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NOTES

MANDATORY DISCLOSURE LAW: A STATUTE FOR ILLINOIS

INTRODUCTION

The real estate law of Illinois has recently been affected yet again by the winds of change, or more appropriately, by ghosts in the attic. In the summer of 1991, the purchaser of a Victorian house in New York sued the seller based on the seller's failure to disclose that the house was haunted.[1] In *Stambovsky v. Ackley*, the purchaser argued that the poltergeists in his new home were a material element of the sale that should have been disclosed.[2] In holding for the plaintiff, the New York Supreme Court reasoned that since the seller had previously publicized the existence of ghosts in the home, the seller could not deny that the ghosts were a material element affecting its value.[3] The *Stambovsky* court held that nondisclosure was a sound basis for rescission of the sale since the buyer could not have discovered the ghostly presence through reasonable inspection.[4]

Stambovsky, along with other decisions that have similarly held for the buyer on grounds of nondisclosure,[5] frightened the community of real estate brokers and sellers everywhere. As a result, the National Association of Realtors (NAR) lobbied to enact mandatory seller disclosure laws throughout the country.[6] The

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1. Stambovsky v. Ackley, 572 N.Y.S.2d 672 (N.Y. App. Div. 1991).
2. *Id.* at 674. The reputation of the house greatly impaired the resale value of the property. *Id.*
3. *Id.* Ackley deliberately informed the general public that supernatural forces were at work in her home. Her poltergeists were written about in a 1977 *Reader's Digest* article and in the local paper in 1982. *Id.* The court wrote that the "defendant is estopped to deny their [poltergeists'] existence and, as a matter of law, the house is haunted." *Id.*
4. *Stambovsky*, 572 N.Y.S.2d at 674. In a 3-2 decision, the *Stambovsky* court concluded that since the buyer was a New York City resident, he could not be expected to know the legend of the house located in Nyack Village. *Id.* The court reasoned that it was unfair for the seller to take advantage of the buyer's ignorance of a condition which would not ordinarily prompt inquiry, and which would not be discovered through reasonable diligence. *Id.* at 677.
5. For a discussion of the current case law regarding the issue of nondisclosure, see *infra* part III.
6. James D. Lawlor, *Mandatory Seller Disclosure Laws*, PROB. & PROP., July-Aug. 1992, at 34. The National Association of Realtors is an organization that began in 1908 and is currently based in Chicago, Illinois. ENCYCLOPEDIA

NAR's efforts have succeeded in eleven states: Alaska, California, Delaware, Kentucky, Maine, Missouri, New York, Pennsylvania, Rhode Island, Virginia, and Wisconsin.[7] Illinois is the most recent state to adopt a mandatory disclosure law.[8]

For most people, the purchase of a home is the single most important acquisition of one's life.[9] As a result, used home buyers need increased protection.[10] Although a growing number of states

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OF ASS'NS: REGIONAL, STATE, AND LOCAL ORGANIZATIONS § 3115 (Grant J. Eldridge ed., 1992). The NAR is comprised of approximately 800,000 members and has an annual budget of over $5,000,000. *Id.* The Illinois Association of Realtors (IAR) is affiliated with the NAR and consists of approximately 30,000 members with an annual budget of $4,000,000. *Id.* § 1940. Since January 1992, the IAR License Law Task Force has spent a great deal of time drafting a model statute concerning seller disclosure. ILLINOIS ASS'N OF REALTORS LICENSE LAW TASK FORCE, SELLER DISCLOSURE FINAL REPORT & RECOMMENDATIONS (Sept. 1992).

7. Eleven states already have disclosure laws in effect: ALASKA STAT. § 34.70.010 (1992); CAL. CIV. CODE §§ 1102-1102.15 (West 1990); DEL. CODE ANN. tit. 24, § 2929A (1992); KY. REV. STAT. ANN. § 324.360 (Baldwin 1992); Code Me. R. § 330 (1991); MO. CODE ANN., BUS. OCC. & PROF. § 16-528 (1992); N.Y. REAL PROP. LAW § 443 (McKinney 1993) (to be repealed Dec. 31, 1993); PA. STAT. ANN. tit. 63, §§ 455.606-.607 (1993); R.I. GEN. LAWS § 5-20.8 (1992); VA. CODE ANN. § 55-517 (Michie 1992); and WIS. STAT. ANN. § 709 (West 1992).

8. The following ten states are currently considering mandatory disclosure laws: H.B. 657, Idaho 51st Leg. 1st Sess. (1992); H.B. 5282, Mass. 177th Gen. Court (1992); H.B. 5106, Mich. 86th Leg. (1991); S.F. 1481, Minn. 77th Leg. Sess. (1991); S.B. 2821, Miss. Leg. Sess. (1992); S.B. 304, Ohio 119th Gen. Assembly (1992) [(enacted)]; S.B. 996, Tenn. 97th Gen. Assembly, 2nd Sess. (1991); H.B. 51, Vt. 61st Gen. Assembly, 1st Sess. (1991); H.B. 2122, Wash. 52d Leg. (1992); H.B. 4608, W. Va. 70th Leg., 2nd Sess. (1992).

As of August 1992, twenty-three states had voluntary disclosure programs. James D. Lawlor, *Seller Beware: Burden of Disclosing Defects Shifting to Sellers*, A.B.A. J., Aug. 1992, at 90 [hereinafter *Seller Beware*]. Coldwell Banker is a real estate brokerage firm that has its own program for seller disclosure. Telephone Interview with Kathy Walgreen, Real Estate Agent, Coldwell Banker (Oct. 8, 1992). It is the policy of Coldwell Banker not to represent a seller unless the seller completes a disclosure form provided by Coldwell Banker. *Id.*

9. Serena Kafker, *Sell and Tell: The Fall and Revival of the Role on Non-Disclosure in Sales of Used Real Property*, 12 U. DAYTON L. REV. 57, 58 (1986) (citing Bethlahmy v. Bechtel, 415 P.2d 698 (Idaho 1966) as a moral foundation for the enactment of mandatory disclosure legislation).

10. *See* Joel M. King, *Broker Liability After* Easton v. Strassburger: *Let the Buyer Be Aware*, 25 SANTA CLARA L. REV. 651, 662 (1985). Although the current real estate market appears to favor the buyer, the price of a used home remains a substantial proportion of the typical buyer's income. *Id.* Thus, a used home buyer is in need of assurances. By contrast, there is more than adequate protection for the buyer of a new home. *See* Joseph C. Brown, Jr., *The Implied Warranty of Habitability Doctrine in Residential Property Conveyances: Policy-Backed Change Proposals*, 62 WASH. L. REV. 743 (1987) (discussing the role of the implied warranty of habitability in real estate transactions). For instance, a buyer of a new home can maintain a claim based on the implied warranty of habitability. *See* Schleyhahn v. Cole, 532 N.E.2d 1136 (Ill. App. Ct. 1989) (holding a builder liable under the implied warranty of habitability for defects in a new home, even though those defects did not make the home literally uninhabitable). Generally, there is an implicit agreement between the parties that the seller will convey a house that is suitable to live in, and the seller's failure to do so is a breach of warranty. *Id.*

have come to realize the significance of the purchaser's problem,[11] some states overlook rather crucial elements when formulating their policies and enacting their purportedly protective statutes.[12]

This Note focuses on the formulation of a comprehensive mandatory disclosure statute for Illinois. Part I discusses the development of the principle of *caveat emptor*, its evolution, and how it has withered away in the law of real estate. Part II examines the broker's role in a typical real estate transaction and considers how a disclosure law would aid both buyer and broker throughout the home buying process. Part III addresses current case law on the issue of liability for nondisclosure. Part IV critically examines the legislative response to the case law on mandatory disclosure. Using California's mandatory disclosure law as a model, Part IV then proposes to modify and amend the Illinois mandatory disclosure statute based on similar statutes currently under consideration in other states.

I. Background

A. *The Origin of* Caveat Emptor

Traditionally, the sale of both real property and personal property has been based on the doctrine of *caveat emptor*.[13] The Latin phrase first appeared on signs in ancient Roman markets that warned "let the buyer beware."[14] The Romans understood that the buyer had the responsibility of protecting himself from crafty

11. *See Seller Beware*, *supra* note 8, at 90 (discussing how seller disclosure laws have come to the forefront in state legislatures throughout the country).

12. For a discussion of California's mandatory disclosure statute and the deficiencies in the Illinois counterpart, see *infra* notes 143-190 and accompanying text. For instance, at first blush the California Code entitled "Disclosures Upon Transfer of Residential Property" appears not to offer any substantial protection. CAL. CIV. CODE § 1102.6 (West 1990). The California disclosure statute sets out the following disclaimer: "It is not a warranty of any kind by the seller(s) or any agent(s) representing any principal(s) in this transaction, and is not a substitute for any inspections or warranties the principal(s) may wish to obtain." *Id.* This disclaimer raises the issue of whether the buyer may sue based on a violation of the code if the facts revealed to the buyer are inaccurate. *See also* Robert J. Bruss, *Watch Out When Buying "As Is" House*, CHI. TRIB., Oct. 25, 1992, at 1F (warning buyers of real property that an "as is" disclaimer in a real estate contract signifies that the seller makes no warranties or representations as to the condition of the property).

13. King, *supra* note 10, at 652. *Caveat emptor* is an English common law maxim that developed in the seventeenth century. *Id.* Under the maxim, the buyer was denied any claims as to the quality of goods. *Id.*

14. The full Latin adage reads, "*Caveat emptor, qui ignorarea non debuit quod jus alienum emit*," which is translated as "let the buyer beware, who ought not be ignorant of the amount and nature of the interest which he is about to buy, exercise caution." Renee D. Braeunig, Johnson v. Davis: *New Liability for Fraudulent Nondisclosure in Real Property Transactions*, 11 NOVA L. REV. 145, 146 n.9 (1986) (citing H. BROOM, LEGAL MAXIMS 768 (7th ed. 1874)).

merchants by inspecting the products he purchased.[15] The philosophy of *caveat emptor* carried over into the Dark Ages of Europe as a result of the Crusades and the decline of the Catholic Church.[16] In the wake of the Crusades and the decline of the Church's authority, unregulated trade flourished among all the countries of the known world, and with it the thesis that each buyer—whether he be a merchant, middleman, or ultimate consumer—must fend for himself.[17]

Caveat emptor, as a legal maxim, was easily translated into the law of real estate in Middle Age England since agriculture was the sole purpose for land.[18] In feudal Europe, the possession of land by anyone, other than a lord or king, was a rarity.[19] In fact, by the end of the eleventh century all land was held by the king, with others holding under him in tenure.[20] The allodial form of ownership was unknown in England.[21] The focus of real estate was on the soil itself and not on the structure atop the soil.[22] *Caveat emptor* was so

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15. *Id.*

16. Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931). In order to instill and propagate the necessary sense of morality in the common people, the Christian Church involved itself in commercial activities. *Id.* at 1138. For instance, the Church prohibited the receipt of interest on loans, reasoning that the income came without actual work and was therefore sinful. 18 ENCYCLOPEDIA BRITANNICA 385 (15th ed. 1986). In addition, the Church fixed the price of certain goods in an attempt to enhance fair dealing with unlearned buyers. *Id.* With the decline of the Church's power, its influence withered away allowing the markets to trade free of regulations. *See also* Comment, *Caveat Vendor — A Trend in the Law of Real Property*, 5 DE PAUL L. REV. 263 (1956) [hereinafter *Caveat Vendor*] (discussing the rise and fall of the doctrine of *caveat emptor*).

17. 16 ENCYCLOPEDIA BRITANNICA, *supra* note 16, at 891. As a result of the Crusades, travel became more common among various nations and cultures. *Id.* Soldiers and merchants alike journeyed throughout the known world trading with one another, guided by their common sense.

18. Patricia Esser Cooper, *The Wave of Seller Liability*, PROB. & PROP., July-Aug. 1992, at 26 (noting that the central purpose of land during feudal times was to grow produce to feed the family occupying the land, and to serve as a source of tax for the feudal lords). In modern times, the need is less for arable land and more for shelter. *Id.* at 27.

19. *See* CORNELIUS J. MOYNIHAN, A PRELIMINARY SURVEY OF THE LAW OF REAL PROPERTY 3—4 (West Publishing Co. ed., 1940) (explaining that after the Norman Conquest, the king became the sole owner of all land and then transferred land to soldiers for payment of military duties). The granting of land was considered a luxury. *Id.* As such, the grantees were not inclined to complain about any defects. *Id.*

20. *Id.* at 3 (explaining that the Norman lawyers established the principle that all land was derived from the King; and stating that by 1086 England was divided among approximately 1,500 tenants, each owing the King some type of service).

21. *Id.* at 14 (explaining that the concept of singular ownership — ownership of land not in relation to a superior — was unknown). The term "allodial" refers to land owned "not holden of any lord or superior." BLACK'S LAW DICTIONARY 76 (6th ed. 1990).

22. At the outset of Anglo law a conveyance of the land included any structure built upon the land. MOYNIHAN, *supra* note 19, at 14. Even today, no

ingrained in English jurisprudence that Lord Cairns in *Peek v. Guiney*[23] explained that the seller has no duty to disclose facts regardless of how "morally censurable" silence may be.[24] Accordingly, the English common law, with few demurrers, strictly applied the doctrine of *caveat emptor* in the purchase of both goods and real estate.[25]

B. The Sale of Goods and Caveat Emptor *in the United States*

In the United States, the doctrine of *caveat emptor* concerning the sale of goods became woven into the fabric of the common law during the industrial revolution.[26] At that stage of American history, society favored individualism and the frontier spirit.[27] The courts reflected society's general preference for a *laissez faire* economy by refusing to interfere with business ventures, and by generally holding that a purchaser must "take care of his own interests."[28]

The first dent in the protective shield of *caveat emptor* came in 1906 with the enactment of the Uniform Sales Act.[29] The Uniform Sales Act was a forthright attempt by the respective state legislatures to protect buyers from defective goods. As a result of the enactment of the Uniform Sales Act, sellers began to vouch for their products and discovered that honesty could bring back satisfied customers.[30] This statutory exception to the common law rule of *caveat emptor* effectively emasculated the maxim as it applied to the sale of personal property.[31]

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reference need be made in a deed as to the existence of a structure existing upon the land. *Id.* at 15.

23. Peek v. Gurney, L.R. 6 H.L. 377 (1873).

24. Kafker, *supra* note 9, at 58 (citing Peek v. Gurney, L.R. 6 H.L. 377 (1873), and describing Lord Cairns' reasoning that the law of *caveat emptor* was grounded in the freedom of contract).

25. Hamilton, *supra* note 16, at 1137.

26. *Caveat Vendor*, *supra* note 16, at 264.

27. *Id.* at 264. The focus of business was on pure capitalism, fueled by the abhorrence of any governmental influence. *See also* Hamilton, *supra* note 16, at 1171 (stating that American entrepreneurs strongly supported the doctrine of *caveat emptor*, believing it promoted self-reliance, sharpened acumen and would help business and society flourish by leaving unbridled each person's self-interested ambition).

28. *See* Barnard v. Kellog, 77 U.S. 383 (1870) (holding that the needs of business are best served by utilizing the principle of *caveat emptor*).

29. UNIFORM SALES ACT (1906); King, *supra* note 10, at 653.

30. *See Caveat Vendor*, *supra* note 16, at 264 (explaining that once sellers stood behind their products, they realized customers would return with more business).

31. *Id.* The author suggests that the exceptions to *caveat emptor* not only swallowed the rule, but also pushed the law of sales to the opposite extreme of *caveat venditor*, "let the seller beware." *Id.* at 265. *See also* Johnson v. Davis, 480 So. 2d 625 (Fla. 1985) (stating that the law is moving to the point where a seller must fully disclose all material facts whenever equity demands).

C. *Real Estate Law in the United States Was Not Quick to Abolish* Caveat Emptor

Though the law governing the sale of goods overcame *caveat emptor*, the law of real estate contracting and conveyancing was not so quick to abolish the maxim,[32] leaving purchasers of real property unguarded by analogous protections. As recently as 1965, one commentator was moved to say that the law offers more protection to a person buying a dog leash than it does to the purchaser of a house.[33] Courts continued to cling to the notion that a seller had no duty whatsoever to disclose anything to the buyer.[34]

However, *caveat emptor* never completely shielded the seller of real estate. The common law has always recognized exceptions to the maxim and held sellers of real estate liable under theories of fraud or express warranties.[35] Yet, these exceptions did not have a far reaching effect, given the courts' narrow definition of fraud.[36] For instance, in *Vulcan Metals Co. v. Simmons Manufacturing Co.*, Judge Learned Hand wrote that even if a seller of a product misled a buyer with what Judge Hand termed "dealer's talk," fraud was not actionable unless the buyer had no chance to inspect.[37]

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32. *Caveat Vendor, supra* note 16, at 265.

33. *See* Paul G. Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633 (1965) (proposing that owners of personal property have protections, like the warranty of merchantable quality, but that real estate purchasers assume all the risks and have no recourse against the seller).

34. The court in Swinton v. Whitinsville Savings Bank, 42 N.E.2d 808 (Mass. 1942) summarized this attitude well. In *Swinton*, the buyer claimed that the seller fraudulently failed to reveal that the house was infested with termites. *Id.* at 808. The *Swinton* court held that the seller had no duty to disclose the presence of the pests for the law had not "reached the point of imposing upon the frailties of human nature a standard so idealistic as this." *Id.* at 809. In other words, a seller may take advantage of an uninformed buyer regardless of fair play. *Id.* The necessary protections for real estate purchasers came slowly, case by case.

35. *See* Richard M. Jones, Comment, *Risk Allocation and the Sale of Defective Used Housing in Ohio—Should Silence Be Golden?*, 20 CAP. U. L. REV. 215, 217 (1991) (explaining that the common law has always acknowledged certain exceptions to the general rule that a seller need not disclose material facts to a buyer).

36. *See* Craig A. Peterson, *Tort Claims by Real Estate Purchasers Against Sellers and Brokers: Current Illinois Common Law and Statutory Strategies*, 1983 S. ILL. U. L.J. 161, 164 (discussing how even today fraud may be difficult to allege since many states require proof of scienter). *See* RESTATEMENT (SECOND) OF TORTS § 526 (1977) (discussing the elements which a plaintiff must prove to establish a *prima facie* case of fraud); *see, e.g.*, Park v. Sohn, 414 N.E.2d 1 (Ill. App. Ct. 1980) (reversing judgment and holding in favor of defendant-builders, because plaintiff failed to prove defendants were aware that they had built the home in violation of a zoning ordinance).

37. *See* Vulcan Metals Co. v. Simmons MFG. Co., 248 F. 853 (2d Cir. 1918) (reasoning that since the buyer had ample opportunity to inspect the vacuum cleaner, the seller's statements were not misrepresentations; rather they were considered an exaggeration of the vacuum cleaner's qualities).

The first inroad on *caveat emptor* as it applied to the sale of real estate dealt with the seller's duty to disclose material facts.[38] The courts eventually changed their rigid viewpoint on the seller's duty to disclose in situations that involved dangerous conditions, holding that sellers must disclose facts that might threaten a buyer's well-being.[39] In 1932, the Restatement of Contracts took another step in the same direction.[40] The Restatement advocated a broad legal duty to disclose all known facts that were crucial to the transaction.[41] The Restatement commentators reasoned that nondisclosure of such facts would be tantamount to mistake, thereby voiding the entire contract.[42]

The next step in modifying the rule of *caveat emptor* concerned the interpretation of "reasonable diligence."[43] In the mid-twentieth century, courts began to impose a duty on sellers to disclose facts which a purchaser could not discover through the exercise of reasonable diligence.[44] For instance, if a seller were aware that the furnace was defective and a buyer could not determine its condition through a reasonable inspection, the seller would have a duty to reveal that fact to the purchaser.[45]

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38. *See Caveat Vendor, supra* note 16, at 265 (stating that one of the fundamental principles of *caveat emptor* was that the seller had no duty to disclose facts).

39. *See* Kafker, *supra* note 9, at 59 (explaining that when courts impose a duty to disclose material defects, they often base their holdings on the threat that nondisclosure poses to a buyers' safety); *see, e.g.*, Thacker v. Tyree, 297 S.E.2d 885 (W. Va. 1982) (finding that the seller had a duty to disclose that the house was built on filled ground which caused the walls to crack to the point where the house was not safe for occupation). *See also* Cooper, *supra* note 18, at 28 (explaining that although contract law may be used creatively to circumvent *caveat emptor*, the rush of liability in recent times stems from actions based on tort).

40. RESTATEMENT OF CONTRACTS § 502 (1932).

41. *See Caveat Vendor, supra* note 16, at 265 (referring to the *Restatement of Contracts* § 502 (1932) as requiring disclosure of facts that are crucial to the transaction); *see also* Cooper, *supra* note 18 (reasoning that a buyer who is unaware of a defect which is material to the transaction may rescind the contract based on mutual mistake, regardless of whether the seller was aware of the defect). However, in the recent case of Harding v. Willie, 458 N.W.2d 612 (Iowa Ct. App. 1990), the buyer sought to rescind a contract for the purchase of a house after he realized that the roof still leaked. The *Harding* court held that since the seller had had work done on the roof, the seller was unaware of the problem and was, therefore, not liable for telling the buyer that the roof was fine. *Id.*

42. *Caveat Vendor, supra* note 16, at 265.

43. *Id.* at 266; *see, e.g.*, Revitz v. Terrell, 572 So. 2d 996 (Fla. Dist. Ct. App. 1990). In *Revitz*, the buyer based a cause of action on nondisclosure against a broker for not revealing the actual cost of flood insurance. *Id.* The Florida court of appeals held that the buyer satisfied the requirement of reasonable diligence when the buyer inquired why neighboring homes were on stilts. *Id.* at 998.

44. *See, e.g.*, *id.*

45. However, few courts will find a seller liable based on the seller's superior knowledge. Kafker, *supra* note 9; *see* Holcomb v. Zinke, 365 N.W.2d 507

California took an even stronger stance on the seller's breach of this newly-imposed duty to disclose. In 1947, a California appellate court held that concealment would be considered fraudulent in situations where the seller refuses to reveal material facts that "are unknown to the buyer."[46] Hence, silence became the functional equivalent of fraud.[47] Thus, California made it more dangerous for a seller to remain silent by holding that the seller had not necessarily fulfilled the duty to disclose, even after the buyer had inspected the house.[48]

The common law also modified the doctrine of *caveat emptor* as it applied to affirmative representations. Although courts still charged the buyer with the duty to conduct a reasonable investigation, they declined to punish the buyer for believing the seller's misrepresentations.[49] In *Prescott v. Brown*,[50] the Oklahoma Supreme Court took "the view that a vendor, guilty of a falsehood made with intent to deceive, should not be heard to say that the purchaser ought not to have believed him."[51] The courts afforded real estate purchasers the right to rely on sellers' express assertions.[52]

(N.D. 1985) (asserting that although there exists no fiduciary duty between buyer and seller, it is clear that the seller is in a superior position due to the seller's familiarity with the property).

46. *See* King, *supra* note 10, at 653 (quoting the holding in Dyke v. Zaiser, 182 P.2d 344 (Cal. Ct. App. 1947) where the defendant-lessor induced the plaintiff-lessee to sign an eight year lease to operate a concession stand at an amusement park). In *Dyke*, the California Court of Appeals held the defendant liable for fraud. The court reasoned that because the defendant was a city official, he knew that the facility was to be shut down by the police the day after the lease was signed, yet still made representations to the effect that the facility would remain open for years. *See also* Southern v. Floyd, 80 S.E.2d 490 (Ga. Ct. App. 1954) (holding seller liable based on fraud for concealing a crack in a furnace so as to frustrate discovery).

47. *See, e.g.*, *Dyke*, 182 P.2d 344; *Southern*, 80 S.E.2d 490.

48. *See, e.g.*, *Dyke*, 182 P.2d 344; *Southern*, 80 S.E.2d 490.

49. *See* Carol R. Goforth, *Sales of Structurally Defective Homes: The Potential Liability of Sellers and Real Estate Brokers*, 41 OKLA. L. REV. 447, 450 (1988) (discussing the courts' reasoning that a buyer need not go to great lengths to investigate a home; instead, the buyer's duty to conduct a search is minimal). It seems clear, however, that a buyer will be held responsible for discovering patent defects. *Id.*

50. Prescott v. Brown, 120 P. 991 (Okla. 1911).

51. *Id.* at 994.

52. *See* RESTATEMENT (SECOND) OF TORTS § 552 (1977) (stating that if the buyer was justified in relying on a seller's misstatements, the buyer has a right to damages for any pecuniary loss which resulted from the seller's purposeful or negligent communication of false information). *See* Braeunig, *supra* note 14, at 148 (discussing how half truths are tantamount to fraud); *see, e.g.*, Elsey v. Lamkin, 162 S.W.2d 106 (Ky. 1914) (holding the seller liable for disclosing the existence of only one of the two graveyards on the premises); PROSSER AND KEETON ON THE LAW OF TORTS § 106 (5th ed. 1984). Once a seller chose to speak, she assumed the duty to disclose the whole truth. *Id.* Thus, if a buyer relied on a prior representation and the seller acquired new information which showed the prior representation to have been incorrect, the seller would be responsible for failing to convey the newly-acquired truths. *Id.* *See also* RESTATEMENT (SECOND) OF TORTS § 529 (1977): "A representation stating the truth so far as it goes

In extending this protection to buyers of real estate, courts then examined the notion of "puffing."[53] Since an exception to *caveat emptor* required a misrepresentation of fact, the courts had to address the question of whether "puffing" was truly such a misrepresentation. In *Passero v. Loew*,[54] the Texas Supreme Court found that "puffing" was an exception to *caveat emptor*. The *Passero* court reasoned that a seller who asserts that a house was built well, when it truly was not, would be liable for making a misrepresentation of fact.[55]

In addition to ruling that a seller must not lie, courts held that any material misrepresentation, whether purposeful or not, would allow the buyer to rescind the contract.[56] The seller's subjective honesty or diligence would no longer be a factor since the law would impose the same penalty on both innocent misrepresentations and more deliberate misstatements.[57]

D. Caveat Emptor *Is a Useless Doctrine*

In sum, *caveat emptor* does not have a ghost of a chance of remaining a viable tenet in late twentieth century jurisprudence.[58] Courts have repeatedly demonstrated that the maxim of *caveat emptor* is not appropriate in contemporary society.[59] In light of the

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but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter is fraudulent misrepresentation."

53. *Caveat Vendor*, *supra* note 16, at 268. "Puffing" is defined as a seller's exaggeration about the quality of a product for the purpose of inducing a buyer to purchase. BLACK'S LAW DICTIONARY 1233 (6th ed. 1990).

54. *See* Passero v. Loew, 259 S.W.2d 909 (Tex. Civ. App. 1953) (holding that a seller's false representation was material where the seller asserted that the house was well constructed and that the buyer would experience no serious problems, when in fact the house was built on clay subsoil).

55. *Id.*

56. See JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 357 (3d ed. 1987) for a discussion of how nondisclosure of a material fact in a transaction may lead to recision of a contract.

57. *Id.*

58. Frona M. Powell, *Mistake of Fact in the Sale of Real Property*, 40 DRAKE L. REV. 91, 116 (1991). Courts today have a revived interest in minimum standards of fair dealing, reminiscent of the Church a millennium before. *Id.* This is reflected in the courts' general acceptance of the implied warranty of habitability. *See* Grand, *Implied and Statutory Warranty in the Sale of Real Estate: The Demise of Caveat Emptor*, 15 REAL EST. L.J. 44 (1986) (asserting that the doctrine of *caveat emptor* should be directly confronted by way of legislation which would require sellers of real estate to deliver a sound product for a fair price). For a discussion of the implied warranty of habitability in real estate transactions, see *supra* note 10.

59. Braeunig, *supra* note 14, at 147. It was always assumed that parties dealt with one another at arm's length and that the buyer had an equal opportunity to inspect the property in question. *Id.* This attitude originated from early transactions between neighbors, conducted face to face. *Id.* Moreover, the parties usually were well acquainted with one another and lived in the same

increasing complexity of real estate transactions, the law should mandate fair and reasonable disclosure.

II. Overview of a Basic Real Estate Transaction

In order to fully understand how a mandatory disclosure law would benefit all parties in a real estate transaction, one needs to understand the intricacies of the transaction itself. Part II of this Note examines the role of the broker in relation to both the buyer and the seller. Then, it explains the limited points in time at which the buyer currently has an opportunity to inspect the real estate.

A. *The Broker As a Dual Agent*

One of the central problems surrounding the average real estate transaction is that buyers expect that brokers will protect the buyers' interests.[60] Buyers operate under a false sense of security, believing that real estate brokers are agents of the buyer. In Illinois, even though brokers must explain that their fiduciary duty is to sellers,[61] most buyers will continue to believe that the brokers are their confidants.[62] Accordingly, a mandatory disclosure law, whereby the seller and the seller's broker must reveal all material defects and alert the buyer to the buyer's substantive rights, will help to rouse the buyer out of a false sense of security.

The normal scenario in the sale of residential real estate in-

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small communities. *Id.* Accordingly, a seller's self-interested motivation was lessened greatly.

60. "The legal relations of the parties must vary with the variation of the operative facts of the particular transactions, their complexity and variation being increased by the fact that at least three parities are always involved — a seller, a purchaser, and a broker." CORBIN ON CONTRACTS § 50, at 194 (1963).

61. Illinois law mandates that a broker who has been contacted by a prospective buyer, must inform the buyer of any agency relationship with the seller. 225 ILCS 455/18.2 (1993) provides as follows:

> Persons licensed under this Act shall disclose in writing to prospective buyers the existence of an agency relationship between the licensee and the seller, or shall disclose in writing to sellers, or their agent, the existence of an agency relationship between the licensee and a prospective buyer at a time and in a manner consistent with regulations established by the Department.

Id.

62. Jones, *supra* note 35, at 225. There are a number of reasons why a buyer is lulled into a sense of security. At the preliminary stages of home buying, a buyer will seek a broker. Often, a friend of the buyer will refer the broker to him. *Id.* Typically, the buyer divulges a great deal of personal information, principally his financial status, to the broker so that the buyer may be placed in the correct market. *Id.* Also, the buyer discusses his personal likes and dislikes with the broker to further narrow the search. *Id.* After spending a great deal of time with the broker — discussing personal information, being escorted to various homes, and helped in other ways — a buyer may be misled into believing that his new-found friend is a professional who has the buyer's best interest primarily at heart.

volves two brokers: (l) the listing broker,[63] who obtains the listing from the seller and principally represents and deals with the seller; and (2) the cooperating broker, also known as the selling or showing broker, who deals almost exclusively with the buyer. Both brokers, however, are primarily agents of the seller.[64] Once either broker brings a buyer who is ready, willing and able to buy, either on the listing terms or on other terms acceptable to the seller, the broker has essentially "earned" her commission.[65]

B. *Opportunities to Inspect*

In the typical real estate transaction, the buyer has only two opportunities to conduct an inspection of the property: after signing the sales contract and immediately prior to closing. However,

63. *See* RAYMOND J. WERNER & ROBERT KRATOVIL, REAL ESTATE LAW § 10.11 (10th ed. 1992) (defining the broker who obtains the listing from the seller as the listing broker). The first thing a seller normally does when she intends to sell her home is to contact a real estate broker and enter into a listing agreement. *Id.* Then, the listing broker will usually enter the listing in a multiple listing service (MLS). *Id.* The MLS takes the information about the seller's particular property and disseminates it throughout a given geographic region to other brokers, known as cooperating brokers. *Id.* If a particular broker is a member of an MLS, she is obligated to put the property into the multiple listing bureau within one or two days after obtaining the seller's listing. *Id.* Otherwise, she will not be able to continue her participation in the association. *Id.*

64. Lately, however, because the buyer normally believes that the cooperating broker is his personal agent, the cooperating broker has been held to have a fiduciary duty to the buyer. Stefani v. Baird & Warner, 510 N.E.2d 65 (Ill. App. Ct. 1987). In *Stefani*, the defendant-broker prepared a purchase offer on behalf of the plaintiff-buyers for a home located in Chicago. *Id.* at 67. Offers and counter-offers were exchanged between plaintiffs and the home owners. *Id.* While negotiations continued, the defendant contacted another couple to purchase the house who offered more money than the plaintiffs. *Id.* The defendant never informed plaintiffs that another couple had made an offer. *Id.* The court found that the cooperating broker had a fiduciary duty to the plaintiffs to disclose that there are other potential purchasers. *Id.* Thus, the cooperating broker paradoxically seems to have a dual allegiance.

65. *See* Hallmark & Johnson Properties, Ltd. v. Taylor, 559 N.E.2d 141 (Ill. App. Ct. 1990) (finding for the brokers based on the rule that a broker's commission is earned once a ready, willing, and able buyer is produced; notwithstanding the fact that the failure of buyer in question to appear at closing was due to his arrest by federal law enforcement agents).

However, if a contract is subject to a condition, the broker's commission is technically earned only after that condition is fulfilled. *See How to Draft a Real Estate Brokerage Agreement*, PRAC. REAL EST. LAW., Mar. 1987, at 45-54. For example, one condition might require that a buyer first obtain a mortgage; another condition might require that the house pass a building inspection. Under these circumstances, although the broker often does not receive her commission until closing, she has earned her commission once the condition occurs. *Id.*

In some listing contracts, the broker is entitled to a commission from the seller even if the deal falls through. *Id.* Therefore, a prudent attorney representing the seller will insert a clause into the brokerage contract stating that the broker will earn and receive a commission only if the deal closes. *See also* Ellsworth Dobbs, Inc. v. Johnson, 236 A.2d 843 (N.J. 1967) (establishing a three part test as to when a broker earns his commission).

as this section demonstrates, many buyers do not avail themselves of these opportunities.

At the contract drafting stage, a mandatory disclosure law would be an invaluable tool. The drafting of a real estate contract is the point in the transaction at which the buyer's attorney can best protect her client.[66] Real estate contracts usually include provisions on such matters as the purchase price, earnest money, marketable title, a survey of the property itself, and attorney approval clauses.[67] It is becoming increasingly common for the sales contract to also provide the buyer an opportunity to have an expert inspect the property, and to make the contract contingent on the building inspector's approval of the property. Within a short time after signing the contract, the buyer's expert will inspect the structural integrity of the property; and absent disapproval by the inspector, the contract becomes unconditional.[68]

However, a buyer does not always take advantage of this opportunity to have an expert inspect the property. When an inspection is provided for in the contract, the broker who drafts the form contract frequently allows only a short period of time for the inspection.[69] Conducting the inspection within the period provided requires a degree of diligence on the buyer's part that the buyer frequently cannot meet. Therefore, it is evident that a disclosure law—including a mandatory inspection—will facilitate the consummation of the contract.

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66. "The contract of sale is the key to the real estate transaction. It is the critical document which fixes the fundamental rights and obligations of the parties from the time it is signed through the closing of title and, in many cases, even beyond." ARTHUR S. HORN, RESIDENTIAL REAL ESTATE LAW AND PRACTITIONER IN NEW JERSEY § 1.1 (2d ed. 1989).

67. "Attorney approval" clauses are attached to the contract when the contract itself is filled out by the broker. *See* Chicago Bar Ass'n v. Quinlan & Tyson, 203 N.E.2d 131 (Ill. App. Ct. 1964) (holding that brokers are permitted to fill in form real estate contracts). An example of an attorney approval clause reads as follows:

> Attorney Review: The parties agree that their respective attorneys may review and make modifications other than stated purchase price mutually acceptable to the parties within four (4) business days after the date of the Contract acceptance. If the parties do not agree and written notice thereof is given to the other party within the time specified then this Contract will become BY ALL PARTIES HERETO AND THIS CONTRACT WILL BE IN FULL FORCE AND EFFECT.

Courts have held that attorneys can withhold approval of a completed and signed contract for any reason, provided that the attorney acts in good faith. *See* Indoe v. Dwyer, 424 A.2d 456 (N.J. 1980); Trenta v. Gay, 468 A.2d 737 (N.J. Super. Ct. Ch. Div. 1983).

68. WERNER & KRATOVIL, *supra* note 63, § 10.11. Disapproval frequently must be personally delivered to the seller within a predetermined time frame. At this point, the broker will have earned her commission and thereafter the contract must be performed as written. *Id.*

69. *Id.* Frequently, real estate contracts allow the buyer three to five days to have an inspection completed. For a discussion of mandatory inspections, see *infra* part IV.C.3.a.

Once a buyer obtains a mortgage commitment from a lender, a title insurance company must conduct a title search to ascertain the present condition of the title, starting with the first conveyance of the land.[70] If a substantial objection in the title commitment makes the title unmarketable, the buyer's attorney will inform the other side that the deal cannot close.[71] Once the title commitment is issued and the buyer's attorney is convinced that the title is fundamentally marketable, the buyer's attorney informs the seller's attorney that the deal may close.[72]

Fundamentally, at closing the seller gives a deed to the buyer conveying title to the land, and the buyer pays money or other consideration to the seller.[73] Immediately prior to the closing, it is cus-

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70. *See* WERNER & KRATOVIL, *supra* note 63, § 15.06. A few decades ago, lawyers actually went to the Recorder's Office to search the official books as to the condition of title. *Id.* Today, because there have been so many transactions over such short periods of time, lawyers in urban areas no longer conduct title searches. *Id.* This function is now performed by organizations such as Chicago Title Insurance, Ticor Title, Intercounty Title, Attorney's Title Guarantee Fund, to name a few. *Id.* § 15.01.

A title insurance company will search the records (theoretically from the first U.S. land grant to the present time) and determine who is presently in title. *Id.* The title searcher will also determine what liens, conditions, utility easements, and other title concerns affect the land. *Id.* The title insurance company commitment, once issued, does not rid the title of these objections or exceptions. *Id.* It simply informs the prospective buyer what those exceptions are. *Id.* After having seen the title commitment, the buyer's attorney must decide whether the title is "marketable." *Id.*

The title commitment to the land has nothing to do with the structural integrity of the building. Instead it deals with, for example, whether there is a possibility of reverter, whether there are any liens against the land, whether or not there are private or public easements that affect the land, and other such title questions. *Id.*

71. WERNER & KRATOVIL, *supra* note 63. Furthermore, consider that if the buyer had agreed in the contract to take the property subject to a substantial exception (e.g., to an easement for a private road), the buyer has no right to back out of the sale. In other words, when the buyer signs a contract, the buyer agrees to take title subject to certain exceptions and limitations. The more exceptions and limitations the buyer agrees to in the contract, the less chance she has of rescinding the sales contract once the title insurance commitment is finally issued.

72. *Id.*

73. *Id.* § 14.01. The buyer's money comes from a combination of funds, *i.e.*, from his own savings and from monies borrowed from the mortgage lender. *Id.* In days gone by, the lenders would conduct the closing, issue a check to the seller, and pay off liens of an ascertainable amount. Currently, lenders do not actually conduct the closing. *Id.* Instead, they delegate the job to an officer of the title company that issued the title insurance commitment. *Id.* Therefore, the title company wears two hats; one of title searcher and insurer, and another of deal closer. *Id.*

Brokers are usually present at the closing and at that time hand the keys to the buyer. Upon conclusion of the closing, which takes about two hours, the buyer owns the property free of all liens except his own mortgage. After the sale has finally closed and a few more weeks have elapsed, the recorded deed will be mailed back to the buyer's attorney along with the new title policy. *Id.* This completes a normal residential real estate transaction.

tomary for the buyer to re-inspect the premises to be sure that all items of personal property listed in the contract remain on the premises, and that the house is as structurally sound as it was on the day the contract was signed.

A mandatory disclosure law should once again come into play at this juncture of the transaction. A complete disclosure law would require the seller to make up-to-date disclosures of defects that occurred during the executory period of the contract.[74] Occasionally, the buyer re-inspects the property before closing and realizes a defect has surfaced that either ought to be remedied, or is so crucial that it justifies canceling the sale. However, by this time the buyer is doubtlessly so psychologically committed to purchasing the house that she is likely to dismiss even potentially major problems and will deem practically anything acceptable. Therefore, the seller should have the duty to recertify that the property has not deteriorated—ordinary wear and tear excepted—from the time of the initial disclosure to the date of closing. The mandatory disclosure law should also provide that the seller's recertification, being supported by separate consideration, would survive the closing and be separately actionable by the buyer. This would obviate the normally strong—and otherwise conclusive—presumption that all pre-closing contractual commitments are merged into the deed and expire at closing.

III. CURRENT CASE LAW

A. *Brokers Now Assume the Same Liability as Sellers*

With the demise of *caveat emptor*, a disappointed purchaser may plead a number of causes of action against a seller. Buyers today may base suits on fraud,[75] breach of express or implied warranty,[76] and consumer protection acts,[77] to name a few.[78] However, the variety of remedies available to buyers is not the issue that unnerves members of the NAR. Rather, the brokers' fraying nerves are attributable to the fact that buyers are beginning to seek

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74. *See infra* part IV.C.2 (discussing a modification to Illinois' existing proposal that would provide for up-to-date disclosure of newly discovered defects).

75. Jones, *supra* note 35, at 217 (citing Grant v. Wrona, 662 S.W.2d 227 (Ky. Ct. App. 1983) as an example of where a buyer based a cause of action on fraud).

76. *Id.*

77. *Id.* (citing Koltz v. Underwood, 563 F. Supp. 335 (E.D. Tenn. 1982) as an example of where a buyer based a cause of action on a consumer protection act); *see, e.g.*, Young v. Joyce, 351 A.2d 857, 859 (Del. 1975).

78. Jones, *supra* note 35, at 217. *See* Chapman v. Hosek, 475 N.E.2d 593 (Ill. App. Ct. 1985) (holding that a purchaser's cause of action for fraud would stand where the broker failed to disclose that the property flooded, and observing that although information about the flooding was on public record, the public record alone did not put the buyer on sufficient notice to extinguish the buyer's suit).

relief for faulty transactions from the brokers themselves.[79]

One reason for the brokers' concern is that often the seller, alone, does not have the funds to adequately compensate the buyer. So, as a practical matter, buyers—and their attorneys—look to the deep pockets of the real estate broker.[80] Buyers' attorneys realize that many mistakes and wrongdoings on the part of the broker are covered by the broker's professional insurance.[81]

Courts today understand that the broker plays a crucial role in residential transactions.[82] Not only do both parties rely on the broker for guidance, but the broker also has a substantial personal interest, given that she derives her income from the sale.[83] Consequently, many courts hold both the seller and the broker liable for failure to make adequate disclosure.[84]

For instance, in *Lingsch v. Savage*[85] a California appellate court held both the broker and seller liable for failure to disclose defects. In *Lingsch*, the buyer sued both the seller and the broker alleging that the failure to disclose material facts amounted to a $5,000 fraud.[86] The *Lingsch* court explained that the seller had a duty to disclose all facts materially affecting the value of the property.[87] Failure to comply with the duty was actual fraud.[88] Moreover, the court reasoned that since the defendant broker had a personal interest in the sale, he too was a party to the transaction.[89] Therefore, the broker, who was actually aware of material defects, was jointly and severally liable for damages.[90]

Thus, by the 1980s, both the seller and broker were left unprotected by *caveat emptor* and could be held liable under numerous causes of action. The buyer could sue either the seller or the broker for intentional misrepresentation,[91] innocent misrepresentation,[92]

79. *See infra* text accompanying notes 97-114.
80. Jones, *supra* note 35, at 219.
81. *Id.* at 220.
82. *Id.*
83. *Id.*
84. King, *supra* note 10, at 655.
85. Lingsch v. Savage, 29 Cal. Rptr. 201 (Cal. Ct. App. 1963).
86. *Id.* at 203. That is, the property was truly worth $5,000 less than it was represented to be, due to the fact that the property was in a state of disrepair.
87. *Id.* at 204.
88. *Id.* at 205.
89. *Lingsch*, 29 Cal. Rptr. at 205.
90. *Id.*
91. *See, e.g.*, Weintraub v. Krobatsch, 317 A.2d 68 (N.J. 1974) (where a home was infected with roaches, the New Jersey Supreme Court applied the modern view of concealment, holding that the failure to reveal a substantial defect which the buyer could not reasonably have discovered on his own amounts to fraud).
92. *See, e.g.*, Bevins v. Ballard, 655 P.2d 757, 763 (Alaska 1982) (holding the broker liable under the doctrine of innocent misrepresentation for repeating the seller's false statements).

negligent misrepresentation,[93] breach of express warranty, breach of implied warranty of habitability,[94] strict liability,[95] and statutory consumer trade acts.[96]

B. Easton v. Strassburger *Has Extended the Liability of Brokers*

By the early 1980s, many brokers believed that by placing additional duties on brokers and sellers alike the courts had tipped the scales in the buyers' favor.[97] In February of 1984, a California appellate court added fuel to this controversial fire with its decision in *Easton v. Strassburger.*[98] The effects of the *Easton* decision raced through the country like wildfire, causing the NAR to assemble its forces and push for legislation.[99]

Easton generated alarm because it dramatically expanded the scope of broker liability.[100] *Easton* involved the sale of a one acre plot of land on which stood a 3,000 square foot house, a swimming pool, and a guest house.[101] The plaintiffs bought the property in 1976 for $170,000.[102] Shortly after the sale, in 1977 and again in 1978, massive earth movements substantially damaged the property.[103] Experts attributed the problem to improperly compacted fill under the property.[104]

At trial it was revealed that the sellers previously experienced two slides, took corrective measures, but withheld that information from their brokers.[105] Moreover, the evidence also revealed that the brokers were aware of many clues, such as netting on a slope by the house and uneven floors in the guest house which, in California,

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93. *See, e.g.*, Richmond v. Blair, 488 N.E.2d 563, 567 (Ill. App. Ct. 1985) (holding the broker liable for not disclosing known defects of the property being sold).

94. *See* Peterson v. Hubschman, 389 N.E.2d 1154 (Ill. 1979) (establishing an implied warranty of habitability).

95. *E.g.*, Gauerke v. Rozga, 332 N.W.2d 804 (Wis. 1983) (finding the real estate broker strictly liable to the purchaser of property for misrepresentations regarding the acreage and amount of road and river frontage); Schipper v. Levit, 207 A.2d 314 (N.J. 1965).

96. Staurt Knowles, Note, *Real Estate Brokers Liability for Failure to Disclose: A New Duty to Investigate*, 17 PAC. L.J. 327, 332 (1985).

97. Braeunig, *supra* note 14, at 162 (citing Johnson v. Davis, 480 So. 2d 625 (Fla. 1985) (Boyd, C.J., dissenting) wherein the dissenting justice cautioned that soon sellers may become guarantors of the property — placing the entire duty of inspection on the seller — leaving the buyer without responsibility).

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

99. *See* Lawlor, *supra* note 6, at 34 (stating that the NAR support for man datory disclosure laws is a direct result of *Easton*, yet not entirely altruistic, but rather a means to minimize the broker's liability).

100. Knowles, *supra* note 96, at 336.

101. *Easton*, 199 Cal. Rptr. at 385.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 386.

is evidence that slides have taken place.[106] In short, regardless of the sellers' actions, the brokers understood the importance of these "red flags," yet did not inform the buyers.[107]

The buyers grounded their cause of action against the brokers in negligence.[108] The *Easton* court based its reasoning on the decisions of two earlier California cases, *Lingsch* and *Cooper v. Jevne*.[109] The *Easton* court held that, in addition to the duty to disclose known facts, a broker has an affirmative duty to the buyer to conduct a reasonably diligent inspection of the property.[110] The duty imposed exists regardless of whether or not the buyer could have discovered the defect on her own. Hence, the broker need not have actual knowledge of material defects to be liable for failure to disclose such defects. The court noted that this new development was implicit in the earlier disclosure requirement.[111] If the duty to disclose is to have any meaning at all, a broker must be responsible for inspecting the property.[112] Otherwise, the law will be rewarding a broker for remaining ignorant.[113] More importantly, the court wanted to protect the buyer from an unethical seller or broker by forcing both the seller and the broker to provide sufficient, accurate information which would enable the buyer to make an educated decision.[114]

C. *Case Law in Illinois*

Illinois has not yet taken the dramatic step that California took in *Easton*. Nonetheless, a definite movement exists both in the country and in Illinois to similarly increase the scope of the broker's liability.[115] The development of broker liability in Illinois is compa-

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106. *Easton*, 199 Cal. Rptr. at 386.

107. *Id.*

108. *See id.* (instructing the jury about negligent misrepresentation and simple negligence, since the buyers voluntarily dismissed the actions for fraudulent concealment and intentional misrepresentation).

109. Cooper v. Jevne, 128 Cal. Rptr. 724 (Cal. Ct. App. 1976).

110. *Easton*, 199 Cal. Rptr. at 390.

111. *Id.* (citing Brady v. Carman, 3 Cal. Rptr. 612 (Cal. Ct. App. 1960) to illustrate that a real estate agent's duty to discover problems is an implicit duty reflected in the law). The *Brady* court wrote that the broker was obligated, as a professional, to obtain information about the easement and make full disclosure of the burdens it imposed on the land.

112. *Id.* at 388.

113. *See id.* (reasoning that if brokers were only required to reveal known defects, brokers would be sheltered by their ignorance).

114. *Id.*

115. There is a recent trend to impose more strict duties on real estate brokers. John R. Ardaugh, Note, *Mandatory Disclosure: The Key to Residential Real Estate Brokers' Conflicting Obligations*, 19 J. MARSHALL L. REV. 201, 203 (1985) (citing and describing cases in footnote 16: *see, e.g.*, Bevins v. Ballard, 655 P.2d 757 (Alaska 1982) (holding the real estate broker liable to the purchasers for making material representations to the purchasers as to the condition of a well on unimproved property, even though the representation was innocently

rable to the experience of other states.

In the past 20 years, the Illinois General Assembly has demonstrated a strong tendency in favor of protecting the purchaser.[116] From 1980 through 1986, disappointed used home buyers could base a cause of action against brokers on two statutes: the Illinois Consumer Fraud and Deceptive Business Practice Act (Consumer Fraud Act),[117] and the Illinois Real Estate Brokers and Salesmen License Act (Real Estate License Act).[118]

In 1980, an Illinois appellate court for the first time made a connection between the sale of real estate and the Consumer Fraud Act in *Beard v. Gress*.[119] The purchasers in *Beard* sued both the sellers and the sellers' broker, alleging misstatements regarding the interest on the mortgage—which had been assumed by the purchasers—and the length of time the property had remained unsold.[120] On appeal, the *Beard* court found that the broker was not liable for common law fraud since the plaintiffs did not allege that the broker knew or should have known of the mistake.[121] However,

made); Zichlin v. Dill, 25 So. 2d 4 (Fla. 1946) (allowing a non-principal buyer to recover against a broker who represented that the property could not be purchased for less than $5,000, when in fact the broker bought it for $4,500 and resold it to the buyer for a $1,000 profit); Gouveia v. Citicorp Person-to-Person Fin. Ctr., Inc., 686 P.2d 262 (N.M. Ct. App. 1984) (defining brokers' status as to prospective purchasers with respect to known or discoverable defects); Provost v. Miller, 473 A.2d 1162 (Vt. 1984) (stating that a broker will be found negligent if the broker passes information to the buyer that the broker knows or has reason to know may be untrue); First Church of the Open Bible v. Cline J. Dunton Realty, Inc., 574 P.2d 1211 (Wash. Ct. App. 1978) (finding that the selling broker negligently represented to the prospective buyer that three parcels of property were included in the listing when in fact there was only one); Gauerke v. Rozga, 332 N.W.2d 804 (Wis. 1983) (finding the real estate broker strictly liable to the purchaser of property for misrepresentations regarding the acreage and amount of road and river frontage); Hagar v. Mobley, 638 P.2d 127 (Wyo. 1981) (holding that the real estate broker who skimmed over the lease should have known its terms and had a duty to inform the buyers that the length of said lease was less than that represented to the buyers)).

116. *See* Peterson, *supra* note 36, at 180 (quoting from Duhl v. Nash Realty, 429 N.E.2d 1267, 1277 (Ill. App. Ct. 1981) wherein the Illinois appellate court noted that the Consumer Fraud Act "indicates a decisive move on the part of the Illinois Legislature to enact broad protective coverage for consumers from the many types of deceptive or unfair selling and advertising techniques used by businesses.").

117. 815 ILCS 505/2 (1992).

118. ILL. REV. STAT. ch. 121 1/2, ¶ 262 (1990) (repealed 1984) replaced by 225 ILCS 455/1 (1992) (amended 1992, 225 ILCS 455/13.2); *see* Daniel R. Hofstetter, *Illinois Real Estate Broker Liability: Developments Over the Past Decade*, ILL. B.J., Mar. 1991, at 126. In 1986 the legislature eliminated a private cause of action under the Illinois Real Estate Brokers and Salesmen License Act that had been granted in Sawyer Realty Group, Inc. v. Jarvis Corp., 432 N.E.2d 849 (Ill. 1982). Today, an Illinois statute provides that no private right of action for damages may be based on the act. 225 ILCS 455/32 (1992).

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

120. *Id.* at 449.

121. *See id.* (recalling that state of mind is an element of common law fraud).

the *Beard* court did hold the broker liable under the Consumer Fraud Act for his innocent misrepresentation.

Thus, the holding in *Beard* was twofold. First, the Illinois court held that the Consumer Fraud Act applied to real estate transactions.[122] Second, the court held that neither the broker's state of mind nor the diligence of the purchaser in checking the accuracy of the broker's representation was material to the cause of action.[123] Accordingly, in *Beard*, the Illinois appellate court held that the broker's failure to exercise due care in providing information to the buyer was a basis for liability under the Consumer Fraud Act.[124]

A 1982 amendment to the Consumer Fraud Act modified the result of *Beard*.[125] The amendment provided that in order to be held liable, the broker must have actual knowledge of the inaccuracy when relaying the information.[126] However, the 1982 amendment addresses neither concealment nor nondisclosure. The amendment only deals with affirmative communications which are false or misleading.[127] In 1982, the Illinois appellate court in *Duhl v. Nash Realty*[128] noted that the Consumer Fraud Act demonstrates clearly the intent of the Illinois legislature to expand the rights of consumers beyond the common law to protect buyers against the deceptive business practices of unscrupulous brokers and sellers.[129]

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122. *See id.* at 452 (concluding that now section 2 of the Consumer Fraud Act is broadened to allow buyers of real estate to sue for violations of that section).

123. *See id.* (following the precedent of Grimes v. Adlesperger, 384 N.E.2d 537 (Ill. 1978) where the Illinois Supreme Court held that neither the mental state nor the diligence of the injured party to check the accuracy of the misstatements was material to grounding a cause of action under the Consumer Fraud Act; in *Grimes*, the sale of a restaurant was rescinded because the MLS given to the buyer contained flagrantly inaccurate data regarding previous gross sales).

124. *See* Peterson, *supra* note 36, at 179 (suggesting that *Beard*, 413 N.E.2d 448, should not be interpreted to hold a broker strictly liable).

125. 815 ILCS 505/10(b) (1992).

126. *See* Hofstetter, *supra* note 118, at 127 (quoting language from the 1982 amendment which provides that nothing in the Consumer Fraud Act would apply to the "communication of any false, misleading or deceptive information, provided by the seller of real estate located in Illinois, by a real estate salesman or broker licensed under The Real Estate Brokers License Act, unless the salesman or broker knows of the false, misleading or deceptive character of such information.").

127. Peterson, *supra* note 36, at 179.

128. Duhl v. Nash Realty, 429 N.E.2d 1267 (Ill. App. Ct. 1981).

129. Peterson, *supra* note 36, at 181 (quoting language from *Duhl*, 429 N.E.2d at 1277).

IV. Legislative Response to Case Law

A. *Legislation Is the Best Solution*

In the last ten years, the potential liability of sellers and real estate brokers has grown considerably.[130] Brokers assert that the traditional disclaimers in contract and tort law no longer serve as protection.[131] The NAR estimates that two-thirds of the suits brought against sellers and brokers involve nondisclosure problems.[132] The average award granted to buyers has doubled since 1984 to $9,800.[133] A statute is needed which can curb the escalating liability against sellers and brokers while protecting buyers from shady transactions.[134] The goal of protecting buyers who are at a disadvantage in dealing with unscrupulous brokers is an end worthy of legislation.[135] Mandatory disclosure laws are the best means by which to offer complete protection to the buyer, while remaining fair to the broker.

The business world has already embraced disclosure laws for commercial real estate transactions.[136] In commercial transactions the parties involved are generally more familiar with the complexities of a real estate contract, yet the law requires that a disclosure form be used to aid buyers of commercial property.[137] It only makes sense that similar laws should apply in residential transactions.

Disclosure laws put a buyer on notice as to what the law considers "material."[138] Disclosure laws also state explicitly that the

130. Lawlor, *supra* note 6.

131. Kafker, *supra* note 9. *But see* Diedrich v. N. Ill. Publishing Co., 350 N.E.2d 857, 860 (Ill. App. Ct. 1976) (excusing the seller from liability based in part on the "as is" provision drawn up by the purchaser himself); *see also* Dee v. Peters, 591 N.E.2d 115 (Ill. App. Ct. 1992) (holding fast to the doctrine of *caveat emptor* by refusing to find the seller liable for his silence in disclosing defects).

132. Illinois Ass'n of Realtors License Law Task Force, Seller Disclosure, Final Report & Recommendations, (Sept. 1992) [hereinafter Seller Disclosure Report].

133. *See* H. Jane Lehman, *Lobby Effort To Focus on Home Defects; Real Estate Agents Seek Seller-Disclosure Law*, The Wash. Post, July 6, 1991, at E1 (stating that the NAR began lobbying for mandatory disclosure laws as a result of the trend to hold the seller and broker liable).

134. For a discussion of the ideal mandatory disclosure statute for Illinois, see *infra* part IV.C.

135. Knowles, *supra* note 96, at 339. *See also Easton*, 199 Cal. Rptr. 383, 388 (discussing how buyers' inclination to rely on the real estate brokers' expertise makes them susceptible to being misled).

136. Frona M. Powell, *The Seller's Duty to Disclose in Sales of Commercial Property*, 28 Am. Bus. L.J. 245 (1990).

137. *Id.*

138. "Material" is defined as a condition or representation that is so significant to the transaction as to be deemed almost necessary and have the result of influencing the party to whom it is made. Black's Law Dictionary 976 (6th ed. 1990).

broker is the agent of the seller,[139] thus, putting the buyer on guard. These laws create a higher standard of care for brokers, which is more consistent with the ethical duties already imposed on them.[140] Disclosure laws will reduce litigation and will reward and encourage honesty by all parties involved in the sale of residential real estate.[141] For instance, a well drafted disclosure law would prohibit a broker from simply repeating a seller's false statement and hiding behind her own ignorance. Although every buyer should look out for her own best interests, disclosure laws will enable a buyer to rely on the assumption that a seller and broker will not knowingly sell a house that is in a less than habitable condition. Accordingly, although legislation may not be a panacea, it is the best solution for protecting the residential buyer.[142]

B. *Illinois' Mandatory Disclosure Statute*

Senator James "Pate" Philip introduced a real estate disclosure bill to the 87th General Assembly on April 7, 1992.[143] With a few modifications, the bill became law in July 1993, and will take effect on October 1, 1994.[144] Although the changes made between the introduction of the bill and the enactment of the mandatory disclosure law were an improvement, the legislature did not go far enough. In order for the law to have the most significant impact,

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139. Although Illinois already requires the broker to disclose her fiduciary relation to the seller, a mandatory disclosure law will insure that a buyer fully understands her position. For a discussion of the Illinois statute requiring the broker to disclose her fiduciary relation to the seller, see *supra* note 61 and accompanying text.

140. *See* Knowles, *supra* note 96 (citing from *Easton* 152 Cal. App. at 104, in which the court reasoned that since brokers are professionals, they should make use of their education); *see also* NATIONAL ASS'N OF REALTORS, INTERPRETATION OF THE CODE OF ETHICS (1992) (discussing the codes that a broker is charged to uphold).

141. *See* SELLER DISCLOSURE REPORT, *supra* note 132 (asserting that disclosure forms reduce the possibility of lawsuits).

142. Some believe the solution lies in eliminating the dual agency of real estate brokers by statute. The law would require every buyer to find her own broker. Hence, every real estate transaction would involve two brokers — one for the seller and one for the buyer. Proponents of such a measure argue that commercial real estate transactions typically employ two brokers, so residential sales should as well. In a commercial real estate transaction, the buyer pays her broker either a flat fee or on an hourly basis. As a result, the buyer's broker will not hesitate to disclose all defects since her fee is not dependent on a sale. While requiring the buyer to have her own broker eliminates the misconception that the seller's broker represents the buyers interests, such a law is inefficient. A buyer's broker might reveal a material defect to dissuade Buyer A, while Buyer B must still hire his own broker to conduct the same search and hopefully discover the same defect. The multiplicity of buyers and buyer's brokers would encourage sellers and their brokers to conceal defects, hoping that one of the many potential buyers' brokers will fail to discover a particular defect.

143. S.B. 1714, Ill. 87th Gen. Assembly (1992).

144. Residential Real Property Disclosure Act, Act of July 20, 1993, P.A. 111 (effective Oct. 1, 1994).

the conflicting interests of the buyer, the seller, and the real estate broker must be carefully weighed and balanced.[145] The focus of this section is to compare and contrast the basic components of Illinois' new statute on real estate disclosure with both California's disclosure statute and the 1992 draft of the disclosure law.

1. Using California as a Model

California's mandatory disclosure statute was the first mandatory disclosure statute enacted and has served as a guide for most other states.[146] California's statute consists of approximately sixteen provisions, eight of which contain the basic ideas that are the foundation of most other states' laws. The crucial provisions include those dealing with the following: applicability of the article,[147] exceptions,[148] time of delivery,[149] errors and omissions,[150]

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145. *See* King, *supra* note 10, at 662 (explaining how the California Legislature reacted to *Easton* by enacting California Senate Bill No. 453 which went in the opposite direction of *Easton* and statutorily decreased a broker's potential liability).

146. *E.g.*, WIS. STAT. ANN. § 709 (West 1992); H.B. 5106, Mich. 86th Leg. (1991).

147. CAL. CIV. CODE § 1102 (West 1990) sets forth the applicability of the mandatory disclosure statute and provides the following:

> Except as provided in Section 1102.1, this article applies to any transfer by sale, exchange, installment land sale contract, as defined in Section 2985, lease with an option to purchase, any other option to purchase, or ground lease coupled with improvements, of real property, or residential stock cooperative, improved with or consisting of not less than one nor more than four dwelling units.

Id.

148. CAL. CIV. CODE § 1102.1 (West 1990) sets forth the different types of real estate transactions that are exempt from the statute and provides as follows:

> Non-application of article. The provisions of this article do not apply to the following: (a) Transfers which are required to be preceded by the furnishing to a prospective transferee of a copy of a public report pursuant to Section 11018.1 of the Business and Professions Code and transfers which can be made without a public report pursuant to Section 11010.4 of the Business and Professions Code. (b) Transfers pursuant to court order, including, but not limited to, transfers ordered by a probate court in administration of an estate, transfers pursuant to a writ of execution, transfers by any foreclosure sale, transfers by a trustee in bankruptcy, transfers by eminent domain, and transfers resulting from a decree for specific performance. (c) Transfers to a mortgagee by a mortgagor or successor in interest who is in default, transfers to a beneficiary of a deed of trust by a trustor or successor in interest who is in default, transfers by any foreclosure sale after default, in an obligation secured by a mortgage, transfers by a sale under a power of sale or any foreclosure sale under a decree of foreclosure after default in an obligation secured by a deed of trust or secured by any other instrument containing a power of sale, or transfers by a mortgagee or a beneficiary under a deed of trust who has acquired the real property at a sale conducted pursuant to a power of sale under a mortgage or deed of trust or a sale pursuant to a decree of foreclosure or has acquired the real property by a deed in lieu of foreclosure. (d) Transfers by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust. (e) Transfers from one co-owner to one or more other co-owners. (f)

Transfers made to a spouse, or to a person or persons in the lineal line of consanguinity of one or more of the transferors. (g) Transfers between spouses resulting from a decree of dissolution of marriage or a decree of legal separation or from a property settlement agreement incidental to such a decree. (h) Transfers by the Controller in the course of administering Chapter 7 (commencing with Section 1500) of Title 10 of Part 3 of the Code of Civil Procedure. (i) Transfers under Chapter 7 (commencing with Section 3691) or Chapter 8 (commencing with Section 3771) of Part 6 of Division 1 of the Revenue and Taxation Code. (j) Transfers or exchanges to or from any governmental entity.

Id.

149. CAL. CIV. CODE § 1102.2 (West 1990) sets forth when and how the disclosure form must be delivered and provides as follows:

Delivery of required written statement from transferor to prospective transferee; indication of compliance with article; disclosures delivered after offer to purchase; time to terminate. The transferor of any real property subject to this article shall deliver to the prospective transferee the written statement required by this article, as follows: (a) In the case of a sale, as soon as practicable before transfer of title. (b) In the case of transfer by a real property sales contract, as defined in Section 2985, or by a lease together with an option to purchase, or a ground lease coupled with improvements, as soon as practicable before execution of the contract. For the purpose of this subdivision, "execution" means the making or acceptance of an offer. With respect to any transfer subject to subdivision (a) or (b), the transferor shall indicate compliance with this article either on the receipt for deposit, the real property sales contract, the lease, or any addendum attached thereto or on a separate document. If any disclosure, or any material amendment of any disclosure, required to be made by this article, is delivered after the execution of an offer to purchase, the transferee shall have three days after delivery in person or five days after delivery by deposit in the mail, to terminate his or her offer by delivery of a written notice of termination to the transferor or the transferor's agent.

Id.

150. CAL. CIV. CODE § 1102.4 (West 1990) sets forth the liability imposed for the delivery of inaccurate information and provides as follows:

Errors, inaccuracies, or omissions of information delivered; liability of transferor; delivery of information by public agency; delivery of reports or opinions prepared by experts. (a) Neither the transferor nor any listing or selling agent shall be liable for any error, inaccuracy, or omission of any information delivered pursuant to this article if the error, inaccuracy, or omission was not within the personal knowledge of the transferor or that listing or selling agent, was based on information timely provided by public agencies or by other persons providing information as specified in subdivision (c) that is required to be disclosed pursuant to this article, and ordinary care was exercised in obtaining and transmitting it. (b) The delivery of any information required to be disclosed by this article to a prospective transferee by a public agency or other person providing information required to be disclosed pursuant to this article shall be deemed to comply with the requirements of this article and shall relieve the transferor or any listing or selling agent of any further duty under this article with respect to that item of information. (c) The delivery of a report or opinion prepared by a licensed engineer, land surveyor, geologist, structural pest control operator, contractor, or other expert, dealing with matters within the scope of the professional's license or expertise, shall be sufficient compliance for application of the exemption provided by subdivision (a) if the information is provided to the prospective transferee pursuant to a request therefore, whether written or oral. In responding to such a request, an expert may indicate, in writing, an understanding that the information provided will be used in fulfilling the requirements of Section 1102.6 and, if so, shall indicate the required disclosures, or parts thereof, to which the information

subsequent information,[151] good faith,[152] and failure to comply.[153]

The heart of the California statute is the disclosure form itself.[154] The California form sets forth four major requirements.

> being furnished is applicable. Where such a statement is furnished, the expert shall not be responsible for any items of information, or parts thereof, other than those expressly set forth in the statement.

Id.

151. CAL. CIV. CODE § 1102.5 (West 1990) sets forth that after the disclosure form is delivered, newly acquired information need not be disclosed and provides as follows:

> Information subsequently rendered inaccurate; required information unknown or not available. If information disclosed in accordance with this article is subsequently rendered inaccurate as a result of any act, occurrence, or agreement subsequent to the delivery of the required disclosures, the inaccuracy resulting therefrom does not constitute a violation of this article. If at the time the disclosures are required to be made, an item of information required to be disclosed is unknown or not available to the transferor, and the transferor or his or her agent has made a reasonable effort to ascertain it, the transferor may use an approximation of the information, provided the approximation is clearly identified as such, is reasonable, is based on the best information available to the transferor or his or her agent, and is not used for the purpose of circumventing or evading this article.

Id.

152. CAL. CIV. CODE § 1102.7 (West 1990) sets forth the requirement of good faith in completing the form and provides as follows:

> Good faith required. Each disclosure required by this article and each act which may be performed in making the disclosure, shall be made in good faith. For purposes of this article, "good faith" means honesty in fact in the conduct of the transaction.

Id.

153. CAL. CIV. CODE § 1102.13 (West 1990) sets forth the amount of damages one will be liable for violating the statute and provides as follows:

> Failure to comply with article; transfer not invalidated; damage. No transfer subject to this article shall be invalidated solely because of the failure of any person to comply with any provision of this article. However, any person who willfully or negligently violates or fails to perform any duty prescribed by any provision of this article shall be liable in the amount of actual damages suffered by a transferee.

Id.

154. CAL. CIV. CODE § 1102.6 (West 1990) sets forth the disclosure form itself and provides as follows:

> Disclosure form.
>
> The disclosures required by this article pertaining to the property proposed to be transferred are set forth in, and shall be made on a copy of, the following disclosure form:
>
> REAL ESTATE TRANSFER DISCLOSURE STATEMENT. THIS DISCLOSURE STATEMENT CONCERNS THE REAL PROPERTY SITUATED IN THE CITY OF ______________, COUNTY OF ______________, STATE OF CALIFORNIA, DESCRIBED AS ______________. THIS STATEMENT IS A DISCLOSURE OF THE CONDITION OF THE ABOVE DESCRIBED PROPERTY IN COMPLIANCE WITH SECTION 1102 OF THE CIVIL CODE AS OF ______________, 19__. IT IS NOT A WARRANTY OF ANY KIND BY THE SELLER(S) OR ANY AGENT(S) REPRESENTING ANY PRINCIPAL(S) IN THIS TRANSACTION, AND IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THE PRINCIPAL(S) MAY WISH TO OBTAIN.

First, the form requires the seller to disclose known existing defects

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I
COORDINATION WITH OTHER DISCLOSURE FORMS

This Real Estate Transfer Disclosure Statement is made pursuant to Section 1102 of the Civil Code. Other statutes require disclosures, depending upon the details of the particular real estate transaction (for example: special study zone and purchase-money liens on residential property). Substituted Disclosures: The following disclosures have or will be made in connection with this real estate transfer, and are intended to satisfy the disclosure obligations on this form, where the subject matter is the same:____ ____ ____ ____
(list all substituted disclosure forms to be used in connection with this transaction)

II
SELLER'S INFORMATION

The Seller discloses the following information with the knowledge that even though this is not a warranty, prospective Buyers may rely on this information in deciding whether and on what terms to purchase the subject property. Seller hereby authorizes any agent(s) representing any principal(s) in this transaction to provide a copy of this statement to any person or entity in connection with any actual or anticipated sale of the property.

THE FOLLOWING ARE REPRESENTATIONS MADE BY THE SELLER(S) AND ARE NOT THE REPRESENTATIONS OF THE AGENT(S), IF ANY. THIS INFORMATION IS A DISCLOSURE AND IS NOT INTENDED TO BE PART OF ANY CONTRACT BETWEEN THE BUYER AND SELLER.

Seller —is —is not occupying the property.
A. The subject property has the items checked below:

_Range	_Wall/Window Air Conditioning
_Oven	_Sprinklers
_Microwave	_Public Sewer System
_Dishwasher	_Septic Tank
_Trash Compactor	_Sump Pump
_Garbage Disposal	_Water Softener
_Washer/Dryer Hookups	_Patio/Decking
_Window Screens	_Built-in Barbecue
_Rain Gutters	_Gazebo
_Burglar Alarms	_Sauna
_Smoke Detector(s)	_Pool
_Fire Alarm	_Spa
_T.V. Antenna	_Hot Tub
_Satellite Dish	_Security Gate(s)
_Intercom	_Automatic Garage Door
_Central Heating	_Number Remote Controls
_Central Air Conditioning	_Carport Pool/Spa Heater:_Gas _Solar
_Evaporator Cooler(s)	_Electric Water Heater:
	_Gas _Private Utility

or

Water Supply:_City _Well
Other_______ Gas Supply:_Utility _Bottled
Exhaust Fan(s) in_____ 220 Volt Wiring in_____ Fireplace(s) in_ Gas Starter___ Roof(s): Type:_______ Age:_______ (approx.) Other:_

Are there, to the best of your (Seller's) knowledge, any of the above that are not in operating condition? _Yes _No.

If yes, then describe. (Attach additional sheets if necessary):_

B. Are you (Seller) aware of any significant defects/malfunctions in any of the following? __Yes __No. If yes, check appropriate space(s) below.

__Interior Walls __Ceilings __Floors __Exterior Walls __Insulation __Roof(s) __ Windows __Doors __Foundation __Slab(s) __Driveways __Sidewalks __Walls/Fences __ Electrical Systems __Plumbing/Sewers/Septics __Other Structural Components (Describe: __ __) If any of the above is checked, explain. (Attach additional sheets if necessary):__ __ __ __

C. Are you (Seller) aware of any of the following:
1. Substances, materials, or products which may be an environmental hazard such as, but not limited to, asbestos, formaldehyde, radon gas, lead-based paint, fuel or chemical storage tanks, and contaminated soil or water on the subject property
__Yes __No

2. Features of the property shared in common with adjoining landowners, such as walls, fences, and driveways, whose use or responsibility for maintenance may have an effect on the subject property
__Yes __No

3. Any encroachments, easements or similar matters that may affect your interest in the subject property
__Yes __No

4. Rooms additions, structural modifications, or other alterations or repairs made without necessary permits
__Yes __No

5. Rooms additions, structural modifications, or other alterations or repairs not in compliance with building codes
__Yes __No

6. Landfill (compacted or otherwise) on the property or any portion thereof
__Yes __No

7. Any settling from any cause, or slippage, sliding, or other soil problems
__Yes __No

8. Flooding, drainage or grading problems
__Yes __No

9. Major damage to the property or any of the structures from fire, earthquake, floods, or landslides __Yes __No

10. Any zoning violations, nonconforming uses, violations of "setback" requirements __Yes __N

11. Neighborhood noise problems or other nuisances __Yes __No

12. CC&R's or other deed restrictions or obligations __Yes __No

13. Homeowners' Association which has any authority over the subject property
__Yes __No

14. Any "common area" (facilities such as pools, tennis courts, walkways, or other areas co-owned in undivided interest with others)
__Yes __No

15. Any notices of abatement or citations against the property
__Yes __No

16. Any lawsuits against the seller threatening to or affecting this real property
__Yes __No

If the answer to any of these is yes, explain. (Attach additional sheets if necessary.):__ __ __ Seller certifies that the information herein is true and

in any fixtures or appliances on the property.[155] Second, the form requires the seller to disclose known defects in the structure of the home.[156] Third, the form requires the seller to disclose defects in the property or matters affecting the property itself.[157] Fourth, the form requires both the listing broker and the cooperating broker to conduct a reasonably competent and diligent visual inspection of

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correct to the best of the Seller's knowledge as of the date signed by the Seller.

Seller ______________________________ Date __
Seller ______________________________ Date __

III

AGENTS INSPECTION DISCLOSURE (To be completed only if the Seller is represented by an agent in this transaction.) THE UNDERSIGNED, BASED ON THE ABOVE INQUIRY OF THE SELLER(S) AS TO THE CONDITION OF THE PROPERTY AND BASED ON A REASONABLY COMPETENT AND DILIGENT VISUAL INSPECTION OF THE ACCESSIBLE AREAS OF THE PROPERTY IN CONJUNCTION WITH THAT INQUIRY, STATES THE FOLLOWING: __ __ __ __ Agent (Broker Representing Seller) ____________________ By ____________________
Date __________ (Please Print)
(Associate Licensee or Broker-Signature)

IV

AGENTS INSPECTION DISCLOSURE (To be completed only if the agent who has obtained the offer is other than the agent above.)

THE UNDERSIGNED, BASED ON A REASONABLY COMPETENT AND DILIGENT VISUAL INSPECTION OF THE ACCESSIBLE AREAS OF THE PROPERTY, STATES THE FOLLOWING: __ __ __ __

Agent (Broker obtaining the Offer) ______________
By ______________________________ Date ______

(Please Print) (Associate Licensee or Broker-Signature)

V

BUYER(S) AND SELLER(S) MAY WISH TO OBTAIN PROFESSIONAL ADVICE AND/OR INSPECTIONS OF THE PROPERTY AND TO PROVIDE FOR APPROPRIATE PROVISIONS IN A CONTRACT BETWEEN BUYER AND SELLER(S) WITH RESPECT TO ANY ADVICE/INSPECTIONS/DEFECTS. I/WE ACKNOWLEDGE RECEIPT OF A COPY OF THIS STATEMENT.

Seller ______________________________ Date ______
Buyer ______________________________ Date ______
Seller ______________________________ Date ______
Buyer ______________________________ Date ______
Agent (Broker Representing Seller)____________________
By ______________________________ Date ______
(Associate Licensee or Broker-Signature)
Agent (Broker obtaining the Offer) ____________________
By ______________________________ Date ______
(Associate Licensee or Broker-Signature)

A REAL ESTATE BROKER IS QUALIFIED TO ADVISE ON REAL ESTATE. IF YOU DESIRE LEGAL ADVICE, CONSULT YOUR ATTORNEY.

Id.

155. *Id.*
156. *Id.*
157. *Id.*

the property.[158] However, the disclosure form states clearly that none of the information disclosed constitutes a warranty by the seller or broker, that the form is not part of the sales contract, and that the buyer is encouraged to use an expert inspector.[159]

2. Contrasting Illinois' Act

Illinois' mandatory disclosure law, entitled the Residential Real Property Disclosure Act (Act),[160] is similar to California's statute in form and substance. The Act consists of thirteen sections which cover most of the issues discussed in the description of California's statute. The Act, however, is missing one central ingredient that California's law includes. Illinois' real estate disclosure form, entitled the Residential Real Property Disclosure Report (Disclosure Report),[161] does not require the real estate agents to sign the form after making an inspection of the property. The California statute requires the signature of two brokers, both the listing and cooperating broker, if both are involved in the sale of the property.[162] Curiously, the 1992 Illinois bill required the signature of at least one real estate agent.[163] It seems that the lobbyists for the NAR persuaded the legislature to shield the real estate industry both from potential liability and from the responsibility to examine a house before selling it. The agent inspection disclosure provision in the 1992 draft required those agents who represented the seller to make a "reasonably competent and diligent visual inspection" of the property.[164] That section of the Disclosure Report would have had the effect of barring brokers and agents from blissfully relying on the representations of unscrupulous, misinformed, or ignorant sellers. As the law exists now in Illinois, real estate brokers and agents are free to sing the praises of a house without signing their name to its true worth.

In addition, the Illinois Disclosure Report does not require the seller to reveal whether former federal or state ordnance locations were ever situated near the property as does the law in California. The California statute expressly requires a seller to reveal if nearby land was formerly used for military training.[165] California enacted

158. *Id.*
159. CAL. CIV. CODE § 1102.6 (West 1990).
160. Residential Real Property Disclosure Act, Act of July 20, 1993, P.A. 111 (effective Oct. 1, 1994).
161. P.A. 111, § 35 (1993).
162. CAL. CIV. CODE § 1102.6 (West 1990).
163. S.B. 1714, § 30 (1992).
164. *Id.*
165. CAL. CIV. CODE § 1102.15 (West 1990) sets forth that a seller, who has actual knowledge, must disclose if a nearby location was once a military facility which may contain explosives, and provides in pertinent part:

> [T]he seller of residential real property subject to this article who has actual knowledge of any former federal or state ordnance locations within the

this provision in response to a 1983 incident in which two eight-year-old boys were killed when an abandoned mortar shell exploded while the boys were playing on a hillside near their newly acquired home.[166] A similar provision might be appropriate in Illinois since the Clinton administration has chosen to close a number of bases in Illinois, such as Fort Sheridan and the Glenview Naval Airbase, which will presumably be sold to developers, and may very well contain dangerous munitions.

3. *Comparing the Act with the 1992 Draft*

The Illinois legislature made a number of advances with the statute after Senator Philip first introduced the idea of a mandatory disclosure law in 1992. In general, the approved draft is shorter and easier to understand. More importantly, the legislature added a few provisions that enhance the Act.

The Disclosure Report itself is simple and requires the seller to answer twenty-two questions to the best of her knowledge.[167] The legislature made some notable improvements to the 1992 Disclosure Report. Specifically, the legislature followed California's example by asking questions of the seller pertaining to the existence of radon, lead paint, lead pipes, and asbestos—all very common materials in homes over 20 years old.[168] As enacted, the disclosure report also asks whether the drinking water is safe; whether termites exist in the home or have previously caused structural damage; and whether there are underground storage tanks on the property.[169] The foregoing are all concerns which the 1992 draft overlooked.

> neighborhood area shall give written notice of that knowledge as soon as practicable before transfer of title. . . . [Ordnance location is defined as] an area once used for military training purposes which may contain potentially explosive munitions.

Id.

166. *See* Maureen Fan, *Sitting on a Powder Keg*, L.A. TIMES, Jan. 23, 1989, pt. at 1. A group of small boys were playing on a hillside near their homes in Tierrasanta, California, when one discovered a World War II mortar round. *Id.* A second boy unknowingly banged the round on a rock and detonated it, instantly killing two boys and injuring a third. *Id.* The incident enraged the community who demanded that the Tierrasanta local government warn residents that they live atop a World War II artillery range. *Id.* The article notes that people who buy homes in Tierrasanta will be warned of the danger due to a state law which requires full disclosure of former ordnance locations. *Id.*

167. P.A. 111, § 35 (1993).

168. *See id.* (requiring sellers to disclose pertinent environmental information just as California's law requires). A number of towns in the northern suburbs of Chicago have warned their residents that the drinking water, which is carried through lead pipe, contains lead. The towns advise residents to run the water for two minutes each day before drinking to wash out the stagnant water that may have been contaminated overnight. The Note author believes information of this sort should be disclosed to potential home buyers.

169. *Id.*

The rest of the Act saw improvements as well. The legislature added a definitions section[170] and a provision clarifying that the Act is to apply only to used residential real estate[171]—since another statute applies to the sale of new homes.[172] To their credit, the legislature made two other additions to the bill worth noting. First, the statute wisely limits all suits arising from the statute to one year from the point of receipt of the disclosure form.[173] Second, the statute requires that the buyer receive the Act itself along with the disclosure form.[174] This will have the effect of educating the buyer and putting her on equal footing with the seller.[175]

4. *Lost in the Transition*

Although the enacted statute is an improvement as compared to the 1992 draft, a few ideas were lost in transition. The Disclosure Report is unfortunately missing an entire section, contained in the proposed report,[176] pertaining to common items found in and around most homes. The bill's original Disclosure Report questioned the seller about those items which a buyer could not reasonably evaluate by a visual inspection; items one would have to actually use to ascertain if they were defective.[177] Some of the fifty items listed on the proposed Disclosure Report which the seller was supposed to comment on included an oven, dishwasher, rain gutters, burglar alarms, sump pump, smoke detectors, and water heater.[178] The enacted Disclosure Report also eliminated a question contained in the bill[179] asking whether there are currently any lawsuits which might affect the property.

C. *Modifications to the Act*

This section suggests changes that should be made to the Act based on provisions in the mandatory disclosure statutes and pending bills of other states. This section, first, discusses the deficien-

170. *Id.* § 5.
171. *Id.* § 15(9).
172. P.A. 111, § 35 (1993).
173. *See id.* § 60 ("No action for violation of this Act may be commenced later than one year from the earlier of the date of possession, date of occupancy, or date of recording of an instrument of conveyance of the residential real property.").
174. *See id.* § 65 ("A copy of this Act, excluding Section 35, must be printed on or as a part of the Residential Real Property Disclosure Report form.").
175. The requirement that an actual statute be tendered to purchasers has been employed in many landlord-tenant transactions. For instance, in Chicago, the Residential Landlord-Tenant Ordinance must be attached to all leases. CHICAGO, ILL., CODE ch. 5.12.010-.200. The ordinance has been in effect for years and has proven very effective.
176. S.B. 1714, § 30, II.A (1992).
177. *Id.*
178. *Id.*
179. *Id.* § 30, II.C.14 (1992).

cies in the Act in relation to the bills of other states; second, this section discusses modifications which should be considered based on those other statutes; and, third, this section proposes amendments that should be added to the Act in order to more fully accomplish the legislature's goals.

1. Deficiencies

One of the central faults with the Act is that it attempts to placate both the buyer and seller, but does not do enough for either. For purposes of this Note it is assumed that the Illinois General Assembly intended the Act to outline the duties of the parties involved, to protect the buyer from the unscrupulous, and to shield brokers and sellers from needless liability. However, the Act takes too many unnecessary steps to accomplish this. Illinois chose to follow California's lead in requiring that the Disclosure Report be delivered to the buyer before the signing of the contract.[180] The Illinois Act further provides that if the seller does not deliver the Disclosure Report prior to the signing of the contract, the buyer has the option to terminate her offer.[181]

At first glance, this provision seems reasonable. However, the Illinois statute provides little incentive to encourage the seller to produce the disclosure form on time. On the one hand, section 20 of the Act demands that the disclosure form be tendered before the contract is signed.[182] On the other hand, section 40 explains that if

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180. P.A. 111, § 20 (modeling CAL. CIV. CODE § 1102.2 (West 1990), *supra* note 149).

181. P.A. 111, § 40. Section 40 provides as follows:

> If a material defect is disclosed in the Residential Real Property Disclosure Report delivered to a prospective buyer after acceptance by the prospective buyer of an offer or counter-offer made by a seller or after the execution of an offer made by a prospective buyer that is accepted by the seller for the conveyance of the residential real property, then the prospective buyer may, within 3 business days after receipt of that report by the prospective buyer, terminate the contract or other agreement without any liability or recourse except for the return to prospective buyer of all earnest money deposits or down payments paid by prospective buyer in the transaction. The right to terminate the contract, however, shall no longer exist after the conveyance of the residential real property. For purposes of this Act the termination shall be deemed to be made when written notice of termination is personally delivered to at least one of the sellers identified in the contract or other agreement or when deposited, certified or registered mail, with the United States Postal Service, addressed to one of the sellers at the address indicated in the contract or agreement, or, if there is not an address contained therein, then at the address indicated for the residential real property on the report.
>
> A prospective buyer shall have no right to terminate the contract or other agreement under this Act if the report is delivered before the prospective buyer enters into an agreement for the conveyance, lease, or other transfer of the residential real property.

Id.

182. *Id.* § 20. Section 20 provides as follows:

the seller tenders the disclosure form after the contract is executed and material defects are discovered, the buyer has the option to back out of the contract within three days.[183] Thus, it is possible that an unscrupulous seller may forego delivering the Disclosure Report before signing the contract, and then provide the Disclosure Report days before the closing. From a practical viewpoint this is too late to be of any value, because by this time the buyer is legally, financially, and, most importantly, psychologically committed to the purchase.[184]

Another major shortcoming of the Act is that it allows the seller and her broker to remain silent about subsequently discovered defects.[185] Section 25 states that the seller need not correct any inaccuracy on the form if she discovers a defect after it was delivered to the buyer.[186] This provision might encourage both the seller and the broker to initially review the condition of the property in a cursory manner, then claim the defects occurred after the initial disclosure.[187] The Act should compensate for this oversight.

Lastly, section 55, which deals with the seller's failure to comply with the Act, should be modified.[188] It is a typical example of the legislature's inability to reach an effective compromise. Section 55 leaves the buyer with only a fraud or negligence cause of action.[189] Thus, the buyer's only right once she closes is to sue for damages.[190] The buyer is stuck with the property.

2. *Modifications*

The Illinois General Assembly can improve the Residential Real Property Disclosure Act, and thereby accomplish its legislative goals more effectively by incorporating certain provisions used in

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> A seller of residential real property shall complete all applicable items in the disclosure document described in Section 35 of this Act. The seller shall deliver to the prospective buyer the written disclosure statement required by this Act before the signing of a written agreement by the seller and prospective buyer that would, subject to the satisfaction of any negotiated contingencies, require the prospective buyer to accept a transfer of the residential real property.

Id.

183. P.A. 111, § 40 (1993).

184. *See supra* part II.B (explaining that buyers will often be so deep into the deal by the last stages of the transaction that defects then disclosed will be dismissed, whereas they would not have been acceptable earlier).

185. P.A. 111, § 25 (1993).

186. *See id.* ("The seller is under no obligation to amend the disclosure document after its delivery to a prospective buyer . . . .").

187. "Where ignorance is bliss, 'Tis folly to be wise." THOMAS GRAY, ON A DISTANT PROSPECT OF ETON COLLEGE, Stanza 10 (1742).

188. P.A. 111, § 55 (1993).

189. *Id.*

190. Section 40 affirmatively sets forth that "The right to terminate the contract, however, shall no longer exist after the conveyance of the residential real property." P.A. 111, § 40 (1993).

other states. First, the Illinois General Assembly can clarify the ambiguity in section 20, which deals with the time of delivery of the disclosure report,[191] by following Kentucky's example. The Kentucky legislature avoids misleading buyers by requiring that the disclosure form be available when the seller enters into the listing contract.[192] Since the listing agreement is one of the first steps in the transaction,[193] all known defects will be disclosed from the beginning.

The Delaware bill goes a step further.[194] Delaware provides that a copy of the disclosure form must be provided to all prospective buyers or their agents before the buyer even makes an offer.[195] This provision is truly "buyer friendly." Providing the disclosed information to every prospective buyer eliminates the possibility that the buyer will be drawn into the deal, only to be confronted later with serious problems. Illinois should amend the Act to require that a written disclosure statement be delivered to a prospective buyer before he tenders an offer; for if a buyer is fully informed before she presents an offer, the deal is more likely to go through saving the time, money, and effort of all parties involved.

Second, Illinois should adopt Delaware's provision on subsequently discovered defects.[196] Section 25 of the Illinois Act expressly relieves the seller from any obligation to reveal defects discovered after the initial disclosure.[197] Whereas the Delaware statute requires the seller to update the disclosure report with any significant changes that occur throughout the transaction.[198] Since actual disclosure is one of the aims of a mandatory disclosure law, Illinois should add a provision similar to that of the Delaware statute.

Third, the Illinois General Assembly should alter section 55 of the Act.[199] Section 55 does away with a protective recourse for the buyer. As a result of section 55, the buyer may no longer sue for rescission of the deed.[200] Thus, the Residential Real Property Disclosure Act seems to exude policy but no protection. Since it is pre-

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191. P.A. 111, § 20 (1993).

192. H.B. 570, Ky. Reg. Sess. (1992) (enacted) provides in part that "[t]he form shall be completed and signed by the seller at the time of listing for sale." *Id.*

193. For a discussion of the initial stages of a real estate transaction, see *supra* note 63.

194. H.B. 642, Del. 136th Gen. Ass. (1992).

195. *Id.* The Delaware bill provides in part that, "a Seller transferring residential real property shall disclose, in writing, to the Purchaser . . . all material defects of that property that are known at the time the property is offered." *Id.*

196. *Id.*

197. P.A. 111, § 25.

198. H.B. 642, Del. 136th Gen. Assembly (1992).

199. P.A. 111, § 55 (1993).

200. *See also supra* note 189 and accompanying text for the buyer's recourse.

sumed that a legislature does not enact meaningless laws, the language of section 55 must be changed so that a buyer, offended by a seller's breach of the statute, is afforded at least a basic contract or warranty cause of action that will survive the closing. Again, the Delaware bill should serve as guidance. The Delaware bill provides that the disclosure form itself becomes part of the contract.[201] Consequently, if either the seller or the broker materially fails in their duty, the buyer will have a contract cause of action on which to base a suit.

3. *Additions to the Illinois Act*

In order to fully accomplish the goal of placing the buyer on an equal footing with the seller, the Note author recommends that two provisions be added to the Illinois Act. This section then discusses the matters that, in fairness to the seller, should never be disclosed.

a. Mandatory Inspection of Older Homes

The Illinois General Assembly should add a mandatory inspection provision to the Act. The provision would provide that all used residential homes of a certain age must be examined by a licensed home inspector.[202] The inspection would take place after the parties enter into the contract and the cost would be borne by the seller.[203]

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201. Presumably the disclosure form will not be merged into any later deed. The doctrine of merger states that all matters relating to title are absorbed in the deed. *See* WERNER & KRATOVIL, *supra* note 63, § 10.11 (discussing the doctrine of merger). Therefore, the buyer may not complain about questions of title once she accepts the deed at closing. *Id.*

202. *See* King, *supra* note 10, at 662 (discussing the possibility of a mandatory housing inspection provision for California). In the case of newer homes that are not subject to the mandatory inspection provision because they do not exceed the requisite age, the broker should have the duty of alerting the buyer to the benefits of inspection. *Id.* at 664. The broker should inform the buyer about the items that are normally inspected and should explain the warranty coverage that inspection provides. *Id.* Once the buyer understands the benefits of inspection he must either agree to have the inspection conducted or he must sign a waiver, relieving the broker of liability for all unknown defects that may come to light in the future. *Id.*

203. Requiring an inspection at this time is appropriate for a number of reasons. First, an inspection conducted at this stage occurs early enough in the transaction so that the prospective buyer may learn about essential aspects of the property before becoming too deeply involved, and can rescind the contract with minimal discomfort. Second, the inspection occurs late enough so that the seller knows that the prospective buyer is seriously interested in the house before it is inspected. The seller may not wish to go through the annoyance of an inspection unless the buyer is willing to purchase on terms acceptable to the seller. The seller may also not wish to subject her home to possible damage from the inspection without some manifest interest on the part of the buyer. Lastly, practice has shown that when voluntary inspections take place today, they are conducted at this stage.

The mandatory inspection would be limited to certain important aspects of construction. Since a house is a complex "product" and an inspector's time is costly,[204] the examination would be restricted to elements that a layman could not learn on her own. For example, the electrical system, plumbing system, and the soundness of a home's foundation are all aspects that the average buyer—and presumably the average seller as well—could not discover independently.

The inspector would be legally responsible for the warranties made on the condition of the house.[205] The inspection report would be signed by the expert and delivered to both parties. Once the buyer accepts the report from the inspector, the broker and the seller would no longer be liable for defects that were raised in the report.[206] Since the expert would be made liable for his own errors or omissions, his conclusions would not be influenced by whoever is paying his fee.[207] Moreover, since present Illinois law does not require home inspectors to carry insurance, this provision would encourage buyers to retain experts who are adequately insured.[208]

204. The seller should pay for the inspection. The contract between buyer and seller normally provides that the seller is responsible for the cost of the title search, which discloses to the buyer the quality of the property's title. Analogously, the seller should also pay for the inspection, which informs the buyer as to the home's structural integrity. Both the title search and the inspection are devices for the potential buyer to ascertain the present state of the property.

205. *See* King, *supra* note 10, at 663 (discussing legal responsibilities of inspectors who make warranties on the condition of the house).

206. *Id.* at 664. A provision excusing brokers and sellers from liability where an expert is involved is contrary to current Illinois case law. Mitchell v. Skubiak, 618 N.E.2d 1013 (Ill. App. Ct. 1993). In *Mitchell*, a husband and wife bought a home in 1987 and hired a home inspector to insure that it was free from defects. They discovered problems in the home after they had closed the deal. The defects complained of were not obvious when the plaintiffs inspected the home two months prior. More importantly, the defects were not discovered by the hired home inspector.

Plaintiffs sued the seller for misrepresentation, concealment, and non-disclosure, and the inspection company for negligence. *Id.* at 1015. The trial court dismissed plaintiffs' count against the sellers reasoning that plaintiffs could not have reasonably relied on sellers' representations since plaintiffs hired an expert. The appellate court disagreed. The appellate court held that as a matter of law employing an expert will not bar claims against the seller. *Id.* at 1020.

207. *Id.*

208. Since Illinois law does not require home inspectors to carry insurance, the buyer must be alerted to that fact and given the opportunity to hire qualified inspectors. *See* J. Linn Allen, *Home Inspectors Stay Busy, But Who's Inspecting Them?*, CHI. TRIB., July 19, 1992, at C1 (explaining Illinois does not regulate its home inspectors, and many inspectors do not carry professional insurance). The article discusses the situation of an Illinois buyer who purchased a home in a western suburb of Chicago. *Id.* The buyer hired an inspector who determined that the 1930-dwelling was free from major defects. *Id.* After closing, the buyer hired an electrician to do minor electrical work and noticed that the wiring was both illegal and extremely dangerous. *Id.* The buyer was forced to spend in excess of $10,000 to correct the danger. *Id.*

In addition to delivering the inspection report to both the buyer and the seller, the report should be recorded in the County Recorder's Office. The purpose of this step is to protect any future buyer if the present deal collapses. Once the document is recorded, it will appear on all future title searches.[209] Knowing that the title search will reveal previous inspection reports, a seller will be inclined at the outset to disclose the contents of all previous reports to potential buyers. Of course, the sales contract should provide that a buyer may back out if a previous inspection—brought to light by a title search—reveals a material problem. Analogous to the buyer's right to rescind upon evidence that the title is unmarketable, the buyer should have the right to terminate a contract if a previously recorded inspection report shows material defects in the property.[210] Divulging the results of all previous inspections will also save the time of experts who make subsequent inspections by showing these experts what to look for.

In sum, a mandatory inspection provision would accomplish two purposes. First, it would relieve the broker and seller from liability for unknown defects in the sale of all used homes, and, second, it would fully educate the buyer about the true condition of the home.

b. Disclosing Material Elements that Don't Affect the Physical Condition of the Home

The Illinois statute should require disclosure of certain material elements regarding the marketability of a home that are unrelated to its physical condition. As approved, the Act does not have a provision that requires disclosure of existing noise problems and other nuisances as did the 1992 draft.[211] However, Illinois law expressly condones the failure to disclose that a former occupant of the property was infected with the HIV-AIDS disease or that the property was the site of an egregious occurrence.[212] Although pub-

209. *See How to Draft a Real Estate Brokerage Agreement*, *supra* note 65, at 47 (describing title searches).

210. *See id.* (discussing title searches and the buyer's right to rescind the sales contract where title is determined unmarketable).

211. S.B. 1714, Ill. 87th Gen. Assembly (1992) § 30 (requiring seller to disclose whether the neighborhood is susceptible to noise problems or other nuisances in part II.C of the disclosure form). For a discussion of non-physical factors that the seller currently need not disclose, see Mary Maguire, *Speak No Evil*, CHI. TRIB., Sept. 18, 1992, § 8, at 3. But see Paula C. Murray, *AIDS, Ghosts, Murder: Must Real Estate Brokers and Sellers Disclose?*, 27 WAKE FOREST L. REV. 689 (1992), arguing that certain elements should not impose liability on sellers and brokers.

212. 225 ILCS 455/31.1 (1993) sets forth that no liability will be imposed on a broker for refusing to disclose that a former occupant had the AIDS disease or that the property was the site of an egregious occurrence, and provides as follows:

lic policy prohibits discrimination against those with the AIDS virus, the author contends that the potential buyer has a right to know if the premises were the site of a serious criminal action.[213] Aside from such important public policy concerns as the AIDS epidemic, there is a need to disclose certain other non-physical matters.[214]

Therefore, the disclosure form should include a section pertaining to non-physical conditions that substantially affect the value of a home.[215] In addition to the provision that requires disclosure of nuisances in a neighborhood, the form should require disclosure of the safety of the neighborhood,[216] the quality of nearby schools,[217] and the fair market value of homes in the general area.[218]

> No cause of action shall arise against a licensee for the failure to disclose that an occupant of that property was afflicted with Human Immunodeficiency Virus (HIV) or that the property was the site of an act or occurrence which had no effect on the physical condition of the property or its environment or the structures located thereon.

Id.

213. For instance, the buyer should have a right to know if the home was used as a "crack house," or was the cite of a murder or suicide. The purpose for disclosing such conditions in a mandatory disclosure statute is to avoid the rude awakening a buyer would surely experience after closing, upon learning that such an occurrence had indeed taken place. *See, e.g., Stambovsky*, 572 N.Y.S.2d 672; for an example of an egregious occurrence, see *supra* note 4 and accompanying text; *see, e.g.*, Reed v. King, 145 Cal. App. 3d 261 (1983) (finding that the seller had a duty to disclose the material fact that multiple murders had taken place on the premises ten years prior, because the occurrence affected the market value of the property and the livability of the house). Undoubtedly, a buyer would learn of these matters from her new neighbors. It is grossly unfair to keep such information hidden, thus forcing the buyer to accept a condition to which she may be diametrically opposed.

214. Interview with Joan M. Kelly, Sales Assoc. for Baird & Warner, in Glenview, Ill. (Oct. 24, 1992). Mrs. Kelly believes that in all fairness buyers have a right to know whether a particular house was the site of such occurrences as murder and suicide.

215. As professionals, brokers are acutely aware of the characteristics of the surrounding neighborhoods. Maguire, *supra* note 210. Forcing a buyer to discover non-physical factors on her own for any property in which she is interested wastes a great deal of the buyer's time. Again, if the buyer does not discover significant non-physical concerns before she moves in, she most certainly will discover them after she moves in. But after a buyer moves in, leaving would be too impractical and ascertaining damages would be very difficult.

216. The safety of any given locality is difficult to ascertain from a visual examination. In addition, an out-of-state buyer will have no notion as to a neighborhood's safety. Requiring disclosure of criminal activity in the area will justifiably aid all buyers.

217. The disclosure form should explain which schools are available, the distances and the modes of transportation. The quality of the schools in the neighborhood is often the single most important factor in a couples decision to purchase a particular house. Maguire, *supra* note 210.

218. The broker knows the prices for recent sales in the area. Interview with Joan M. Kelly, *supra* note 213. The MLS gives the broker the prices of all homes bought and sold in any area. For a discussion of the MLS, see *supra* note 63. Just as the broker advised the seller in setting the list price, the broker should assist the buyer in evaluating the fairness of the price. If the buyer knew the intricacies of the market, she could discover this information herself

c. Certain Elements Should Never Be Disclosed

Although some non-physical conditions should be disclosed, certain non-physical characteristics should never be disclosed. For reasons of public policy, a seller or a broker should never answer questions concerning AIDS[219] or a neighborhood's ethnic makeup.[220] For reasons of fairness to the seller, the Illinois statute should not require disclosure of facts that would unjustifiably affect the market price of the property.[221] In general, the only non-physical elements that should be disclosed are those that will affect the living environment for future owners. Elements that merely serve as an unjust bargaining tool, or are considered unfair as a matter of public policy, should never be disclosed by the seller or broker.

CONCLUSION

Although the modifications and additions proposed by this Note might not offer relief to Mr. Stambovsky, or buyers similarly situated, the changes better insure that buyers of used residential real estate will be afforded protection. This Note has outlined the trend toward protecting consumers of real property by way of legislation. However, Illinois should not simply follow the trend, but be a trend-setter. Illinois' mandatory disclosure law should be a distillation of the best ideas demonstrated throughout the country.

It is submitted that the proposals in Part IV of this Note balance the interests of all parties involved. The recommendations educate both sides as to their rights and duties and, thus, put the buyer an on equal footing with both the seller and the broker. To disregard the suggestions set forth herein would render the Act just another statute and leave the buyer without a soul to turn to but the ghosts in his attic.

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via the MLS or by personally researching the sales prices of nearby homes at the recorder's office.

219. For a discussion of the effects of 225 ILCS 445/31.1 (1993) on disclosure law in Illinois, see *supra* note 211 and accompanying text. From a public policy standpoint, the Illinois General Assembly has expressed its intention to protect AIDS victims from discrimination. *Id.*

220. Interview with Joan M. Kelly, *supra* note 213. Mrs. Kelly asserts that real estate agents will not answer any questions regarding the ethnic makeup of a neighborhood, for fear of violating real estate licensing guidelines or fair housing laws.

221. For instance, the seller's reason for moving should never be disclosed (e.g., divorce, lost job, or relocation). The reason for not revealing such concerns is that a buyer could then use this information as a tool to lower the price unjustly.