1995

Ohio's Homeowner Disclosure Law

Daivia S. Kasper

Follow this and additional works at: http://scholarlycommons.law.case.edu/caselrev

Part of the Law Commons

Recommended Citation
Available at: http://scholarlycommons.law.case.edu/caselrev/vol45/iss4/31

This Note is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.
NOTES

OHIO'S HOmeOWNER DISCLOSURE LAW

I. INTRODUCTION

The Ohio legislature recently enacted a homeowner disclosure law to require disclosures by sellers of residential property. Prior to this enactment, residential disclosures were governed by Ohio common law. By adopting statutory disclosure requirements, Ohio joined a number of jurisdictions which have residential disclosure requirements defined by statute or regulation. This Note examines Ohio’s statute, compares it to Ohio’s prior common law, evaluates the statute against those of other jurisdictions, suggests effective interpretations of its provisions, and forecasts areas of continuing or new litigation.

The background section of this Note first reviews the common law in Ohio regarding seller disclosure on transfers of residential property. A brief discussion of the national push toward statutory disclosure requirements follows, which then leads to the introduction of Ohio’s statute. The analysis section first examines the Ohio statute’s provisions and notes similar provisions in other states. The analysis then takes three different perspectives on the Ohio statute to determine: (1) whether the statute advances the rationales behind Ohio’s common law and satisfies the policy objectives underlying the statutory enactment; (2) whether the statute compares favorably with similar statutes developed in other jurisdictions; and (3) what type of difficulties may arise in implementation of the statute. Finally, the conclusion section highlights the advantages of the Ohio statute and summarizes its contentious implications.

1. OHIO REV. CODE ANN. § 5302.30 (Baldwin 1992).
II. BACKGROUND

Historically, the doctrine of caveat emptor\(^2\) reigned over the transfer of property.\(^3\) Based on the assumption of equal bargaining power between parties in an arms-length transaction,\(^4\) the courts refused to introduce a moral element requiring sellers to disclose hidden defects or problems that provided them with a bargaining advantage.\(^5\) However, cracks in the shield of caveat emptor developed as courts slowly recognized that sellers of residential properties held the substantial bargaining edge of familiarity with the property. In other words, sellers possessed 'superior knowledge.'\(^6\) Consequently, courts developed numerous exceptions to the doctrine of caveat emptor, primarily where the seller knew of a defect in the property, the nature of which the buyer would not be able to discover or which presented a dangerous condition.\(^7\) As a result of these exceptions to caveat emptor, controversies swirled for decades regarding what constitutes a defect, how diligent a buyer


\(^4\) See Jones, supra note 3, at 216; William L. Niro, Let the Seller Beware! Illinois Adopts the Implied Warranty of Fitness in the Sale of a New Home, 68 ILL. BJ. 770, 771 (1980) ("[B]uyers of realty are presumed to be knowledgeable in house construction and in equal bargaining position with the vendor of the property.").

\(^5\) Hendrick v. Lynn, 144 A.2d 147, 149 (Del. Ch. 1958) (declining to find a cause of action for nondisclosure, the court refused to "adopt a moral code for vendor and purchaser which to date has no substantial legal sanction"); Swinton v. Whittinsville Sav. Bank, 42 N.E.2d 808, 808-09 (Mass. 1942) (holding that seller of a termite-infested house had no duty to disclose the infestation to the buyer: "The law has not yet, we believe, reached the point of imposing upon the frailties of human nature a standard so idealistic as this.").

\(^6\) See, e.g., Wilhite v. Mays, 232 S.E.2d 141, 143 (Ga. Ct. App. 1976) (finding an exception to the doctrine of caveat emptor which "places upon the seller a duty to disclose in situations where he or she has special knowledge not apparent to the buyer"); Holcomb v. Zinke, 365 N.W.2d 507, 512 (N.D. 1985) ("While the relationship between seller and buyer may not be a fiduciary or confidential one, it is marked by the clearly superior position of the seller vis-a-vis knowledge of the condition of the property being sold.").

\(^7\) Jones, supra note 3, at 219; Kafker, supra note 3, at 59.
must be to conclude that a defect was not discoverable, and what qualifies as a dangerous condition.

A. Ohio's Common Law on Seller Disclosure

Ohio's common law on seller disclosure characterized defects as either patent or latent. Consistent with the rule of caveat emptor, the buyer bore the responsibility for discovering patent defects. Sellers were obliged to disclose latent defects to buyers. In some circumstances, a seller could employ a disclaimer clause in the transfer contract to avoid disclosing latent defects to the buyer. However, seller liability was found in situations where the seller's representations or responses to inquiries by the buyer turned out to be false or misleading.

1. Patent Defects under Caveat Emptor

In Ohio, the doctrine of caveat emptor and its exceptions have remained fairly constant during the last two generations. Despite the rather simple statement in *Traverse v. Long* that "[t]he principle of caveat emptor applies to sales of real estate relative to conditions open to observation," the implementation of that rule has not been so straightforward. Indeed, the court in *Traverse* found that the filled-in land on which a driveway and parking area had been constructed was "open to observation." The buyer, an attorney, was "put on notice" of the condition (the fill) and resulting damages were found to result from the buyer's own lack of diligence.

The rule from *Traverse* was still being used as recently as 1988, when it was specifically quoted and incorporated into *Layman v. Binns*. The *Layman* court expounded upon the usefulness of the doctrine of caveat emptor in reducing the volume of litiga-

---

8. A patent defect is "a defect that could be recognized upon reasonably careful inspection or through the use of ordinary diligence and care." *Barron's Law Dictionary*, *supra* note 2, at 345.

9. A latent defect is "a defect not discoverable even by exercise of ordinary and reasonable care." *Id.* at 268.

10. 135 N.E.2d 256 (Ohio 1956).

11. *Id.* at 259. "Where those conditions are discoverable and the purchaser has the opportunity for investigation and determination without concealment or hindrance by the vendor, the purchaser has no just cause for complaint even though there are misstatements and misrepresentations by the vendor not so reprehensible in nature as to constitute fraud." *Id.*

12. *Id.*

tion and maintained that “[a] seller of realty is not obligated to reveal all that he or she knows.” The defect in Layman was a bowed foundation wall reinforced with structural steel bracing in the basement. The buyer claimed that he “should not be held to have knowledge of the defect simply because he saw a symptom of it.” The buyers were not awarded damages of the cost to repair the defect, which were estimated at fifty percent of the purchase price. Both the filled-in land in Traverse and the bowed foundation in Layman were considered patent defects, discoverable by a buyer. The buyers had “a duty to inspect and inquire about the premises in a prudent, diligent manner” so as to ascertain all patent defects.

The defense of caveat emptor can impose substantial financial hardship on the buyer. The justification for allowing this hardship, beyond controlling litigation, was that the buyer has an affirmative duty to inspect the premises. Consequently, the buyer’s offer was presumed to reflect any defect that a reasonably prudent buyer would observe and consider in tendering an offer. Because the characterization of a defect as patent left the buyer without recourse, buyers often argued that the defect was latent and not open to observation, in hopes of triggering the seller’s duty to disclose.

2. Latent Defects under Caveat Emptor

Where the condition is not open to observation, the latent defect does not fall within the protection of the doctrine of caveat emptor. One of the classic examples of a latent defect is termite infestation. Some jurisdictions have found that termite infestation

14. “[T]he doctrine performs a function in the real estate marketplace. Without the doctrine nearly every sale would invite litigation instituted by a disappointed buyer.” Id. at 644.
15. Id.
16. Id.
17. Id. (citing Traverse v. Long, 135 N.E.2d 256, 259 (Ohio 1956), and Foust v. Valleybrook Realty, 446 N.E.2d 1122, 1125 (Ohio Ct. App. 1981)).
19. Jones, supra note 3, at 216-17 (“Parties to an arm’s length transaction are presumably aware of the risks they assume and protect themselves accordingly.”); Hamilton, supra note 2, at 1186 (“[C]aveat emptor sharpened wits, taught self-reliance, made a man - an economic man - out of the buyer, and served well its two masters, business and justice.”).
20. Miles v. McSwegin, 388 N.E.2d 1367, 1370 (Ohio 1979); see Kafker, supra note 3, at 65 (stating that the seller has a duty to disclose latent defects that could not be detected with reasonable inspection).
does not present an exception to the doctrine of caveat emptor even where the seller was aware of substantial damage caused by the termites.\textsuperscript{21} Ohio courts, however, have been fairly consistent in finding that such an infestation presents either a latent defect or dangerous condition exception to the doctrine of caveat emptor, thus requiring the seller to disclose the condition to the buyer.\textsuperscript{22}

In \textit{Miles v. McSwegin},\textsuperscript{23} the seller’s broker was held liable to the buyers for representing the premises as being “a good solid home” and thereafter having the property treated for termite infestation without disclosing this treatment to the buyers.\textsuperscript{24} Although the seller, the seller’s broker, and the buyer’s mortgagee all knew about the infestation and subsequent remedial treatment, liability for nondisclosure was found against only the broker and the mortgagee with total damages exceeding the purchase price of the house.\textsuperscript{25} Liability for nondisclosure may be assessed against the broker, as in \textit{Miles}, or against the seller. Use of the latent defect exception to a defense of caveat emptor imposed substantial financial liability after the sale transaction was closed and final. The seller, of course, typically has expended most of her financial resources on the purchase of her next house.

The justification for the latent defect exception to the doctrine of caveat emptor as providing a measure of protection for the innocent buyer is well illustrated in \textit{Tucker v. Kritzer}.\textsuperscript{26} The defect at issue was in a chimney for a wood burning stove which was not constructed according to building code requirements.\textsuperscript{27} The buyer was particularly interested in buying a home with a wood burning stove.\textsuperscript{28} The court found that she had ample opportunity to inspect the premises and that the sellers had not engaged in fraud,\textsuperscript{29} yet

\begin{itemize}
\item \textsuperscript{21} Hendrick v. Lynn, 144 A.2d 147, 149 (Del. Ch. 1958) (ruling that where the seller had placed a rug over a hole in the wood floor that had been eaten away by termites, the seller had no duty to disclose the infestation and the buyer had no cause of action against the seller). For an overview of the conflicting seller disclosure obligations for termite infestations, see E.T. Tsai, Annotation, \textit{Duty of Vendor of Real Estate to Give Purchaser Information as to Termite Infestation}, 22 A.L.R.3d 972 § 3 (1968) (Supp. 1993).
\item \textsuperscript{22} See \textit{Miles}, 388 N.E.2d at 1370 (citing sources).
\item \textsuperscript{23} 388 N.E.2d 1367 (Ohio 1979).
\item \textsuperscript{24} \textit{Id.} at 1368.
\item \textsuperscript{25} \textit{Id.;} Miles v. Perpetual Sav. & Loan, 388 N.E.2d 1364, 1366 (Ohio 1979) (finding the mortgagee liable to the buyers on an agency theory).
\item \textsuperscript{26} 561 N.E.2d 1033 (Ohio Ct. App. 1988).
\item \textsuperscript{27} \textit{Id.} at 1034.
\item \textsuperscript{28} \textit{Id.}
\item \textsuperscript{29} \textit{Id.} at 1035.
\end{itemize}
the court ruled in favor of the buyer by a methodical application of *Traverse v. Long.* The court restated the *Traverse* rule:

The doctrine of caveat emptor precludes recovery in an action by the purchaser for a structural defect in real estate where (1) the condition complained of is open to observation or discoverable upon reasonable inspection, (2) the purchaser had the unimpeded opportunity to examine the premises, and (3) there is not fraud on the part of the vendor.

The court elaborated that “[a]ll three elements must concurrently occur to make the defense available to the sellers; if [one] element is missing, then the defense [is] unavailable.” Despite fulfillment of two of the conditions, the fact that the chimney defect was not discoverable upon reasonable inspection precluded the sellers’ defense of caveat emptor. The court explained that “[r]easonable inspection would include only eye observation in the absence of some exterior sign of a latent defect . . . [and] reasonable inspection did not require disassembly of the chimney connection.” Since the defective chimney construction was not observable by a buyer conducting a reasonable inspection, the defect was characterized as latent. The seller therefore had a duty to disclose it.

The latent defect exception to the caveat emptor defense builds on the superior knowledge advantage of the seller and the seller’s control over the premises. The seller is required to disgorge unique knowledge of material defects so that they may be reflected in the calculation of the value of the premises. Therefore, the classification of a defect as latent provides some relief for the buyer who discovers the condition after purchasing the premises and, correspondingly, extends the seller’s liability for nondisclosure beyond the completion of the purchase transaction.

---

30. 135 N.E.2d 256 (Ohio 1956).
32. Id.
33. The sellers themselves were held liable for damages, not the seller’s broker, despite the broker listing the house specifically as having a “place for [a] wood-burning stove.” Id. at 1034.
34. Id. at 1035.
3. Latent Defects and Disclaimer Clauses

As the cracks in the shield of caveat emptor opened, sellers turned to another longstanding technique to limit their liability. The use of a disclaimer in the transfer contract represented the buyer's agreement to take the property in its existing "as is" condition. The court in *Kaye v. Buehrle* summarized the Ohio common law by ruling "that when a buyer contractually agrees to accept property 'as is', the seller is relieved of any duty to disclose. [However,] an 'as is' clause cannot be relied upon to bar a claim for fraudulent misrepresentation or fraudulent concealment." In *Kaye*, the sellers had patched cracks in the basement caused by structural problems eight years prior to selling the house. At the time of the sale, the basement was still likely to "leak during a torrential rain." Finding no evidence of representations by the sellers as to the condition of the basement on which the buyers could claim to have relied nor any evidence indicating that the sellers had patched the cracks in the basement with an intent to conceal the defects, the court found that the "as is" clause written in the transfer contract "clearly places the risk upon the [buyers] as to the existence of any defects." The "as is" disclaimer clause in the transfer agreement shifted the risk of latent defects from the seller's duty to disclose to the buyer's duty to investigate and inquire.

The power of the disclaimer clause to relieve the seller of liability for nondisclosure is significant. Its use eliminates the first element of the Traverse test: the question of whether the defect was open to observation. The existence of a leaky basement, when not inspected during inclement weather, is arguably a latent defect. The 1992 case of *Tipton v. Nuzum* reaffirmed the risk-
shifting advantage of the "as is" clause. The court held that the sellers "had no duty to disclose any knowledge of past water problems with the basement," thus placing the duty to investigate or inquire about defects squarely upon the buyer.

The risk-shifting effect of the disclaimer clause is a step backward in the promulgation of protection for buyers; in other words, it is a step back toward the doctrine of caveat emptor. Some courts have indicated that the presence of a disclaimer clause in the purchase contract should put the buyer "on notice" that the premises may have defects and that it is incumbent on the buyer to inquire and inspect further. However, the inquisitive and questioning buyer retains a significant degree of protection because the seller is legally obliged to respond truthfully and completely to direct inquiries in order to preclude charges of fraud.

4. Latent Defects and the Duty to Speak

The powerful "as is" disclaimer clause could not prevent seller liability for nondisclosure of latent defects when the seller had a duty to disclose such defects. Such a duty to speak may arise from a seller's professional qualifications or in response to a buyer's specific inquiries. The court in Mancini v. Gorick explained:

Although a claim of nondisclosure will not overcome an "as is" clause, a claim of fraudulent concealment will. Non-disclosure will become the equivalent of fraudulent concealment when it becomes the duty of a person to speak in order that the party with whom he is dealing may be placed on an equal footing with him. In Mancini, the duty to speak arose because the seller told the

43. Id. at 269. "We have previously held that when property is accepted in an "as is" condition, the seller is relieved of any duty to disclose." Id. (citing Kaye v. Buchrle, 457 N.E.2d 373, 376 (Ohio Ct. App. 1983)).
44. See id. at 268 ("Under certain circumstances, a reasonably prudent person should be put on notice of a possible defect which necessitates either further inquiry of the owner or inspection by someone with more expertise."); Kafker, supra note 3, at 68 ("The "as is" clause in the contract itself implies that the property was in some way defective.") (quoting Universal Inv. Co. v. Sahara Motor Inn, 619 P.2d 485, 487 (Ariz. Ct. App. 1980)).
45. See discussion infra part II.A.4.
46. 536 N.E.2d 8 (Ohio Ct. App. 1987).
47. Id. at 9, 10 (citation omitted).
buyer that the seller himself, an architectural engineer, had designed and built the house. Therefore, the buyer had justifiably relied on the seller's professional expertise to construct the house without residual latent defects. Builder-vendors, because of their professional expertise and their ability to prevent latent defects, generally do not have access to either the doctrine of caveat emptor or "as is" disclaimer clauses as defenses. As discussed later, they are also excluded from the disclosure requirements of Ohio's seller disclosure law.

The duty to speak truthfully and completely was not limited to professional builders and developers. In Brewer v. Brothers, the seller responded "[y]ou have nothing to worry about" to inquiries from the buyer about the condition of the electrical system. The seller was held liable for damages despite an 'as is' clause in the transfer contract because the electrical system was defective. The Brewer court asserted "that the buyer's duty to inspect the premises to discover defects terminates when representations are made with respect to a material fact in response to a buyer's direct inquiry."

The theory that the buyer's duty to inspect can terminate on direct inquiry was stated by an earlier Ohio court in Foust v. Valleybrook Realty. The buyers in Foust had specifically inquired about the sanitary sewer system. The seller's broker discussed an option to tie into a new municipal system and estimated the costs to do so. After the buyers completed the purchase, they discovered that the sewer tie-in was mandatory and the costs totaled over eight hundred percent of the broker's estimate. The seller and the broker proffered the defense of caveat emptor, but the court was not persuaded. The court stated that "although the purchasers had a duty to inquire and to inspect the premises in a prudent manner, . . . they had a right to rely upon the representa-

48. Id. at 10.
49. For a discussion of builder-vendor liability to both initial and subsequent purchasers, see David J. Strasser, Extension of Implied Warranties to Subsequent Purchasers of Real Property: Insurance Company of North America v. Bonnie Built Homes, 43 Ohio St. L.J. 951 (1982).
52. Id. at 493.
53. Id. at 495.
55. Id. at 1122.
tions of [the broker] and were not under a duty to inquire of others after receiving answers to their questions.\textsuperscript{56} Sellers must respond to direct inquiries from buyers in such a way as to be neither misleading nor incomplete in order to avoid liability for nondisclosure or fraud.

The affirmative duty of sellers to speak truthfully and completely can provide substantial protection for the buyer who knows to ask questions and knows the right questions to ask. Justified reliance on the seller's representations can surmount defenses of caveat emptor and disclaimer clauses. Upon questioning, the burden shifts to the seller to speak carefully and represent honestly the condition of the premises, for even an honest mistake on the part of the seller may allow the buyer to rescind the purchase agreement.\textsuperscript{57}

In summary, Ohio's common law on seller disclosure required: (1) the buyer to inspect the premises in a reasonably prudent manner such that patent defects became the buyer's responsibility to discover; (2) the seller to disclose latent defects, unless the buyer agreed to take the property "as is" in the transfer contract; and (3) the seller to disclose defects, notwithstanding an "as is" clause in the contract, when the seller had a duty to speak, as where the buyer had justifiably relied upon the seller's qualifications and/or representations.

\textbf{B. Development of a Legislative Solution to Seller Disclosure}

Questions of whether a condition was open to observation or what a seller actually said will no longer be the inquiry as a result of the Ohio legislature's enactment of a statutory disclosure provision. Ohio's enactment comports with the national trend of defining residential disclosure requirements by statute or regulation. Ohio's seller disclosure law, section 5302.30 of the \textit{Ohio Revised Code} provides a baseline for disclosures required in the course of transfers of residential real property, effective July 1, 1993.\textsuperscript{58} For better or worse, Ohio sellers now have a procedure to guide them and Ohio buyers now have a procedure on which they can rely.

\textsuperscript{56} \textit{Id.} at 1125.

\textsuperscript{57} Di Pippo v. Meyer, 263 N.E.2d 907 (Ohio Ct. App. 1970) (finding that despite the sellers not knowing of the defects, their representations amounted to constructive fraud and allowed the buyers to rescind the purchase and collect damages). "Constructive fraud, sometimes called legal fraud . . . generally involves a mere mistake of fact." \textit{Id.} at 909.

\textsuperscript{58} \textit{Ohio Rev. Code Ann.} §§ 5302.30(B)(1), (C) (Baldwin 1992).
The apparent impetus behind the enactment was strong lobbying by the Ohio Board of Realtors acting in nationwide concert with the National Association of Realtors. The National Association of Realtors may have been reacting to a series of court decisions across the country which awarded damages and rescission of purchase agreements for nondisclosure of conditions never before considered subject to disclosure. These decisions also imposed affirmative duties of investigation and disclosure on brokers themselves. A 1984 California decision held that a broker must "conduct a reasonably competent and diligent inspection of the residential property listed for sale and . . . [must] disclose to prospective purchasers all facts materially affecting the value or desirability of the property that such an investigation would reveal." This decision came on the heels of the bizarre Reed v. King case. In Reed, the seller failed to mention to the buyer that the house being sold had been the site of a multiple murder ten years earlier. The court found this to be a material fact not accessible to the buyer which the seller had a duty to disclose. Both damages and rescission were available to the buyer upon a showing that the histo-

59. See, e.g., Sherry Harowitz & John Parmelee, Defect Disclosure; A Mixed Blessing for Home Sellers, KIPLINGER'S PERS. FIN. MAG., Nov. 1991, at 90, 91 ("Home sellers in most states are required by law to disclose significant known defects, but so far only California and Maine require broad-ranging written disclosures. The National Association of Realtors would like to see such documents in all states."); James D. Lawlor, Mandatory Seller Disclosure Laws, PROB. & PROP., July-Aug. 1992, at 34 ("Currently, only two states require disclosure of property defects by a seller. . . . However, the topic has engendered much interest and debate across the country, due in large part to the interest the National Association of Realtors (NAR) has taken in encouraging such rules."); Amy Saltzman, Home-Selling Headaches, U.S. NEWS & WORLD REP., Sept. 16, 1991, at 62 ("The [National Association of Realtors] recently kicked off a nationwide campaign in the state legislatures to require sellers to reveal defects in writing."); David S. Sidor, Ohio's New Seller Disclosure Law, OHIO LAW., May-June 1993, at 8 ("During 1992, the Ohio Board of Realtors lobbied strongly for legislation which would make . . . disclosure forms or checklists mandatory in the sale of residential property.").


63. Id. at 133; see also Eugene J. Morris & Kenneth M. Block, The Buyer's Right to Rescission, Damages, NAT'L L.J., Mar. 12, 1984, at 20 (discussing the Reed decision).
The imposition of a disclosure obligation on the seller’s broker to the buyer and the elusive nature of “materiality” caused concern for buyers, sellers, and sellers’ brokers, especially with regard to the finality of the transactions.

Unusual findings of “materiality” were not limited to the progressive West Coast, as illustrated by the equally bizarre 1991 New York case of Stambovsky v. Ackley. The buyer, “to his horror, discovered that the house he had recently contracted to purchase was widely reputed to be possessed by poltergeists.” He immediately sought rescission of the contract. Despite the validity of the doctrine of caveat emptor in New York common law and an “as is” disclaimer clause in the purchase agreement, the court distinguished the issue at law, which would have provided no remedy, and determined the matter as an issue in equity, which permitted rescission. Despite the amusing prose of the court’s decision, it left both sellers’ and brokers’ heads spinning with questions about the type of defect that must be disclosed to avoid liability for nondisclosure. The result of this confusion has been nationwide pressure on state legislatures to adopt statutory disclosure requirements describing what must be disclosed and developing measures to limit liability for nondisclosure.

The California legislature was the first to try to dispel the confusion with the enactment of legislative measures in 1987 which provided written disclosure requirements. Following California’s lead, eighteen states, including Ohio, have enacted comprehensive

64. Reed, 193 Cal. Rptr. at 133.
65. See Aurora Mackey, Home Moaners, CAL. LAW., Dec. 1992, at 20, 23 (“I don’t think the average seller knows what he has to disclose anymore. It’s confusing for everyone.”) (quoting the chairwoman of the Los Angeles Bar Association’s real property division).
67. Id. at 674.
68. Id. at 675, 676. “While . . . in his pursuit of a legal remedy for fraudulent misrepresentation against the seller, plaintiff hasn’t a ghost of a chance, [this court is] nevertheless moved by the spirit of equity to allow the buyer to seek rescission of the contract of sale and recovery of his downpayment.” Id. at 674, 675.
69. See Paula C. Murray, AIDS, Ghosts, Murder: Must Real Estate Brokers and Sellers Disclose?, 27 WAKE FOREST L. REV. 689, 700-01 (1992) (“The Reed and Stambovsky decisions . . . will put sellers and brokers in an increasingly unenviable position. Information that has no logical bearing on the home’s physical structure and does not physically jeopardize its future residents may in some instances constitute material information which must be disclosed to potential buyers.”).
70. CAL. CIV. CODE § 1102 (West 1993).
mandary disclosure programs. An additional nine states have enacted limited disclosure statutes or have disclosure programs pending in their legislatures. Of the other twenty-three jurisdictions, eleven have enacted legislation eliminating certain conditions from mandatory disclosure.

Ohio’s legislative response sought to address not only the brokers’ agenda in terms of defining mandatory disclosure items and limiting liability but also the litigious areas of Ohio’s common law: (1) the patent-latent defect distinction and resulting distribution of liability for defects; (2) the disclaimer clause’s risk-shifting effect leaving the unsuspecting buyer unprotected; and (3) the question of whether and when a seller has a duty to speak. The Ohio statute supplants the prior common law on disclosure of


72. Kentucky has a disclosure statute that applies only for broker-facilitated transactions. KY. REV. STAT. ANN. § 324.360 (Baldwin 1993). Montana has a limited disclosure statute that requires the seller to “provide a written notice to the buyer in a buy-sell agreement or at the time of the sale to the buyer that the dwelling is equipped or is not equipped with smoke detectors or other fire detection devices.” MONT. CODE ANN. § 70-20-113(2) (1992). New Hampshire has a limited disclosure statute that requires notification to buyers of the potential presence of radon gas and lead paint, and disclosure of information regarding the water supply and sewage disposal systems. N.H. REV. STAT. ANN. § 477:4-a, c (1993).


The following states do not appear to have any disclosure legislation: Alabama, Arizona, Arkansas, Indiana, Kansas, Massachusetts, Minnesota, Mississippi, New Jersey, North Dakota, Vermont, and Wyoming.
defects in the majority of residential transfers, and requires the seller to complete a property disclosure form which must be delivered to the buyer. The timetable for receipt of the property disclosure form defines the buyer’s ability to rescind a purchase offer, and compliance with the statute limits the seller’s liability for nondisclosure while also increasing the seller’s ability to rely on the certainty of the transfer contract.

III. ANALYSIS

An analysis of Ohio’s seller disclosure statute first requires focusing on the statutory provisions themselves and how they interrelate. As each provision is discussed, its similarity or divergence from corresponding provisions in other jurisdictions is noted. The analysis then discusses the statute as a whole from three different perspectives: first, comparing it to Ohio’s prior common law on disclosure; second, discussing additional issues addressed by other jurisdictions; and third, forecasting ramifications of the new statute.

A. Ohio’s Statute on Seller Disclosure: The Provisions

The statutory provisions of Ohio’s new seller disclosure law specify which transactions are not governed by the new law, delineate procedural requirements for compliance with the new law, provide the extent of seller liability, and limit buyers’ remedies.

1. Transfers Affected

The Ohio statute applies to all residential real property transfers except those which are specifically listed as exempt. Most of the exceptions deal with involuntary transfers resulting from foreclosure, default, or death, and voluntary transfers between co-owners and family members. The most notable exemptions are those for transfers of new construction to initial buyers, transfers to buyers who themselves have been living in the residence at least one year, and transfers from sellers who have not been living in the...
residence during the preceding year.\textsuperscript{82} The justification for the exemption given to new home transfers is based on the higher level of care owed by builder-vendors to initial buyers. Specifically, builder-vendors are obliged to construct the home in a workmanlike manner.\textsuperscript{83}

Where the buyer has been living in the house prior to the sale or where the seller has not, the transfer is exempt from the disclosure requirements. No longer does the seller have the advantage over the buyer of familiarity with the property, which was a primary justification for requiring seller disclosure of latent defects under the common law.\textsuperscript{84} Although the scope of transfers covered by Ohio's statute is similar to the scope of transfers covered by the disclosure statutes of other states,\textsuperscript{85} the three types of transfers discussed above which are exempt in Ohio are not all exempt in other states. For example, these three types are not explicitly exempted in California.\textsuperscript{86} In addition, Wisconsin only shares the exemption for "property that has not been inhabited,"\textsuperscript{87} and Virginia only shares the exemption for "[t]ransfers involving the first sale of a dwelling."\textsuperscript{88} Only Ohio's statute implements the logic of exempting those who do not have the 'superior knowledge' advantage from the disclosure requirements.

2. Statutory Procedures

The Ohio statute requires sellers to complete a Property Disclosure Form,\textsuperscript{89} "in good faith,"\textsuperscript{90} making approximations where "an item of information is unknown,"\textsuperscript{91} and to deliver the form\textsuperscript{92} "to

\textsuperscript{82} Id. § 5302.30(B)(2)(a). Non-occupying sellers are exempted only when they received the property by inheritance or devise. Id.
\textsuperscript{83} See Strasser, supra note 49, at 951, 954.
\textsuperscript{84} See supra text following note 34.
\textsuperscript{85} The Oregon statute is different from all the other statutes considered here in that disclosure is not mandatory. In a residential real estate transaction, the seller must either make a property disclosure statement or make a written disclaimer "that the seller makes no representations or warranties as to the condition of the real property or any improvement thereon and that the buyer will be purchasing the property "as is,' that is, with all defects, if any." OR. REV. STAT. § 105.465(2) (1993). The Tennessee statute allows the buyer to waive the disclosure requirements. TENN. CODE ANN. § 66-5-202(2) (1994).
\textsuperscript{86} CAL. CIV. CODE § 1102.1.
\textsuperscript{87} WIS. STAT. ANN. § 709.01.
\textsuperscript{88} VA. CODE ANN. § 55-518A9.
\textsuperscript{89} OHIO REV. CODE ANN. § 5302.30(C).
\textsuperscript{90} Id. § 5302.30(E)(1).
\textsuperscript{91} Id. § 5302.30(E)(2).
\textsuperscript{92} Id. § 5302.30(I).
each prospective transferee . . . as soon as is practicable."93 The statute provides that when "any act, occurrence, or agreement" renders an item on the delivered disclosure form inaccurate, the subsequent inaccuracy does not cause the seller to be in noncompliance with the disclosure requirements.94 The statute allows but does not require the seller to amend in writing any information in the delivered disclosure form.95 Upon receipt of the disclosure form, the buyer must return an acknowledgment of the receipt to the seller.96

The significant differences between Ohio's procedure and that of other states are in the requirements for approximations, amendments, and time of delivery of the completed disclosure form to the buyer. Virginia explicitly requires that any approximations made be clearly identified as such.97 Both Alaska and California require sellers to make "a reasonable effort to ascertain" the information before approximating it, and if approximation is necessary to clearly identify it as such.98 Alaska, South Dakota, and Virginia require written amendments when information on a delivered disclosure form is subsequently rendered inaccurate.99 In addition, Alaska and South Dakota require the seller to deliver the disclosure form to the buyer before the buyer submits a written offer on the property.100 In contrast, Wisconsin only requires the seller to deliver the disclosure form to the buyer "not later than 10 days after acceptance" of the sales contract.101 Ohio's procedural requirements are well-defined, yet still provide some flexibility to the seller. This flexibility in making approximations and delivering the form to the buyer may work to the detriment of the buyer who is relying on the accuracy of the disclosures on the form in deciding whether to make or to rescind an offer on the property.102

93. Id. § 5302.30(C).
94. Id. § 5302.30(F)(2).
95. Id. § 5302.30(G).
96. Id. § 5302.30(H).
97. VA. CODE ANN. § 55-522.
98. ALASKA STAT. § 34.70.040(b); CAL. CIV. CODE § 1102.5.
99. ALASKA STAT. § 34.70.040(a); S.D. CODIFIED LAWS ANN. § 43-4-38; VA. CODE ANN. § 55-522.
100. ALASKA STAT. § 34.70.010; S.D. CODIFIED LAWS ANN. § 43-4-38.
101. WIS. STAT. ANN. § 709.02.
102. See discussion infra part III.B.3.a. and text following note 114.
3. Seller Liability

The Ohio statute provides that the seller will not be liable to the buyer for damages arising “from any error in, inaccuracy of, or omission of any item of information required to be disclosed in the property disclosure form” if the form had been completed in compliance with the other sections of the statute. However, compliance with the seller disclosure law does not eliminate a seller’s duty to disclose which may be mandated by other Ohio statutes or Ohio common law to prevent fraud against the buyer. Under the common law, neither a defense of caveat emptor nor an “as is” disclaimer clause in the contract defeated an action for fraud. As a result, the key difference between the new Ohio statute and Ohio’s common law in determining seller liability is the elimination of the latent-patent defect distinction and the elimination of the risk-shifting effect of the “as is” disclaimer clause.

The extent of seller liability in Wisconsin is similar to that provided for in the Ohio statute. Other states, however, impose seller liability for violation of the seller disclosure statute itself. Virginia provides for actual damages or rescission of the contract “[i]n the event of a misrepresentation in any residential property disclosure statement or failure to deliver a disclosure” statement. South Dakota imposes liability for actual damages and recovery of costs and attorney’s fees on the seller “who intentionally or who negligently violates” the seller disclosure statute. Alaska and California impose liability for actual damages on the seller “who negligently violates . . . or fails to perform a duty required” by the seller disclosure statute. Alaska also imposes “up to three times the actual damages” where the seller “willfully violates . . . or fails to perform a duty required” by the seller

103. OHIO REV. CODE ANN. § 5302.30(F)(1).
104. Id. § 5302.30(J). For a discussion of these parallel disclosure requirements, see infra text accompanying notes 207-11.
105. See WIS. STAT. ANN. § 709.07 (freeing owner from liability if the owner did not have knowledge of the error or if the source of the error was information provided by a public agency or qualified third party).
107. S.D. CODIFIED LAWS ANN. § 43-4-42.
108. ALASKA STAT. § 34.70.090(b) (the Alaska statute also provides for recovery of buyer costs and attorney fees, § 34.70.090(d)); CAL. CIV. CODE §§ 1102.4, 1102.8 (the California statute also imposes liability for actual damages for willful or negligent violation of the statute or failure to perform any duty prescribed by the statute, § 1102.13).
Although the Ohio statute only implicitly addresses liability for intentional misrepresentation on the property disclosure form by preserving the common law action for fraud, compliance with the statute effectively avoids much of the lingering liability that sellers carried after the close of the transaction under the prior common law.  

4. Buyer Remedies

Although the Ohio statute is comparatively silent on the issue of seller liability for violation of the disclosure statute itself, the statute is more explicit than any other state’s statute on the issue of rescission rights of the buyer. Rescission rights are defined in a temporal fashion by two conditions: (1) if the buyer has received a property disclosure form prior to submitting an offer on the property to the seller, the buyer does not have a right to rescind the subsequent transfer agreement; and (2) as of the date of closing on the transfer, whether or not the buyer has received a property disclosure form, the buyer’s right to rescind is terminated. Within this timeframe, there are two further limitations on the buyer’s right to rescind. Where the buyer’s offer has been accepted by the seller and subsequently the buyer receives the property disclosure form from the seller, the buyer may rescind (1) within three business days following receipt of the property disclosure form, and (2) within thirty days following the seller’s acceptance of the buyer’s offer. The buyer’s right to rescind terminates on the earliest of these two dates and the date of closing.

The buyer who received a property disclosure form prior to submitting an offer to the seller may not subsequently rescind the transfer agreement. The buyer has had the opportunity to review the disclosures made by the seller, and the buyer’s offer should theoretically reflect the buyer’s determination of the value of the property with the disclosed defects considered. The seller who has made the effort to deliver the property disclosure form to the buyer prior to receiving any offer on the property is justified in relying on any subsequent offer as reflecting an ‘informed consent’ to

109. ALASKA STAT. § 34.70.090(c).
110. See infra text accompanying notes 196-212.
111. OHIO REV. CODE ANN. § 5302.30(K)(3)(d).
112. Id. §§ 5302.30(K)(3)(b), (K)(4).
113. Id. § 5302.30(K)(3)(a).
114. Id. § 5302.30(K)(3)(b).
accept the property with the defects disclosed.

The buyer whose offer on the property is accepted by the seller and thereafter receives a property disclosure form, as explained above, has the right to rescind the agreement which terminates on the earliest of (1) three days after receipt of the disclosure form, (2) thirty days after acceptance of the offer, or (3) the date of closing. It appears that the seller has considerable ability to reduce the amount of time that the buyer has to examine the disclosure form before the buyer's right to rescind terminates. For example, the seller could wait to deliver the disclosure form to the buyer until 29 days after accepting the buyer's offer or until the day before closing. In either case, the buyer would have only one day to consider the items disclosed in order to decide whether to rescind the agreement. It appears that the statute's intent was to give the buyer at least three days to consider the disclosure form. However, this ability of the seller to shorten the length of time that the buyer has to review the disclosure form before the buyer's right to rescind terminates may be manipulated by the seller to pressure the buyer into making hasty decisions.

Statutes in other states restrict the buyer's right to rescind using the same events, but allowing differing amounts of time to act. All of the states except Wisconsin terminate the right to rescind on the date of closing of the transfer. Wisconsin limits the buyer's right to rescind to within two days after receipt of the property disclosure form from the seller and to within 12 days of the seller's acceptance of the offer when the buyer has not received a disclosure form. Alaska is virtually identical to South Dakota, both allowing the buyer to rescind "within three days after the disclosure statement . . . is delivered in person or within six days after the disclosure statement . . . is delivered by deposit in the mail" where the form was received by the buyer after the seller accepted the buyer's offer. The California provision is similar, allowing rescission within three days after receipt

115. See ALASKA STAT. § 34.70.090(a) (providing that transfers are not invalidated by failure to comply with disclosure provisions); CAL. CIV. CODE § 1102.13 (providing that transfers are not invalidated by failure to comply with disclosure provisions); S.D. CODEFIED LAWS ANN. § 43-4-42 (providing that transfers are not invalidated by failure to comply with disclosure provisions); VA. CODE ANN. § 55-520B(iii) (providing that a buyer may terminate prior to "settlement upon purchase of the property").
116. WIS. STAT. ANN. § 709.05.
117. Id. § 709.02.
118. ALASKA STAT. § 34.70.020; S.D. CODEFIED LAWS ANN. § 43-4-39.
Virginia terminates the buyer’s rescission rights under the same time constraints as California; however, Virginia also terminates the right to rescind upon “occupancy of the property by the [buyer]” and upon application by the buyer for a loan under a particular loan provision. Four of the states tie the buyer’s right to rescind to the receipt of the disclosure form and the date of closing. Wisconsin, however, ties the right to rescind to the receipt of the disclosure form and the acceptance of the buyer’s offer. The Ohio statute can be seen as a combination of these provisions, limiting the buyer’s right to rescind based on the acceptance of the offer, the receipt of the disclosure form, and the date of closing.

5. The Property Disclosure Form

The final major component of the Ohio statute is the disclosure form itself. The form, as developed by the director of commerce, requires the seller to indicate whether the seller has actual knowledge of past or current conditions affecting the property divided into twelve sections: A) water supply; B) sewer system; C) roof; D) basement/crawl space; E) structural components (foundations, floors, interior and exterior walls); F) mechanical systems (including electrical system); G) wood boring insects/termites; H) presence of hazardous materials; I) drainage; J) code violations; K) underground storage tanks/wells; and L) other known material defects. The form specifies that “unless otherwise advised in writing by the owner, the owner, other than having lived at or owning the property, possesses no greater knowledge than that which could be obtained by a careful inspection of the property by a potential purchaser.” This admission addresses the seller familiarity justification for requiring seller disclosure. The form also specifies that “unless otherwise advised, [the] owner has not con-

119. CAL. CIV. CODE. § 1102.2.
120. VA. CODE ANN. §§ 55-520B(iv), (vi) (providing that buyer’s right to rescind terminates on making a “written application to a lender for a mortgage loan where such application contains a disclosure that the right of termination shall end upon the application for the mortgage loan”).
121. OHIO REV. CODE ANN. § 5302.30(D).
123. Id.
ducted any inspection of generally inaccessible areas of the property," and defines "material defects" as "any non-observable physical condition existing on the property that could be dangerous to anyone occupying the property or any non-observable physical condition that would inhibit a person's use of the property."

Alaska and Virginia require their Real Estate Commission and Real Estate Board, respectively, to develop the property disclosure forms. The statutes of the other states include their property disclosure forms as a section within the statute. The Wisconsin property disclosure form requires the seller to mark correct, incorrect, or not applicable, statements of knowledge of defects or conditions of the property. For example, "I am aware of defects in the roof." The Wisconsin form defines a 'defect' as a condition that would "have a significant adverse effect on the value of the property" or "significantly impair the health or safety" of occupants or "significantly shorten or adversely affect the expected normal life of the premises." The South Dakota disclosure form requires the seller to mark yes, no, or unknown to specific questions concerning four subject areas: lot and title information ("Are there any unrecorded or recorded liens or financial instruments against the property, other than a first mortgage?"); structural information ("Are there any cracked interior walls or floors . . ."); systems and utility information ("Are there any existing hazardous conditions of the property such as methane gas, lead paint, radon gas in the house . . ."); and miscellaneous information ("When was the fireplace/wood stove/chimney flue last cleaned?").

The California disclosure form is the most notably different from those in other states because it includes a separate section for the seller's broker to complete "based on a reasonably competent and diligent visual inspection of the accessible areas of the property." Further, the form requires the seller to mark whether the property has specific items such as a dishwasher, window screens, and a hot tub, and whether the seller is aware of "significant defects/malfunctions" of specific items such as ceilings, the founda-

124. Id.
125. ALASKA STAT. § 34.70.050; VA. CODE ANN. § 55-525.
126. WIS. STAT. ANN. § 709.03.
127. Id.
128. S.D. CODIFIED LAWS ANN. § 43-4-44.
129. CAL. CIV. CODE § 1102.6; see also supra text accompanying note 61.
tion, and the electrical system. All of the disclosure forms, including Ohio's, explicitly state that the disclosure form is not a warranty by the seller nor a substitute for any inspection the buyer may wish to conduct. In addition, all of the forms suggest that the buyer may want to have the property professionally inspected.

In summary, Ohio's seller disclosure statute combines the provisions of a number of other states' statutes, and provides a fairly straightforward requirement on disclosures. Certain transactions are specifically excluded from the disclosure requirements, and the procedures for delivery and receipt of the disclosure form from seller to buyer are detailed, as are the limitations on the buyer's right to rescind. Finally, the disclosure form is comparatively specific and relatively comprehensive regarding the physical condition of the property.

B. Perspectives Analysis

The analysis of Ohio's seller disclosure statute can be accomplished from three different perspectives. The first perspective looks backward, so to speak, to determine whether the statute is a logical outgrowth of the policy objectives behind the prior common law. The second perspective looks laterally at the current state of the law in other jurisdictions to determine whether the statute moves Ohio to the forefront on a national level on the issue of seller disclosure, or whether the statute is a more conservative measure. The final perspective looks forward toward the implementation of the statute and its future ramifications. Analyzing Ohio's seller disclosure statute from these three different angles provides a comprehensive understanding of both the advantages and the shortcomings of the new law.

1. Looking Backward

Ohio's seller disclosure statute redefines the seller's obligations for disclosure of defects in transfers of residential property. The prior common law did not require the seller to disclose patent defects, but did require the seller to disclose latent defects. The statute eliminates this differentiation between patent and latent defects. Instead of characterizing the type of defect, the statute shifts...
the focus to what the seller knows about the property. Indeed, the
statute requires disclosure of items of which the seller knows that
would not have been considered 'defects' under the prior common
law.

A straightforward example of a case in which the new statute
would require further disclosure as opposed to the prior common
law can be seen by returning to *Tipton v. Nuzum.* The condi-
tion at issue in *Tipton* was a leaky basement. The court found that
"the existence of a sump pump and the fact that a hill slopes to-
ward the house" were sufficient ancillary conditions such that it
was the buyer's obligation to "(1) make further inquiry of the own-
er . . . or (2) seek the advice of someone with sufficient knowl-
edge to appraise the defect." Essentially, the court ruled that
the ancillary conditions were sufficient to classify the leaky base-
ment as a patent defect, which was the buyer's responsibility to
discover. Additionally, since the buyers agreed to take the property
"as is," the court ruled that the sellers "had no duty to disclose
any knowledge of past water problems with the basement." When the facts of this case are examined in light of the new seller
disclosure law, there are significant changes in the obligations of
both the seller and the buyer.

Under the new statute, the seller would have been required to
disclose the condition of which the buyers complained. The resi-
dential property disclosure form requires sellers to admit and de-
scribe or deny knowledge of "any current flooding, drainage, set-
tling or grading problems affecting the property," and to describe
"any repairs, modifications or alterations to the property or other
attempts to control" such condition within the past five years.
These disclosures would have addressed the sloping grade which
caus ed excessive run-off to accumulate at the house. The property
disclosure form specifically requires the seller to describe "any
current water leakage, water accumulation, excess dampness or
other defects with the basement/crawl space," and to describe "any
repairs, alterations or modifications to the property or other at-
ttempts to control" such conditions within the past five years.

---

134. *Id.* at 268-69.
135. *Id.* at 269 (emphasis added).
137. *Id.*
water leakage problems in the basement and the installation of the sump pump (if installed within the preceding five years). Therefore, under the statute, the sellers in Tipton would have had an obligation to disclosure more information about the property than they had to disclose under the prior common law.

The sellers in Kaye v. Buehrle also would have had a more extensive disclosure obligation under the statute than they had under the common law. The sellers would have had to disclose the fact that the basement "would leak during a torrential rain," but not that they had repaired a structural problem in the foundation wall. The repair work had been done eight years prior to the sale and the statute requires only disclosure of repairs done within the preceding five years. The seller’s disclosure obligation is expanded by the statute in two ways. First, by eliminating the distinction between patent and latent defects, sellers must also disclose defects that are open to observation, discoverable upon a reasonable inspection, notwithstanding a disclaimer clause in the sales contract. Second, by requiring disclosure of repair work done in the preceding five years, sellers must disclose conditions that were defective but are now remedied. These two aspects of the new seller disclosure obligation are expansions of the obligations which were present under the prior common law.

The statute not only places additional burdens on the sellers, but also corresponding additional restrictions on the buyers. The seller who complies with the disclosure statute is protected against subsequent claims for nondisclosure and is able to eliminate the buyer’s right to rescind a purchase agreement by providing the buyers with the disclosure form prior to receiving the buyer’s offer. Almost all of the buyers who bring actions for nondisclosure have discovered the defect after completing the purchase and taking possession of the premises. The statute eliminates the buyer’s cause of action for nondisclosure by virtue of the disclosure form and the statute terminates the buyer’s right to rescind upon the closing date of the purchase. The only remedy available to the buyer after closing would be an action for fraud.

139. Id. at 374.
140. Id. at 376; see also supra text accompanying notes 36-39.
141. See supra text accompanying notes 103, 111.
142. See supra text accompanying note 112.
143. See supra text accompanying note 104.
By removing alternative remedies, the statute forces the buyer to either commit to the purchase or rescind the offer before the sellers have relied on the finality of the transaction represented by acceptance of the offer and the closing.

One purpose of the seller disclosure statute is to provide the buyer with a standardized summary of information concerning the property that the seller has acquired by virtue of occupying it.\(^{144}\) The justification for this transfer of information is that the buyer will be better able to assess the value of the property and yet the seller will not be injured by being required to present the property in a light that reflects its actual condition.\(^{145}\) Correspondingly, the buyer's recourse for claims of nondisclosure and the option to rescind the purchase are limited, thus increasing the seller's ability to rely on the certainty of the transaction. Thus a compromise is worked in the disclosure statute that balances the increased disclosure obligation on the seller against the restricted availability of remedies for the buyer. Overall, the statute has the potential to decrease litigation and increase certainty in residential property transfers. This certainly is a substantial benefit: some authorities assert that well over half of the litigation regarding property transfers involves actions for nondisclosure.\(^{146}\)

2. Looking Laterally

Comparing Ohio's statute to similar statutes in other jurisdictions provides another perspective for evaluation of the new disclosure provisions. Although the procedural disclosure provisions are relatively similar among the states with statutory seller disclosure requirements,\(^{147}\) the substantive disclosure provisions, those conditions which are expressly required to be disclosed, hold substantial diversity. Ohio's statute is fairly comprehensive with respect to physical components of the property, but is silent as to nonphysical components. Other jurisdictions have express provisions on a num-

---

144. For further discussion of purposes underlying seller disclosure statutes, see supra text following note 73.

145. For an economic analysis justifying imposing a duty to disclose on the seller as the least cost avoider, see Ellen J. Curnes, Note, Protecting the Virginia Homebuyer: A Duty to Disclose Defects, 73 VA. L. REV. 459, 467-78 (1987).

146. See Lawlor, supra note 61, at 90 ("According to some insurance industry estimates, two-thirds of buyers' claims against sellers and brokers involve non-disclosure . . ."); Saltzman, supra note 59, at 62 ("Sellers who allegedly don't come clean on known defects . . . account for two thirds of all lawsuits against real-estate agents and sellers.").

147. See discussion supra part III.A.2.
ber of nonphysical components of the property. An evaluation of those items which other jurisdictions address, but on which Ohio is silent, may illustrate some intriguing shortcomings of Ohio's new statute.

a. Nonphysical Defects: Extrinsic to the Property

Some of the shortcomings of the Ohio seller disclosure law become apparent when the statutes from other states are examined on the issue of nonphysical defects. The California statute is the easiest to examine because it was enacted in 1987, thus allowing time for the California courts to interpret the statute. One of the nonphysical items requiring disclosure under the California statute is "[n]eighborhood noise problems or other nuisances." The case of Alexander v. McKnight involved a preemptive suit for damages, based on the California seller disclosure statute, before the property had been put up for sale. The Alexanders sued their neighbors, the McKnights, for the diminution in value of the Alexanders' property. The Alexanders claimed that this diminution in value would be realized upon the required disclosure to potential buyers that the McKnights were problem neighbors. The court concluded that the Alexanders would have to disclose to a potential buyer that there were neighborhood problems. The court also concluded that "such a disclosure would affect the market value" of the Alexanders' property. The illustrative purpose

148. The South Dakota statute specifically addresses nonphysical "psychological defects," see infra text accompanying note 176, and requires disclosure of "any other problems that have not been disclosed above," without defining "problems." S.D. CODIFIED LAWS ANN. § 43-4-44(IV)(10). Wisconsin requires disclosure of "other defects affecting the property" and defines "defects" as "a condition that would have a significant adverse effect on the value of the property [or] that would significantly impair the health or safety of future occupants of the property." Wis. STAT. ANN. § 709.03. Therefore, Wisconsin does not limit disclosures to physical conditions.
149. CAL. CIV. CODE § 1102.6.
150. 9 Cal. Rptr. 2d 453 (Ct. App. 1992).
151. Id.
152. Id.
153. Id. at 456. The McKnights' problem behavior, which was found to violate the housing development's restrictive covenants, was "operating a tree trimming business from their house involving the 'use of a noisy tree chipper,' engaging in other activities resulting in excessive noise, e.g. late-night basketball games, parking too many cars on their property and pouring motor oil on the roof of their house." Id. at 455.
154. Id. at 456. The lower court had awarded the Alexanders $24,000 in prospective damages for diminution in value, however, the Court of Appeals disallowed the award for prospective damages but remanded the case to determine whether the Alexanders were
of Alexander in this discussion is to determine whether this type of "defect" should trigger disclosure under Ohio's seller disclosure statute.

The defect in Alexander can be characterized as a nonphysical defect not on the property which negatively affects its value. In addition to neighborhood nuisances, such nonphysical defects could be pending municipal zoning changes or utility assessments, or area crime and safety issues. The Ohio property disclosure form does not require disclosure of these types of defects. The form does provide a catch-all provision requiring the seller to disclose "other known material defects currently in or on the property," and the form defines "material defects" as "any non-observable physical condition existing on the property that could be dangerous to anyone occupying the property or . . . would inhibit a person's use of the property." The requirement that the defect must be a "physical condition existing on the property" may eliminate these nonphysical extrinsic defects from required disclosure under this statute despite their negative impact on the property value.

The issue of disclosure of neighborhood crime faced an Ohio court recently in Van Camp v. Bradford. The buyer was a single mother with a teenage daughter. The seller was also a single mother with a teenage daughter. Four months before Van Camp purchased the home, a woman was raped at knife point in the house. Two months later, another rape occurred in the neighborhood. When Van Camp inspected the property prior to closing, she noticed and inquired about the bars on the basement windows. Bradford, the seller, responded "that a break-in had occurred six-

---

155. The Michigan disclosure statute requires disclosure of some neighborhood nuisances under the heading "environmental concerns (i.e., proximity to a landfill, airport, shooting range, etc.)." MICH. COMP. LAWS § 565.957 (1994). See Patricia Esser Cooper, The Wave of Seller Liability, PROB. & PROP., July-Aug. 1992, at 26, 30 (suggesting that nonphysical defects may be "that the seller had AIDS or cancer . . . , that the property was located in an area under health department study for cancer or leukemia clusters, that the house had been burglarized many times or that a 'ghost' was in residence").

156. See supra text accompanying notes 122-24. The form does require information concerning building and housing code violations, but such violations are typically found in physical conditions (i.e., deficient wiring, plumbing, or roofing).

157. Ohio Residential Property Disclosure Form, supra note 122.

158. Id.


160. Id. at 734.
teen years earlier, but that there was currently no problem with the residence yet still advised Van Camp to leave the bars in place. After Van Camp completed the purchase and took possession of the house, a neighbor told Van Camp about the two previous rapes in the area, and within two months Van Camp’s house was burglarized. Subsequently, Van Camp filed suit against Bradford alleging that the seller knew of the unsafe character of the neighborhood and failed to disclose this “material fact” to her. Van Camp claimed that knowledge of this "material fact" would have influenced her decision to purchase the house. After the suit was filed, Van Camp received threatening phone calls and two more rapes occurred in the neighborhood within the following three months.

The sale of the house was prior to the effective date of Ohio’s disclosure statute; therefore, the seller’s disclosure obligations were governed by the common law. The court first admitted the applicability of the rule from Traverse that “the principle of caveat emptor has been consistently applied in Ohio to sales of real estate relative to conditions discoverable by the buyer, or open to observation upon an investigation of the property.” The court noted that “latent defects do give rise to a duty on the part of the seller, and constitute an exception to the doctrine of caveat emptor.” The question before the court was whether the criminal activity at and near the house could be classified as a latent defect so as to prevail over the seller’s defense of caveat emptor. The court defined the defect by stating “that the property was rendered unsafe for habitation by the [buyer] due to the serious crimes that had occurred in and near the residence.” The stigma associated with such a defect, the court found, was properly classified as a latent defect. “Due to the intangible nature of the defect at issue here, a prospective buyer would have been unable to determine from a walk-through of the house... that it was the site of a serious, unsolved violent crime.” The court then concluded that “the

161. Id.
162. Id.
163. Id.
165. Id. at 735 (citing Traverse v. Long, 135 N.E.2d 256, 259 (Ohio 1956)).
166. Id. (citing Miles v. McSwegin, 388 N.E.2d 1367, 1369 (Ohio 1979)).
167. Id. at 736.
168. Id.
latent nature of the defect at issue here renders the defense of caveat emptor inapplicable. 6 This is the first Ohio court to recognize the proximity of criminal activity as a latent defect for which the burden to disclose to a prospective home buyer was on the seller.

Under the California disclosure statute, a rash of criminal activity in the neighborhood may well fall within the disclosure provision applied in Alexander. 170 The Alexander court stated that the statute ought to be liberally interpreted so as to effectuate its purpose, namely "that a buyer will be fully informed on matters affecting the value of the property." 171 Whether an item rises to the level of a "defect" requiring disclosure depends on a finding of "materiality." "Materiality" is found where the item has "a significant effect on the value of [the] property." 172 The Alexander court found that having "overtly hostile neighbors" could depress the value of the Alexander's home and, therefore, was a material fact which must be disclosed on the property disclosure form. By analogy, a rash of criminal activity in one's neighborhood could negatively affect the value of one's home and, therefore, be considered a material defect requiring disclosure under California's statute.

In contrast, the Ohio statute does not have the 'neighborhood nuisance' provision on its property disclosure form that could forewarn the next Van Camp. The Ohio form focuses on physical defects existing on the property. Thus, the stigma that the court in Van Camp found to be a latent defect does not fit into any of the categories of items to be disclosed on the Ohio disclosure form. As a result, had Van Camp purchased the house after Ohio's statute had become effective, she would not have found relief within its provisions. Although sellers have a more expansive disclosure obligation under the statute, the disclosures are limited to physical conditions. Disclosure of nonphysical defects, neighborhood nuisances, and safety concerns are not compelled by the statute, perhaps to a buyer's distress.

171. Id. at 455.
172. Id.
b. Psychological Defects: Intrinsic to the Property

Another type of nonphysical defect that negatively affects the property value is so-called "psychological defects." Generally, "psychologically impacted property" is property where violent events have occurred or where an occupant has or had a communicable fatal medical condition. South Dakota, Tennessee, and Virginia address these psychological defects within their seller disclosure statutes and twenty other jurisdictions have separate statutory provisions that specifically address these types of defects. Although all these states address the issue of psychological defect, the treatment of the issue is not consistent with respect to disclosure.

The South Dakota provision requires the seller to disclose whether "a human death by homicide [or] [o]ther felony committed against the property or a person on the property" occurred on the property in the preceding twelve months. This disclosure requirement is not the majority position. The Virginia legislature took an opposite view on the issue. The Virginia statute states:

[N]o cause of action shall arise against an owner . . . for failure to disclose that an occupant of the subject real property . . . was afflicted with [HIV] or that the real property was the site of: 1. an act or occurrence which had no effect on the physical structure . . . or 2. a homicide,


174. S.D. CODIFIED LAWS ANN. § 43-4-44; TENN. CODE ANN. § 66-5-207 (1994); VA. CODE ANN. § 55-524A.


176. S.D. CODIFIED LAWS ANN. § 43-4-44.
felony or suicide.\textsuperscript{177}

California also specifically precludes liability for nondisclosure of “the occurrence of an occupant’s death upon the real property or the manner of death where the death has occurred more than three years prior . . . or that an occupant of that property was afflicted with, or died from,” a virus causing AIDS.\textsuperscript{178}

The majority of the states that have “shield laws”\textsuperscript{179} for protecting psychologically impacted properties do not have general seller disclosure statutes. Thus, the majority of the “shield laws” characterize whether an occupant of the property has AIDS or HIV, or whether the property was the site of a homicide, suicide, or other felony, as “not a material fact or material defect regarding the condition of real estate that must be disclosed in a real estate transaction.”\textsuperscript{180} These statutes typically provide that no cause of action arises against the seller for nondisclosure of these conditions. However, many of the statutes go on to caution that the seller must respond truthfully to a specific inquiry from the buyer concerning the existence of such a condition.\textsuperscript{181}

\textsuperscript{177} VA. CODE ANN. § 55-524A.

\textsuperscript{178} CAL. CIV. CODE § 1710.2(a).

\textsuperscript{179} The term “shield laws” is used in this Note to describe laws that “shield home owners and real estate agents from liability for failure to disclose that the subject property was the site of a murder, suicide, or other felony or that a member of the seller’s household suffers from HIV virus (AIDS).” McEvoy, supra note 173, at 579.

\textsuperscript{180} LA. REV. STAT. ANN. § 37:1468. See also CONN. GEN. STAT. ANN. § 20-329dd (“The existence of any fact or circumstance which may have a psychological impact on the purchaser or lessee is not a material fact that must be disclosed in a real estate transaction.”); DEL. CODE ANN. tit. 24, § 2929(d) (“The fact or suspicion that a property might be or is psychologically impacted is not a material fact that must be disclosed in a real property transaction.”). See also Paula C. Murray, What Constitutes a Defect in Real Property?, 22 REAL EST. L.J. 61, 63 (1993) (“The disclosure of this information may have the practical effect of making the homes virtually unsalable and its inhabitants modern-day lepers.”).

\textsuperscript{181} E.g., DEL. CODE ANN. tit. 24, § 2929(e) (“No cause of action shall arise against an owner . . . for failure to . . . make a disclosure about or release information about the fact or suspicion that such property is psychologically impacted.”); GA. CODE ANN. § 44-1-16:

No cause of action shall arise against an owner of real property or the agent of such owner for the failure to disclose in any real estate transaction the fact or suspicion that such property:

(1) Is or was occupied by a person who was infected with a virus or any other disease which has been determined by medical evidence as being highly unlikely to be transmitted through the occupancy of a dwelling place presently or previously occupied by such an infected person; or
The fact that Ohio does not have a separate statutory provision for psychologically impacted property, and the fact that it failed to address the issue within the seller disclosure statute cannot be mere oversight. The Reed v. King\textsuperscript{182} case, which is often cited as being the genesis of the shield laws,\textsuperscript{183} was decided almost a decade before the Ohio legislature developed the seller disclosure statute. Because Ohio's disclosure form addresses only physical defects, the inference is that psychological defects need not be disclosed. However, the issue of psychological defects and the question of disclosure was examined by the Ohio court in Van Camp v. Bradford.\textsuperscript{184}

The Van Camp court was concerned that allowing a cause of action for nondisclosure of criminal activity in the neighborhood, under the latent defect exception to the doctrine of caveat emptor, would open the door to a flood of litigation on an elusive "stigma" standard.\textsuperscript{185} The court recognized that nearly half of the jurisdictions across the nation have "shield laws" which prevent violent events on the property from being considered as material facts, thus precluding the use of the latent defect exception to the doctrine of caveat emptor for forcing disclosure.\textsuperscript{186} However, the court found support for a cause of action for stigmatized property by drawing inferences from an 1984 Ohio Court of Appeals decision involving the disclosure of a suicide in a house for sale.\textsuperscript{187}

(2) Was the site of a homicide or other felony or a suicide;

provided, however, an owner or the agent of such owner shall answer truthfully to the best of such owner's or agent's knowledge, any question concerning the provisions of paragraph (1) or (2) of this Code section.

182. 193 Cal. Rptr. 130 (Ct. App. 1983); see supra text accompanying notes 62-64.
183. See McEvoy, supra note 173, at 579 (noting that the passage of shield laws may have been prompted by Reed v. King); Murray, supra note 180, at 61 ("The psychological impact disclosure trend can be traced back to a 1983 California Court of Appeals case, Reed v. King.").
185. See id. at 737.
186. Id. at 738-39.
187. Id. at 737 (citing Brannon v. Mueller Realty & Notaries, No. C-830876, 1984 WL 7018 (Hamilton County Ct. App. Oct. 24, 1984) (finding that the buyers did not have a cause of action for fraudulent inducement against the seller for failure to disclose a suicide which occurred in the house)). The Van Camp court stated that "[b]y engaging in this analysis, an Ohio Court of Appeals has tacitly asserted that a remedy for stigmatized property is available in certain circumstances." Id. The Van Camp court then stated that "[t]his de facto recognition of a cause of action for psychologically tainted property is the natural culmination of the trend regarding property disclosure in Ohio, and will be upheld
The court then sought to "clearly define the cause of action . . . to protect the stability of contracts and prevent limitless recovery for insubstantial harms and irrational fears." The definition is familiar:

[M]isrepresentation, concealment or nondisclosure of a material fact by a seller of residential property in response to an affirmative inquiry is evidence of a breach of duty on the part of the seller. After inquiry, if the buyer justifiably relied on the misrepresentation or nondisclosure, or was induced or misled into effecting the sale to his/her detriment and damage, the buyer has met the burden of proof required to withstand a summary judgment motion.189

The cause of action for stigmatized property provided by the Van Camp court is a cause of action sounding in fraud.190 The importance of the Van Camp decision is that in the application of fraud to a stigmatized property, the stigma can rise to the level of a 'material fact' to support the action. This is in accord with the Van Camp court finding that the stigma was a latent defect precluding the use of the caveat emptor defense in an action for nondisclosure. This finding of materiality in a psychological defect is contrary to the legislative decisions in the majority of the "shield law" jurisdictions which declare that violent events are not material facts warranting disclosure. Since Ohio's property disclosure statute supplants the prior common law on disclosure, the question is whether a cause of action for stigmatized property is still available. Although the statute does not require disclosure of psychological defects, a cause of action does survive as an action in fraud, based

by this court." Id.

188. Id.

An action for fraudulent misrepresentation requires proof of (1) a representation, (2) which is material to the transaction at hand, (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (4) with the intent of misleading another into relying upon it, (5) justifiable reliance upon the representation or concealment, and (6) a resulting injury proximately caused by the reliance.

Di Pippo v. Meyer, 263 N.E.2d 907, 909 (Ohio Ct. App. 1970) (stating that constructive fraud may be found where there is no intent to deceive, commit fraud, or create injury).
CASE WESTERN RESERVE LAW REVIEW

on the Van Camp decision and its recognition that a psychological stigma can be a material fact.

3. Looking Forward

A prospective look toward the implementation and the ramifications of Ohio’s property disclosure statute may indicate issues inadequately addressed which may subsequently generate new areas of litigation. Implementation problems lurk in the statute’s procedural requirements, and the ramifications of the statute unfold in an examination of parties’ expectations of the statute.

a. Implementation and Procedural Concerns

The procedural requirements of Ohio’s property disclosure statute address, inter alia, how the disclosure form is to be completed by the seller.191 The statute allows for approximations on and amendments to the disclosure form.192 Additionally, seller liability is not triggered by “error . . . inaccuracy . . . or omission [that] was not within the [seller’s] actual knowledge.”193 These qualifications provide some flexibility for the seller in complying with the disclosure statute. However, these qualifications may also create argument as to the “completeness” of the disclosure form.

The purpose of disclosure is to provide the buyer with information concerning the property. However, if the “completeness” of the form is called into question, it can be argued that the value of this information is limited. Assume the seller admits on the property disclosure form that he or she knows of “current water leakage, water accumulation, excess dampness, or other defects with the basement,” and that he or she describes the condition by writing “water leaks into the basement when it rains.” Assume the buyer, aware of this admission and after transfer of the property, stores personal items in the basement on top of pallets to keep them dry in case the basement leaks. When it rains and the “water leakage” turns out to be several feet of water in the basement, the buyer is likely to call foul regardless of the prior disclosure.194 Although the seller is required to acknowledge and then describe

191. See supra text accompanying notes 89-96.
192. OHIO REV. CODE ANN. §§ 5302.30(E)(2), (G).
193. Id. § 5302.30(F)(1); see supra text accompanying note 103.
the defect, there may still be discrepancies, or understatements as to the degree and severity of the defect. This is problematic because the severity of the defect often indicates the length of time that the premises has deteriorated. Further, the length of time of deterioration is usually directly proportional (or, perhaps, exponentially related) to the cost of repairing the damage. It is the accuracy of the original description of the defect, which is logically related to repair costs, that the buyer will rely on to properly assess the value of the property.

The disclosure statute does not focus on the accuracy of the disclosure per se. Indeed, the statute expressly provides for approximations. Granted, the statute does require the seller to disclose items within the seller’s actual knowledge under a “good faith” obligation. However, the seller is not liable for damages arising from inaccuracies on the property disclosure form that are not within the seller’s actual knowledge. By their nature, there are many types of defects, the severity or extent of which may be well beyond the actual knowledge of the seller. Examples of such defects are structural damage caused by a leaky roof or termite infestation. Allowing buyers to litigate over semantics will warrant subjective evaluation of the “completeness” of the description of defects. This will mire the courts in language interpretation, thus actually fostering the type of litigation that the legislature had hoped to avoid by implementation of the disclosure statute.

As a result of this functional shortcoming, it may be necessary to adopt an interpretation of the statute such that disclosure of defects on the form shifts the responsibility for the defect to the buyer. The buyer is put “on notice” of the defect, and it is then the buyer’s obligation to conduct further inquiry and inspection to determine the extent and consequences of the defect. Once the buyer is aware of the defect by virtue of the disclosure form, it should be the buyer’s responsibility to flush out the extent of the defect by direct inquiry posed to the seller. For example, the buyer should ask how often the basement leaks: during the spring thaw or every time it rains? How much does it leak: dampness on the walls and floor or two feet of standing water? How long has it leaked? What remedial measures has the seller undertaken to eliminate or minimize the condition? This would, in effect, be characterizing the defect as a “patent defect.” Under the prior common law, a defect which was “observable” was considered “patent,” and the seller had no obligation to disclose it. Rather, it was the
buyer's obligation to investigate the condition further. With this interpretation of the statute concerning "completeness" of the form, the value of the disclosure form to the buyer is limited to informing the buyer of conditions that may need further investigation.

b. Ramifications and the Expectations of Buyers and Sellers

Forecasting the ramifications of Ohio's property disclosure statute requires examining what buyers and sellers expect from the new law. If the new law fulfills these expectations, the statute is likely to further the underlying policy objectives which instigated its adoption in the first place. If the new law does not fulfill these expectations, the statute may have fallen victim to the political compromising and negotiation that is inherent in the legislative process.

From the seller's point of view, the property disclosure statute should promote increased certainty of transactions, stability of contracts, and limitation of seller liability. Under the prior common law, sellers were vulnerable to the powerful remedy of rescission for mere mistake of fact. Sellers could close the sale on their old house, move into their new house, and then, several months later, find that the sale had been rescinded. The proceeds from the sale, likely to have been relied upon to purchase the new house, would not be forthcoming. This was, arguably, the harshest sanction enforceable against sellers. The closing date on the sale did not represent finality of the transfer, the contract signed was not secure, and substantial liability to the buyers still loomed in the background. Curtailing this uncertainty and severe liability may well have been, from the seller's point of view (and that of sellers' brokers) the most important aspect and benefit of the new disclosure statute.

On this issue of uncertainty and liability after the transaction, the statute performs well. The statute expressly provides that as of the date of closing, if not sooner, the powerful remedy of rescission is foreclosed to the buyer. The seller has the power to preclude any rescission rights of the buyer by providing the buyer

195. See supra text following note 57.
196. See Di Pippo v. Meyer, 263 N.E.2d 907, 909 (Ohio Ct. App. 1970) (stating the Ohio common law rule that a buyer who has been induced by a mere mistake of fact can rescind a contract due to constructive fraud); see supra text accompanying note 57.
197. OHIO REV. CODE ANN. § 5302.30(K)(3)(b); see supra text accompanying notes 111-14.
with the property disclosure form prior to the buyer making an offer on the property. 198 Therefore, if the seller distributes disclosure forms to all prospective buyers, perhaps at the initial inspection of the property, the seller can rely on any subsequent offer that leads to a purchase agreement as being final.

Even where the seller enters into the purchase agreement before providing the buyer with the disclosure form, the seller retains some ability to manipulate the termination of the buyer’s rescission rights. The buyer may rescind the purchase agreement any time prior to receiving the property disclosure form, 199 but at that point, only within the earlier of three days after receipt of the form or thirty days after the purchase agreement (assuming the transaction has not yet closed). 200 Therefore, the seller has the power to limit rescission because rescission can be restricted by delivery of the property disclosure form. Were the seller to provide the buyer with the property disclosure form on the 29th day after the purchase agreement, or on the day before closing, the buyer has only one day to rescind based on those disclosures. The cautious buyer may become suspicious of the delay in receiving the disclosure form, and could rescind prior to receipt of the form, but the statute does not grant the buyer a right to extend the time period to consider the disclosure form before the right to rescind terminates. The statute’s express provisions limiting the buyer’s rescission rights and providing finality as of the closing date adequately addresses sellers’ major dissatisfaction with contract instability and lingering liability under the prior common law on disclosure.

The questions of certainty, contract stability, and lingering liability may not have been the only concerns of sellers under the prior common law. One of the reasons that the legislature was asked to develop a statute on disclosure requirements was the changing and elusive nature of defects that the courts were requiring to be disclosed. 201 Notwithstanding questions of habitation by ghosts 202 and the stigma of being a murder scene, 203 the courts

198. OHIO REV. CODE ANN. § 5302.30(K)(3)(d).
199. Id. § 5302.30(K)(4).
200. Id. §§ 5302.30(K)(3)(a)-(b); see supra text accompanying notes 111-14.
201. See supra text accompanying notes 59-69.
202. See Stambovsky v. Ackley, 572 N.Y.S.2d 672, 677 (App. Div. 1991) (holding that a seller who had undertaken to inform the public about her belief that the house was haunted owed the same duty to the buyer).
203. See Reed v. King, 193 Cal. Rptr. 130, 130 (Cl. App. 1983) (holding that a buyer could maintain an action for rescission and damages against the seller for failing to dis-
were increasing the protection of buyers for what is typically regarded as one of the largest investments a buyer will ever make. This protection was being afforded by the courts through the creation of exceptions to the doctrine of caveat emptor and the molding of defects into those exceptions. The result was an increasing and uncertain disclosure obligation on the seller. Therefore, another expectation of sellers may be that the new property disclosure law provide reasonable straightforward guidelines for required disclosures in order to preclude actions for nondisclosure.

Although the property disclosure law has produced a disclosure form that is fairly comprehensive, the language of the statute leaves the door open for further disclosure obligations, beyond those itemized on the form. The disclosure form does serve as a guideline to assist the seller in a systematic evaluation of the physical condition of the property. By completing the eleven items on the form, the seller is forced to focus on and consider each component of the property. This systematic evaluation assists the seller by essentially requiring the seller to answer specific questions instead of very general questions. For example, the seller must consider the question of whether the roof currently leaks rather than whether the property has any latent defects. The specificity of the questions assists the seller in remembering problems and repairs, and helps prevent an innocent mistake of fact. Therefore, the property disclosure form does provide adequate guidelines by itemizing which defects must be disclosed and assisting the seller in remembering those defects.

However, sellers may also expect that a good faith effort to complete the property disclosure form in compliance with the statute will release them from all liability for defects in the property. The statute does not provide for such immunity. The statute ex-

---

204. See Eric T. Freyfogle, Real Estate Sales and the New Implied Warranty of Lawful Use, 71 CORNELL L. REV. 1, 32 (1985) ("Many courts, it is clear, are dissatisfied today with the application of the caveat emptor doctrine to real estate sales. They have expressed their dissatisfaction by seizing upon a variety of theories that soften the doctrine's impact on unsuspecting and poorly advised buyers."); Jones, supra note 3, at 218-20 ("To the general rule that a seller has no duty to disclose material facts to a purchaser, the . . . courts [have] continued to develop various mitigating qualifications . . . . Perhaps frustrated by attempts to tame caveat emptor, some courts and commentators began to devise methods to destroy it.").

205. See supra text accompanying notes 122-24.

206. See supra text accompanying note 104.

207. See supra text accompanying note 122 (describing the 11 items on the form).
pessly provides that disclosing required items on the form does not limit any obligation to disclose further items. The question then is what disclosure obligation does the seller have beyond that of section 5302.30 of the Ohio Revised Code. Transfers of real property of the type now governed by the property disclosure statute were previously governed by the common law. The common law disclosure obligation of sellers revolved around latent defects. The specificity of the property disclosure form is designed to bring out those defects (patent or latent) of which the seller has actual knowledge. Therefore, the common law disclosure obligation is embodied within the new statutory disclosure obligation and there is no further common law disclosure obligation beyond the statute.

Actions for fraud, however, were outside the common law doctrine of caveat emptor and the exceptions thereto. Disclosure obligations to preclude fraud, then, survive the new statute. This may be a confusing disclosure obligation; a cause of action for fraud may not need proof of a false statement, nor an intent to mislead. However, fraud does need a material fact at issue. The completion of the property disclosure form, by systematic evaluation of each of the property's components, is likely to flush out these material facts. Therefore, although the disclosure obligations to preclude allegations of fraud survive independent of the disclosure obligations itemized on the property disclosure form, the material facts which could give rise to an action for fraud are likely to be disclosed on the property disclosure form. However, the fact remains that the seller's expectation that the property disclosure statute embody the complete disclosure obligation is not completely satisfied. Technically, the continuing independent obligation exists to disclose any item that would give rise to an action for fraud.

On the other side of the transaction is the buyer. The buyer expects the statute to compel disclosure of specific information

208. OHIO REV. CODE ANN. § 5302.30(J); see supra text accompanying notes 103-04.
209. See Di Pippo v. Meyer, 263 N.E.2d 907, 909 (Ohio Ct. App. 1970) (finding constructive fraud by sellers who did not know about the defect); see supra text accompanying notes 189-90 (stating that the cause of action for stigmatized property is a cause of action sounding in fraud which can be maintained by showing a justifiable reliance on a misrepresentation or nondisclosure).
210. See supra text accompanying notes 189-90 (setting forth the elements for a cause of action in fraud).
211. But see discussion, supra text accompanying notes 182-90, for cases in which non-physical stigma defects have given rise to actions for fraud.
necessary to evaluate a particular property. Such information provided on a uniform basis facilitates comparison shopping. Once again, the specificity of the disclosure form provides in large measure just such assistance and direction. However, the buyer must realize that the required description of defects and repair are open to interpretation. The buyer should treat disclosures of defects as “red flags” which warrant further inquiry and investigation to determine the extent and severity of the defect. Information as to these aspects of the defect are really what the buyer needs to accurately assess the impact of the defect on the value of the property.

Besides investigating items disclosed on the property disclosure form, the buyer also needs to consider items not disclosed. Defects not within the seller’s actual knowledge and repairs undertaken over five years ago will not be disclosed on the form. The property disclosure form requires disclosure of “material problems” presently occurring and remedial measures taken in the preceding five years. Whether the advantage to the seller (of not having to disclose earlier repair work) outweighs the disadvantage to the buyer (of not knowing all problems and remedial measures taken) depends on the type of problem and remedy involved. If, for example, the problem was a leaky roof and the seller had the roof shingles replaced twenty years ago, these items would not have to be disclosed. However, the life of a shingle roof is about twenty years and, therefore, it is likely that the roof would now need replacement. Therefore, it is the buyer’s responsibility to inquire about the age of the roof and to determine the likelihood that it needs replacement. This obligation was also present in the prior common law, embodied in the buyer’s duty to investigate and discover patent defects. It is important that the buyer understand that routine maintenance of items which have a relatively long useful life is not required to be disclosed on the property disclosure form. Therefore, substantial repair costs may be incurred after the transfer notwithstanding a properly completed disclosure form. It is not unlikely that disclosure of certain information on the disclosure form will inadvertently suggest that no other conditions exist of which the buyer ought be aware when considering the value of the

\[\text{212. See supra text following note 194 (stating that under the disclosure form, descriptions of the severity of property defects will be only approximations).}\]

\[\text{213. Ohio Residential Property Disclosure Form, supra note 122.}\]

\[\text{214. MICHAEL W. LITCHFIELD, RENOVATION: A COMPLETE GUIDE 98 (1982) (listing the estimated life of a number of components of a house).}\]
property.

The possibility that other important conditions exist beyond those disclosed is also reflected by the requirement that the seller disclose only those conditions of which the seller has "actual knowledge." The buyer should be aware that when a seller has no actual knowledge of a defect the seller is not asserting that no defect in fact exists. \(^{215}\) It is not unlikely that the property has a problem with termites, a leaky roof, or an electrical code violation of which the seller is not aware. Again, it is important that the buyer not be lulled into a false sense of security that these conditions do not exist when they are not reported on the property disclosure form.

This point is illustrated by a review of Brewer v. Brothers.\(^ {216}\) In Brewer, the sellers had done extensive remodeling of their house, including rewiring the electrical system, prior to placing the house on the market. The buyer specifically inquired about the electrical system to which the sellers responded "[y]ou have nothing to worry about."\(^ {217}\) The buyer "specifically relied upon [the seller's] representations regarding the electrical system in choosing not to have an electrical inspection done."\(^ {218}\) The seller disclosure statute does not protect sellers from actions for fraud, so if there was evidence of fraudulent misrepresentation, the buyer could recover damages.\(^ {219}\) However, if the seller made the statement without knowledge of its falsity, then the seller can be said to have no actual knowledge of "any current problems or defects" with the electrical system.\(^ {220}\) The seller would make no notation on the property disclosure form to indicate electrical code violations and the seller would have no liability for damages arising from errors,

\(^{215}\) See Wilson v. Century 21 Great W. Realty, 18 Cal. Rptr. 2d 779, 783 (Ct. App. 1993) (finding no liability for nondisclosure of structural defect of which seller had no knowledge, "[i]ndeed, one who claims to be ‘aware’ of no defects necessarily leaves open the chance that unknown defects do exist"); see also Debra Peterson Conrad, Truth or Consequences? Residential Seller Disclosure Law, Wisc. LAW., Aug. 1992, at 9-10 (discussing Wisconsin's disclosure statute) ("An owner completing the report is only telling what he or she knows or does not know about the property. Thus, the report is only as good as the owner's understanding of the form, actual awareness of property defects and honesty in revealing the same.").


\(^{217}\) Id. at 493.

\(^{218}\) Id. The court of appeals remanded the case to determine whether the evidence supported an action for fraudulent misrepresentation. Id. at 495.

\(^{219}\) See OHIO REV. CODE ANN. §§ 5302.30(I), (L) (stating that the statute is not intended to limit remedies for causes of action outside the statute's provisions).

\(^{220}\) Ohio Residential Property Disclosure Form, supra note 122.
inaccuracies, or omissions on the form. If the buyer infers from the property disclosure form that no problems in fact exist with the electrical system, the buyer may, as Brewer did, decline to have a professional inspection of the system to his later detriment. Therefore, the value of the property disclosure form to the buyer lies only in the positive admissions of the seller of problems and remedial measures taken. Negative admissions are not the equivalent of a statement that no problems in fact exist.

IV. CONCLUSION

Ohio's residential seller disclosure statute explicitly addresses the major areas of dissatisfaction with the prior common law: the question of what defects had to be disclosed and the issue of lingering liability for the seller after the property transfer transaction had closed. The statute eliminates the patent-latent defect distinction and the risk-shifting effect of a disclaimer clause. Essentially, all sellers must complete a comprehensive disclosure form on the physical condition of the property, and such disclosure forecloses the potential of rescission after the closing on the property.

However, the statute does not address nonphysical defects, leaving the door open for substantial liability to sellers for nondisclosure of such intangibles as local crime through an action in fraud. For buyers, inappropriate reliance on the actual disclosures may result in additional financial outlay for which they were unprepared. Although the new statute defines relatively well the seller's disclosure responsibilities, the buyer, as under the prior common law, protects her own best interests by asking additional questions.

DAIVIA S. KASPER

221. See Ohio Rev. Code Ann. § 5302.30(F)(1) (stating that as long as the errors, inaccuracies, and omissions are not within the actual knowledge of the seller, the seller has no liability for damages arising from such).