

Summer 2005

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Recommended Citation

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THE APPLICABILITY OF CONSTRUCTIVE EVICTION, IMPLIED WARRANTY OF HABITABILITY, COMMON- LAW FRAUD, AND THE CONSUMER FRAUD ACT TO OMISSIONS OF MATERIAL FACTS IN A COMMERCIAL LEASE

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Chicago, like most northern cities, has two seasons: winter and road construction. Those orange barrels in the middle of the streets mean big contracts, big taxes, and big traffic jams. If the construction surrounds a retail property, however, they also mean big losses. Where a small retail tenant negotiates a short-term lease and a summer-long road construction project adjacent to the property is planned to begin shortly after commencement of the lease, is the landlord required to disclose the project's existence?

Buyers and sellers of commercial property in Illinois lack guidance on what must be disclosed in their transaction, although their residential counterparts enjoy specific statutory direction under the Residential Real Property Disclosure Act.¹ Moreover, the courts are in conflict on the availability of common-law remedies to a commercial property buyer whose business suffers where the seller fails to disclose material facts in the negotiations.²

In 1961, the Illinois General Assembly passed the Consumer Fraud and Deceptive Business Practices Act,³ ("Consumer Fraud Act" or "the Act"), in an attempt to eradicate fraud in the marketplace.⁴ The Act is broadly

* J.D./LL.M. Candidate, May 2006. I would like to thank my wife, Donna, for her love, support and understanding.

1. In 1993, the Residential Real Property Disclosure Act was passed, and later amended, to require the seller to disclose at least twenty-two different pieces of information about the property in question. 765 ILL. COMP. STAT. 77/1-77/99 (2004). As its name implies, the Act excludes commercial property. See 765 ILL. COMP. STAT. 77/5 (defining residential real property as "real property improved with not less than one nor more than 4 residential dwelling units").

2. See discussion *infra* Part I (highlighting the conflicts and problems inherent in obtaining a remedy through actions premised on constructive eviction, implied warranty of habitability, and common law fraud).

3. 815 ILL. COMP. STAT. 505/1-505/12 (2004).

4. *Robinson v. Toyota Motor Corp.*, 775 N.E.2d 951, 960 (Ill. 2002); *Salkeld v. V.R. Bus. Brokers*, 548 N.E.2d 1151, 1160 (Ill. App. Ct. 1989).

interpreted to fill legislative gaps between more specific statutory mandates.⁵ The Consumer Fraud Act may be available as a gap-filler against certain commercial property sellers that fail to disclose a material fact.⁶ The commercial real estate industry, however, deserves more than the ambiguous gap-filling offered by the Act.

Part I of this comment will discuss the broad, underlying conflict between *caveat emptor* and good faith disclosure that has developed in commercial real estate transactions through the common law doctrines of constructive eviction, implied warranty of habitability, and common law fraud. This conflict is the backdrop to the enactment of the Consumer Fraud Act, a discussion of which will bring Part I to a close. Part II will analyze whether the Act is available to the hypothetical retail tenant or to other commercial property buyers when the seller fails to disclose a material fact. Finally, Part III will show that further legislation is needed, and will offer suggestions for legislation which will allow commercial buyers and sellers to more easily predict the legal ramifications of their actions.

I. AMIDST A BACKGROUND OF COMMON-LAW CONFLICT BETWEEN GOOD FAITH AND CAVEAT EMPTOR, THE GENERAL ASSEMBLY PASSED THE CONSUMER FRAUD ACT.

A. *Historical Conflict: The Broader Argument Between Seller and Buyer.*

Liability for failure to disclose a material fact is really a dispute between *caveat emptor*⁷ and good faith and fair dealing.⁸ The argument

5. 815 ILL. COMP. STAT. 505/11a. This command has been reiterated and followed many times over by the courts. *E.g.*, *Connick v. Suzuki Motor Co., Ltd.*, 675 N.E.2d 584, 594 (Ill. 1996); *Malooley v. Alice*, 621 N.E.2d 265, 268 (Ill. App. Ct. 1993); *Eshaghi v. Hanley-Dawson Cadillac*, 574 N.E.2d 760, 764 (Ill. App. Ct. 1991).

6. See discussion *infra* Part II (analyzing whether the Act would be available to the retail merchant induced into a commercial lease by the omission of a material fact by the lessor).

7. The entire Latin phrase is: "*Caveat emptor, qui ignorare non debuit quod ius alienum emit*," which translates to "[I]et the buyer beware; for he ought not act in ignorance when he buys what another has right to." BLACK'S LAW DICTIONARY app. B, 1708 (8th ed. 2004).

8. John R. Scheid, *Mandatory Disclosure Law: A Statute for Illinois*, 27 J. MARSHALL L. REV. 155, 162-65 (1993); Serena Kafker, *Sell and Tell: The Fall and Revival of the Role of Non-Disclosure in Sales of Used Property*, 12 U. DAYTON L. REV. 57, 57-61 (1986); Frona M. Powell, *The Seller's Duty to Disclose in Sales of Commercial Property*, 28 AM. BUS. L. J. 245, 245-48 (1990) [hereinafter *The Seller's Duty to Disclose*]; Charles L. Armstrong, *Who Pays the Price for Defective Home Construction? A Note on Buecher v. Centex Homes*, 53 BAYLOR L. REV. 687, 694-96 (2001); Frona M. Powell, *Mistake of Fact in the Sale of Real Property*, 40 DRAKE L. REV. 91, 93-94 (1990); William D. Grand, *Implied and Statutory Warranty in the Sale of Real Estate: The Demise of Caveat Emptor*, 15 REAL EST. L. J. 44, 44-46 (1986); Alan M. Weinberger, *Let the Buyer be Well Informed? - Doubting the Demise of Caveat Emptor*, 55 MD. L. REV. 387, 388-90 (1996); Kathleen McNamara Tomcho, *Commercial Real Estate Buyer Beware: Sellers May Have the Right to Remain Silent*, 70 S. CAL. L. REV., 1571, 1571-90 (1997); Sheldon Gardner & Robert Kuehl, *Acquiring an Historical Understanding of Duties to Disclose, Fraud and Warranties*, 104 COM. L.J. 168, 168-95 (1999).

dates back to the dawn of civilization. Ancient Sumerian,⁹ Israelite,¹⁰ and Roman¹¹ societies, all with legal systems that continue to influence our own,¹² demanded full disclosure and fair dealing by their merchants. Throughout the Middle Ages, the Roman Catholic Church controlled the marketplace and enforced the doctrines of good faith and full disclosure.¹³ In fact, the ecclesiastic courts went so far as to forbid any market transaction except during daylight hours, in order to allow buyers the opportunity to fully inspect the goods.¹⁴

These societies often enforced their legal requirements of good faith and fair dealing through harsh and humiliating consequences.¹⁵ For example, in Ancient Sumeria, poor workmanship could result in a sentence of death, while under the rule of the Catholic Church, dishonest merchants

9. The Sumerians advocated strict liability for defects in workmanship, thereby abdicating the need for disclosure. CODE OF HAMMURABI, §§ 229-235 (L.W. King, trans. 1915), available at <http://awc.evansville.edu/anthology/hammurabi.htm> (last visited July 31, 2005) [hereinafter HAMMURABI'S CODE].

10. The Israelite law of disclosure is exemplified in several Old Testament Passages: *Exodus* 23:7, 9; *Leviticus* 19:11,36; *Leviticus* 25:14; *Deuteronomy* 23:19; *Hosea* 12:7; *Amos* 8:5; *Proverbs* 16:11; *Isaiah* 28:6-17; *1 Kings* 6:12. Gardner and Kuehl, *supra* note 8, at 170. See also LEO JUNG, BUSINESS ETHICS IN JEWISH LAW 56 (1987) (stating that Judaism and the Torah stand only for righteousness, so that when two parties enter into a transaction there may be a "satisfactory harvest for both").

11. The Romans espoused their laws in the Twelve Tablets, around 450BC. Allen N. Sultan, *Judicial Autonomy under International Law*, 21 U. DAYTON L. REV. 585, 591-96 (1996). Marcus Tullius Cicero, one of the most influential orators of Rome, specifically advocated full disclosure—apparently finding authority and support in the Twelve Tablets. Gardner & Kuehl, *supra* note 8, at 172 n.9. While such explicit authority does not appear to be set out in what remains of the Tablets, some scholars believe Cicero may have derived and defended his position from the passages in Table VIII, lines 21 ("If a patron defrauds a client he shall be accursed") and 23 ("Whoever is convicted of speaking false witness shall be flung from the Tarpeian Rock"), or Table VI, line 2 ("[F]or those flaws that he has denied expressly, when questioned about them . . . vendor shall undergo a penalty of double damages"). ALLEN CHESTER JOHNSON ET AL., ANCIENT ROMAN STATUTES: TRANSLATION, WITH INTRODUCTION, COMMENTARY, GLOSSARY AND INDEX (Clyde Pharr ed., University of Texas Press 1961), available at http://www.yale.edu/lawweb/avalon/medieval/twelve_tables.htm (last visited July 31, 2005). Also offering support to Cicero's position is Table VIII, line 8a, which begins, "Whoever enchants away crops . . ." and line 8b, which states in part, "nor shall one lure away another's grain . . ." *Id.* These provisions are an appropriate beginning to a rule advocating disclosure.

12. The Israelites, the Sumerians, the Roman Empire, and the Roman Catholic Church are generally recognized as the oldest societies with legal systems. Daniel G. Ashburn, *Appealing to a Higher Authority?: Jewish Law in American Judicial Opinions*, 71 U. DET. MERCY L. REV. 295, 295-98 (1994). Their foundational influence is still reflected in the modern American system. *Id.*; Gardner & Kuehl, *supra* note 8, at 170-74.

13. The Roman Catholic Church, through Thomas Aquinas, based its authority for requiring disclosure on the books of the New Testament: *John* 14:6; *Matthew* 21:13; *Mark* 11:17; *Luke* 19:46; *John* 2:14, 15; *Matthew* 22:39; *Mark* 12:31; *Romans* 13:9; *Galatians* 5:14; and *James* 2:8. The Church heavily regulated the marketplace through the ecclesiastical courts, demanding strict disclosure. Gardner & Kuehl, *supra* note 8, at 172.

14. Gardner & Kuehl, *supra* note 8, at 170 n.9.

15. Walter H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133, 1152-53 (1931).

were subject to public humiliation and were banned from the marketplaces.¹⁶ At some point lost in history, however, the pendulum of disclosure requirements swung to the opposite end, embracing the notion of *caveat emptor*.¹⁷

Caveat emptor, commonly translated as “let the buyer beware,”¹⁸ imposes no duty to disclose material facts on either party to a contract or conveyance.¹⁹ Scholars have supported the doctrine because it recognizes

16. Hammurabi’s Code imposed harsh penalties upon merchants for failing their customers: faulty construction of a home called for death of a builder or a member of his family; a defect in the building of a ship required the shipbuilder to make the purchaser whole; and medical malpractice demanded that the surgeon’s hand be cut off. HAMMURABI’S CODE, §§ 229-232. The Romans, likewise, would often kill a merchant who intentionally defrauded a customer, although they would only require the merchant to make a customer whole for an innocent misrepresentation. Hamilton, *supra* note 15, at 1145-47. Under the Catholic Church, merchants who deceived their customers and violated the strict disclosure requirements were “displayed humiliatingly in the streets with their wares, put in the stocks with their products underfoot and forbidden from selling . . . [t]heir fraud . . . an affront to the community.” *Id.* at 1152-53.

17. Professor Hamilton attributes the phrase *caveat emptor* to Fitzherbert, in his 1534 text, *Boke on Husbandrie*. Hamilton, *supra* note 15, at 1134. Professor Scheid, however, contends that the phrase appeared far earlier as warnings upon the signs of Roman merchants in the marketplace. Scheid, *supra* note 8, at 157. From its humble beginning as advice to the Roman shopper, *caveat emptor* was later “easily translated into the law of real estate in Middle Age England since agriculture was the sole purpose for land.” *Id.* at 158. Scheid further notes all land belonged to the king and was given to his subjects. *Id.* It would surely be only the rarest and most benevolent of monarchs that would not only make a gift of his land but also guarantee that land’s character and value through the laws of his own court.

18. BLACK’S LAW DICTIONARY app. B, 1708

19. *Laidlaw v. Organ*, 15 U.S. (2 Wheat.) 178 (1817), is one of the first American cases accepting *caveat emptor*. *Laidlaw* involved the buyer’s nondisclosure of information that would dramatically increase the value of tobacco. *Id.* at 178-79. Specifically, the buyer learned that President Madison signed the Treaty of Ghent, thus ending the War of 1812, and more importantly for the plaintiff, eliminating British blockades of American exports. *Id.* at 182. Several hours after the contract was signed, the seller learned of the Treaty and refused to deliver the tobacco at the contract price as the ability to export the tobacco had driven the price up considerably. *Id.*

The Court ruled the buyer was under no duty to disclose the information to the seller “where the means of intelligence are equally accessible to both parties” and where each party “take[s] care not to say or do anything tending to impose upon the other.” *Id.* at 195.

Chief Justice Marshall rejected the plaintiff’s reference to Cicero’s argument that a corn merchant who reaches the shores of a starving market before a line of other suppliers cannot exact an inflated value for his corn by failing to apprise the buyers of the existence of additional suppliers. *Id.* at 185.

An oft-cited English case highlighting *caveat emptor*’s effect on the property buyer is *Sutton v. Temple*, (1843) 152 Eng. Rep. 1108 (Exch.). In *Sutton*, the tenant leased a pasture to graze his animals. *Id.* at 1108. Soon after the animals grazed they began to die. Upon examination, particles of old paint, which poisoned the animals, were found mixed with the fertilizer that the lessor spread over the ground. *Id.* The lessee abandoned the property and notified the lessor, who brought a claim for the rent. *Id.* at 1108-09. The court denied the plaintiff’s assertion that there was an implied covenant that the property was fit for the purpose for which it was let, and held the lessee was obligated to pay rent on the remainder of the lease. *Id.* at 1109-15.

the freedom to contract,²⁰ transactional certainty,²¹ the ability of the purchaser to inspect the premises,²² the unwillingness of parties to reduce their own bargaining position,²³ and the incidental nature of buildings to the primary conveyance of land.²⁴ Regardless of the true origins of either doctrine, the fundamentals of pure *caveat emptor* cannot be reconciled with those of pure good faith and fair dealing.

B. Doctrinal Conflict Between Caveat Emptor and Disclosure Requirements Produce Inconsistent Results in the Common Law.

1. Constructive Eviction

In Illinois, the doctrine of constructive eviction, as a violation of the long recognized implied covenant of quiet enjoyment, is one possible avenue of relief for the wronged tenant.²⁵ Under constructive eviction, a tenant is relieved of lease obligations when the property becomes useless for its intended purpose to the tenant through some act or omission by the landlord,²⁶ which causes the tenant to abandon the property.²⁷ Whether the landlord had knowledge of the defect prior to execution of the lease is often the determining factor for a constructive eviction claim.²⁸ Illinois courts have used constructive eviction to protect tenants of a boarding house damaged by flooding caused by road construction;²⁹ a tenant haberdasher from ongoing water leaks;³⁰ a commercial tenant whose business was hurt by

20. Kafker, *supra* note 8, at 58.

21. Gardner & Kuehl, *supra* note 8, at 174.

22. *The Seller's Duty to Disclose*, *supra* note 8, at 254.

23. *Id.* at 250.

24. Scheid, *supra* note 8, at 158-59.

25. The covenant of quiet enjoyment, in Illinois, dates back to at least 1846. *Beebe v. Swartwout*, 8 Ill. 162, 163-71 (Ill. 1846).

26. *Auto. Supply Co. v. Scene-In-Action Corp.*, 172 N.E. 35, 37-38 (Ill. 1930).

27. The tenant need not abandon the property immediately upon discovery of the defect. If the tenant does delay in vacating the property, however, the tenant must thereafter prove the delay was reasonable. *See id.* at 38-39 (affirming verdict against tenant where the tenant remained in possession from February to May but complained of the landlord's failure to provide heat); *JMB Props. Urban Co. v. Paolucci*, 604 N.E.2d 967, 969-70 (Ill. App. Ct. 1993) (holding a five-year delay in abandonment operates as a waiver from the potentially untenable condition created by a neighboring tenant's noise); *Dell'Armi Builders v. Johnston*, 526 N.E.2d 409, 412 (Ill. App. Ct. 1988) (affirming a verdict against a tenant who stayed in possession of the premises for over two years).

28. *Eskin v. Freeman*, 203 N.E.2d 24 (Ill. App. Ct. 1964). In *Eskin*, the complaint did not allege the lessor knew of violations of city codes prior to the lease. *Id.* at 28. The court noted the frequently stated rule: "There is . . . no implied warranty . . . the premises are fit for . . . the purpose of business . . . unless by some artifice, the lessor prevents the lessee . . . from making an examination of latent defects known to the lessor . . . and unknown to the lessee. . . and of which knowledge would not be obtained by an ordinary and reasonable examination . . ." *Id.* at 27 (quoting *Sunasack v. Morie*, 98 Ill. App. 505, 507 (Ill. App. Ct. 1900) (emphasis in original)).

29. *White v. Walker*, 31 Ill. 422, 425-29 (Ill. 1863).

30. *Gibbons v. Hoefield*, 132 N.E. 425, 428-29 (1921) (holding a lessor's failure to repair water leaks and to put the premises in a tenantable condition for the purposes for

a landlord who failed to provide heat and water and who obstructed the entrance of the shop,³¹ and tenants who could not occupy the property due to excessive filth, an infestation of roaches, and a general state of disrepair.³²

On the other hand, the courts have denied a tenant clothier's claim that it was constructively evicted when the landlord significantly reduced available parking spaces.³³ Another court denied a defendant pizza parlor's constructive eviction defense based upon the smell of varnish and the presence of disruptive lines created by its new neighboring tenant, the Old Country Buffet.³⁴ In that same case, however, the court affirmed a reduced award for plaintiff landlord's claim for rent, reasoning that "the jury could have concluded defendant was entitled to an offset because of damages suffered by these inconveniences."³⁵

2. *Implied Warranty of Habitability*

Other tenants have sought relief under the implied warranty of habitability, which was incorporated into residential leases in Illinois in 1971.³⁶ Nevertheless, some Illinois decisions still cling to *caveat emptor* and refuse to imply a warranty of habitability into commercial leases to cover defects in the premises.³⁷ Unfortunately, many of these cases, which involved insubstantial damages, have been relied on without further elaboration or analysis. For example, in *J.B. Stein & Co. v. Sandberg*, the Illinois Appellate Court for the Second District, after pausing to note the lack of any substantial discussion of the issue in prior cases, nevertheless went on to hold that a women's clothing store, that had lost its entire inventory due to electrical problems allegedly caused by the landlord's acts or omissions, could not assert a defense of constructive eviction to escape its lease.³⁸

which they have been leased (a commercial haberdashery), constituted constructive eviction even though the lease contained an exculpatory "as-is" clause).

31. *Giddings v. Williams*, 168 N.E. 514, 516 (Ill. 1929).

32. *Home Rentals Corp. v. Curtis*, 602 N.E.2d 859, 862-63 (Ill. App. Ct. 1992).

33. *See RNR Realty, Inc. v. Burlington Coat Factory Warehouse, Inc.*, 522 N.E.2d 679, 685-86 (Ill. App. Ct. 1988) (finding insufficient evidence to show a causal relationship between a lack of parking spaces provided by the lessor and reduced revenue to the tenant).

34. *Metro. Life Ins. Co. v. Nauss*, 590 N.E.2d 524 (Ill. App. Ct. 1992).

35. *Id.* at 528-29.

36. *Jack Spring, Inc. v. Little*, 280 N.E.2d 208, 217 (Ill. 1972).

37. *See Elizondo v. Perez*, 356 N.E.2d 112, 114 (Ill. App. Ct. 1976) (refusing to extend implied warranty to cover a crack in a window); *Clark Oil & Refining Corp. v. Banks*, 339 N.E.2d 283, 287-88 (Ill. App. Ct. 1975) (holding that there is no implied warranty of habitability in a lease of a gas station because there were no facts alleged to support the warranty); *Ing v. Levy*, 326 N.E.2d 51, 54 (Ill. App. Ct. 1975) (holding, without discussion, that there was no implied warranty of habitability in commercial leases and, therefore, the commercial tenant, a real estate broker, was not entitled to withhold rent when water leaked into the office bathroom).

38. *J.B. Stein & Co. v. Sandberg*, 419 N.E.2d 652, 657-58 (Ill. App. 1982). To date, there are no published opinions offering an extended discussion of how, if at all, the implied warranty of habitability is read into commercial leases in Illinois.

Conversely, other Illinois courts have imposed liability on commercial landlords for latent defects in the property even if the parties appear to have contractually waived such liability, often by requiring that a repairs-and-maintenance clause must explicitly state the precise defect at issue before the landlord can escape liability.³⁹ Such straining of other legal doctrines to fill in the gaps left by the court's refusal to imply warranties into commercial leases is not rare. For example, after refusing to imply a warranty of habitability or suitability for a specific purpose, one court held the landlord liable for property damage under a theory of simple negligence in failing to properly disconnect water pipes that damaged the defendant's drain, even though the court admitted that the landlord had no duty to disconnect them.⁴⁰

3. Common Law Fraud

Still other tenants seek relief through an action in common law fraud.⁴¹ Fraud has been advanced under different theories of recovery, depending on the facts of the case.⁴² Common law fraud in the inducement of a contract, premised upon the omission of a material fact, requires the existence of a duty to speak.⁴³ That duty can be pled as a matter of law or through the particular facts and circumstances of the case.⁴⁴

39. See *Sandelman v. Buckeye Realty, Inc.*, 576 N.E.2d 1038, 1040-41 (Ill. App. Ct. 1991) (holding a landlord liable for the replacement of a roof even though the lease required the tenant to keep the buildings "in good repair" and the roof had not been in need of repair for the first forty years of a seventy-year lease); *Kaufmann v. Shoe Corp. of Am.*, 164 N.E.2d 617, 621-22 (Ill. App. Ct. 1960) (holding a commercial landlord liable for removal of a steam-heat system and installation of new system when the local utility company discontinued service to the surrounding area, even though the lease stated that the tenant was responsible for keeping all buildings in a "rentable condition").

40. *A.O. Smith Corp. v. Kaufman Grain Co.*, 596 N.E.2d 1156, 1161-62 (Ill. App. Ct. 1992).

41. "[T]he elements of a cause of action for fraudulent misrepresentation (sometimes referred to as "fraud and deceit" or "deceit") are: (1) false statement of material fact (2) known or believed to be false by the party making it; (3) intent to induce the other party to act; (4) action by the other party in reliance on the truth of the statement; and (5) damage to the other party resulting from such reliance." *Soules v. Gen. Motors Corp.* 402 N.E.2d 599, 601 (Ill. 1980).

42. Illinois recognizes active misrepresentation (also called deceit or fraud, where the party commits an affirmative act or statement with knowledge of its falsity), active concealment (where a party does more than simply remain silent, such as painting over flood marks on a wall), half-truth misrepresentation (where a party is not totally silent, there is an obligation to speak the whole truth), and breach of fiduciary duty for failure to disclose a material fact (where the law requires full disclosure of facts known by one who occupies a position of trust to the buyer). MICHAEL J. POLELLE & BRUCE L. OTTLEY, *ILLINOIS TORT LAW* §§ 9-1 – 9-11 (2004).

43. *Connick*, 675 N.E.2d at 593.

44. See *Kinzer ex rel. City of Chicago v. City of Chicago*, 539 N.E.2d 1216, 1220 (Ill. 1989) (holding that questions of breach of fiduciary duty are "controlled by the substantive laws of agency, contract and equity") (internal citations omitted); *Paskas v. Illini Fed. Sav. & Loan Ass'n*, 440 N.E.2d 194, 198 (Ill. App. Ct. 1982) (recognizing attorney-client and trustee-beneficiary relationships as fiduciary in nature as a matter of law, but rejecting bank-depositor as such a relationship); *Zimmerman v. Northfield Real Estate*, 510 N.E.2d 409, 413-14 (Ill. App. Ct. 1986) (holding that because real-estate brokers occupy a

In *Forest Preserve District of Cook County v. Christopher*, two individuals negotiated a land lease to build and operate a tavern.⁴⁵ The landlord, represented by counsel at all times, encouraged the tenants to invest more money on improvements to the property than originally planned.⁴⁶ Prior to and concurrent with the lease negotiations, however, the landlord was also negotiating with the Forest Preserve District over an eminent domain action to convert the same property to Forest Preserve.⁴⁷ In condemning the landlord's silence, the court stated, "when . . . the other remains silent when it is within his power to prevent expenditure under a delusion . . . to permit one to take advantage of the mistake of another would be revolting to every sentiment of justice."⁴⁸ The court further stated, "there are times . . . when it becomes the duty of a person to speak, in order that the party he is dealing with may be placed on equal footing and when a failure to state a fact is equivalent to a fraudulent concealment . . . [and amounts to an] affirmative falsehood."⁴⁹

Christopher was followed by *City of Chicago v. American National Bank*,⁵⁰ which involved multiple commercial tenants claiming fraud in the inducement of their lease of Chicago's McCarthy Building based on the landlord's failure to inform them of the possibility that the building might lose its landmark status and be condemned.⁵¹ As part of a neighborhood redevelopment project, the city stripped the property of its landmark status and condemned the property by ordinance.⁵² Litigation to block the ordinance was ongoing at the time of the negotiation of the leases and was later settled by the Illinois Supreme Court.⁵³

According to the complaint, the landlord failed to inform the tenants of the ordinance and condemnation litigation and to some plaintiffs affirmatively denied any possibility of losing the landmark status.⁵⁴ The trial court dismissed the complaint finding there was no duty to disclose condemnation proceedings because they were a matter of public record and it was a future fact about which the landlord could not be certain until after the

position of trust, they must deal honestly and in good faith with potential buyers). *But see* *Farmer City State Bank v. Guingrich*, 487 N.E.2d 758, 763 (Ill. App. Ct. 1985) (holding that a party asserting the existence of a fiduciary relationship that does not exist as a matter of law, must plead, by clear and convincing evidence, the circumstantial factors that give rise to such a relationship—factors such as "the degree of kinship, disparity of age, health, mental condition, education and business experience between the parties, and the extent to which the allegedly servient party entrusted the handling of his business and financial affairs to the other and reposed faith and confidence in him").

45. *Forest Pres. Dist. of Cook County v. Christopher*, 52 N.E.2d 313, 314 (Ill. App. Ct. 1943).

46. *Id.* at 314-16.

47. *Id.*

48. *Id.* at 316.

49. *Id.* at 319.

50. *City of Chicago v. Am. Nat'l Bank*, 599 N.E.2d 1126 (Ill. App. Ct. 1992).

51. *Id.* at 1127-28.

52. *Id.*

53. *Landmark Pres. Council v. City of Chicago*, 531 N.E.2d 9 (Ill. 1988).

54. *Am. Nat'l Bank*, 599 N.E.2d at 1128-29.

litigation.⁵⁵ In so doing, the trial court reasoned, “a person in possession of his mental faculties is not justified in relying upon representations before he acts.”⁵⁶

Justice McCormick rebuked the trial court’s ruling, holding that such reasoning, “which is a restatement of the principle of *caveat emptor*, is not the law in Illinois.”⁵⁷ On appeal, the tenants’ claims for apportionment of the condemnation award was allowed because the landlord fraudulently induced the leases.⁵⁸

Though courts allow claims for common law fraud, they have ingrained robust obstacles against the plaintiff in advancing such actions.⁵⁹ For example, fraud pleadings are subject to a stricter, more specific pleading requirement.⁶⁰ The burden of persuasion in a common law fraud claim — clear and convincing evidence — is greater than most civil actions.⁶¹ Further, it may be difficult for a plaintiff to claim reliance on a deceptive statement of the law because everyone is presumed to know the law.⁶² For example, courts differ on whether it is reasonable to rely on another party’s statement of the law.⁶³ This discontinuity in common law fraud, like that

55. *Id.* at 1129.

56. *Id.* at 1132.

57. *Id.*

58. *Id.*

59. Gardner & Kuehl, *supra* note 8, at 173.

60. “A successful common law fraud complaint must allege, with specificity and particularity, facts . . . including what misrepresentations were made, when they were made, who made the misrepresentations and to whom they were made.” *Connick*, 675 N.E.2d at 591.

61. *Hoffmann v. Hoffmann*, 446 N.E.2d 499, 506 (Ill. 1983).

62. *Compare* *Tan v. Boyke*, 508 N.E.2d 390, 393 (Ill. App. Ct. 1987) (affirming a verdict against defendant on a deceit claim based upon the defendant’s failure to disclose that the subject apartment building violated city zoning ordinances), *and Am. Nat’l Bank*, 599 N.E.2d at 1128 (holding that the plaintiff sufficiently pled fraud even though the alleged material fact omitted was a city ordinance stripping the subject property of landmark status and condemning building, which passed only after wide debate in the newspapers and public litigation and appeals to the Illinois Supreme Court), *and Cappicioni v. Brennan of Naperville*, 791 N.E.2d 553, 558 (Ill. App. Ct. 2003) (holding a plaintiff may reasonably rely on a false statement that a home is located in a favored school district, even though the district map is readily available to public inspection), *with Randels v. Best Real Estate, Inc.*, 612 N.E.2d 984, 997 (Ill. App. Ct. 1993) (holding the plaintiff had *not* sufficiently pleaded fraud where the vendor failed to disclose a city ordinance that required the building be renovated for hook-ups to the city sewer system within five years because the ordinance was public knowledge). The plaintiff knew of the existence of both sewer and septic services in the area, and plaintiff, himself a real estate agent, did not exercise ordinary prudence in determining the existence of such a requirement. *Id.*

63. *Compare* *Schmidt v. Landsfield*, 169 N.E.2d 229, 232 (Ill. 1960) (noting that it is well settled “that a party is not justified in relying on representations made when he has ample opportunity to ascertain the truth of the representations before he acts[;]if he does not avail himself of the means of knowledge open to him he cannot . . . say he was deceived by misrepresentations . . .”), *with Eisenberg v. Goldstein*, 195 N.E.2d 184, 186 (Ill. 1964) (stating that “[i]f one party makes a positive statement of material fact . . . which he knows to be false but intends to be relied upon by the other party as true . . . , the party making the statement cannot charge the other with negligence in believing it”). *See*

found in constructive eviction and the implied warranty of habitability, leads to further unpredictability in the commercial property transaction.

C. The Consumer Fraud Act as a Legislative Response to Caveat Emptor.

Against this background of conflict between disclosure and *caveat emptor*, the General Assembly passed the Consumer Fraud Act, "to protect consumers and . . . businessmen against fraud . . . and unfair or deceptive acts or practices in the conduct of any trade or commerce."⁶⁴

The Act's plain language requires a broad and liberal interpretation in order to effectuate its purpose.⁶⁵ Though amendments to the Act specifically enumerate many forms of deceptive practice,⁶⁶ the potency of the Act is found in the broad and unmistakable language of section two, which outlaws "deception fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact . . ."⁶⁷ In clear and unambiguous language, the Act rings the death bell for merchants' reliance on *caveat emptor* in Illinois.⁶⁸

The courts have not only heard the call, they have been the horse that draws the wagon.⁶⁹ The Act requires a lower burden of persuasion — preponderance — as compared to common law fraud.⁷⁰ The elements of a

also Chicago Title and Trust Co. v. First Arlington Nat'l Bank, 454 N.E.2d 723, 728-30 (Ill. App. Ct. 1983) (discussing at length the two differing opinions on the subject: the "older approach" typifying the *caveat emptor* attitude and "[t]he better reasoned cases", [which] reject the notion that plaintiff's negligence in failing to discover intentional fraud will bar his action for deceit" (quoting PROSSER ON TORTS § 108 (4th ed. 1971)); Cappicioni, 791 N.E.2d at 558 (holding the plaintiff did not state a claim of common law fraud because he failed to adequately allege scienter on part of defendant in making erroneous statement concerning the location of a house in relation to school districting, which was public knowledge, but nevertheless holding the plaintiff had stated a claim under the Consumer Fraud Act).

64. 815 ILL. COMP. STAT. 505/1.

65. 815 ILL. COMP. STAT. 505/11a. This command has been reiterated many times by the courts. *E.g.*, *Malooley*, 621 N.E.2d at 268; *Eshaghi v. Hanley-Dawson Cadillac*, 574 N.E.2d at 764.

66. 815 ILL. COMP. STAT. 505/2A-2QQ.

67. 815 ILL. COMP. STAT. 505/2.

68. The Act defines "consumer" as "any person who purchases . . . merchandise not for resale in the ordinary course of his trade or business but for his use . . ." 815 ILL. COMP. STAT. 505/1(e). Implicit in the definition is the notion that corporations, partnerships, and sole proprietorships may be considered "consumers" for the purposes of the Act. *Law Offices of William J. Stogsdill v. Cragi Fed. Bank for Sav.*, 645 N.E.2d 564, 566-67 (Ill. App. Ct. 1995). It appears that the General Assembly's views are in accordance with an economist's definition of "consumer". By the same token, the courts have noted that a private individual who is not in the business of selling the product exchanged in the underlying transaction cannot be liable as a merchant under the Act. *Carrera v. Smith*, 713 N.E.2d 1282, 1284-85 (Ill. App. Ct. 1999) (holding the purely private sale of one's own home is beyond the reach of the Act).

69. The legislature did not pass section 505/10a of the Act, authorizing a private action, until 1971—nearly one year after the Illinois Supreme Court recognized such a private right under the Act. *Rice v. Snarlin*, 266 N.E.2d 183, 188 (Ill. 1970).

70. *See Malooley*, 621 N.E.2d at 268-69 (holding preponderance of the evidence to be the correct standard as opposed to the clear and convincing evidence standard). *Accord*

cause of action under the Act⁷¹ are easier to prove than those of common law fraud,⁷² which so clearly protects the seller and the doctrine of *caveat emptor*.⁷³ The Act does not require the seller to have actual knowledge of the falsity of the fact, so even innocent misrepresentations are actionable.⁷⁴ The Act does not require reasonable reliance.⁷⁵ And, finally, the Act allows the shifting of attorney's fees, awarding of punitive damages, rescission, and potentially other equitable relief.⁷⁶

Under the broad umbrella of the Act, the court has provided shelter for home purchasers,⁷⁷ commercial property purchasers,⁷⁸ residential tenants,⁷⁹ borrowers,⁸⁰ and customers in a multitude of other industries that would have otherwise required extensive legislative and executive investigation at the State's expense. However, the Act is not without its bounds. The common law pleading requirements of particularity still survive.⁸¹ The Act requires a showing of proximate cause, which should be analyzed under the federal standards of transaction and loss causation.⁸² In addition, in a private action, the deceptive act must have reached the plaintiff in order to recover.⁸³ Furthermore, the plaintiff cannot claim injury based on an overall increase in the market price of a commodity (otherwise known as the "market theory" of damages) due to the deceptive act.⁸⁴ The Act was not intended to affect every alleged breach of contract⁸⁵ and can be preempted when a more

Avery v. State Farm Mutual Auto Ins. Co., 746 N.E.2d 1242, 1262 (Ill. App. Ct. 2001); Cuculich v. Thomson Consumer Electronics, 739 N.E.2d 934, 940 (Ill. App. Ct. 2000).

71. The elements of a claim under the Act are: (1) a deceptive act by the defendant, (2) intended to be relied upon by plaintiff, (3) which occurs during the course of trade or commerce, (4) actual damage, (5) proximately caused by the deception. Zekman v. Direct Am. Marketers, 695 N.E.2d 853, 860 (Ill. 1998).

72. Seigel v. Levy Org. Dev. Co., Inc., 607 N.E.2d 194, 198 (Ill. 1992); Miller v. William Chevrolet/GEO, Inc., 762 N.E.2d 1, 11-13 (Ill. App. Ct. 2001).

73. Gardner & Kuehl, *supra* note 8, at 169.

74. Check v. Clifford Chrysler-Plymouth of Buffalo Grove, Inc., 794 N.E.2d 829, 839 (Ill. App. Ct. 2003).

75. Connick, 675 N.E.2d at 593. *But see* discussion *infra* Part II (showing that the issue of reliance is far from settled in Illinois).

76. Gent v. Collinsville Volkswagon, Inc., 451 N.E.2d 1385, 1390-91 (Ill. App. Ct. 1983).

77. Beard v. Gress, 413 N.E.2d 448, 452 (Ill. App. Ct. 1980).

78. Tan, 508 N.E.2d at 396-97.

79. Carter v. Mueller, 457 N.E.2d 1335, 1341-42 (Ill. App. Ct. 1983).

80. Walker v. Gateway Fin. Corp., 286 F.Supp.2d 965, 968 (N.D. Ill. 2003).

81. Paul H. Schwendener, Inc. v. Larrabee Commons Partners, 787 N.E.2d 192, 201 (Ill. App. Ct. 2003). *But see* Zinser v. Rose, 614 N.E.2d 1259, 1263-64 (Ill. App. Ct. 1993) (holding the Consumer Fraud claim is not subject to the heightened specificity of a common law fraud claim).

82. Oliveira v. Amoco Oil Co., 776 N.E.2d 151, 157 (Ill. 2002). *See also* discussion *infra* Part II (showing the relationship between reliance and proximate cause).

83. Oliveira, 776 N.E.2d at 160-64.

84. *Id.* *See also* Zekman 695 N.E.2d at 862 (holding the plaintiff's claim fails as a matter of law because the plaintiff was not actually deceived).

85. *Law Offices of William J. Stogsdill*, 645 N.E.2d at 567.

specific federal or state law governs the facts.⁸⁶ More importantly, there is no right to a jury under the Act⁸⁷ and the legislature explicitly allows “the court, in its discretion . . . [to award] any other relief which the court deems proper.”⁸⁸

In summary, there exists great inconsistencies in the common law due to the conflict between *caveat emptor* and “an emerging duty to speak.”⁸⁹ This Part introduced the General Assembly’s response to *caveat emptor* in the Consumer Fraud Act. Though the issue has never been litigated, the Consumer Fraud Act may be another potential remedy for the commercial property buyer where the seller performs a deceptive act that causes a loss.

II. THE CONSUMER FRAUD ACT MAY PROVIDE AN ALTERNATIVE AVENUE OF RELIEF FOR AN ILLINOIS RETAIL TENANT NOT INFORMED OF A PENDING ROAD CONSTRUCTION PROJECT.

Under established Illinois standards, the retail tenant on orange barrel island should, under some circumstances, find relief under the Act. The language of the Act calls for application to commercial real property transactions between merchant and consumer.⁹⁰ The pending construction project may be a “material fact” that proximately causes a commercial tenant’s injury, and the fact that such construction plans could potentially be discovered by a thorough search of the public records should not bar the claim. There are no other, more specific statutes preempting application of the Act to commercial tenants. Lastly, by recognizing the claim, Illinois would join other jurisdictions that provide commercial tenants relief.

A. The Commercial Tenant Seeking Relief Under the Act is Simply a Logical Extension of the Well-Reasoned Decisions that Interpret the Plain Language of the Act to Hold Merchant Property Sellers Accountable to the Purchaser for Nondisclosure of a Material Fact.

The language of the Illinois Act applies to most commercial landlords and tenants. The Act authorizes “any person” to bring an action.⁹¹ According to the Act, “person” includes “partnership, corporation, . . . company, . . . business entity or association.”⁹² In contrast, similar statutes

86. See *Weatherman v. Gary-Wheaton Bank*, 713 N.E.2d 543, 550 (Ill. 1999) (holding Consumer Fraud claim preempted by RESPA); *Cripe v. Leiter*, 703 N.E.2d 100, 101-02 (Ill. 1998) (affirming dismissal of a plaintiff’s Consumer Fraud claim against his attorney for alleged over-billing because the “actual practice of law” is heavily regulated by the court superseding the CFA).

87. *Wheeler v. Sunbelt Tool Co.*, 537 N.E.2d 1332, 1347 (Ill. App. Ct. 1988).

88. 815 ILL. COMP. STAT. 505/10(a).

89. *Polelle & Ottley*, *supra* note 41, at §9.01(b).

90. 815 ILL. COMP. STAT. 505/2. See also *People ex rel. Scott v. Larance*, 434 N.E.2d 5, 7-8 (Ill. App. Ct. 1982) (noting that neither sections 505/1 nor 505/2 limit the application of the Consumer Fraud Act to only traditional “merchants”).

91. 815 ILL. COMP. STAT. 505/10(a).

92. 815 ILL. COMP. STAT. 505/1(c). This is the result of a change in 1981, years after the court already interpreted the Act to include transactions between business entities, so long as the “consumer” is not in the business of reselling the product or service that makes

enacted in Ohio,⁹³ Maryland,⁹⁴ and Hawaii⁹⁵ are more narrowly drafted to exclude business plaintiffs. Massachusetts divided its statute so that individuals file claims under one section,⁹⁶ while businesses (i.e., those engaged in “the conduct of any trade or commerce”) must file claims under a separate section.⁹⁷ Illinois courts have consistently found business plaintiffs have standing under the Act so long as they purchase goods or services as the ultimate consumer.⁹⁸ Therefore, if the orange-barrel tenant does not enter the lease in order to sublease, the Act should not bar their claim.

Also, the Illinois Act includes real property in its definition of covered trades and commerce.⁹⁹ Other states specifically exempt real estate transactions from coverage under their version of the Act.¹⁰⁰ Meanwhile, several states allow a claim for residential purchasers, but exempt commercial property purchasers.¹⁰¹ Illinois is one of the small number of

up the transaction for the claim. *Law Offices of William J. Stogsdill*, 645 N.E.2d at 566-67.

93. See OHIO REV. CODE ANN. §§ 1345.01(A), §1345.02(A) (West 2004) (restricting claims to “suppliers” in a “consumer transaction”).

94. See MD. CODE ANN., COM. LAW II § 13-101(c),(d) (2004) (restricting claims to “purchasers of consumer goods, consumer services, consumer realty or consumer credit . . . which are primarily for personal, household, family or agricultural purposes”).

95. See HAW. REV. STAT. § 480-2 (2003) (restricting claims for unfair or deceptive acts to consumers, the attorney general, and the director of the office of consumer protection, but allowing any person to bring a claim for unfair competition).

96. MASS. GEN. LAWS ch. 93A, § 9 (2004).

97. MASS. GEN. LAWS ch. 93A, § 11.

98. See *Law Offices of William J. Stogsdill*, 645 N.E.2d at 547 (holding a law firm had standing against a bank because it used the bank’s service as a normal consumer); *W.E. O’Neil Constr. Co. v. Nat’l Union Fire Ins. Co.*, 721 F. Supp. 984, 989 (N.D. Ill. 1989) (finding the plaintiff, a construction company, had standing to sue its insurance company for failure to settle because the construction company used the insurance as a normal consumer would). *But see Allcare, Inc. v. Bork*, 531 N.E.2d 1033, 1035 (Ill. App. Ct. 1988) (holding that a business plaintiff does not have standing to bring a Consumer Fraud claim against a competitor in its field).

99. 815 ILL. COMP. STAT. 505/1(f). See also *Cappicioni*, 791 N.E.2d at 559 (holding that the real-estate broker’s exemption of 505/10b applies only when a real-estate professional’s misstatements are “innocent”, i.e., when the client selling the property, but not the agent, has knowledge of relevant defects).

100. See *Detling v. Edelbrock*, 671 S.W.2d 265, 273 (Mo. 1988) (interpreting Missouri’s consumer protection statute as not applicable to real estate transactions); *Heritage Hills Ltd. v. Deacon*, 551 N.E.2d 125, 127-28 (Ohio 1990) (interpreting the Ohio Consumer Fraud Act as not applicable to leases or other real estate transactions because the statute’s language explicitly excludes real estate and because such a claim would be preempted by other, more specific statutes); *Chelsea Plaza Homes, Inc. v. Moore*, 601 P.2d 1100, 1104 (Kan. 1979) (holding the Kansas Landlord Tenant Act is a more specific regulation covering the leases of real property and, therefore, exempting coverage by the Kansas Consumer Fraud Act).

101. See PA. STAT. ANN. tit. 73, § 201-9.2(a) (West 2004) (requiring the purchase to be “primarily for personal, family or household purposes”); MICH. COMP. LAWS § 445.902 (2004) (requiring the purchase of property, including real property, to be “primarily for personal, family or household purposes”).

states compelling their courts to apply the Act under the broadest terms, including real property.¹⁰²

This is exactly what Illinois courts continue to do. It is now axiomatic that a homebuyer can seek relief from a developer.¹⁰³ Purchasers of unimproved vacant property can bring a claim under the Act.¹⁰⁴ Residential tenants claims have long been recognized.¹⁰⁵ Mobile home park leases are also covered.¹⁰⁶ Further, though it may have erred for reasons not argued on appeal, the Illinois Appellate Court for the Second District reversed a dismissal of a consumer's claim of fraud in the inducement of a contract to purchase two apartment buildings.¹⁰⁷ As the legislature has failed to amend the Act while the courts have continually interpreted the Act to include property purchasers, it is reasonable to say that this interpretation is in accordance with the legislature's will.¹⁰⁸ The commercial tenant seeking relief under the Act is simply a logical extension of the well-reasoned decisions that hold merchant property sellers accountable to their purchaser for nondisclosure of a material fact.

102. 815 ILL. COMP. STAT. 505/1 (2004). *See also* COLO. REV. STAT. § 6-1-105(1)(e), (g), (i) & (l) (2004) (encompassing deception in the sale, lease, or advertising of real property as a violation of the Colorado Consumer Protection Act); N.C. GEN. STAT. § 75-1.1(b) (2004) (defining "commerce" to include all business activity except that of a "learned" profession); TEX. BUS & COM. CODE § 17.45(4), (5)&(6) (2004) (including real property, but excluding business consumers with more than twenty-five million dollars in assets and requiring an analysis of the consumer's contract experience and bargaining power to determine if the transaction was "unconscionable" for taking advantage of the consumer to a "grossly unfair degree").

103. *See Siegel v. Levy Org. Dev. Co.*, 607 N.E.2d 194, 201 (Ill. 1992) (allowing a claim for omission of material fact in the sale of a condominium for \$1.6 million because architectural drawings were not clear to show the existence of mullions (pillars) blocking view of Chicago skyline); *Kleczek v. Jorgensen*, 767 N.E.2d 913, 920-21 (Ill. App. Ct. 2002) (allowing relief for a homeowner where the builder-vendor disclosed no plumbing code violations despite having received verbal notice of violations prior to making such a statement).

104. *See Overton v. Kingsbrooke Dev. Inc.*, 788 N.E.2d 1212, 1221 (Ill. App. Ct. 2003) (allowing a claim where the developer misrepresented the presence and amount of landfill on the site, requiring additional expenditures to make the site suitable for construction).

105. *See Carter*, 457 N.E.2d at 1341-42 (allowing a claim for a failure to provide an apartment with a southerly view and a failure to provide an apartment with working appliances and in clean condition).

106. *See People ex rel. Fahner v. Tesla*, 445 N.E.2d 1249, 1252 (Ill. App. Ct. 1983) (holding former tenants of a mobile home park had a valid claim against the defendant lot-owner who refused to offer a lease to prospective purchasers of their mobile home and instead offered to buy the homes at half the price). *But see Brown v. Veile*, 555 N.E.2d 1227, 1231 (Ill. App. Ct. 1990) (holding that lot-owners, as resellers of used mobile homes, do not have standing as they are not the ultimate consumers of the goods).

107. *Tan*, 508 N.E.2d at 396. The court might have erred in not dismissing the plaintiff's claim in *Tan* due to the fact that the purchaser of an apartment building is not the ultimate consumer of the product. Rather, the product (i.e., the living space) is bought with the intention of reselling it to tenants. However, the issue before the court was whether or not the buyer acted reasonably in ascertaining whether the apartments were built without city approval. *Id.*

108. *Modern Dairy Co. v. Dep't of Rev.*, 108 N.E.2d 8, 14 (Ill. 1952).

B. A Pending Road Construction Project Could be a Material Fact That Proximately Causes Damage to a Retail Tenant, for Which the Public Availability of the Information Should not Bar Relief.

1. The road construction project could be a material fact.

Material facts are deal breakers, ones that would cause a party to act differently or upon which a reasonable person would normally rely in making a decision to purchase property.¹⁰⁹ Under the Act, a seller must disclose material facts, regardless of whether a duty to do so exists at common law.¹¹⁰

In single-family home sales, the following examples have been held to be material facts: defective siding;¹¹¹ location in a desirable school district;¹¹² the necessity of installing sewer hook-ups;¹¹³ obstructed views of scenery;¹¹⁴ and the presence of termites.¹¹⁵ Further, providing a property with a litany of problems when the buyer requests a “maintenance free” property is an omission of a material fact.¹¹⁶ In lease arrangements, the lack of a promised southerly view and filthy conditions in an apartment,¹¹⁷ and an improper refusal to sublease,¹¹⁸ have also been held to be actionable material facts.

While no Illinois court appears to have directly addressed the issue, courts in other jurisdictions have expanded the scope of material facts to include off-site conditions that affect the value of the land. New Jersey courts applied their act to a residential seller’s failure to disclose an abandoned hazardous waste site nearby and plans of a tennis court that

109. *Connick*, 675 N.E.2d at 595.

110. *Id.* at 595.

111. *Shannon v. Boise Cascade*, 805 N.E.2d 213, 218-19 (Ill. 2004) (finding that defective siding might be a “material fact” under the Deceptive Practices Act, but nevertheless holding the plaintiff, homeowner, was not entitled to relief because she did not see the deceptive advertising, did not allege the contractor or architect had been deceived, and did not name the contractor or architect as defendants).

112. *Cappacioni*, 791 N.E.2d at 560-61.

113. *Randels*, 612 N.E.2d at 987-88 (holding the defendant was not liable for failing to disclose the subject building soon needed to be refitted for sewer access because the purchaser could have discovered this fact through the exercise of due diligence).

114. *Seigel*, 607 N.E.2d at 199.

115. *Warren v. LeMay*, 491 N.E.2d 464, 470-72 (Ill. App. Ct. 1986) (holding the omission of the second page of a termite report, which indicated a material infestation, was a material fact upon which liability could be based, especially where the first page of the report indicated there was no infestation).

116. *See Malooley*, 621 N.E.2d at 267-69 (listing factual circumstances supporting the defendants’ counterclaim under the Act: a broken soil pipe, an electrical system in need of replacement, a hot water heater in need of replacement, bathroom walls that were collapsing, a roof that leaked in the sunroom, family room, stairwell, and chimney; leakage through the foundation into the basement, roof shingles blowing off, a stairwell wall collapsing, and an entire ductwork system for the heating and air-conditioning system in need of replacement—all of which problems the counter-defendant failed to disclose).

117. *Carter*, 457 N.E.2d at 1338.

118. *Ex rel. Fahner*, 445 N.E.2d at 1252-53.

obstructed the plaintiff's view.¹¹⁹ In California, residential sellers are required to disclose problems with neighbors, such as excessive late-night noise.¹²⁰ In Michigan, a court dismissed a commercial plaintiff's claim based on the seller's failure to disclose a state highway bypass that rerouted traffic away from the commercial enterprise.¹²¹ While the court agreed with the plaintiff about the materiality of the bypass and the change in traffic flow, it denied the claim because the plaintiff relied on their own accountant to investigate traffic flow, not the seller's statements, and the final approval of the bypass did not take place until ten months after the sale of the premises.¹²²

Many different factors can affect the value of commercial property enough to constitute potential material facts.¹²³ In an eminent domain context, the Illinois Constitution protects access to a roadway as a right, the public use of which cannot be taken or damaged without just compensation.¹²⁴ For commercial property, roadway access, entrances and exits, and location in relation to major highways and thoroughfares are of even greater importance.¹²⁵

Several factors will determine whether the pending road construction project is a material fact. If the lease is short-term — as many modern commercial leases are — and the length of the project is extended, it would logically be more material.¹²⁶ If, however, it is a long-term lease, a six-

119. See *Strawn v. Caruso*, 657 A.2d 420, 428-31 (N.J. 1995) (holding a developer liable for failure to disclose the presence of an abandoned hazardous waste site nearby); *Tobin v. Paparone Constr. Co.*, 349 A.2d 574, 577-78 (N.J. 1975) (finding for the home-buyer where the developer failed to disclose plans to build a tennis court on adjacent property, which would obstruct the plaintiff's view and cause disruptions contrary to the quiet community promoted by the developer). *But see Nobrega v. Edison Glen Assoc.*, 772 A.2d 368, 376-77 (N.J. 2001) (holding the enactment of New Jersey's disclosure statute precluded future claims for consumer fraud so long as the seller complies with the requirements of the new statute).

120. *Shapiro v. Sutherland*, 76 Cal. Rptr. 2d 101 (Cal. Ct. App. 1998) (holding the seller liable for failure to disclose the neighbors played loud music late at night, poured oil on their rooftop, and played late-night basketball games).

121. *McMullen v. Jordesma*, 435 N.W.2d 428, 430-31 (Mich. Ct. App. 1988).

122. *Id.*

123. Letter from Jack Macke, real estate broker with Coldwell Banker, to Robert Gray (Nov. 5, 2004) (on file with author).

124. See *Dep't of Pub. Works & Bldg's v. Wilson & Co.*, 340 N.E.2d 12, 16 (Ill. 1975) (interpreting Article Two, Section Thirteen of the Illinois Constitution to require the state to compensate property owners for a taking of access to roadways adjacent to the property). After citing nine cases dating back to 1886, all in support of its constitutional interpretation, the court stated, "it is clear from the foregoing cases and others that a property owner suffers compensable damage if his access to an abutting street is eliminated." *Id.*

125. *Id.* See also *Dep't of Transp. v. Western Nat'l Bank*, 347 N.E.2d 161, 165 (Ill. 1976) (finding factors such as proximity to intersections of major highways, proximity to large shopping malls, and recent area growth are properly considered when valuing commercial property).

126. See Charles L. Armstrong, *supra* note 8, at 698-99 (listing the generally shortened term of leases as among the several factors that distinguish modern commercial leases from their pre-industrial counterparts).

month construction project is not only less material, but also more reasonable for the tenant to expect and desire. Another possible factor is the timing of the construction in relation to the commencement of the lease. If the project starts shortly after the lease, it would seem more material, as this would interrupt business in the beginning (and more fragile) stages of the business' life.¹²⁷ Conversely, a project that commences long after the inception of the lease should be less material because the business had an opportunity to build a customer base. Another factor is the property's location. A retail location in the middle of Chicago's Loop is less likely to be affected by road construction, because most patrons probably walk there anyway. However, a suburban location that relies on high vehicle traffic flow and ease of access to and from the site by car should increase road construction's materiality.

2. *A road construction project could cause reduced traffic flow around a retail tenant, proximately causing damage.*

The Act requires a private individual to prove "actual damage as a result of a violation of this Act"¹²⁸ The Illinois Supreme Court has concluded that a traditional tort analysis of proximate cause is appropriate under the Act.¹²⁹ Proximate causation, according to the court, is analyzed as the federal courts have applied the concepts of "transaction causation" and "loss causation."¹³⁰ Illinois follows the majority of federal courts in requiring both transaction causation and loss causation for recovery in tort.¹³¹

Transaction causation questions whether the plaintiff would have made the purchase or transaction if they had known of the material fact.¹³² In this way, transaction causation is much like the common law fraud element of actual reliance. Loss causation, on the other hand, means the damage must flow as a natural consequence of the deceptive act.¹³³ Illinois courts reject the notion that proof of transaction causation eliminates the need for loss causation, opening damages to any foreseeable consequences of the

127. See Don B. Bradely III & Chris Cowdery, *Small Business: Causes of Bankruptcy*, ASSOC. FOR SMALL BUS. & ENTREPRENEURSHIP 205, 205-07 (2004), available at http://www.sbaer.uca.edu/research/asbe/2004_fall/16.pdf (last visited July 31, 2005) (discussing the fact up to seventy or eighty percent of small businesses fail within the first year, and that such failure is, in part, due to poor choice of location).

128. 815 ILL. COMP. STAT. 505/10a(a).

129. *Zekman*, 695 N.E.2d at 860-61; *Martin*, 643 N.E.2d at 747.

130. *Martin*, 643 N.E.2d at 747-50.

131. *Id.* at 747.

132. *Zekman*, 695 N.E.2d at 868 (holding a plaintiff cannot claim the defendant's deceptions caused him harm when he knew the truth at the time he allegedly acted in reliance on the deception).

133. *Martin*, 643 N.E.2d at 749 (holding that an investor who proves the transaction caused him harm is entitled to a return of the entire investment, but where the deceit only involves the amount that should have been paid, the investor is entitled only to the difference between the actual amount paid and either the fair market value or what they would have been required to pay without the deception).

transaction.¹³⁴ While the Illinois Supreme Court has attempted to clarify the requirement of causation, the case law is riddled with uncertainty, especially with respect to reliance.¹³⁵

While loss causation is a fact-sensitive inquiry, the orange barrel tenant should, as a general rule, satisfy transaction causation. The small business retail tenant, contracting for a short-term lease, is not likely to enter the lease if the tenant knows the outlet for its products will be strangled by a sea of construction for a significant portion of the lease. The tenant should likewise be able to show that large traffic jams and road construction stifle new customers from visiting the location. Further, the construction project may physically block the view of the store, thus reducing the advertising effectiveness of any signs. Additionally, since less people are willing to travel the congested routes, less potential customers will be exposed to the tenant's advertisement. Finally, even those customers that will brave the aggravation of road construction may do so on a less frequent basis, reducing potential revenue.

3. *The availability of information through public records should not bar the tenant's claim.*

When information is available to a party, the court generally holds them accountable for that information. While reasonable reliance and a duty to disclose are supposedly not required under the Act, many courts still analyze the issue in those terms. Such analysis is most likely when the deceptive act involves facts available, at least to some degree, to the public.

If the court engages in an analysis of publicly available information, it does so because of its familiarity with the reasonable reliance element of common law fraud, not because such analysis is required under the Act. At common law, the operative question is whether, "there were facts and circumstances present at the time the false representations were made sufficient to put the injured party upon his guard or to cast suspicion upon their truth." If there were, a party who has "neglected to avail himself of the warning thus given, . . . will not afterwards be heard to complain."¹³⁶

Under the Act, the only reliance analysis should be (1) whether the defendant intended the plaintiff to rely on the deceptive act or practice, (2) whether the plaintiff actually relied on the deception to make the transaction, and (3) whether that reliance proximately caused the plaintiff's damage.¹³⁷

Even under the heightened requirements of common law fraud, the fact that information is publicly available does not necessarily bar a claim. Illinois plaintiffs have often recovered even though they failed to ascertain

134. *Id.* at 750.

135. Compare *id.* at 754 (stating that "the Consumer Fraud Act does not require actual reliance"), with *Oliveira*, 776 N.E.2d at 160 (stating "to properly plead the element of proximate causation in a private cause of action . . . under the Act, a plaintiff must allege that he was, in some manner, deceived.")

136. *Morel v. Masalski*, 164 N.E. 205, 207 (Ill. 1928).

137. *Perona v. Volkswagen of Am.*, 684 N.E.2d 859, 864 (Ill. App. Ct. 1997) (citing *Connick*, 174 Ill. 2d at 501).

whether a home was in a coveted school district;¹³⁸ failed to note or attend multiple city council hearings; ignored extensive media coverage and lengthy litigation over possible condemnation;¹³⁹ and violated building and zoning ordinance by adding dwelling units to an apartment building without authorization.¹⁴⁰ On the other hand, defendants have prevailed where the plaintiff relied on oral representations contradicted in writing¹⁴¹ and where a plaintiff, who was represented by counsel, failed to discover a zoning violation.¹⁴²

While knowledge of pending construction projects may be publicly available, it may not bar the orange barrel island tenant from relief. Currently, the Illinois Department of Transportation's website makes discovery of pending state construction projects easy for the potential tenant.¹⁴³ However, not all road construction is done by the state. Moreover, this information is just as easy for the landlord to obtain and relay to the potential tenant as it is for the tenant to obtain. Since the owner is more likely to enjoy the long-term benefits of road construction, it is more efficient to allocate the burden of investigation to the owner where the value of the property is linked to vehicle flow. The public availability should not bar relief.

C. There are No More Specific Preemptory Statutes.

Application of the Act to a commercial lease is not preempted by any existing federal or state legislation. The Residential Real Property Disclosure Act, as previously noted, specifically applies only to residential property.¹⁴⁴ Similarly, the Illinois Landlord Tenant Act, unlike, for example, Kansas' landlord-tenant statutes, should in no way be construed to preempt a consumer fraud claim arising from a seller's failure to disclose facts material to a lease.¹⁴⁵

Likewise, because they serve the same ends, the Real Estate Dealer's and Broker's License Act should not preempt a claim against a broker under the Consumer Fraud Act.¹⁴⁶ It should be noted, however, that the Consumer

138. *Cappicioni*, 791 N.E.2d at 558.

139. *Am. Nat'l Bank*, 599 N.E.2d at 35.

140. *Tan*, 508 N.E.2d at 59.

141. *Adler v. William Blair & Co.*, 613 N.E.2d 1264 (Ill. App. Ct. 1993); *First Nat'l Bank & Trust Co. v. First Nat'l Bank*, 648 N.E.2d 226 (Ill. App. Ct. 1995).

142. *First Nat'l Bank & Trust Co. v. First Nat'l Bank*, 533 N.E.2d 8 (Ill. App. Ct. 1988).

143. See Illinois Dept. of Transp., Road Construction, <http://www.dot.state.il.us/> (last visited July 21, 2005) (providing information about and a map of major state road construction projects).

144. See discussion *supra* note 1 (concerning the Residential Real Property Disclosure Act).

145. Compare 765 ILL.COMP.STAT. 705/1 (2004) (negating all clauses in leases that release landlord's from liability for physical injuries incurred on the premises) and 765 ILL.COMP.STAT. 705/5 (allowing a lessor to rescind a lease where a lessee is convicted of a Class X felony) with KAN. STAT. ANN. §§ 58-2540 to 58-2573 (2004) (regulating with far greater detail the relationship and transactions between landlords and tenants).

146. See 225 ILL. COMP. STAT. 454/15-25 (2004) (requiring brokers to treat all customers honestly, and prohibiting them from knowingly or negligently providing false

Fraud Act calls for a heightened degree of protection for brokers, which unless challenged and ruled unconstitutional, requires a plaintiff to prove that the broker, in addition to the seller, had actual knowledge of the deceptive act or the omission.¹⁴⁷

D. Other Jurisdictions Allow a Claim Under a Similarly Written Version of the Act.

Other jurisdictions have allowed relief for the commercial tenant. The North Carolina statute bans deception “in or affecting commerce,”¹⁴⁸ and allows a commercial tenant to proceed against a landlord for fraudulent inducement of the lease.¹⁴⁹ The Colorado statute does not explicitly refer to omissions in the inducement of real estate contracts,¹⁵⁰ but has, nonetheless, been applied to commercial leases.¹⁵¹ Texas courts would, under their statute, likewise recognize a proper claim brought by a commercial tenant.¹⁵² By allowing a claim from a commercial tenant, the Illinois courts would simply be joining those other jurisdictions that attempt to eradicate all forms of fraud in the market.

As the foregoing discussion demonstrates, the Consumer Fraud Act may be available to the prospective retail tenant to remedy damages caused by a landlord’s failure to disclose a known pending road construction project that affects the value of the premises. Factors that may influence the court are the severity of the defective material fact, the nature of the tenant’s

information or failing to disclose latent material defects in the physical condition of the property).

147. Compare 815 ILL. COMP. STAT. 505/10b (requiring a plaintiff real estate buyer to show that the defendant broker had actual knowledge of the falsity of information provided by the seller in order to proceed against the broker under the Consumer Fraud Act, thus exempting brokers from negligent or innocent misrepresentations) with *Allen v. Woodfield Chevrolet, Inc.*, 802 N.E.2d 752, 764-65 (Ill. 2003) (declaring those portions of the Consumer Fraud Act that provided additional safeguards for car dealerships and salesman violated the special legislation clause in Article Four, Section Thirteen of the Illinois Constitution).

148. N.C. GEN. STAT. § 75-1.1(a).

149. See *Kent v. Humphries*, 275 S.E.2d 176, 182-83 (N.C. App. 1981), *aff’d* 281 S.E.2d 43, 46 (N.C. 1981) (reversing dismissal of plaintiff’s claims where the plaintiff tenant had acted in reliance upon the landlord’s oral promise, which the landlord later broke, to not operate a fiberglass and plastic manufacturing business in a location adjacent to the tenant’s beauty salon).

150. COLO. REV. STAT. §6-1-105(1)(a).

151. *Walter v. Hall*, 940 P.2d 991, 998-99 (Colo. Ct. App. 1996) (applying the Colorado Consumer Protection Act against a developer who misinformed a purchaser about access by easement across a third party’s property).

152. See *Koch v. Griffith-Straud Constr. & Leasing Co.*, No. 14-03-00526-CV, 2004 Tex. App. LEXIS 2549, at *11-13 (Tex. App. March 23, 2004) (holding a commercial tenant satisfies the requirements of a “consumer” under the Texas Deceptive Trade Practices Act, but ultimately denying relief to the plaintiff where the lease, which provided the basis for the consumer’s claim, did not, in fact, cause the alleged harm, i.e., confiscation and subsequent sale of the plaintiff’s property from within the subject premises).

business, the parties' level of sophistication, the method of deception employed, and the availability of knowledge to both parties.

Nevertheless, commercial property buyers and sellers deserve more than the ambiguous gap-filling role of the Consumer Fraud Act and the uncertainty of the common law remedies. They deserve the same level of clear statutory disclosure guidance from the General Assembly as their residential counterparts in Illinois and their commercial counterparts in other states.

III. THE GENERAL ASSEMBLY SHOULD LEGISLATE CLEAR DISCLOSURE STANDARDS FOR COMMERCIAL PROPERTY TRANSACTIONS.

The preceding sections highlight the inconsistency and unpredictability of results where there has been an alleged failure to disclose material defects in a commercial property transaction. This inconsistency destabilizes the commercial real estate transaction at a time when real estate investments are increasing at record rates. Furthermore, many of the same factors that pushed the General Assembly to protect the residential property transactions are now present in the commercial property transaction.

A. Legislation is Needed

In 1993, the Illinois General Assembly passed the Residential Real Property Disclosure Act,¹⁵³ long after the court's recognition of the need for relief to residential property buyers.¹⁵⁴ Enacted after much scholarly criticism,¹⁵⁵ this Act marked the death of *caveat emptor* and the birth of buyer protection in residential real estate transactions.¹⁵⁶ Passed with the

153. See *supra* note 1.

154. See *Peterson v. Hubschman*, 389 N.E.2d 1154, 1157-58 (Ill. 1979) (holding there is an implied warranty of habitability in the sale of new homes to "avoid the unjust results of *caveat emptor*"); *Carter*, 457 N.E.2d at 1341-42 (recognizing the need for Consumer Fraud Act protection in residential leases); *Kelley v. Astor Investors, Inc.*, 478 N.E.2d 1346, 1349-50 (Ill. 1985) (holding there exists an implied warranty of habitability in agreements to substantially refurbish apartment buildings to convert them into condominiums); *Jack Spring, Inc. v. Little*, 280 N.E.2d at 217 (reading an implied warranty into apartment leases).

155. See *Scheid*, *supra* note 8 at 163 (stating, "*caveat emptor* does not have a ghost of a chance of remaining a viable tenet of late twentieth century jurisprudence"); Nicola W. Palmieri, *Good Faith Disclosures Required During Precontractual Negotiations*, 24 SETON HALL L. REV. 70, 109-12 (1993) (comparing the courts' interest in good faith and fair dealing with the Catholic Church's mandates prior to the middle ages); William D. Grand, *Implied and Statutory Warranty in the Sale of Real Estate: The Demise of Caveat Emptor*, 15 REAL EST. L. J. 44 (1986) (calling for legislatures to directly confront *caveat emptor* in the sale of real estate by requiring the seller to deliver a fair product for a fair price).

156. See *Gardner & Kuehl*, *supra* note 8 at 177-83 (describing the Granger Laws (which protected farmers from unfair railroad rates), the Uniform Commercial Code and its warranties of merchantability and fitness for particular purpose, the Federal Trade Commission Act, the Consumer Fraud Act, and the Residential Real Property Disclosure Act as examples of legislation that was enacted specifically to combat the negative effects of *caveat emptor*).

support of the National Association of Realtors,¹⁵⁷ this Act also protects sellers and brokers from unnecessary litigation.¹⁵⁸

Many of the facts that drove the passage of the Residential Property Disclosure Act apply to the retail tenant and other commercial property buyers. The commercial tenant is the last leaf on the real estate branch of the withered tree of *caveat emptor*.¹⁵⁹ Illinois courts have long recognized the harsh realities of nondisclosure in commercial property transactions and have strained to develop and extend doctrines to combat them.¹⁶⁰ Additionally, the Uniform Consumer Sales Practice Act suggests more precise statutory guidelines for real estate.¹⁶¹ Though some scholars would leave the buyer in the dark, others agree with the notions of fair and full disclosure.¹⁶²

The need for legislative protection is especially important for the smaller commercial tenant. The physical location of a business is one of the

157. See James D. Lawlor, *Mandatory Seller Disclosure Laws*, PROB. & PROP., July-Aug. 1992 at 34 (explaining that the National Association of Realtors (NAR) has dedicated much time to the construction and enactment of uniform disclosure statutes); Scheid, *supra* note 8, at 155-56 (noting the NAR's influence in legislation in at least eleven states including Illinois).

158. Scheid, *supra* note 8, at 185.

159. See *Peterson*, 389 N.E.2d at 1169 (requiring an implied warranty of habitability in the sale of homes); *Carter*, 457 N.E.2d at 1341-42 (affirming relief for tenant in a residential apartment); *People ex rel. Fahner v. Tesla*, 445 N.E.2d 1249, 1252-53 (Ill. App. Ct. 1983) (holding that a mobile-home landlord is subject to the Consumer Fraud Act); *Perkins v. Collette*, 534 N.E.2d 1312, 1317-18 (Ill. App. Ct. 1989) (holding that misrepresentation in the sale of vacant land is actionable under the Consumer Fraud Act); *Tan*, 508 N.E.2d at 393 (granting relief to buyer of commercial property).

160. For example, *Tan* involved the sale, not rental, of apartment buildings, not units. 508 N.E.2d at 392. The court affirmed a judgment against the seller under the Consumer Fraud Act. *Id.* at 397. The court specifically addressed the standing of the plaintiff, Dr. Tan, in terms of the merchandise purchased, i.e., real estate. *Id.* The court also addressed Dr. Tan as a consumer in terms of the defendant's occupation as a developer. *Id.* The court did not, however, address the issue of Dr. Tan's standing under the Act as a buyer of a product (66 apartment units, some of which did not conform to building codes) to be used for resale (through leases to present and future tenants) in the ordinary course of his new business as a landlord. See also *supra* Part I (outlining how courts have used strained versions of constructive eviction, implied warranty of habitability, negligence and common law fraud in order to provide relief where justice clearly dictated).

161. See UNIFORM CONSUMER SALES PRACTICES ACT § 2, 7A U.L.A. 233, 235 Official Comment to Section 2(1) (1985) (excluding real estate transactions from the definition of "consumer transaction" (and thus excluding applicability) based "[o]n the assumption that land transactions frequently are, and should be, regulated by specialized legislation . . .") (emphasis added).

162. Compare Scheid, *supra* note 8, at 174-75 (noting the business world's acceptance of disclosure requirements in commercial transactions) and *Seller's Duty to Disclose*, *supra* note 8, at 260-61 (calling for continued legislation towards disclosure in commercial property transactions) with Weinberger, *supra* note 8, at 421-23 (concluding that the discretionary nature of the commercial transaction justifies the continuation of caveat emptor for commercial property and that disclosure laws tend to reinvent the doctrine of caveat emptor).

single most important decisions an organization of any size faces.¹⁶³ Like the homeowner, the small business owner will be investing a significant portion of its budget in the property transaction. Further, just as the homebuyer does not have the expertise to inspect a home for quality or latent defects, the retail business owner is generally not an expert in the business of commercial real estate.

Professor Weinberger argues that disclosure legislation increases the demand on an already overly-clogged legal system and retards the property market because of increased uncertainty in the transaction.¹⁶⁴ To the contrary, disclosure legislation should reduce conflicts after the agreement because both parties will have actual knowledge, prior to the agreement, of all material facts relating to the value of the property. This knowledge places both parties in near equal bargaining positions, allowing the forces of the free market to determine the true value of the transaction. Thus, clear statutory requirements should not increase litigation, but rather, should reduce litigation lower than its current levels.

Furthermore, because clear legislation encourages a true market value, the commercial property market should expand because investors can more confidently rely on the quality of the premises and the finality of the transaction. The only negative impact of disclosure is the probable reduced value of property with defects.

B. *What Should the Legislation Include?*

Illinois should enact legislation that squarely addresses the issues that confront the commercial property transaction, reducing the need for further revisions. Since commercial property value is partially idiosyncratic, any legislation should begin with broad language requiring disclosure of any fact or circumstances not specifically enumerated that clearly affects the value of the transaction.¹⁶⁵ For more specific facts, the General Assembly should look to the Illinois residential property requirements, Illinois case history, other jurisdictions' commercial property requirements, and the parties to the transaction to fashion a response.

The Illinois Residential Real Property Disclosure Act enumerates many specific items to be acknowledged by both buyer and seller for any property

163. QuickMBA.com, The Marketing Mix, <http://www.quickmba.com/marketing/mix/> (last visited July 31, 2005). The "Four P's"—product, price, promotion, and *place* — are the four essential elements of successfully marketing a business. *Id.*

164. Weinberger, *supra* note 8, at 415-18.

165. See *Cleveland C., & C. & St. L. Ry. Co. v. Wood*, 90 Ill. App. 551, 551-52 (Ill. App. Ct. 1900) (holding a railroad breached a lease with a tenant hotel and restaurant by failing to stop its passenger trains at the location which affected the value of the leasehold); *Luciani v. Bestor*, 436 N.E.2d 251, 256 (Ill. App. Ct. 1982) (dismissing a claim arising from an alleged misrepresentation concerning the effect of Greyhound buses no longer stopping nearby made during the sale of a motel because the plaintiffs had knowledge of the planned discontinuance of bus service and the defendants had also allowed the plaintiffs access to relevant financial statements and reports).

with between one and four residential units.¹⁶⁶ Those requirements include physical characteristics of the property, such as structural defects¹⁶⁷ and defects in the utilities.¹⁶⁸ More requirements are aimed at environmental concerns such as the presence of radon gas, mold, or underground storage tanks.¹⁶⁹ Still other requirements cover legal disputes.¹⁷⁰ In sum, the Illinois Residential Act is aimed at those facts or circumstances that negatively affect the property's value in the free market or are likely to cause litigation.

Some specific commercial disclosure requirements should pass legislation with little debate considering the obvious effect on the value of the property and the history of litigation in Illinois arising from their nondisclosure. It would be difficult, for example, to argue against disclosure of physical defects in the structure or utilities.¹⁷¹ Environmental hazards are likewise subject to litigation.¹⁷² Of course, if the buyer is to be a party to a lawsuit or the property is subject to other government action, such as for improper zoning for a stated use or condemnation proceedings, nondisclosure will almost certainly result in litigation.¹⁷³ These factors help determine the true value of the property and should be included in disclosure legislation.

However, commercial transactions should likewise require disclosure of facts that affect value but are unique to the property's commercial status. In a shopping mall lease, for example, tenants should be continually apprised of the landlord's intent to lease to other tenants who are business competitors.¹⁷⁴ Any planned changes in the highways, roads, parking space

166. See 765 ILL. COMP. STAT. 77/35 (requiring the seller to confirm or deny in writing any defects in the subject property, and likewise requiring the buyer to acknowledge receipt of same by initialing).

167. See *id.* (listing defects in the foundation, roof, walls or floors, and the presence of termites or other wood-boring insects as required disclosures).

168. See *id.* (listing defects in the plumbing, electric, well, septic, heating and air conditioning, ventilation, and fireplace systems to be initialed by both the buyer and the seller).

169. *Id.*

170. *Id.* (requiring disputes over boundary lines, or violations of local, state, or federal law to be disclosed).

171. See discussion *supra* Parts I & II (listing cases where disputes arose over a failure to disclose a latent physical defect or a defect in the utilities).

172. See Tomcho, *supra* note 8, at 1594-95 (noting that federal law currently holds property sellers liable for existing environmental problems on their land under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9607 (1994), unless the defect is readily observable).

173. See *Christopher*, 52 N.E.2d 313 and *Am. Nat'l Bank*, 599 N.E.2d 1126 (allowing claims by property buyers where the seller failed to disclose condemnation proceedings).

174. See *Arrington v. Walter E. Heller Int'l Corp.*, 333 N.E.2d 50, 58 (Ill. App. Ct. 1975) (holding the dominant tenant of a commercial building did not violate its lease by refusing to allow the landlord to lease space in the building to a prospective tenant that was a competitor of the dominant tenant); *Bolchazy v. Chicago Inv. Group*, 440 N.E.2d 950, 953-55 (Ill. App. Ct. 1982) (denying relief to a tenant where the landlord negotiated a lease with a competitor in the printing business to occupy space in the same shopping center); *Kusiciel v. LaSalle Nat'l Bank*, 435 N.E.2d 1217, 1222 (Ill. App. Ct. 1982) (denying relief to a tenant where the landlord misrepresented occupancy by other tenants

availability, or avenues of access to the property are also material.¹⁷⁵ Another issue likely to be of concern to a commercial property lessee is the landlord's possible bankruptcy.¹⁷⁶

Most importantly, the General Assembly should pass language that provides the courts with clear direction on the issues of reliance, proximate cause, materiality, and availability of public information. The ambiguous and often conflicting decisions over these issues are a continuing cause of litigation. Clear language on these issues is important to stop any court from interpreting the wasteful and inefficient doctrine of *caveat emptor* back into the law.

Other jurisdictions specifically address the need for regulation in the commercial context either through commercial property legislation or inclusion in their deceptive practices act. Tennessee, for example, expressly protects commercial lessees under some circumstances.¹⁷⁷ California requires commercial property sellers to disclose environmental safety concerns.¹⁷⁸ Texas protects buyers through their deceptive trade practice act, but limits exposure to sellers by limiting claims to buyers with assets less than twenty-five million dollars and looks at the relative bargaining position of the parties.¹⁷⁹

Though the roots of the tree of *caveat emptor* may be buried in antiquity, its leaves are falling fast. The General Assembly should not only hasten its death, it should burn the tree at its roots. The enactment of a clear commercial property disclosure requirement would serve that purpose for the

in the shopping center, reasoning that other lease transactions were likely to occur in the future and beyond the knowledge of the landlord).

175. See discussion *supra* Part II (analyzing whether a road construction project that interrupts the flow of traffic around a retail space is a material fact that must be disclosed to potential consumers under the Consumer Fraud Act); *Mutual of Omaha Life Ins. Co. v. Executive Plaza, Inc.*, 425 N.E.2d 503, 508 (Ill. App. Ct. 1981) (finding in favor of a tenant where the number of parking spaces and their position in relation to the tenant's property were decreased by the landlord's subsequent rental of premises to another tenant); *McMullen*, 435 N.W.2d at 430-31 (denying relief for property buyer where highway access to the property was eliminated).

176. See Robert M. Zinman, *Precision in Statutory Drafting: The Qualitech Quagmire and the Sad History of Section 365 (H) of the Bankruptcy Code*, 38 J. MARSHALL L. REV. 97, 141-42 (2004) (noting that upon the landlord's declaration of bankruptcy, the tenant in possession of a commercial lease may not have the option to retain the lease if the lease's value is below market value as determined by the bankruptcy trustee).

177. See TENN. CODE ANN. §66-7-108 (2004) (requiring, upon request by a prospective tenant of less than 1500 sq. ft. of non-industrial space, a disclosure of fire, electric, and plumbing in compliance with zoning requirements).

178. See CAL. HEALTH & SAFETY CODE § 26154 (Deering 2004) (requiring disclosure of the presence of any mold that has not been properly removed according to applicable standards, but not requiring an investigation into same); CAL. CIV. CODE § 2079.9 (Deering 2004) (requiring delivery of manual for safety during earthquakes to all purchasers of real property, including purchasers of commercial property).

179. See TEX. BUS. & COM. CODE ANN. § 17.45 (excluding from the definition of "consumer" under Texas' Deceptive Trade Practices and Consumer Protection Act, any business consumer that either owns assets in excess of \$25 million or is owned or controlled by an organization with more than \$25 million in assets).

real estate industry. Further, it would reduce the potential for litigation, serving a benefit to the legal system.

IV. CONCLUSION

In summary, this comment has shown that the struggle between *caveat emptor* and good faith and fair dealing has created conflict within the common law of constructive eviction, implied warranty of habitability, and common law fraud. While there appears to be no Illinois case where a commercial tenant has used the Consumer Fraud Act to obtain relief, under some circumstances, the Act should be available as a gap-filler to provide relief for the tenant. The Illinois General Assembly should address this continued conflict and uncertainty in order to facilitate growth in the commercial property market through an increased confidence in the true value of the property and the finality of the sale.