup> *Id.* § 2694(b)(1)-(3).

<sup>206</sup> CAL. PUB. RES. CODE § 2691 *et seq.* (1993). The risk zone maps will identify areas where liquefaction and landslides due to earthquakes pose a particular threat.

<sup>207</sup> *Id.* § 2694(a).

<sup>208</sup> *Id.* § 2694(c)(1).

<sup>209</sup> *Id.* § 2694. See generally Robert M. Washburn, *Residential Real Estate Condition Disclosure Legislation*, 44 DEPAUL L. REV. 381 (1995).

<sup>210</sup> See, e.g., CAL. CIV. CODE § 1102.6 (Supp. 1997); S.D. CODIFIED LAWS § 43-4-44 (1998), TEX. PROP. CODE § 5.008(B) (1998) and WIS. STAT. § 709.03 (1997). The Oregon statute gives the seller the option of providing the disclosure statement or a written disclaimer: "The seller makes no representations or warranties as to the condition of the real property or any improvement therein, and that the buyer will be purchasing the property 'as is,' that is, with all defects, if any." OR. REV. STAT. § 105.465(2) (1996).

<sup>211</sup> See, e.g., ALASKA STAT. § 34.70.040 (1996); IND. CODE § 24-4.6-2-7 (1997); IOWA CODE § 558A.3(2)(A) (1998), S.D. CODE LAWS § 43-4-44 (1997); VA. CODE ANN. § 55-522 (Michie 1995).

Under the California statute, the enumeration of items for disclosure does not limit or abridge any other statutory provisions or preclude an action for fraud, misrepresentation or deceit.<sup>212</sup>

The remedy for a statutory violation may be actual damages or rescission if the violation or misrepresentation is due to negligence.<sup>213</sup>

### MATERIAL FACTS

Clearly, not all facts have to be revealed to prospective purchasers.<sup>214</sup> Indeed, it is impossible to disclose every "fact" about every inch of a dwelling, its history, underpinnings and surroundings. Consequently, the general rule is that only "material facts" need be disclosed. The *Restatement* defines a material fact as one which "a reasonable [person] would attach importance to its existence or nonexistence in determining . . . [the] choice of action in the transaction in question."<sup>215</sup> In other words, would the other party act differently if made aware of the concealed fact?<sup>216</sup> The *Restatement* definition has been readily adopted by the courts.<sup>217</sup> A variation of the *Restatement* definition is to add that a fact is also material if the vendor knows, or has reason to know, the purchaser regards, or is likely to regard, the matter as important in determining the choice of action, even if a reasonable person would not so regard it.<sup>218</sup>

Another definition of materiality is whether "it probably influenced the making of the contract; that is, whether the plaintiffs would have purchased the property for the price paid had they been apprised of these conditions."<sup>219</sup> Other courts view a fact as material if it affects the value of the property.<sup>220</sup>

For some courts, materiality is not an issue "if the misrepresentation is knowingly made" whereas a fact must be material if it is innocently made.<sup>221</sup> An alternative approach to determining which facts are "material" is to look at specific situations in

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<sup>212</sup> CAL. CIV. CODE §1102.8 (1990).

<sup>213</sup> See, e.g., S.D. CODE LAWS § 43-4-42 (1997); VA. CODE §§ 55-524B1, 55-524B2 (Michie Ann. 1995).

<sup>214</sup> "Minor conditions which ordinary sellers and purchasers would reasonably disregard as of little or no materiality in the transaction would clearly not call for judicial intervention." *Weintraub v. Krobatsch*, 317 A.2d 68, 74 (N.J. 1974).

<sup>215</sup> RESTATEMENT (SECOND) OF TORTS § 538(2)(a) (1977).

<sup>216</sup> *Chapman v. Hosek*, 475 N.E.2d 593, 598 (Ill. App. Ct. 1985).

<sup>217</sup> See, e.g., *Lynn v. Taylor*, 642 P.2d 131, 134 (Kan. Ct. App. 1982); *Griffith v. Byers Construction Co. of Kansas, Inc.*, 510 P.2d 198, 205 (Kan. 1973); *Cousineau v. Walker*, 613 P.2d 608 (Alaska 1980).

<sup>218</sup> *Ollerman v. O'Rourke*, 288 N.W.2d 95, 107 (Wis. 1980).

<sup>219</sup> *Kaze v. Compton*, 283 S.W.2d 204, 207 (Ky. 1955).

<sup>220</sup> *Johnson v. Davis*, 480 So. 2d 625, 629 (Fla. 1985); *Kaze v. Compton*, 283 S.W.2d 204, 208 (Ky. Ct. App. 1955).

<sup>221</sup> See, e.g., *Shane v. C. J. Hoffmann, Jr.*, 324 A.2d 532, 536 (Pa. Super. Ct. 1974).

which courts have viewed specific facts as material. The list of these material facts include defects in the structural integrity of the property,<sup>222</sup> expansive soil,<sup>223</sup> building a house over a cesspool,<sup>224</sup> the existence of fill,<sup>225</sup> leaky roofs,<sup>226</sup> roach infestations,<sup>227</sup> termite infestations,<sup>228</sup> unstable soil conditions,<sup>229</sup> unstable foundations,<sup>230</sup> defective sewer system,<sup>231</sup> defective septic system,<sup>232</sup> water damage,<sup>233</sup> and the adequacy of the water supply.<sup>234</sup> A material misstatement also exists for stating in a listing that flood insurance is not required.<sup>235</sup> Material facts include not only problems which pose a safety risk, but any material fact affecting the value of the property.<sup>236</sup>

### CONSUMER PROTECTION STATUTES

Real estate transactions may also fall under the ambit of state consumer protection statutes.<sup>237</sup> For example, in the New Jersey case of *Strawn v. Canuso*,<sup>238</sup> one cause of action was stated pursuant to the New Jersey Consumer Fraud Act, which prohibits "the knowing concealment, suppression, or omission of any material fact . . . in connection with the sale or advertisement of any merchandise or real estate . . . ." <sup>239</sup> The omission of a material fact with intent that others rely upon the omission is an unlawful

<sup>222</sup> See, e.g., *Hill v. Jones*, 725 P.2d 1115 (Ariz. Ct. App. 1986).

<sup>223</sup> *Burkett v. J.A. Thompson & Son*, 310 P.2d 56 (Cal. Ct. App. 1957).

<sup>224</sup> *Weikel v. Sterns*, 134 S.W. 908 (Ky. 1911).

<sup>225</sup> *Barnhouse v. City of Pinole*, 183 Cal. Rptr. 881, 891 (Ct. App. 1982); *Burkett v. J.A. Thompson & Son*, 310 P.2d 56 (Cal. Ct. App. 1957); *Buist v. C. Dudley De Velbiss Corp.*, 6 Cal. Rptr. 259, 263 (Ct. App. 1960); *Cohen v. Vivian*, 349 P.2d 366 (Colo. 1960); *Loghry v. Capel*, 132 N.W.2d 417, 419 (Iowa 1965).

<sup>226</sup> *Johnson v. Davis*, 449 So. 2d 344 (Fla. Ct. App. 1984).

<sup>227</sup> *Weintraub v. Krobatsch*, 317 A.2d 68 (N.J. 1974).

<sup>228</sup> *Hill v. Jones*, 725 P. 2d 1115 (Ariz. Ct. App. 1986); *Lynn v. Taylor*, 642 P.2d 131 (Kan. Ct. App. 1982); *Soniat v. Johnson-Ras & Hays*, 626 So. 2d 1256 (Ala. 1993) (failure to fully produce evidence of old termite damage); *Godfrey v. Steinpress*, 180 Cal. Rptr. 95 (Ct. App. 1982); *Lingsch v. Savage*, 29 Cal. Rptr. 201, 207 (Ct. App. 1963).

<sup>229</sup> *Barnhouse v. City of Pinole*, 183 Cal. Rptr. 881 (Ct. App. 1982).

<sup>230</sup> *Easton v. Strassberger*, 199 Cal. Rptr. 383 (Ct. App. 1986).

<sup>231</sup> *Shane v. Hoffman*, 324 A.2d 532 (Pa. 1974).

<sup>232</sup> *Catucci v. Ouellette*, 592 A.2d 962, 963-64 (Conn. Ct. App. 1991).

<sup>233</sup> *Barnhouse v. City of Pinole*, 183 Cal. Rptr. 881 (Ct. App. 1982).

<sup>234</sup> *Lyon v. Ward*, 221 S.E.2d 727, 729 (N.C. Ct. App. 1976).

<sup>235</sup> *Chapman v. Hosek*, 475 N.E.2d 593 (Ill. App. Ct. 1985); see also *Revitz v. Terrell*, 572 So. 2d 996 (Fla. Ct. App. 1990).

<sup>236</sup> See, e.g., *Reed v. King*, 193 Cal. Rptr. 130 (Ct. App. 1988); *Gauerke v. Rozga*, 332 N.W.2d 804 (Wis. 1983); *Bevins v. Ballard*, 655 P.2d 757 (Alaska 1982) (size of property, dry well).

<sup>237</sup> See, e.g., *Real Estate Marketing, Inc. v. Franz*, 885 S.W.2d 921 (Ky. 1994); *Beard v. Gules*, 413 N.E.2d 448 (Ill. App. Ct. 1980); *Gabriel v. O'Hara*, 534 A.2d 488 (Pa. Super. Ct. 1987); CONN. GEN. STAT. § 42-110g(a) (1998); LA. CIV. CODE ANN. art. 2545 (West 1998). But see *State v. First National Bank of Anchorage*, 660 P.2d 406 (Alaska 1982) (failure to disclose lots were subject to flooding from Lake George).

<sup>238</sup> 657 A.2d 420 (N.J. 1995).

<sup>239</sup> N.J. STAT. ANN. § 56:8-2 (West 1989).

practice. When applicable, brokers are especially susceptible to liability under these statutes.<sup>240</sup> Actual knowledge may also be a prerequisite to liability.<sup>241</sup>

#### OFF-SITE CONDITIONS

Upon recognition that a duty might exist to disclose material on-site hazards to the purchaser, it then became obvious that off-site conditions could pose an equal, if not greater, risk to the purchaser.<sup>242</sup> In reality, defects in construction will often have only a minimal impact on the habitability of the structure. However, defects in siting may often be irreparable and result in the destruction of the structure. Consequently, the duty to disclose has been extended to off-site conditions, both of a natural origin and of human origin.

Liability clearly exists if defective construction results in the flooding out of a house.<sup>243</sup> The same risk exists if a home is built in a flood plain. Thus, in one case where the developer knew of the danger of the vendor's home lying within the drainage path of the 5-year storm, the court held the seller had a duty to tell buyer that the lot was situated in a flood plain.<sup>244</sup> Similarly, constructing a residence at the toe of a hillside gives rise to a duty to disclose.<sup>245</sup> Disclosure must also be made of external natural forces that can impact on the property, such as seasonal watercourses.<sup>246</sup> Purchasers on hillsides should also be informed that the drainage sys-

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240 See, e.g., *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535 (Tex. 1981) (misrepresentation of square footage of house); *Young v. Joyce*, 351 A.2d 857 (Del. Super. Ct. 1975); *McRae v. Bolstad*, 646 P.2d 771 (Wash. App. 1982); *Mongeau v. Boutelle*, 407 N.E.2d 352 (Mass. 1980) (misrepresentation as to acreage); *Beard v. Gress*, 413 N.E.2d 448 (Ill. App. Ct. 1980).

241 For example, the Massachusetts Consumer Protection Act has been construed to require knowledge of hazards before a broker could be held liable under the statute. See generally Michael D. Isacco, Comment, *A Massachusetts Real Estate Broker's Duty to Disclose: The Quandary Presented by AIDS Stigmatized Property*, 27 NEW ENG. L. REV., 1211, 1216-20 (1993).

242 By way of analogy, substantial secondary authority exists for the disclosure of off-site environmental dangers. See, e.g., Elizabeth A. Dalberth, *Unfair and Deceptive Acts and Practices in Real Estate Transactions: The Duty to Disclose Off-Site Environmental Hazards*, 97 DICK. L. REV. 153, 176 (1992) (analyzing necessity and impact of consumer protection statutes); Sarah L. Inderbitzin, *Taking the Burden Off the Buyer: A Survey of Hazardous Waste Disclosure Statutes*, 1 ENV'T. LAW. 513, 519-20 (1995); Note, *Imposing Tort Liability on Real Estate Brokers Selling Defective Housing*, 99 HARV. L. REV. 1861, 1871-74 (1986) (arguing that duty should be imposed on brokers to inspect and disclose reasonably discoverable defects). See generally Frana M. Powell, *The Seller's Duty to Disclose in Sales of Commercial Property*, 28 AM. BUS. L.J. 245, 273-74 (1990) (exploring the recent trend of imposing on sellers a duty to disclose conditions of real property).

243 See, e.g., *Wawak v. Stewart*, 449 S.W.2d 922 (Ark. 1970).

244 *Village Development Co. v. Filice*, 526 P.2d 83 (Nev. 1974).

245 *ABC Builders, Inc. v. Philips*, 632 P.2d 925 (Wyo. 1981) (the house was thereby placed in the path of a potential landslide); see also *Conolley v. Bull*, 65 Cal. Rptr. 689, 697-98 (Ct. App. 1968) which held a developer negligent for building without providing adequate drainage, thereby causing a landslide.

246 *Nei v. Burley*, 446 N.E.2d 674 (Mass. 1983).

tem is designed to use the streets in front of their houses, thereby posing a risk of overflowing onto the premises.<sup>247</sup>

More recently, the New Jersey Supreme Court held a duty exists to disclose the existence of a town landfill near hundreds of residential homes. Plaintiffs alleged the builder/developer knew of the toxic landfill before considering the site for residential development. The court held the developer and its sales agents are under a duty to disclose off-site conditions which will adversely affect the value and enjoyment of the property. The Environmental Protection Agency had warned against building homes near the landfill, which was suspected of containing toxic waste. In an unanimous opinion, the court stated:

We hold that a builder-developer of residential real estate or a broker representing it is not only liable to a purchaser for affirmative and intentional misrepresentations, but also for non-disclosure 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 sufficiently less desirable or valuable to the objectively reasonable buyer. Whether a matter not disclosed by such a builder or broker is of such materiality, and unknown and unobservable by the buyer, will depend on the facts of each case and will be decided by a jury.<sup>248</sup>

#### NONPHYSICAL PROBLEMS

Some courts have given credence to a duty to disclose conditions that arise from the dwelling itself, such as a house with a history.<sup>249</sup> Such homes may be "stigmatized." These stigmatized properties may have a lower value, or take longer to sell, because of emotional or psychological reactions triggered by the knowledge of homicides,<sup>250</sup> suicides, other crimes,<sup>251</sup> diseases and natural deaths, or ghosts,<sup>252</sup> that have occurred on the premises. The famous California case of *Reed v. King*<sup>253</sup> involved a failure of the seller to inform the purchaser the home had been the site of multiple homicides ten years earlier. In a subsequent New York case involving "poltergeists," the appellate tribunal noted that, while

<sup>247</sup> *Yox v. City of Whittier*, 227 Cal. Rptr. 311 (Ct. App. 1986) and *Sheffet v. County of Los Angeles*, 84 Cal. Rptr. 11 (Ct. App. 1970); cf. *Miller v. Los Angeles County Flood Control Dist.*, 505 P.2d 193 (Cal. 1973).

<sup>248</sup> *Strawn v. Canuso*, 657 A.2d 420 (N.J. 1995).

<sup>249</sup> See Marianne M. Jennings, *Buying Property from the Addams Family*, 22 REAL ESTATE J. 43 (1993). See generally Ross R. Hartog, *The Psychological Impact of AIDS on Real Property and a Real Estate Broker's Duty to Disclose*, 36 ARIZ. L. REV. 757 (1994).

<sup>250</sup> *Reed v. King*, 193 Cal. Rptr. 130 (Ct. App. 1988).

<sup>251</sup> See, e.g., *Ikeda v. Curtis*, 261 P.2d 684, 691 (Wash. 1953) (Bordello).

<sup>252</sup> *Stamovsky v. Ackley*, 572 N.Y.S.2d 672 (Sup. Ct. App. Div. 1991).

<sup>253</sup> 193 Cal. Rptr. 130 (Ct. App. 1983).

caveat emptor would permit a recovery against the vendor, rescission would be in equity.<sup>254</sup>

Many legislatures reacted to the California and New York decisions by enacting legislation that protects the sellers and their agents from failing to disclose to a purchaser that a property is stigmatized.<sup>255</sup> These "shield laws" preclude a cause of action for nondisclosure of "stigmatized" property. However, the seller must still respond truthfully to a question by the prospective purchaser.<sup>256</sup>

The value of a plot of land or dwelling may also be affected by a nonphysical, off-site problem, such as the presence of a neighborhood nuisance or criminal activity.<sup>257</sup> As with the Ohio case of *Van Camp v. Bradford*,<sup>258</sup> the duty to disclose may include criminal activity in the neighborhood. A renter's daughter was raped in defendant's house on October 30, 1991. On December 30, 1991 another rape occurred in a neighboring house. Defendant listed her house for sale on that day. Plaintiff, a single mother with a teenage daughter, submitted an offer to buy the house on February 4, 1992.

The purchaser inquired about the bars on the basement windows. The seller replied that they were installed sixteen years earlier after a break-in, but no problems currently existed with the residence. The house was broken into two months after the closing. Two additional rapes subsequently occurred in the neighborhood. The court viewed the crime problem as a latent defect, which could not be observed by the purchaser on a walk-through. The court thereby recognized that psychological stigma may therefore constitute a latent defect that renders the doctrine of caveat emptor inapplicable.<sup>259</sup>

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254 *Stamboy v. Ackley*, 572 N.Y.S.2d 672 (Sup. Ct. App. Div. 1991).

255 A few statutes require disclosure of psychologically stigmatized property. See, e.g., S.D. CODE LAWS § 43-4-44(IV)(4) (1997); VA. CODE § 55-524A (1995). More common are statutes which provide the sellers and brokers do not have to disclose the previous occupant of the property had AIDS. CAL. CIV. CODE § 1710.2 (1997); COLO. REV. STAT. § 38-35.5-101 (1992); CONN. GEN. STAT. § 20-329dd (1997); D.C. CODE ANN. § 45-1936(f) (1996); FLA. STAT. § 689.25 (1994); HAW. REV. STAT. § 467-14(18) (1997); ILL. COMP. STAT. ch. 111, para. 5831.1 (1994); KY. REV. STAT. ANN. § 207.250 (Michie 1991); NEV. REV. STAT. § 40.565 (1996); N.M. STAT. § 47-13-2 (1995); OKLA. STAT. tit. 59, § 858-513 (1996); OR. REV. STAT. § 93.275 (1990); S.C. CODE ANN. § 40-57-270 (Law. Co-op. 1996); TENN. CODE § 66-5-110 (1993); TEX. REV. CIV. STAT. ANN. art. 6573a § 15(C) (West 1991).

256 See, e.g., GA. CODE ANN. § 44-1-16 (1991).

257 *Alexander v. McKnight*, 9 Cal. Rptr. 2d 453 (Ct. App. 1992). Surrounding land uses can affect the property value of homes. Thus, the Board of Tax Review in Greenwich, Connecticut reduced by 4.7 to 10% the assessed valuation of nine homes located near a halfway house. Dirk Johnson, *Taxes Cut for Neighborhoods in Homes for Mentally Ill*, N.Y. TIMES, Apr. 11, 1985, at B2, cols. 1-6.

258 623 N.E.2d 731 (Ohio Com. Pleas 1993). The sale occurred prior to enactment of the Ohio Disclosure Act, OHIO REV. CODE ANN. § 5302.30 (Anderson 1997) and thus was subject to the common law.

259 *Id.* at 736.

## DEFENSES RELATED TO CAVEAT EMPTOR

*Merger Clauses*

The caveat emptor doctrine was historically strengthened by the "merger clause," whereby only representations contained in the four corners of the deed were recognized. Thus, any oral representations would disappear. Such a clause has also fallen by the wayside in the twentieth century,<sup>260</sup> and is no defense against a cause of action for fraud.<sup>261</sup>

*"As Is" Clauses*

Another common occurrence was the insertion of an "as is" clause in the sales agreement; i.e., the property is sold in an "as is" condition. After all, a buyer who knowingly purchases a "fixer-upper" should not subsequently complain about defects in the property.

However, builders, developers and sellers started to routinely include "as is" clauses in sales contracts. Once the implied warranty of habitability was recognized in the sale of new homes, courts soon struck down "as is" clauses in the agreement since such a clause would effectively nullify the implied warranty of habitability.<sup>262</sup> As a matter of common sense, no purchaser reasonably expects a new structure to be sold in an "as is" condition.

Courts also increasingly struck the clause down in situations involving defects in the property. Thus, an "as is" clause will not protect the seller against fraud,<sup>263</sup> fraudulent misrepresentation,<sup>264</sup> fraudulent concealment,<sup>265</sup> fraudulent nondisclosure,<sup>266</sup> material misrepresentations of fact,<sup>267</sup> misrepresentation or passive concealment.<sup>268</sup> As one court explained, an "as is" clause allocates the risk of loss arising from conditions unknown to the

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<sup>260</sup> See, e.g., *Lingsch v. Savage*, 29 Cal. Rptr. 201, 206 (Ct. App. 1963).

<sup>261</sup> *Hill v. Jones*, 725 P.2d 1115 (Ariz. Ct. App. 1986).

<sup>262</sup> See, e.g., *Smith v. Old Warson Development Co.*, 479 S.W.2d 795 (Mo. 1972); *Davies v. Bradley*, 676 P.2d 1242 (Colo. Ct. App. 1983); *Briarcliff West Townhouse Owners Ass'n v. Wiseman Construction Co.*, 480 N.E.2d 833 (Ill. App. Ct. 1985). Similarly, an exculpatory clause will not affect an action for fraud. *Zimmerman v. Northfield Real Estate Co.*, 510 N.E.2d 409, 415 (Ill. App. Ct. 1986).

<sup>263</sup> *Loghry v. Capel*, 132 N.W.2d 417 (Iowa 1965); *Wagner v. Cutter*, 757 P.2d 779 (Mont. 1988); *Rayner v. Wise Realty Co. of Tallahassee*, 504 So. 2d 1361 (Fla. Ct. App. 1987); *Brewer v. Brothers*, 611 N.E.2d 492 (Ohio Ct. App. 1992); *Lingsch v. Savage*, 29 Cal. Rptr. 201, 208-9 (Ct. App. 1963).

<sup>264</sup> *Gibb v. Citicorp Mortgage, Inc.*, 518 N.W.2d 910, 917-18 (Neb. 1994).

<sup>265</sup> *Kaye v. Buehle*, 457 N.E.2d 373 (Ohio Ct. App. 1983); *Mancini v. Gorick*, 536 N.E.2d 5 (Ohio Ct. App. 1987); *Lingsch v. Savage*, 29 Cal. Rptr. 201 (Ct. App. 1963); *Dannann Realty Co. v. Harris*, 157 N.E.2d 397 (N.Y. Ct. App. 1959).

<sup>266</sup> *Rather v. Wise Realty Co. of Tallahassee*, 504 So. 2d 1361, 1364 (Fla. Ct. App. 1987).

<sup>267</sup> *Cruse v. Coldwell Banker/Graben Real Estate, Inc.*, 667 So. 2d 714 (Ala. 1995).

<sup>268</sup> *Driver v. Melone*, 60 Cal. Rptr. 98, 101-2 (Ct. App. 1970).

parties.<sup>269</sup> The clause will not therefore protect the seller against a known defect.

Conversely, an "as is" clause may be upheld if the buyer signs it after being made aware of potential problems in the neighborhood, such as settling and foundation problems.<sup>270</sup> In such a situation though, the purchaser is fully informed of the risks.

As we have seen, the duty to disclose can be triggered by a query by the purchaser.<sup>271</sup> Thus, when the seller answered the buyer's questions about the condition of the electrical system by responding, "You have nothing to worry about," the "as is" clause in the sales contract was nullified.<sup>272</sup>

### THE DUTY TO DISCLOSE

A hallowed maxim of the common law is that if the reason for a rule changes, then so too should the rule.<sup>273</sup> Caveat emptor was premised on an equality of knowledge and bargaining power between purchaser and seller. The doctrine was also developed during a time of laissez faire wherein the government promoted, rather than regulated, commerce.

Certainly a major factor in activating the duty to disclose is the difference in access to information between the professional seller of residential real estate and the usual buyer. Much of the reason for abrogating caveat emptor is to protect buyers. The ordinary purchaser is not in a position to discern defects, and must rely upon the builder or developer of a new home.<sup>274</sup> In addition, the ordinary purchaser of existing homes is often unable to ascertain defects.<sup>275</sup> Thus, the purchasers are often unable to protect themselves.

We should not realistically expect a purchaser to check the county clerk's office, the planning and zoning commission files, the Army Corps of Engineers, the United States Geologic Society, the state geologist, other agencies,<sup>276</sup> and the internet,<sup>277</sup> prior to

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269 *Lorenzo v. Noel*, 522 N.W.2d 724, 726 (Mich. Ct. App. 1994).

270 *See, e.g., Leatherwood, Inc. v. Baker*, 619 So. 2d 1273 (Ala. 1993).

271 *See* notes 74 and 156, *supra*, and accompanying text.

272 *Brewer v. Brothers*, 611 N.E.2d 492, 493 (Ohio Ct. App. 1992). (\$2,000 to repair the electrical system).

273 *See, e.g., CAL. CIV. CODE* § 3510 (1872) (causing any rule, for which there is no longer a need, to cease); *see also, Pierce v. Yakima Valley Memorial Hosp. Ass'n*, 260 P.2d 765 (Wash. 1953) (holding that charitable, nonprofit hospitals should no longer be held immune from liability for their employer's negligence).

274 *See, e.g., Moxley v. Lorraine Builders, Inc.*, 600 P.2d 733, 735 (Wyo. 1979).

275 *See, e.g., Humber v. Morton*, 426 S.W.2d 554, 561 (Tex. 1968).

276 For example, the California Department of Conservation prepares and maintains an inventory of landslide maps, provided for use by local governments as part of the Landslide Hazard Identification Program.

277 For example, California residents can check out the earthquake risks in their homes and neighborhoods at the following websites: <<http://www.earthquake.com/>> and <[http://](http://www.earthquake.com/)

purchasing a house, much less bringing a building inspector, hydrologist, geologist and meteorologist to the site.

Nor can we reasonably expect a potential purchaser to search for a myriad of potential problems, such as asbestos, carpenter ants, defective septic and sewer systems, dry rot, faulty plumbing, lead paint, radon gas<sup>278</sup> and termites. Some, but not all, of these problems may be observable by an inspector in making the standard inspection prior to the close.<sup>279</sup>

As this survey clearly establishes, the property law doctrine of caveat emptor was already in major decline at the time of the famous 1942 case of *Swinton v. Whittensville Savings Bank*. Through a combination of judicial and legislative actions, caveat emptor no longer retains much viability.

Indeed, the limiting property doctrine of caveat emptor has been supplanted by the expansive tort law concepts of implied warranties and the duty to disclose. Fraud, misrepresentation, warranties of habitability, and especially duties to disclose are all Tort constructs. In addition, caveat emptor does not protect the seller against liability to third parties. The *Restatement (Second) of Torts* § 353 provides liability to a vendor of real estate who either fails to disclose, or conceals, any condition which produces an unreasonable risk to people on the land.<sup>280</sup>

We thereby recognize and posit a tort duty on the part of the seller, and the seller's broker, to disclose material geologic hazards of which the seller, and the seller's broker, know, or reasonably should know. The law should impose, based upon reasonable foreseeability, a duty on developers of new developments, sellers of existing structures, and the selling agents, a duty to disclose to prospective purchasers if the building is located in a geologically fragile area, such as an earthquake or landslide zone. The disclosure statement should include:

1. The nature of the risk;
2. Historical occurrences of the risk in the area;
3. Scientific projections of the risk in the area;
4. The potential magnitude impact should the risk materialize;  
and
5. The estimated chance of the risk materializing.

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[www.homerisk.com/](http://www.homerisk.com/)>. Other information web sites on earthquakes are <<http://www.sceec.org/>> and <<http://edcwww.cr.wsgs.gov/dclass.html>>.

<sup>278</sup> Naturally occurring radon contaminated soil is a major problem on the East Coast, with heavy concentrations in the Appalachian Mountains, Florida, New England, New Jersey, New York and Pennsylvania. See Frank B. Cross and Paula C. Murray, *Liability for Toxic Radon Gas in Residential Home Sales*, 66 N.C. L. REV. 687, 692 (1988). The buyer should be aware of uranium toxicity under the house. *Schnell v. Gustafson*, 638 P.2d 850 (Colo. Ct. App. 1981).

<sup>279</sup> However, even a building inspection is not designed to discern latent defects or off-site geologic or neighborhood problems.

<sup>280</sup> RESTATEMENT (SECOND) OF TORTS § 353 (1965).

Liability in tort law is normally based upon establishing a duty of care. In turn, the duty of care in negligence is based upon a variety of factors, of which the most prominent is the reasonable foreseeability of the risk.<sup>281</sup>

The standard of care is flexible. Duty is proportional to the potential harm. As the risk increases, so does the standard of reasonable care.<sup>282</sup> For example, only slight care might be required with a stock watering pond in an isolated, rural area. Conversely, the highest duty of care, bordering on strict liability, would be involved in designing, constructing, and maintaining a large dam overlooking a major population center.<sup>283</sup>

Tort law has progressively expanded liability during the last half of the twentieth century. Immunities have been abrogated.<sup>284</sup> Long-standing limitations on "duty" have been lifted,<sup>285</sup> new causes of actions recognized,<sup>286</sup> and causation issues addressed.<sup>287</sup>

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<sup>281</sup> The California Supreme Court made foreseeability of the risk the major factor in establishing duty in a series of cases in the 1970s and 1980s. *See, e.g.*, *Bigbee v. Pacific Tel. & Tel. Co.*, 665 P.2d 947, 951-53 (Cal. 1983) (presenting all issues of defendant's negligence in context of inquiry whether accident was reasonably foreseeable); *Weirum v. RKO Gen. Inc.*, 119 Cal. Rptr. 191 (1975) (defining foreseeability as "a primary consideration in establishing" duty). *See also* *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 342 (Cal. 1976) (calling foreseeability the most important factor in determining duty). More recent cases revert back to the reasonable foreseeability of the risk. *See, e.g.*, *Ann M. v. Pacific Plaza Shopping Ctr.*, 863 P.2d 207, 213-14 (Cal. 1993) (stating that a landowner has a duty to protect others from third-party acts only when those acts may be reasonably anticipated).

<sup>282</sup> This principle was set forth in the germinal negligence case of *Brown v. Kendall*, 60 Mass. (6 Cush.) 292, 296 (1850). As stated by Prosser and Keeton:

[I]f the risk is an appreciable one, and the possible consequences are serious, the question is not one of mathematical probability alone. The odds may be a thousand to one that no train will arrive at the very moment that an automobile is crossing a railway track, but the risk of death is nevertheless sufficiently serious to require the driver to look for the train and the train to signal its approach . . . . As the gravity of the possible harm increases, the apparent likelihood of its occurrence need be correspondingly less to generate a duty of precaution.

W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 31, at 171 (5th ed. 1984).

<sup>283</sup> *See* *Mayor of New York v. Bailey*, 2 Denio 433, 440-41 (N.Y. 1845); *see also* *Eikland v. Casey*, 266 F. 821, 823 (9th Cir. 1920), *cert. denied*, 254 U.S. 652 (1920); *Erickson v. Bennion*, 503 P.2d 139 (Utah 1972).

<sup>284</sup> Charitable immunity, *Pierce v. Yakima Valley Memorial Hospital Ass'n*, 260 P.2d 765 (Wash. 1953); interspousal immunity, *Burns v. Burns*, 518 So. 2d 1205 (Miss. 1988); parent-child immunity, *Goller v. White*, 122 N.W.2d 193 (Wis. 1963); sovereign immunity, *Muskopf v. Corning Hospital District*, 11 Cal. Rptr. 89 (Cal. 1961).

<sup>285</sup> Abrogation of the locality rule in medical malpractice suits, *Cobbs v. Grant*, 104 Cal. Rptr. 505 (Cal. 1972); guest statutes, *Brown v. Merlo*, 106 Cal. Rptr. 388 (Cal. 1973); negligent infliction of emotional distress on bystanders, *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968); owners and occupants of land, *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968).

<sup>286</sup> *Dram shop*, *Kelly v. Gwinnell*, 476 A.2d 1219 (N.J. 1984); insurer's bad faith refusal to settle, *Crisci v. Security Insurance Co. of New Haven*, 58 Cal. Rptr. 13 (Cal. 1967); intentional infliction of emotional distress, *State Rubbish Collectors Ass'n v. Siliznoff*, 240 P.2d 282 (Cal. 1952); malpractice, *Helling v. Carey*, 519 P.2d 981 (Wash. 1974); *Ybarra v. Spangard*, 154 P.2d 687 (Cal. 1944); medical monitoring, *Ayers v. Jackson Township*, 525 A.2d 287 (N.J. 1987); products liability, *Greenman v. Yuba Power Products*, 27 Cal. Rptr. 697 (Cal. 1962); wrongful birth, *Berman v. Allen*, 404 A.2d 8 (N.J. 1979).

Liability in tort law is not based on whether a similar event has occurred before, but whether this particular risk is foreseeable. Past occurrences are a major, but not exclusive, factor in determining the foreseeability of the risk. Foreseeability is not based just on history, but also upon that which science and technology can project into the future. History can tell us which areas have been subjected to forces of nature. Science may predict which regions are subject to such forces in the future. Even if a natural force had not struck a particular location before, liability may still exist if reasonable design, construction, operation, inspection or maintenance should have anticipated and thereby prevented or minimized the risk.

The Tort concept of duty can be very expansive. The California Supreme Court held in 1968 in *Conner v. Great Western Savings & Loan Association* that a bank was liable to the home owners in a subdivision.<sup>288</sup> The homes suffered serious damage from cracking caused by ill-designed foundations that could not withstand the expansion and contraction of adobe soil. The contractor laid slab foundations on adobe soil without taking proper precautions recommended by soil engineers.

The bank had warehoused the land for developers. The bank knew, or should have known, the developers were inexperienced and operating on a dangerously thin capitalization. In addition, the bank knew or should have known, of the expansive soil problem. Yet it failed to require soil tests, examine foundation plans, or recommend changes. Liability would arise if the activity extended outside the scope of normal lending activities or if the lender had been a party to misrepresentation.

As discussed in *Conner*, the purchaser of a home is ill-equipped with experience or financial means to discern structural defects.<sup>289</sup> A home is both a major investment and the only shelter for the buyer.<sup>290</sup>

In *Karoutas v. Homefed Bank*,<sup>291</sup> the California Court of Appeals held the beneficiary, with actual knowledge of facts materially affecting the value of the property, has a duty to disclose these facts to prospective bidders at a trustee's sale. The purchasers paid \$173,000 for the property, then discovered soil conditions and other defects in the residence that would cost in excess of \$250,000 to repair. The beneficiary's own studies had estimated repairs

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<sup>287</sup> See, e.g., *Sindell v. Abbott Laboratories*, 163 Cal. Rptr. 132 (Cal. 1980) (market share liability); *Mitchell v. Gonzales*, 1 Cal. Rptr. 2d 913 (Cal. 1991) (proximate cause).

<sup>288</sup> *Conner v. Great Western Savings & Loan Ass'n.*, 33 Cal. Rptr. 369 (Cal. 1968). The holding was subsequently limited by the legislature to preclude liability for normal lending activities. CAL. CIV. CODE § 3434 (1997).

<sup>289</sup> *Id.* at 378.

<sup>290</sup> *Id.*

<sup>291</sup> 283 Cal. Rptr. 809 (Ct. App. 1991).

would cost in excess of \$350,000, would not be economically feasible, and recommended the residence be demolished. However, no disclosure was made to the purchasers, who could not inspect the property prior to the trustee's sale. The court recognized caveat emptor does not apply to nonjudicial foreclosure sales.<sup>292</sup>

In *Mortert v. CBL & Associates*,<sup>293</sup> the Supreme Court of Wyoming held a theater operator owed a duty to warn theatergoers that flash flood warnings existed and that citizens were advised to stay off the streets.

#### THE FORESEEABILITY OF THE RISKS

Every year witnesses the loss of human life and the widespread destruction of property due to natural forces, such as floods, earthquakes and hurricanes. Many of these fatalities occur because the dwellings were located in ill-advised geologic settings, subject to the inexorable forces of nature.

There are no natural disasters; human activity invites the resulting tragedy by building in, on, or under areas that are subject to the forces of nature. These forces of nature are natural acts. The tragedies are of human origin.<sup>294</sup>

"Natural disasters" are often the results of a high population density in geologically fragile areas. As civilization, especially an uninformed and unprepared population, encroaches upon geologically fragile areas, the potential for tragedies increases.<sup>295</sup> The

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<sup>292</sup> *Id.* at 814.

<sup>293</sup> 741 P.2d 1090 (Wyo. 1987).

<sup>294</sup> See generally ANDERS WIJCKMAN & LLOYD TIMERLAKE, *NATURAL DISASTERS: ACTS OF GOD OR ACTS OF MAN*, (1984) (stating that disasters are increasingly man-made political and social events which, although triggered by natural phenomena such as floods or earthquakes, are often preventable). Their thesis states:

Though triggered by natural events such as floods and earthquakes, disasters are increasingly man-made. Some disasters (flood, drought, famine) are caused more by environmental and resource mismanagement than by too much or too little rainfall. The impact of other disasters, which are triggered by acts of nature (earthquake, volcano, hurricane) are magnified by unwise human actions.

*Id.* at 6.

<sup>295</sup> For example, one of the difficulties in fighting modern forest fires is the problem of "urban interface," in which homes are invading the wilderness. These developmental pressures change the matrix of factors which determine how a fire is to be fought. In the past, some areas would be left to burn themselves out. That option may be effectively hindered by the presence of human habitation. See Timothy Egan, *New Hazard in Fire Zones: Houses of Urban Refugees*, N.Y. TIMES, Sept. 16, 1994, at A1 (outlining the hazards of living in potential fire zones); John Kifner, *In Washington, Saving Scenic View Taking on Importance in Firefighting*, N.Y. TIMES, Aug. 8, 1994, at B6 (discussing the difficulties of fighting forest fires in populated areas).

New Orleans is considered especially vulnerable to hurricanes. The city rests six feet below sea level, and is surrounded by water on three sides. It is protected from flooding by an extensive series of levees. In addition, the Army Corps of Engineers has devised a bypass system through the Atchafalaya, to divert floodwaters from the Mississippi River to the Gulf, and the Bonnet Carre spillway into Lake Pontchartrain, thereby substantially reducing the threat of swollen Mississippi River water flooding New Orleans. Conse-

hubris of the human race is that it believes technology can trump nature.<sup>296</sup> This belief, coupled with years of natural quiescence, can lead to false senses of security and resulting catastrophes. Complacency, ignorance and an otherwise casual disregard of the risks can lead to over-development.<sup>297</sup>

Landslide risks are a prime example of human activity intensifying the risk. The most frequent causes of landslide are water from intensive rainfall or human-introduced sources.<sup>298</sup> As with

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quently, the severe 1993 flooding of the Missouri and Upper Mississippi River Basins left New Orleans unscathed. However, the levees and diversion systems will not protect New Orleans against a major hurricane tracking up the Mississippi River from the Gulf of Mexico. In one expert's worst case scenario, "New Orleans could become a lake 20 feet deep." The storm surge would enter Lake Pontchartrain, top the 16-foot levees, and pour into the city. The levees would then serve as dams retaining the storm water in New Orleans, most of which lies at or below sea level. Frances F. Marcus, *Storm Adds Reality to New Orleans Drill*, N.Y. TIMES, May 14, 1995, at 18.

New Orleans has been struck at least nine times by hurricanes. New Orleans experienced hurricanes in 1817, 1837, 1887, 1900, 1915, 1939, 1947, 1965 (the infamous Hurricane Betsy) and 1969 (the equally infamous Hurricane Camille). Other hurricanes struck coastal areas of Louisiana and may have come close to New Orleans. A history of hurricanes striking Louisiana is found at Mark Schleifstein, et al., *Eyeing a Hurricane*, NEW ORLEANS TIMES-PICAYUNE, May 30, 1993, at J1.

<sup>296</sup> Two examples will suffice. First, in spite of the devastation caused by the Northridge Earthquake of January 17, 1994 to the greater Los Angeles freeway system, one expert believes that enough is known "about the behavior of structure in earthquakes that we can design them so that they survive intact." Calvin Sims, *Quake Damage Shakes Faith in Overpass Designs*, N.Y. TIMES, Jan. 24, 1994, at A1, A10.

Second, the Mississippi River has a long history of flooding and rechannelling itself. Indeed, Mark Twain wrote:

"One who knows the Mississippi will promptly aver—not aloud, but to himself—that ten thousand River Commissions, with the monies of the world at their back, cannot tame that lawless stream, cannot curb it or confine it, cannot say to it, Go here, or go there, and make it obey; cannot save a shore which it has sentenced . . . ."

MARK TWAIN, *LIFE ON THE MISSISSIPPI*, 172-73 (Signet Classic 1961).

Yet, the Chief of Engineers concluded in 1926 that river improvements would prevent the "destructive effects of floods." PETE DANIEL, *DEEP'N AS IT COME: THE 1927 MISSISSIPPI RIVER FLOOD* 6 (1977).

<sup>297</sup> For example, weather patterns are cyclical. Thus, there has been a decrease over the past century in the number of major hurricanes striking the East Coast and Florida peninsula. Eric Morgenthau, *He's No Blowhard: Dr. Gray Can Predict Atlantic Hurricanes*, WALL ST. J., Aug. 8, 1994, at A1.

However, it is estimated that sooner or later a major hurricane will again strike the northeastern United States. The famous 1938 hurricane which struck Long Island and New England is ranked as the seventh most costly hurricane in United States history, and the worst ever recorded in the Northeast. A hurricane of similar magnitude, striking the Northeast today, could be the costliest in United States history because of the extensive development in the region, inadequate design and construction to withstand hurricanes, and inadequate evacuation and sheltering procedures. William K. Stevens, *Historic Hurricane Could Catch Northeast With Its Guard Down*, N.Y. TIMES, Aug. 23, 1994, at C4.

In spite of the devastation unleashed upon south Florida by Hurricane Andrew in 1992, the National Hurricane Center ranked it as only the third most intense storm to hit land in the United States this century, following Hurricane Camille in 1964, and the 1935 Labor Day hurricane that struck the Florida Keys, killing 600 people. *Hurricane Andrew is Termed Third Worst in This Century*, N.Y. TIMES, Sept. 18, 1992, at A16.

<sup>298</sup> Roger R. Olshansky & J. David Rogers, *Unstable Ground: Landslide Policy in the United States*, 13 *ECOLOGY* L.Q. 939, 943 (1987). Earthslides can often be traced to lack of support in the underlying soil or instability in the soil above.

other natural hazards, landslide damage is intensified because of increased development in hillside areas,<sup>299</sup> and encroachment upon potentially unstable slopes.<sup>300</sup> Landslide risks can be heightened by poor forestry practices, development on improper fill and poor grading.<sup>301</sup> The risks of landslides can be reduced through enforcement of grading ordinances, advanced engineering and earthquake practices. However, landslides will still occur in hillside areas.<sup>302</sup>

A strong argument exists that governmental agencies should never have issued the requisite zoning and building permits. The purpose of this article is not to discuss the potential liability of governmental agencies in issuing permits for such areas as floodplains or earthquake zones. The issuance of a permit does not negate the risk to the uninformed purchaser.

Many forces of nature cannot be controlled. Volcanoes are a classic example. If and when a volcano erupts, the extent of the eruption, and the velocity and direction of the magma flow are not subject to human influences. Predictability is of limited application.<sup>303</sup> Other forces of nature, such as hurricanes, can be tracked, but the precise point of impact on land is still not predictable. Similarly, structural survivability cannot be guaranteed against natural forces, such as earthquakes, fires, hurricanes or tornadoes. Shorelines, seismic zones, and slopes are inherently unstable.

Yet the lack of scientific certainty does not preclude Tort liability. For example, a builder may be liable in negligence for failure to use reasonable construction and design techniques to minimize the foreseeable risks.<sup>304</sup> Even where forces of nature cannot be accurately predicted, controlled or programmed, they can still be detected, measured, observed and be subject to general

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299 *Id.* at 944.

300 *Id.* at 941.

301 See generally Nigel Skermer, *Landslides: Acts of God, or Acts of Man*, 50 THE ADVOCATE 931 (1992).

302 Olshansky, *supra* note 298, at 967.

303 See generally Kenneth Reich, *On Shaky Ground: Despite High-Tech Tools, Predicting Volcanos' Behavior Is Still a Very Inexact Science*, L.A. TIMES, Jan. 22, 1998, at B2, cols. 1-4.

304 Earthquake technology has sufficiently advanced such that two commentators wrote: "Because cost-effective technology is available to reduce substantial injuries associated with an earthquake, the judicial system should not protect isolated design professionals who ignore or fail to stay abreast of the tribulations." William D. Flatt & Wesley R. Kliner, *When the Earth Moves and Buildings Tumble, Who Will Pay?—Tort Liability and Defenses for Earthquake Damage Within the New Madrid Fault Zone*, 22 MEM. ST. U.L. REV. 1, 22-23 (1991). See generally John C. Peck & Wyatt A. Hoch, *Liability of Engineers for Structural Design Errors: State of the Art Considerations in Defining the Standard of Care*, 30 VILLANOVA L. REV. 403 (1985); Matthew S. Steffey, *Negligence, Contract and Architects Liability for Economic Loss*, 82 KY. L.J. 659 (1993-94).

foreseeability.<sup>305</sup> A simple example will suffice. A lightening bolt striking a utility line may be a force of nature not subject to precise predictability as to the point of impact, but failure to ground the line is a human act of negligence.<sup>306</sup>

The real question, which remains after the demise of caveat emptor, is who should have the burden of obtaining the requisite geologic information: the seller or purchaser.<sup>307</sup> In theory, at least, the purchaser could discover almost every risk through title searches, house inspections, checking geologic records, and surfing the net. Such information is recorded in history books, almanacs, newspaper archives, government records,<sup>308</sup> government studies, investigative reports, official studies, and individual memories. The information may even be obtainable on-line through the internet.

However, such a standard would not only place an onerous burden on the purchaser, but would in fact resurrect caveat emptor under a new guise. Similarly, we could hold that the duty to disclose varies depending upon the knowledge, intelligence and experience of the purchaser. Such a standard would be extremely unpredictable and subjective.

Conversely, the seller's broker is a professional with expertise. The brokers, just as developers, know, or reasonably should

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<sup>305</sup> Geologists now recognize that dozens of fault lines underlie the Los Angeles Basin. These faults are referred to as blind faults because, unlike major fault lines such as the San Andreas, they are not visible from the surface. Sharon Begley, et al., *A Whole Lot of Shaking Going On*, NEWSWEEK, Jan. 31, 1994, at 34; Frederick Rose, *Beneath Los Angeles, More Earthquakes Are Lurking*, WALL ST. J., Mar. 22, 1994, at B1. One report stated that almost 100 active faults have been identified in the Los Angeles area. James F. Dolan et al., *Prospects for Larger or More Frequent Earthquakes in the Los Angeles Metropolitan Region*, 267 SCI. 199 (1995).

Both the 1989 Loma Prieta Earthquake in northern California and the 1994 Northridge Earthquake in Los Angeles were initiated on previously unidentified faults, but both "occurred in structurally complex and seismically active areas." Thomas L. Holzer, *Predicting Earthquake Effects - Learning from Northridge and Loma Prieta*, 265 SCI. 1182, 1183 (1994). Earlier earthquakes in both areas had alerted scientists to the potential risks in the area. *Id.*

<sup>306</sup> Central Ga. Elec. Membership Corp. v. Heath, 4 S.E.2d 700, 702 (Ga. Ct. App. 1934). Similarly, failure to protect against lightning striking oil storage tanks which were not vapor proof, and which had open holes on top, constitutes negligence. Tex-Jersey Oil Corp. v. Beck, 292 S.W.2d 803, 807 (Tex. Civ. App. - Texarkana (1956), *aff'd in part rev'd in part*, 305 S.W.2d 162 (Tex. 1957).

<sup>307</sup> See Key Sales Co. v. South Carolina Elec. and Gas Co., 290 F. Supp. 8, 27 (D.S.C. 1968) (stating that plaintiff was responsible for not checking the history prior to purchase); Gill v. Marquoit, 525 P.2d 1030, 1032 (Or. 1974) (holding that sellers are entitled to assume that purchasers will inquire about susceptibility of land to flooding). See also Fairmont Foods Co. v. Skelly Oil Co., 616 S.W.2d 548, 550 (Mo. Ct. App. 1981) (holding that purchaser had the burden of proving that the undisclosed information was not within its reasonable reach); Brown v. B & D Land Co., 823 P.2d 380, 382 (Okla. Ct. App. 1991) ("The means and knowledge of obtaining the truth regarding the property were readily available to plaintiff upon inquiry.")

<sup>308</sup> See, e.g., Chapman v. Hosek, 475 N.E.2d 593, 599 (Ill. App. Ct. 1985) (finding that an action for fraud existed even though information that showed the property flooded, was in the public record).

know, of the potential geologic problems with the property because of their duty, responsibility, and knowledge of the area.

Science has identified the major geologic fault lines,<sup>309</sup> mapped floodplains<sup>310</sup> and landslide zones,<sup>311</sup> recognized the vulnerability of coastal zones and barrier islands,<sup>312</sup> and distinguished dormant from extinct volcanoes. Tort law clearly imposes a duty "to anticipate the usual weather of the vicinity, including all ordinary forces of nature."<sup>313</sup> Such foreseeable forces of nature

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309 Congress adopted the Earthquake Hazard Reduction Act of 1977, in which it was recognized that all 50 states are vulnerable to earthquakes. Thirty-nine states are considered at risk for moderate to major earthquakes. Although earthquakes in California get most of the publicity, earthquakes have occurred in all 50 states. Major fault lines include the San Andreas in California, the Cascadia in Washington, the Wasatch in Utah, and the New Madrid in the Mississippi Valley. In fact, three of the largest earthquakes in United States history occurred during the winter of 1811-1812 on the New Madrid Fault. U.S. GENERAL ACCOUNTING OFFICE, FEDERAL BUILDING: MANY ARE THREATENED BY EARTHQUAKES, BUT LIMITED ACTION HAS BEEN TAKEN 15 (May 1992).

310 Federal maps highlighting floodplains are available at city and county government offices and the Federal Emergency Management Agency (FEMA). The U.S. Army Corps of Engineers has been mapping floodplains of the United States for decades.

311 The United States Geologic Survey and several state agencies have undertaken landslide mapping. Robert Olshansky & J. David Rogers, *Unstable Ground: Landslide Policy in the United States*, 13 *ECOLOGY L.Q.* 939, 952-54 (1987). For example, studies indicated slides have occurred in a section of Anaheim Hills for decades. Surveyors and engineers reported substantial levels of ground water in the hills in the early 1950s. The city allowed construction in the 1970s and early 1980s. In the winter of 1993 almost 29 inches of rain fell in the area, resulting in the earth sliding 12 inches in some areas.

About 240 homeowners have filed suit against the city, county, metropolitan water district and several private concerns. See Ann Pepper, *El Nino Haunts Those in '93 Slide Zone*, ORANGE COUNTY REGISTER, Oct. 20, 1997 at p.1, col.1.

These studies are precisely the type of information potential purchasers should be aware of in making an informed decision. States with major landslide risks include Alabama, California, Colorado, Illinois, New York, North Carolina, Ohio, Oregon, Tennessee, Texas, Utah and Washington. Richard L. Meehan et al., *The Battered Exclusion: Who Pays How Much for Landslides*, 29 *FOR THE DEFENSE* 19, 22 (1987).

California initiated a Landslide Hazard Identification Program in 1985.

312 Congress enacted the Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464, to protect the nation's coastal resources and to encourage states to promulgate coastal zone management plans. Reappraisals of the wisdom of developing the coastal zone and barrier islands on the Atlantic and Gulf coasts occur after every major hurricane. See, e.g. Peter Applebome, *After Hugo, a Storm Over Beach Development*, N.Y. TIMES, Sept. 24, 1989, at A1. The devastation inflicted by Hurricane Hugo gave rise to the restrictions invalidated in *Lucas v. South Carolina*, 505 U.S. 1003 (1992). These risks deal with erosion. A less common, but more dangerous, risk to certain coastal areas are tsunamis, commonly referred to as tidal waves. Over 50,000 people have been killed by tsunamis around the world over the past century. Scott McCredie, *When Nightmare Waves Appear Out of Nowhere to Smash the Land*, SMITHSONIAN, Mar. 1994, at 32. Hawaii is the most vulnerable of the 50 states. *Id.* at 33. Hilo, Hawaii is struck by tsunamis more often than any other place in the United States. *Id.* at 39. "In Hilo, Hawaii, every telephone book has maps that show tsunami inundation zones and safe areas." *Id.* This information could easily be made available to real estate purchasers.

313 W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS, § 44, at 304 (5th ed. 1984).

include avalanches,<sup>314</sup> blizzards,<sup>315</sup> erosion, expansive soil,<sup>316</sup> fires, floods, landslides,<sup>317</sup> high winds<sup>318</sup> and rain.<sup>319</sup>

The purpose of disclosure is to give the purchaser an informed choice, analogous to informed consent in medical procedures, full disclosure in securities law, and warnings in product liability cases.<sup>320</sup> Personal autonomy then allows the individual to make a personal assessment of the risks and benefits of the contemplated transaction. The informed, potential purchaser may then disre-

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314 In 1975 the Supreme Court of Washington held the State of Washington may have assumed a common law duty of care to warn of an avalanche danger. Although the court had difficulty understanding the facts, and had to deal with a "hypothetical" factual background, it held that a cause of action would exist against the state if it had negligently misled others. *Brown v. MacPherson's*, 545 P.2d 13 (Wash. 1975).

315 See *McKinley v. Hines*, 215 P. 301, 303 (Kan. 1923); *Diamond Cattle Co. v. Clark*, 74 P.2d 857 (Wyo. 1937).

316 For example, parts of Colorado contain "expansive soil," which expands when wet. Steve Raabe, *Soiled Homeowners Sue Developer Over Damage From Expanding Ground*, CHI. TRIB., Feb. 25, 1996, § 16, at 5L, col. 5.

317 Some states, such as California and Colorado, require communities to consider landslide risks in formulating their land use plans. CAL. GOV'T CODE § 65302(g) (West 1998) and COLO. REV. STAT. § 24-65.1-103(8)(a) (1990). Landslide litigation in a state such as California may give rise to liability under a number of theories, such as strict liability, *Avner v. Longridge Estates*, 77 Cal. Rptr. 633 (Ct. App. 1969); implied warranty against the builders and graders, *Pollard v. Saxe & Yolles Dev. Co.*, 525 P.2d 88 (Cal. 1974), and negligence against neighboring property owners, *Sprecher v. Adamson Cos.*, 636 P.2d 1121 (Cal. 1981). Unsettled coastal soil, continental-edge geography and hilly geography are prime territory for landslides in California. Stuart M. Gordon & Diane R. Crowley, *Earth Movement and Water Damage Exposure: A Landslide in Coverage*, 1983 INS. COUNS. J. 418.

318 See, e.g., *Naxera v. Wathan*, 159 N.W.2d 513 (Iowa 1968); *Jacobson v. Suderman & Young, Inc.*, 17 F.2d 253, 254 (5th Cir. 1927) (noting that wind may be an expected occurrence depending on knowledge of local weather conditions for certain times of the year); *Cachick v. United States*, 161 F. Supp. 15, 19 (S.D. Ill. 1958) (holding that where strong winds should be expected the act of God defense does not excuse negligent construction); *Fairbrother v. Wiley's, Inc.*, 331 P.2d 330, 337 (Kan. 1958) (ruling that if defendant should have anticipated strong and gusty winds liability will attach regardless of the natural phenomenon).

319 See, e.g., *Garret v. Beers*, 155 P. 2, 4 (Kan. 1916) (holding that the fact that heavy rains had occurred "many times before" rendered defendant liable for failing to adequately safeguard against flooding); *Webb v. Platte Valley Pub. Power & Irrigation Dist.*, 18 N.W.2d 563, 568 (Neb. 1945) (holding that although a rainfall may be extraordinary if it is such that has occasionally occurred, it should be foreseen by reasonable person); *Fairbury Brick Co. v. Chicago R.I. & Pac. Ry. Co.*, 113 N.W. 535, 537 (Neb. 1907) (holding that earlier rainfalls of the same magnitude, although unusual, render a defendant responsible for reasonable precautions); *Cottreu v. Marshall Infirmary*, 24 N.Y.S. 381, 382-83 (N.Y. Sup. Ct. 1893) (holding that a similar rainfall in 1869 demonstrated that such rainfalls that washed away defendant's dam were not so phenomenal as to absolve defendant of liability); *Gulf, C. & S.F. Ry. Co. v. Pomeroy*, 3 S.W. 722, 724 (Tex. 1887) (holding that history of such flooding made flooding foreseeable and, thus, left defendant liable); *Holter Hardware Co. v. Western Mortgage & Warranty Title Co.*, 149 P. 489 (Mont. 1915); *Milton D. Taylor Constr. Co. v. Ohio Dep't of Transp.*, 572 N.E.2d 712, 715 (Ohio Ct. App. 1988) (holding that when rainfall is reasonably expected one cannot claim such as unforeseeable and beyond the control of the party).

320 See RESTATEMENT (SECOND) OF TORTS § 402a, cmt. K (1979) (a proper warning nullifies liability in cases of unavoidably unsafe products).

gard the warnings, walk away from the deal, or negotiate a lower price.<sup>321</sup>

The purpose of the warning is not to change the decision of individuals.<sup>322</sup> We should not realistically expect large numbers of individuals to change their behavior when society collectively decides to develop these geologically fragile lands. Indeed, population growth will necessitate an increased development and spillover into geologically fragile areas.

For example, the population of the Los Angeles and San Francisco metropolitan areas continues to increase despite the well recognized risks of being near the San Andreas and other faults.<sup>323</sup>

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321 For example, mudslides in the Big Rock Mesa area of Malibu, and Pasadena Glen, occurred in areas that had been identified by California Department of Conservation geologists as susceptible to landslides during heavy winter rain. BUS. WIRE, Feb. 9, 1994 (available on WestLaw at 2/9/94 B WIRE). The Big Rock Mesa landslide in 1983 damaged or destroyed 250 expensive homes overlooking the Pacific Ocean. The litigation against Los Angeles County and the California Department of Transportation was settled for \$97 million. Mark Thompson, *Big Rock is Big No More*, CAL. LAW., Mar. 1989, at 32.

The Big Rock Mesa slide gave rise to extensive litigation, including an attempt to revoke the real estate license of a broker. See *Vaile v. Edmonds*, 6 Cal. Rptr. 2d 1 (Ct. App. 1991). A 1982 geologic report discussing slide dangers was provided to the buyers in 1983. A second report was prepared in 1983. The purchaser then intended to conduct a visual inspection, but had trouble reaching the property because of a landslide on the Pacific Coast Highway, just east of the property. The geologist told the purchaser "about the steady erosion on the property, but this did not seem to trouble him, and he joked that he would be dead before the bluff eroded all the way to the house." *Id.* at 4. Several other warnings were provided prior to the close of escrow. The house was subsequently lost in a slide. The purchaser then testified "they would not have purchased the house if they had been aware of a groundwater or landslide danger." *Id.* at 7.

An Oakland, California resident, who lives along the Hayward Fault, stated: "Living here is a considered risk. . . . But I love this area, and I'd rather live to be 50 in the Bay Area than 100 in Kansas." *With Fault Like Kobe, Fears Rise in Oakland*, N.Y. TIMES, Jan. 23, 1995, at A11.

Mammoth Mountain is a major ski resort east of Los Angeles. It has been rocked by scores of volcanic induced earthquakes with magnitudes of 3 and 4+. One condo owner stated: "It just makes your vacation more interesting. . . . If you're gonna go, how would you rather go? In a freeway accident on the I-5 or chased down Mammoth by a wall of lava? No contest. Let's hit the mountains." Esther Schrader, *Mammoth Skiers Are Taking Quakes in Stride*, L.A. TIMES, Jan. 2, 1998, at A22, col. 1.

322 Warnings are not always effective in changing behavior, witness the large number of people who still smoke. See, e.g., Tara Parker-Pope, *Danger: Warning Labels May Backfire*, WALL ST. J., April 28, 1997, at B1, col. 3; Steven Waldman, *Do Warning Labels Work? Their Increasing Use May Carry a Risk of Overkill*, NEWSWEEK, July 18, 1988, at 40; Michael de Courcy Hinde, *As Warning Labels Multiply, Messages Are Often Ignored*, N.Y. TIMES, Mar. 5, 1988, at 1, col. A3.

The purpose of warnings in real estate transactions will be to give the purchaser an informed choice, not necessarily to change behavior.

323 For example, the population of the United States increased 9.8% between 1980 and 1990, from 226,545,805 to 248,709,873. However, California's population rose 25.7%, from 23,667,902 to 29,760,021, and Florida's population increased 32.7%, from 9,746,324 to 12,937,926. 1995 INFORMATION PLEASE ALMANAC, ATLAS AND YEARBOOK 828 (48th ed. Houghton Mifflin Co. 1995). Most of California's population resides in geologically fragile areas. The Los Angeles-Riverside-Orange county complex had 15,047,772 people as of July 1, 1992, and the San Francisco-Oakland-San Jose area had an additional 6,409,891 people. *Id.* at 827. Of the ten metropolitan statistical areas and consolidated metropolitan statistical areas that had the largest population gains between 1990 and 1996, the Los Angeles-

The population of the Puget Sound region is rapidly growing in spite of earthquake and volcanic risks.<sup>324</sup> Furthermore, people continue to build along the Atlantic shoreline in spite of warnings and knowledge the ocean is clearly reclaiming beaches. In the words of one commentator:

There is the familiar barrier beach tale of hope against hope, trust that shoreline engineering can fool Mother Nature, reliance in the great faucet of Government disaster aid and cheap storm insurance and ultimately, denial of the obvious—that is, that all up and down the Atlantic Coast, the sea, aided by storms and hurricanes, is slowly but inexorably rolling up and over beaches.<sup>325</sup>

### CLEAR, OPEN, AND OBVIOUS HAZARDS

A close look at many of the cases which “validate” caveat emptor reveals consent in a contractual sense or assumption of risk in a tort context. Purchasers should not be able to consciously blind themselves to apparent dangers and then claim ignorance.<sup>326</sup> Thus, a purchaser, given the opportunity to undertake a physical inspection of the property, should not be heard to complain of defects that reasonably should have been discovered during such an inspection. An understandable hesitancy exists to grant judicial rights to parties unwilling to look out for themselves. Even the California Court of Appeals in the landmark case of *Easton v. Strasberger* stated:

Cases will undoubtedly arise in which the defect in the property is so clearly apparent that as a matter of law a broker would not be negligent for failure to expressly disclose it, as he could reasonably expect that the buyer's own inspection of the premises would reveal the flaws.<sup>327</sup>

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Riverside-Orange County area led with an increase of 963,626. Number nine was San Francisco-Oakland-San Jose, followed by Seattle-Tacoma-Bremerton. Steven A. Holmes, *Immigration Is Fueling Cities' Strong Growth, Data Shows*, N.Y. TIMES, Jan. 1, 1998, at A1, col. 5 (nat. ed.).

<sup>324</sup> Mt. Rainier is a dormant, but far from extinct, volcano which majestically towers over the Puget Sound region. It is but one of several volcanoes which form the Pacific Rim of Fire. Mt. Rainier is an active volcano, which last blew 150 years ago. Experts cannot estimate when it might erupt again. See Jon Krakauer, *Geologists Worry About Danger of Living "Under the Volcano,"* SMITHSONIAN, July 1996, at 33. The potential risks, if Mt. Rainier erupts, vastly exceed the damages inflicted by its neighboring volcano, Mt. St. Helens, in its eruption of May 18, 1980, which destroyed plant and animal life for 150 square miles. *Id.* at 33, 34. The potential mudflow zones, should Mt. Rainier erupt, have been charted. It is estimated that over 100,000 people live in homes built in debris washed down the mountain by catastrophic debris flows (known to geologists as “lahars”). *Id.* at 34.

<sup>325</sup> B. Drummond Ayres, Jr., *Sea Threatens Costly Building, Reviving a Debate*, N.Y. TIMES, Dec. 24, 1997, at A7, col. 1.

<sup>326</sup> See, e.g., *Zack Cheek Builders, Inc. v. McLeod*, 597 S.W.2d 888 (Tenn. 1980).

<sup>327</sup> 199 Cal. Rptr. at 391.

Oregon has held no duty exists to disclose land is susceptible to flooding.<sup>328</sup> The Oregon Supreme Court noted that river flooding is a matter of common knowledge—so common in fact that a seller may ordinarily assume a purchaser knows, or will discover, the phenomenon.<sup>329</sup> Thus, in Oregon, no duty exists to disclose geologic hazards which are obvious. Oregon has similarly held no implied warranty of habitability exists with the potential risk of erosion of oceanfront lots.<sup>330</sup> Recovery has also been denied when the purchaser could have easily discovered the property was located in a floodplain.<sup>331</sup>

Thus, the owners of a building known as the "Under the Hill Club," which rested at the base of a tall, near vertical bluff overlooking the Mississippi River, should not have been surprised when a large section of the bluff collapsed on the building during a mudslide<sup>332</sup> caused by excessive rainfall.

These cases do not stand up to close scrutiny, though, when dealing with the ordinary purchaser of a home. These purchasers are not architects, engineers, fire marshals, geologists, hydrologists or meteorologists. Many hazards, such as avalanches, blizzards, erosion, fire, floods, geologic faults, hurricanes, insect infestations, psychic impairment and latent defects, and tornadoes, may not be readily observable to the reasonable home buyer. If observed, the full risk might not reasonably be appreciated.<sup>333</sup>

Some hazards may seem well known and obvious.<sup>334</sup> However, in light of today's highly mobile population, such an assumption may be invalid. Natural geologic forces, such as weather patterns, may ebb and flow in cycles over millennia, but the

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328 Gill v. Marquoit, 525 P.2d 1030 (Or. 1974); see also Nei v. Burley, 446 N.E.2d 674 (Mass. 1983) (no duty to disclose existence of seasonal watercourse across property).

329 *Id.* at 1032. Conversely, a Texas case held flood hazards are not a fact of which brokers should have known. Ozuna v. Delaney Realty, Inc., 600 S.W.2d 780 (Tex. 1980).

330 Beri, Inc. v. Salishan Properties, Inc., 580 P.2d 123 (Or. 1978).

331 Brown v. B&D Land Co., 823 P.2d 380 (Okla. Ct. App. 1991).

332 O'Malley v. United States Fidelity & Guaranty Co., 776 F.2d 494 (5th Cir. 1985). The section which collapsed was estimated to be about 50' by 30' by 10', and weighed 800,000 to 1,000,000 pounds.

333 As expressed in *Schipper v. Levitt & Sons*, 207 A.2d 314, 324 (N.J. 1965), "While the evidence may indicate that Messrs. Kreitzer and Schipper had become aware of the absence of a mixing valve, they may not have fully appreciated the extraordinary nature of the risk and, in any event, any omissions or contributing fault on their part would not preclude a finding that Levitt had been negligent and was to be held responsible to others who foreseeably might be injured as a result of its negligence."

334 In the famous California case of *Sprecher v. Adamson*, 636 P.2d 1121, 1122 (Cal. 1981) the downslope land was subject to landslide risks from the upslope property. The risk has been evident since the turn of the century. Yet people developed the area anyway. See also *Easton v. Strassburger*, 199 Cal. Rptr. 383 (Ct. App. 1984) (discussing soil problems and landslides in Diablo, California); *Connor v. Great W. Sav. & Loan Ass'n*, 73 Cal. Rptr. 369 (Cal. 1968) (discussing foundational problems due to expanding and contracting adobe soil in Ventura County, California); *Oakes v. The McCarthy Co.*, 73 Cal. Rptr. 127 (Ct. App. 1968) (discussing improper grading and filling of real estate lots in Los Angeles County).

human reality is often limited to a short time span. Indeed, whenever someone new moves into an area, that person's framework of reality starts anew because of unfamiliarity with the natural perils.<sup>335</sup> People may move into an area during the dry cycle, and then be totally surprised by the wet cycle.

For example, the natural beauty of beachfront communities in Southern California may issue a "siren" call to new residents, who are unfamiliar with the risks of earthquake, fire, erosion, wind, flooding, landslides and ocean storms. Similarly, a person buying a house in a Southern California canyon may be unaware of the cycle of drought, wind, fire and floods that plague these seemingly beautiful, placid settings.<sup>336</sup> However, these dangers are well-known to community planners, real estate developers and environmentalists. Such dangers should also be communicated to the purchaser.

In addition, even long-term residents, who may have experienced the risks in the past, may have been lured into a false sense of security by decades of geologic quiescence. Geologic "stability" or quiescence leads to complacency. For example, landslides are not a major problem during drought years. Residents may also rush to rebuild on the assumption that it either cannot happen again or that improved construction techniques will prevent a recurrence.<sup>337</sup>

Even a knowledge of a general risk may be insufficient to warrant a finding of specific knowledge.<sup>338</sup> For example, there is obviously a general knowledge of earthquake risks in California, but these risks are actually pervasive throughout the country. The

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335 For example, a court noted that a resident of New York City could not be expected to have familiarity with the folklore of Nyack, New York. Plaintiff was, thus, unaware he contracted to purchase a haunted house, "widely reputed to be possessed by poltergeists." *Stambovsky v. Ackley*, 572 N.Y.S.2d 672, 674 (App. Div. 1991).

336 See Charles Fleming et al., *A Flammable Mix of Man and Nature*, NEWSWEEK, Nov. 8, 1993, at 55 (discussing the effect of the Santa Ana winds on fires in the Los Angeles Basin area). The Santa Ana winds blow in from the east, carrying the heat of the deserts. If the dry hillsides catch on fire when the Santa Ana winds are blowing, the fires rapidly spread and become more difficult to fight. Conversely, excessive, but rare, precipitation sometimes causes flash floods. See, e.g., *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) (demonstrating damage and problems caused by flash floods in Los Angeles County). For a graphic portrayal of the fire-flood cycle in the San Gabriel Mountains outside Los Angeles, see JOHN MCPHEE, *THE CONTROL OF NATURE* 183-272 (1989). The chapter is aptly entitled "Los Angeles Against the Mountains."

337 A year after a levee broke in California's Central Valley, a person moved his trailer into the shadow of the dike that broke. He stated: "I figure, it can't happen again." Phil Garlington, *Living Along the Levees*, ORANGE COUNTY REGISTER, Dec. 28, 1997, at News 12, col. 1.

338 A Homeowners' Guide to Earthquake Safety may be delivered to the purchaser of real property in California. CAL. BUS. & PROF. CODE § 10149 (1997). An additional publication by the California Department of Real Estate, ENVIRONMENTAL HAZARDS—A GUIDE FOR HOMEOWNERS AND BUYERS (1991), is also made available. These brochures deal with general risks and do not address the need for a disclosure of specific risks in individual transactions.

specific risks in California vary by region, soil condition and contractors' methods. The differences in risks will often not be observable to the naked eye.<sup>339</sup>

A general risk of hurricanes exists for the Atlantic and Gulf Coasts, Puerto Rico, Hawaii and Guam. Yet no specific risk exists until a specific threat to a specific area has been identified. Similarly, almost any building can catch on fire, but some methods of construction, such as shake roofs, and landscaping, such as (dry) foliage close to an abode, are high risk in fire prone canyons of California. Prospective purchasers may also notice cracks, flaking, bulges, or peeling, but may not be able to assess the significance of these phenomena.

Geologic instability, such as with landslide areas, may be visible to observers.<sup>340</sup> Yet, the purchaser may reasonably rely upon the issuance of permits by the public agencies, the expertise of the developer and builder, and perhaps decades of "no problem," in acquiring the property. The purchaser is also probably unable to assess the stability of a slope.<sup>341</sup>

The collective knowledge of risks transcends individual knowledge. Thus, the risks posed by the New Madrid Fault may not be fully appreciated by residents of St. Louis, Little Rock or Memphis, but these risks are known to the scientific community. We expect architects, engineers and contractors to take these risks into consideration in exercising reasonable care in designing and constructing an edifice.<sup>342</sup> The standard of reasonable care at a minimum requires compliance with building codes, but more significantly, to apply the standard of a reasonable architect or engineer under the circumstances.

The geologic information that is reasonably available to the construction industry is just as available to the real estate industry. There is no hidden magic in ascertaining the presence of flood-

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339 A recent article in the Los Angeles Times indicates the living room of the house made famous by the famous TV family of Ozzie and Harriett Nelson lies astride the Hollywood fault. Philip Fradkin, *Fractured Dreams*, L.A. TIMES MAG. 16, 37 (Jan. 25, 1998).

340 As one law review commentator has written: "Malibu: Where the Slide Meets the Tide," Rob Risley, *Landslide Peril and Homeowners' Insurance in California*, 40 UCLA L. REV. 1145 (1993).

341 Even experts may have difficulty predicting the location and probability of a landslide. Robert B. Olshansky & J. David Rogers, *Unstable Ground: Landslide Policy in the United States*, 13 ECOLOGY L.Q. 939, 944 (1987).

342 For example, an Arkansas statute provides:

Hereafter, neither the state, any county, city, township, village or private entity shall construct, add to, alter, retrofit, or remodel any public structure unless the structural elements are designed to resist the anticipated forces of the designated seismic zone in which the structure is located. . . .

1991 Ark. Acts 1100 § 4 (Arkansas Environmental Resident Design Act).

plains, avalanche perils, canyons, volcanoes, seismic fault lines and similar geologic hazards.<sup>343</sup>

#### CONCLUSION

As we enter the twenty-first century, the time has come to formally inter caveat emptor, an anachronistic doctrine of the sixteenth century. The reasons justifying the doctrine have long since been superseded by twentieth century developments. The New Jersey Supreme Court has led the way in *Strawn v. Canuso*.

Instead, we should formally adopt the Tort concept of a duty to disclose material geologic hazards in real estate transactions. Tort concepts of fraud, misrepresentation, and warranties have effectively rendered caveat emptor a shell of its former self. Statutory disclosure legislation has further diluted caveat emptor.

Expanding population pressures have increasingly settled in geologically fragile areas. Living in such areas therefore increases the risk that a "natural disaster" will result in loss of life and substantial property damage. The prospective residents should therefore be apprised of the risks before purchase.

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343 For an example of the lack of warning by real estate brokers to purchasers of properties in the Los Angeles hills, see JOHN MCPHEE, *THE CONTROL OF NATURE* 251-54 (1989).