

# *Fordham Environmental Law Review*

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*Volume 8, Number 1*

2011

*Article 2*

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## Caveat Emptor Is Alive And Well And Living In New Jersey: A New Disclosure Statue Inadequately Protects Residential Buyers

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## NOTE

# CAVEAT EMPTOR IS ALIVE AND WELL AND LIVING IN NEW JERSEY: A NEW DISCLOSURE STATUTE INADEQUATELY PROTECTS RESIDENTIAL BUYERS

*Robert H. Shisler\**

For most American families, the purchase of a new home is the most significant investment they will ever make.<sup>1</sup> The purchasing process is full of decisions ranging from size and price range to the kind of neighborhood and location desired.<sup>2</sup> If the family has children, the quality of area schools may be another important factor. Still, other considerations may include proximity to highways, mass transportation, and shopping and recreation areas.

Most prospective buyers would also like to know whether the home they plan to purchase was built next door to a leaking toxic waste dump, or whether a large dirt pile situated in a neighborhood lot was contaminated with lethal thorium.<sup>3</sup> The question in such residential real estate transactions is who should bear the burden of discovering and disclosing the presence of such off-site environmental hazards.

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1. *In re* Opinion No. 26 of the Committee on the Unauthorized Practice of Law, 654 A.2d 1344, 1346 (N.J. 1995).

2. One court has noted that "location is the universal benchmark of the value and desirability of property." *Strawn v. Canuso*, 657 A.2d 420, 431-32 (N.J. 1995) [hereinafter cited as *Strawn II*].

3. See, e.g., Bruno Tedeschi, *Know thy Neighborhood N.J. Requires Disclosure of Hazards*, THE BERGEN RECORD, Sept. 24, 1995, at R1.

Recently, the New Jersey Supreme Court placed this responsibility on the seller of new residential housing.<sup>4</sup> The court held that due to the professional seller's recognized advantage in knowledge and expertise, she must disclose to the buyer the presence of all "material off-site conditions" such as a closed, leaking toxic waste dump located next door.<sup>5</sup>

This extension of the common-law duty to disclose material latent defects in the sale of residential real estate to off-site conditions is the latest shift in a modern judicial trend of protecting the buyer in such transactions.<sup>6</sup> The ancient doctrine of *caveat emptor*, or "let the buyer beware,"<sup>7</sup> has steadily gone by the wayside as courts have recognized the modern realities of the residential real estate marketplace.<sup>8</sup> Accordingly, courts have imposed on the seller such common-law creations as the implied warranty of habitability and the duty to disclose material latent defects to the buyer.<sup>9</sup>

New Jersey's highest court recently continued this trend of protecting the buyer at the expense of the seller by extending the duty to disclose explicitly to physical conditions that exist off-site.<sup>10</sup> However, because of vagueness in the decision relating to both the scope and nature of the new duty, the New Jersey Legislature, besieged by industry,<sup>11</sup> responded with a completely novel approach and rewrote the duty to disclose in the off-site context.<sup>12</sup>

The New Residential Construction Off-Site Conditions Disclosure Act<sup>13</sup> (the "Statute") approaches the problem of off-site defects from a completely different angle than the judiciary. It creates a public repository of information about the location and the nature of certain off-site defects deemed by the statute to be "material

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4. *See Strawn II*, 657 A.2d 420.

5. *Id.*

6. *Id.* at 426-27.

7. BLACK'S LAW DICTIONARY 222 (6th ed. 1990) ("The purchaser must examine, judge, and test for himself.").

8. *See Strawn II*, 657 A.2d at 426.

9. *See id.* at 426-27.

10. *Id.* *See* discussion *infra* Part II.

11. *See* Tedeschi, *supra* note 3.

12. *See* opening "Statement" 1995 N.J. Sess. Law Serv. 253 (West).

13. N.J. STAT. ANN. § 46:3C-1 to -12 (West 1996).

conditions."<sup>14</sup> The new duty, then, is not to disclose the presence and location of such off-site conditions, but merely to disclose that the public repository exists.<sup>15</sup> This new scheme however, is problematic because it may not reach all instances of a seller's nondisclosure,<sup>16</sup> and may create a vehicle for sellers to shield themselves from liability for nondisclosure through technical compliance with the statute.<sup>17</sup> Balanced against this potential for abuse are the advantages entailed in the centralization of information regarding certain fixed environmental hazards in the community.

This Note will cover the early rule of *caveat emptor* and trace the development of the modern rule, and the response to it by the legislature. Part One will briefly trace the evolution from the ancient doctrine of *caveat emptor* to the modern rule, generally using New Jersey law to exemplify the change. Part Two will examine in detail the modern rule as embodied in *Strawn v. Canuso*,<sup>18</sup> a New Jersey case that explicitly extended the duty to disclose to conditions that occur beyond the property line. Part Two will also examine the problems with the *Strawn* decision, and hence, the reasons why New Jersey's Legislature felt that a new Statute was needed. Part Three will examine the Statute, and detail its express purpose and function. Part Three will also examine the effect of the new Statute on the Seller/Buyer relationship, and whether it lives up to its express purpose. This Note will conclude by arguing that the current Statute is fatally flawed in several important respects, and will suggest specific improvements.

#### PART ONE: THE RISE AND FALL OF CAVEAT EMPTOR

At ancient common law, most real estate transactions were arms-length between two similarly situated parties with comparable bargaining power.<sup>19</sup> In the agrarian setting, the land itself was far

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14. *Id.* § 46:3C-4 (West 1996).

15. *Id.* § 46:3C-8 (West 1996).

16. *See, e.g.,* Reed v. King, 193 Cal. Rptr. 130 (1983); *Strawn II*, 657 A.2d at 430 (N.J. 1995); Michael A. O'Hara, *The Utilization of Caveat Emptor in CERCLA Private Party Cleanups*, 56 LAW AND CONTEMP. PROBS. 149 (Winter 1993).

17. *See* N.J. STAT. ANN. § 46:3C-1 to -12 (West 1996).

18. *Strawn II*, 657 A.2d 420 (N.J. 1995).

19. Walter H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J.

more important than any simple buildings or other improvements it might have contained,<sup>20</sup> and the buyer was expected to inspect the property for its suitability for his particular intended use.<sup>21</sup> Both the buyer and seller were generally farmers with similar levels of bargaining power<sup>22</sup> and the availability of the seller's defense of *caveat emptor* created a heavy incentive for the buyer to fully inspect the property<sup>23</sup> because representations and obligations made to the buyer integrated with the deed upon delivery.<sup>24</sup>

*Caveat emptor*, or "let the buyer beware," was the rule.<sup>25</sup> As the New Jersey Supreme Court has stated, "the principle of *caveat emptor* dictates that in the absence of an express agreement, a seller is not liable to the buyer or others for the condition of the land existing at the time of transfer."<sup>26</sup> Thus, for used homes, there was no duty to disclose on-site material defects "no matter how morally

1133 (1931); *see also, infra* note 22. "[A]rm's length transaction" has been described as one between two parties with roughly equal bargaining power and comparable skill and experience. *Frickel v. Sunnyside Enter., Inc.*, 725 P.2d 422, 425 (Wash. 1986).

20. *See, e.g.*, *Green v. Superior Court*, 517 P.2d 1168, 1172 (Cal. 1974) ("[T]he land itself was by far the most important element of a lease transaction."). For a complete history of *caveat emptor*, *see generally*, Hamilton, *supra* note 19, at 1133.

21. *See, e.g.*, *Philadelphia Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 312-13 (3d Cir. 1985).

22. *See* Hamilton, *supra* note 19, at 1157.

23. *See* O'Hara, *supra* note 16.

24. The common law rule of merger by deed provides that upon delivery of the deed, all other promises contained in earlier agreements are terminated. *See* Paul Teich, *A Second Call for Abolition of the Rule of Merger by Deed*, 71 U. DET. MERCY L. REV. 543 (1994). Some have observed that this is merely an extension of the "integration doctrine" under which "all prior documents are considered [to have been] integrated into the final contract, and only the provisions contained in the final contract are part of the agreement." 6A RICHARD R. POWELL & PATRICK J. ROHAN, *POWELL ON REAL PROPERTY* § 9011d at 81A-157 (1992).

25. *See* *Weintraub v. Krobatsch*, 317 A.2d 68 (N.J. 1974); *Schipper v. Levitt & Sons, Inc.*, 207 A.2d 314 (N.J. 1965); *Michaels v. Brookchester, Inc.*, 140 A.2d 199 (N.J. 1958); *Levy v. C. Young Constr. Co.*, 134 A.2d 717 (N.J. Super. Ct. App. Div. 1975) [hereinafter cited as *Levy I*].

26. *T&E Indus. v. Safety Light Corp.*, 587 A.2d 1249, 1257 (N.J. 1991) (citing *RESTATEMENT (SECOND) OF TORTS* § 352 comment (a) (1977)).

censurable such silence might be,"<sup>27</sup> and for new homes, no implied warranty of habitability or fitness existed.<sup>28</sup> If the buyer later discovered any latent defects, she had no recourse unless she had protected herself by negotiating express warranties into the deed.<sup>29</sup>

The real estate marketplace however, has evolved from this agrarian context into a modern setting, where mass developers build dozens of homes at one time, and sell the homes to buyers using standardized form contracts.<sup>30</sup> In these transactions, the builder/seller negotiates with a distinct advantage over the buyer<sup>31</sup> because the buyer relies upon the knowledge and expertise of the builder/seller.<sup>32</sup> Furthermore, since the builder/seller is the one who actually built the homes, superior knowledge about the structure, property, and surrounding areas is obviously conferred.<sup>33</sup> The standardized form contracts which the builder/seller often uses offers little room for bargaining.<sup>34</sup> Finally, in cases where housing is in short supply, other potential buyers may be waiting in line for the opportunity to submit an offer for the same house, presenting the purchaser with a "take it or leave it" situation. In recognition of this modern state of affairs, courts have moved to protect the buyer. This protection has come in the form of a duty to disclose material

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

28. *Levy v. C. Young Constr. Co.*, 139 A.2d 738 (N.J. 1958) [hereinafter cited as *Levy II*].

29. *McDonald v. Mianeki*, 398 A.2d 1283 (N.J. 1979).

30. *See Weintraub v. Krobatsch*, 317 A.2d 68 (N.J. 1974).

31. *Id.*

32. *McDonald*, 398 A.2d at 1289.

33. *House v. Thorton*, 457 P.2d 199, 204 (Wash. 1969) ("[Builder's] position throughout the process of [site] selection, planning and construction was markedly superior to that of their first purchaser-occupant.").

34. *McDonald*, 398 A.2d at 1292 ("[B]uilders utilize standard form contracts, and hence the opportunity to bargain for protective clauses is by and large nonexistent."); James J. Knappenberger, *Extension of Implied Warranties to Developer-Vendors of Completed New Homes*, 11 URB. L. ANN. 257, 260 (1976) (Standard form contracts are generally utilized and "[e]xpress warranties are rarely given, expensive, and impractical for most buyers to negotiate."). For the proposition that builder-vendors generally enjoy superior bargaining position, see, e.g., *Weeks v. Slavick Builders, Inc.*, 180 N.W.2d 503 (Mich. Ct. App. 1970); Note, *The Doctrine of Caveat Emptor as Applied to Both the Leasing and Sale of Real Property: The Need for Reappraisal and Reform*, 2 RUT.-CAM. L.J. 120, 136-37 (1970).

latent defects<sup>35</sup> and an implied warranty of habitability.<sup>36</sup>

The implied warranty of habitability and the seller's duty to disclose all known latent material defects collectively represent a vast shift in the burden from the buyer to the seller.<sup>37</sup> Courts are interjecting into common real estate transactions the seller's implied representations that the house is fit for habitation and that both parties have all information pertinent to the transaction. This is especially true of information about defects which affect health or safety,<sup>38</sup> but also includes information that merely affects value.<sup>39</sup> The extent to which the buyer is protected is illustrated by the cases granting rescission even when the contract of sale contains an "as is" clause.<sup>40</sup>

35. *Weintraub v. Krobatsch*, 317 A.2d 68 (N.J. 1974).

36. *McDonald*, 398 A.2d at 1288. The implied warranty of habitability is sometimes referred to under the rubric of an implied warranty of fitness for a particular purpose which, in the case of residential real estate, is, of course, habitation. See *Aronsohn v. Mandara*, 484 A.2d 675, 681 (N.J. 1984) ("Habitability is synonymous with suitability for living purposes; the home must be occupiable.").

37. This is motivated by the trend of "consumerism." See, e.g., Kevin C. Culum, *Hidden-But-Discoverable-Defects: Resolving the Conflicts Between Real Estate Buyers and Brokers*, 50 MONT. L. REV. 331, 332 (1989).

38. See, e.g., *McDonald*, 398 A.2d at 1283 (potable water supply is essential to habitation); *Schipper v. Levitt & Sons, Inc.*, 207 A.2d 314 (N.J. 1965) (hot water system unreasonably dangerous); *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968) (dangerously defective fireplace and chimney). See also *Elderkin v. Gaster*, 288 A.2d 771, 777 (Pa. 1972) ("without drinkable water, the house cannot be used for the purpose intended.").

39. See, e.g., *Lingsch v. Savage*, 29 Cal. Rptr. 201 (1963) (building in disrepair and placed for condemnation); *Ollerman v. O'Rourke Co. Inc.*, 288 N.W.2d 95 (Wis. 1980) (uncapped well under home).

40. See, e.g., *Wolford v. Freeman*, 35 N.W.2d 98 (Neb. 1948) ("As is" clause is not a bar to rescission based on seller's fraud); *Loughrin v. Superior Court*, 19 Cal. Rptr. 2d 161 (1993) ("As is" clause is not the equivalent to waiver of potential common-law misrepresentation claim. "As is" simply means that purchaser accepts property in the condition visible or observable by him. "As is" clause will not protect against claims of intentional misrepresentation, fraudulent concealment, or negligent concealment unrelated to the failure to inspect.).

The Uniform Commercial Code requires that if the deed contains an "as is" clause intended to defeat the implied warranty of habitability, it must so state in conspicuous language. U.C.C. § 2-316(2) (1972). "Conspicuous" is defined as "a term or clause . . . so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals . . . is conspicuous.

Until recently, implied warranty and duty to disclose cases have almost invariably dealt with physical defects found on the premises: a problem with the structure or with the land.<sup>41</sup> Recent notable exceptions have been the so-called "stigma" cases, where an "intangible" defect reduced the desirability and therefore the property value of the house.<sup>42</sup> In one infamous California case, it was held that because the property's notoriety as the site of a grisly murder had negatively affected its value, the failure to disclose the murders was actionable.<sup>43</sup>

The ancient doctrine placing the burden on the buyer was applied in modern times in *Levy v. C. Young Construction Co.*<sup>44</sup> In *Levy*,

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Language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color." *Id.* § 1-201(10).

41. See *Strawn II*, 657 A.2d 420 (N.J. 1995).

42. See, e.g., *Reed v. King*, 193 Cal. Rptr. 130 (1983) (Failure to disclose house was notorious murder site); *Stambovsky v. Ackley*, 572 N.Y.S.2d 672 (N.Y. App. Div. 1991) (failure to disclose house was haunted). See also, Paula C. Murray, *AIDS, Ghosts, Murder: Must Real Estate Brokers and Sellers Disclose?*, 27 WAKE FOREST L. REV. 689 (1992).

43. *Reed*, 193 Cal. Rptr. at 133.

44. *Levy I*, 134 A.2d 717 (N.J. Super. Ct. App. Div. 1957). For a general treatment of *caveat emptor* see, E.B. Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 CORNELL L.Q. 835, 837 (1967)

*Caveat emptor* . . . did not adversely affect the typical buyer of a new house during the nineteenth century. In those days, after all, the homeowner-to-be was commonly a middle-class fellow who purchased his own lot of land and then retained an architect to design a home for him. Once the plans were ready the landowner hired a contractor who built a house according to the plans. Quality control was assured because the builder was paid in stages as he completed each part of the house to the satisfaction of the architect. If the house did happen to collapse, the homeowner had a choice of lawsuits to recoup his losses: either the plans were defective, in which case the architect had been negligent, or the building job had not been workmanlike, in which case the contractor was liable . . . . After World War II . . . the building industry underwent a revolution. It became common for the builder to sell the house and land together in a package deal. Indeed, the building industry outgrew the old notion that the builder was an artisan and took on all the color of a manufacturing enterprise, with acres of land being cleared by heavy machinery and prefabricated houses being put up almost overnight. Having learned their law by rote, however, the lawyers tended to insist that *caveat emptor* nonethe-



it was alleged that the builder had negligently laid a sewer pipe and that its replacement was necessary.<sup>45</sup> The court applied *caveat emptor* and held that “[a]bsent any covenant binding defendant to sell a well constructed house, plaintiffs cannot sue on an implied warranty.”<sup>46</sup>

The first incremental erosion of the doctrine in New Jersey came in the case of *Michaels v. Brookchester, Inc.*<sup>47</sup> In *Michaels*, the New Jersey Supreme Court stated that *caveat emptor* no longer applied to leasehold interests in property, noting that in other jurisdictions “[e]xceptions to the broad immunity [of *caveat emptor* had] inevitably developed.”<sup>48</sup> Thus, the landlord “owes a duty of reasonable care with respect to the portions of a building which are not demised and remain in the landlord’s control.”<sup>49</sup>

The more significant change in New Jersey law from vendor immunity under *caveat emptor* came in a case involving a dangerous condition created by the builder. In *Schipper v. Levitt & Sons, Inc.*,<sup>50</sup> a young child was severely scalded by hot water drawn from a bathroom faucet.<sup>51</sup> The home was part of a mass-development that used a unique water heating system which forced extremely hot water through coils embedded in the concrete floors in order to heat the living areas.<sup>52</sup> The same boiler also supplied the faucets in the kitchen and bathrooms with the same 190 degree water, which was considered “excessively hot” or “scaldingly hot,” compared with the normal domestic hot water temperature in the area of 140 degrees.<sup>53</sup> The builder had deliberately failed to install

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less applied to these sales.

*Id.*

45. *Levy I*, 134 A.2d 717.

46. *Id.* at 719 (“Although the doctrine of *caveat emptor*, so far as personal property is concerned, is very nearly abolished, it still remains as a viable doctrine in full force in the law of real estate.”), *aff’d on other grounds*, 139 A.2d 738 (1958).

47. 140 A.2d 199 (N.J. 1958).

48. *Id.* at 201.

49. *Id.*

50. 207 A.2d 314 (N.J. 1965).

51. *Id.* at 316.

52. *Id.* at 316-17.

53. *Id.* at 318.

“mixing valves” in order to reduce the temperature of the tap water to a safer level, despite specific recommendations of the boiler manufacturer to do so.<sup>54</sup>

Holding for the plaintiff, the court emphasized the “special and concealed danger far beyond any danger incident to contact with normally hot water.”<sup>55</sup> The defendant argued that the traditional rule was to not imply a warranty,<sup>56</sup> and further urged the court to require a showing of privity between the injured child and the builder.<sup>57</sup> The defendant attempted to distinguish foreign cases that had departed from *caveat emptor* as actions where no questions of privity arose because they were suits by the purchaser directly against the builder-vendor.<sup>58</sup> The court dismissed this attempt to

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54. *Id.*

55. *Id.* at 324.

56. *Id.* at 327 (citing 4 WILLISTON, CONTRACTS § 926 (Rev.ed. 1936)). The *Schipper* court noted that although the 1936 edition of Williston's CONTRACTS stated the traditional rule, the 1963 edition of the same volume noted that the trend was changing toward “an exception in the sale of new housing where the vendor is also the developer or contractor” because the purchaser “relies on the implied representation that the contractor possesses a reasonable amount of skill necessary for the erection of a house; and that the house will be fit for human dwelling.” 7 WILLISTON, CONTRACTS, § 926A at 810 (3d ed. 1963).

57. In this case, the infant was the child of a lessee not in privity with the builder. Privity of contract is “the connection or relation which exists between two or more contracting parties.” BLACK'S LAW DICTIONARY 1199 (6th ed. 1990). Traditionally, the element of privity between the plaintiff and defendant had been required in order to maintain an action on the contract. *Id.* See also, Sean M. O'Brien, *Caveat Venditor: A Case for Granting Subsequent Purchasers A Cause of Action Against Builder-Vendors for Latent Defects in the Home*, 20 J. CORP. L. 525, 537-38 (1995) (noting the trend away from requiring privity).

58. *Schipper v. Levitt & Sons, Inc.*, 207 A.2d 314, 326-27 (N.J. 1965). Among the cases cited by the defendant builder were: *Carpenter v. Donohoe*, 388 P.2d 399 (Colo. Sup. Ct. 1964)

([T]he implied warranty doctrine is extended to include agreements between builder-vendors and purchasers for the sale of newly constructed buildings, completed at the time of contracting. There is an implied warranty that builder-vendors have complied with the [area's] building code. . . . [T]here are implied warranties that the home was built in workmanlike manner and is suitable for habitation.);

*Gilsan v. Smolenske*, 387 P.2d 260 (Colo. Sup. Ct. 1963); *Jones v. Gatewood*, 381 P.2d 158 (Okla. Sup. Ct. 1933); *Weck v. AM Sunrise Const. Co.*, 184 N.E.2d 728 (Ill. App. Ct. 1962) (contract to purchase a house under construc-

distinguish the other cases and noted that they "undoubtedly evidence the just stirrings [in other jurisdictions] towards recognition of the need for imposing on builder vendors an implied obligation of reasonable workmanship and habitability which survives delivery of the deed."<sup>59</sup> However, the court added that to require privity in real estate transactions would revive an old doctrine that was quickly disappearing from the products liability area from which it first arose.<sup>60</sup> Moreover, the current trend was towards a modern products liability approach that "held [builders] to the general standard of reasonable care for the protection of anyone who might foreseeably be endangered by their negligence, even after acceptance of the work."<sup>61</sup>

Although *Schipper* involved a mass developer (which the court compared to mass producers of consumer products), New Jersey's implied warranty doctrine was extended to include even small-scale developers where the builder had failed to provide an adequate water supply. In *McDonald v. Miannecki*,<sup>62</sup> a small-scale developer built a home for the plaintiffs on a lot the plaintiffs had selected. The home was to be supplied with water from a well on the property and the wellwater turned out to be unfit for drinking.<sup>63</sup> Following foreign cases holding that a "potable water supply is essential to any functioning living unit,"<sup>64</sup> the *McDonald* court included the availability of drinkable water within the warranty in New Jersey and explicitly extended its obligations to cover small-

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tion carries with it an implied warranty of reasonable workmanship and habitability which survives the deed); *Hoye v. Century Builders*, 329 P.2d 474 (Wash. Sup. Ct. 1958); *Miller v. Cannon Hill Estates*, 2 K.B. 113 (1931). Also cited were: Leo Bearman, Jr., *Caveat Emptor in Sales of Realty—Recent Assaults upon the Rule*, 14 VAND. L. REV. 541 (1961); Allison Dunham, *Vendor's Obligation as to Fitness of Land for a Particular Purpose*, 37 MINN. L. REV. 108 (1953).

59. 207 A.2d at 327.

60. *Id.* at 328.

61. *Id.* at 321 (citing *Dow v. Holly Manufacturing Co.*, 321 P.2d 736 (Cal. Sup. Ct. 1958)).

62. 398 A.2d 1283 (N.J. 1979).

63. *Id.* at 1285.

64. *Id.* at 1293-94; *Lyon v. Ward*, 221 S.E.2d 727 (N.C. App. 1976); *Elderkin v. Goster*, 288 A.2d 771 (Pa. Sup. Ct. 1972); *House v. Thornton*, 457 P.2d 199 (Wash. Sup. Ct. 1969).

scale developers.<sup>65</sup> The court reasoned that “regardless of whether [the builder] can be labeled a ‘mass producer’, . . . the purchaser relies upon [the builder’s] superior knowledge and skill, and [the builder] impliedly represents that he is qualified to erect a habitable dwelling.”<sup>66</sup>

The next stage in moving the burden from the buyer to the seller in New Jersey came in the form of protection for the buyer distinct from the warranty of habitability - the duty on the part of sellers of used homes to disclose known latent defects. In *Weintraub v. Krobatsch*,<sup>67</sup> the seller of a six-year-old home failed to disclose that the property was infested by roaches, and in fact, may have actively concealed the infestation.<sup>68</sup> Upon discovering the infestation shortly before closing,<sup>69</sup> the buyers attempted to rescind the con-

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65. *McDonald*, 398 A.2d at 1294-95. New Jersey courts have also held the implied warranty of habitability includes a defective septic system. *Andreychak v. Lent*, 607 A.2d 1346 (N.J. Super. Ct. App. Div. 1992); *Hermes v. Staiano*, 437 A.2d 925 (N.J. Super. Ct. Law Div. 1981); *see also Trentacost v. Brussel*, 412 A.2d 436 (N.J. Sup. Ct. 1980) (“At a minimum, the necessities of a habitable residence include sufficient heat and ventilation, adequate light, plumbing and sanitation and proper security and maintenance.”).

66. *McDonald*, 398 A.2d at 1292. The builder

is also in a better position to prevent the existence of major defects. Whether or not engaged in mass production, builders utilize standard form contracts, and hence the opportunity to bargain for protective clauses is by and large nonexistent. Finally, it is the builder who has introduced the article into the stream of commerce. Should defects materialize, he-as opposed to the consumer purchaser-is the less innocent party.

*Id.*; *see also* Linda M. Libertucci, *Builder’s Liability to New and Subsequent Purchasers*, 20 SW. U. L. REV. 219, 220 (1991) (“In today’s world of mass production and specialization, the home purchaser simply cannot be expected to have the detailed knowledge of homes acquired by those in the business. Now the purchaser relies on the expertise of the builder-vendor.”).

67. 317 A.2d 68 (N.J. 1974).

68. *Id.* at 69-70. The “concealment” took the form of brightly illuminating the house during visits by the prospective buyers. Because roaches are nocturnal, leaving the lights on effectively concealed their presence. *Id.* at 70.

69. The purchasers discovered the infestation when they visited the home at night. Upon turning on the lights, they were “astonished to see roaches literally running in all directions, up the walls, drapes, etc.” *Id.* at 70.

tract and the seller sued for the deposit held in escrow.<sup>70</sup> The New Jersey Supreme Court reversed the lower court's holding that the purchasers were liable to the seller under the contract, stating that "under modern concepts of justice and fair dealing," sellers were under the duty to disclose material latent defects "known to them but unknown and unobservable by the buyer."<sup>71</sup>

These two modern doctrines, the duty to disclose and the warranty of habitability, together represent a monumental shifting of the burden in real estate transactions. This shift is a grand evolution in the way real estate transactions are viewed by courts from the strict doctrine of *caveat emptor*, to vastly more equitable<sup>72</sup> rules based on "modern concepts of justice and fair dealing."<sup>73</sup>

Although the distinction between these two doctrines is less important than what they represent, at least for the purposes of this Note, a brief discussion of their distinction is instructive in light of their application to differing fact scenarios.

The distinction is a straightforward one. The implied warranty of habitability arose under equitable contract principles.<sup>74</sup> Because of a superior bargaining position and surrounding policy reasons, the builder/seller of a new home is said to impliedly warrant that the home conveyed is suitable for habitation, whether he knows of any defects or not.<sup>75</sup> Any latent defects that exist in the new home due to faulty construction may not obviate themselves until some time after the new owner moves in. Here, the warranty protects the buyer if a poorly fitted pipe, which the builder may not know about, fails after the buyer moves in causing her to incur curative expenses.<sup>76</sup>

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70. *Id.*

71. The holding in *Weintraub* was framed in the context of a reversal of a motion for summary judgment in favor of the seller. The court held that in light of "current principles grounded on justice and fair dealing," the buyer was entitled to a full trial below. *Id.* at 80.

72. See O'Hara, *supra* note 16, at 160.

73. *Weintraub*, 317 A.2d at 75.

74. Libertucci, *supra* note 66, at 221.

75. See, e.g., *Schipper v. Levitt & Sons, Inc.*, 207 A.2d 314, 326 (N.J. 1965).

76. Cf. *Levy I*, 134 A.2d 717 (N.J. Super. Ct. App. Div. 1957) (absent proof that the vendor knew about defect, the purchaser could not recover if he had accepted the deed without a construction warranty).

For a used home, the owner/seller, who generally has lived in the home, also has a pretty good idea of the property's condition and whether latent defects exist. The duty to disclose such defects arose under a fraud theory.<sup>77</sup> In cases where one party has superior access to information, mere silence may be the equivalent of an affirmative misrepresentation.<sup>78</sup> Thus, the duty to speak arises and silence under the duty is fraudulent.<sup>79</sup>

The distinction between the doctrines is important in one respect. The duty to disclose latent defects may arise in some situations not clearly covered by the warranty of habitability.<sup>80</sup> This is because there are some defects that may materially affect the value of the home, while not substantially affecting its habitability. For example, in the stigma cases from California<sup>81</sup> and New Jersey,<sup>82</sup> the infamous nature of the sites materially affected the value of the properties, but probably didn't impair their habitability.<sup>83</sup> It is unlikely, although conceivable, that a court would extend the warranty of habitability to a case where the buyer's discovery of the home's reputation psychologically affected him so much that residence there would be unbearable.

The distinction is for the most part insignificant because courts apply whichever doctrine will likely result in the protection of the buyer.

## PART TWO:

### A. *The Modern Rule — Strawn v. Canuso*

The final stage of this burden-shifting in the law is embodied in

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77. Robert M. Washburn, *Residential Real Estate Condition Disclosure Legislation*, 44 DEPAUL L. REV. 381, 386-89 (1995).

78. *See, e.g.*, Weintraub v. Krobatsch, 317 A.2d 68, 73 (N.J. 1974).

79. *Id.*

80. *See, e.g.*, *Strawn II*, 657 A.2d 420 (N.J. 1995); *Tobin v. Paparone Constr. Co.*, 349 A.2d 574 (N.J. 1975); *Landriani v. Lake Mohawk Country Club*, 97 A.2d 511 (N.J. 1953).

81. *Reed v. King*, 193 Cal. Rptr. 130 (1983).

82. *Tobin v. Paparone Constr. Co.*, 349 A.2d 574 (N.J. 1975); *Landriani v. Lake Mohawk Country Club*, 97 A.2d 511 (N.J. 1953).

83. It did not impair the habitability in the sense that the house was physically adequate as a dwelling.

the 1995 case of *Strawn v. Canuso*.<sup>84</sup> The New Jersey Supreme Court for the first time explicitly addressed the question of whether there was a duty to disclose a condition occurring beyond the property line of the subject property. Although other cases had previously addressed conditions that did not occur within the structure or on the land which was the subject of the transaction,<sup>85</sup> this was the first time the specific question of whether an off-site defect must be disclosed was actually answered.

The *Strawn* plaintiffs were a certified class of more than 150 families who were recent purchasers of homes in a new development built by the defendants, John B. Canuso, Sr. and Jr., and their companies, Canetic Corporation and Canuso Management Corporation.<sup>86</sup> Their marketing agent, Fox and Lazo, Inc. brokerage was also named as a defendant.<sup>87</sup> The plaintiffs brought suit upon learning that their new homes had been constructed literally next door to a closed, and leaking toxic waste dump, and after developing health problems<sup>88</sup> generally associated with the proximity of the dump.<sup>89</sup>

The toxic dump encompassed two tracts of land owned by RCA and the Voorhees Township, known as the Buzby Landfill. Although not licensed to accept liquid industrial or chemical toxic waste, the dump was reported to the New Jersey Department of Environmental Protection ("DEP") as having had received several tanker trucks dumping liquid chemical waste.<sup>90</sup> Furthermore, records show that the landfill operators had written to one of the owners of the landfill, in 1971 and 1972, objecting to the delivery of chemicals to the landfill for dumping.<sup>91</sup> Numerous tests of ground and surface water were conducted revealing heavy metal and organic pollutants<sup>92</sup> (including methane that had migrated

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84. *Strawn II*, 657 A.2d 420 (N.J. 1995).

85. *Tobin*, 349 A.2d at 575; *Landriani*, 97 A.2d at 512.

86. *Strawn II*, 657 A.2d at 423.

87. *Id.*

88. The health problems that occurred were not considered in the court's decision.

89. *Strawn II*, 657 A.2d at 423.

90. *Id.*

91. *Id.* at 424.

92. *Id.* at 423.

more than 100 feet from the landfill's perimeter fence), placing it within the backyards of some of the new homes.<sup>93</sup> A 1991 U.S. Health and Human Services Agency for Toxic Substances and Disease Registry report noted that a "stream containing hazardous substances" from the landfill was indeed running through several backyards in the development.<sup>94</sup> As early as 1980, the U.S. Environmental Protection Agency warned that if any homes were built near the landfill, "[t]he potential for a future Love Canal existed at this site."<sup>95</sup>

The defendant builder knew of the existence of the landfill while it was still operational, before the homes were built, and was aware of the potential health hazards.<sup>96</sup> Indeed, the defendant broker's marketing director urged the defendant builder to disclose the presence of the landfill to potential buyers.<sup>97</sup>

The *Strawn* plaintiffs alleged common-law fraud, negligent misrepresentations, and violations of the New Jersey Consumer Fraud Act ("CFA").<sup>98</sup> Although originally alleging breach of the warranty of habitability, the plaintiffs voluntarily dropped this claim.<sup>99</sup> The trial court dismissed all of the claims, holding that "there is no duty that the owner of lands owe[s] . . . to disclose to [the] prospective purchaser the conditions of somebody else's property."<sup>100</sup> The Appellate Division reversed, holding that the duty existed, and the defendants appealed.<sup>101</sup>

The New Jersey Supreme Court affirmed the Appellate Division, holding that:

[A] builder-developer of residential real estate or a broker representing it, is . . . liable for nondisclosure of *off-site* physical conditions known to it and unknown and not readily observable by the buyer if the existence of those conditions is of sufficient materiality to affect the habitability, use, or enjoyment of the property and,

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93. *Id.* at 430.

94. *Id.*

95. *Id.* at 423.

96. *Id.* at 424.

97. *Id.*

98. *Id.*

99. *Id.* at 431 n.5 (the reason for this is unknown).

100. *Id.* at 424.

101. *Id.* at 424-25.



therefore, render the property substantially less desirable or valuable to the objectively reasonable buyer.<sup>102</sup>

In deciding what the Appellate Division called the "novel issues" raised by this case,<sup>103</sup> the New Jersey Supreme Court relied on its precedents in *Schipper*,<sup>104</sup> *McDonald*,<sup>105</sup> and *Weintraub*<sup>106</sup> to support the steady erosion of the *caveat emptor* doctrine. It also relied on *Berman v. Gurwicz*<sup>107</sup> for the proposition that "[c]aveat emptor, the early rule, no longer prevails in New Jersey."<sup>108</sup> The court then noted that other jurisdictions have limited the role of *caveat emptor*, citing California's rule that

when the seller knows of facts materially affecting the value or desirability of property and the seller also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is subject to the duty to disclose those facts to the buyer.<sup>109</sup>

The question before the *Strawn* court was whether to extend the *Weintraub* doctrine of the duty to disclose on-site latent defects known only to the seller to off-site conditions, and if so, to what extent.<sup>110</sup>

The court examined the latter question first, and determined that only professional builder-vendors would be obligated to disclose off-site material latent conditions, thereby excluding from the scope of the duty the resale of a home by its owner.<sup>111</sup> This

102. *Id.* at 431 (footnote omitted) (emphasis added).

103. *Strawn v. Canuso*, 638 A.2d 141, 144 (N.J. Super. Ct. App. Div. 1994) [hereinafter cited as *Strawn I*].

104. *Schipper v. Levitt & Sons, Inc.*, 207 A.2d 314, 326 (N.J. 1965).

105. *McDonald v. Miannecki*, 398 A.2d 1283, 1290 (N.J. 1979).

106. *Weintraub v. Krobatsch*, 317 A.2d 68, 75 (N.J. 1974).

107. 458 A.2d 1311, 1313 (N.J. Super. Ct. Ch. Div. 1981) (citing *Weintraub*, 317 A.2d 68), *aff'd* 458 A.2d 1289 (App. Div. 1983).

108. *Strawn II*, 657 A.2d at 427.

109. *Strawn I*, 638 A.2d 141 (N.J. Super. Ct. App. Div. 1994) (citing *Lingsch v. Savage*, 29 Cal. Rptr. 383 (1984) (imposing duty on broker to inspect property listed for sale to determine whether settlement or erosion problems are likely to occur and to disclose such information to prospective purchasers)).

110. *Strawn II*, 657 A.2d at 428.

111. *Id.* at 428-29.

limitation was based "on an assessment of the various policies that have shaped the development of [New Jersey] law in this area."<sup>112</sup> The factors shaping the duty to disclose in past cases, the court stated, were the superior bargaining position of professional sellers (builder-vendors and their brokers), and their markedly superior advantage in access to information about the subject property.<sup>113</sup> These factors led the court to conclude that it was "reasonable to extend to such professionals a similar duty to disclose off-site conditions that materially affect the value or desirability of the property."<sup>114</sup>

Of further significance, the court stated that the policies as well as the law of the state Consumer Fraud Act ("CFA") applied to professional builder-vendors and their brokers.<sup>115</sup> The CFA was aimed at "the public harm resulting from ' . . . unconscionable practices engaged in by professional sellers seeking mass distribution of many types of consumer goods,'"<sup>116</sup> including real estate.<sup>117</sup> Under its provisions, an omission may violate the statute if the defendant acted knowingly<sup>118</sup> in the "omission of any material fact with intent that others rely upon such . . . omission, in connection with the sale . . . of . . . real estate."<sup>119</sup> The CFA does not confine "material fact" to conditions found only on the premises.<sup>120</sup>

Although apparently finding it unnecessary to say so explicitly, the New Jersey Supreme Court appears to have affirmed the Appellate Division's decision to reverse the trial court's dismissal of the Consumer Fraud claim.<sup>121</sup> As the Appellate Division

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112. *Id.* at 428.

113. *Id.*

114. *Id.*

115. *Id.* at 429 (citing *Arroyo v. Arnold-Baker & Assoc.*, 502 A.2d 106, 108 (N.J. Super. Ct. Law Div. 1985)).

116. *Id.* at 429 (citing *DiBernardo v. Mosley*, 502 A.2d 1166 (N.J. Super. Ct. App. Div. 1986) and quoting *Kugler v. Romain*, 279 A.2d 640, 648 (N.J. 1971)).

117. *Arroyo*, 502 A.2d at 108.

118. *Chattin v. Cape May Greene, Inc.*, 581 A.2d 91, 95 (N.J. Super. Ct. App. Div. 1990), *aff'd*, 591 A.2d 943 (N.J. 1991).

119. N.J. STAT. ANN. § 56:8-2 (West 1989 & Supp. 1996).

120. *Strawn II*, 657 A.2d at 429.

121. See *Strawn I*, 638 A.2d 141 (N.J. Super. Ct. App. Div. 1994).

stated, "[t]he [trial] court apparently reasoned that because there was no duty to disclose the existence of the landfill, all omissions with respect thereto would not violate the Act."<sup>122</sup> Since the Supreme Court found that a landfill can be a material fact,<sup>123</sup> which must be disclosed according to common law,<sup>124</sup> the Appellate Division's reversal of the trial court's finding was impliedly affirmed.

The court then explored the common law of fraudulent omissions, in which a claim may be made "by showing that the seller's . . . nondisclosure of material fact induced the purchaser to buy."<sup>125</sup> The court cited cases where defendants had fraudulently failed to disclose facts material to the transaction, including such things as a planned adjacent tennis court,<sup>126</sup> a separate lease for a condominium complex's recreation area,<sup>127</sup> and the prior federal convictions and disbarment of an applicant for a rabbi position.<sup>128</sup> The court then stated that "[t]here is no logical

122. *Id.* at 150-51.

123. *Id.* at 141.

124. *Id.*

125. *Strawn II*, 657 A.2d at 429.

126. *Tobin v. Papparone Constr. Co.*, 349 A.2d 574, 578 (N.J. Super. Ct. Law Div. 1975) (Defendant's silence created a "mistaken impression on the part of the purchaser which operated to induce the purchaser to buy.").

127. *Berman v. Gurwicz*, 458 A.2d 1311, 1315 (N.J. Super. Ct. Ch. Div. 1981) ("It is clear . . . that defendants had a duty to disclose to the buyers those materials which materially and adversely affected [the buyers]. . . . The existence of the [separate] recreation lease, which imposed substantial financial burdens upon buyers, was material and adverse.").

128. *Jewish Ctr. of Sussex County v. Whale*, 397 A.2d 712 (N.J. Super. Ct. Ch. Div. 1978)

(The fact that no affirmative misrepresentation of a material fact has been made does not bar relief. The suppression of truth, the withholding of the truth when it should be disclosed, is equivalent to the expression of falsehood. The question under those circumstances is whether . . . the defendant is bound in conscience and duty to recognize that the facts so concealed are significant and material and are facts in respect to which he cannot innocently be silent.)

(citation omitted), *aff'd*, 432 A.2d 521 (1981).

However, in *Jewish Center*, the court held that the defendant only committed "equitable fraud." In contrast to legal fraud, with equitable fraud the plaintiff seeks only an equitable remedy (rescission or reformation) and is not required to show scienter (knowledge and intention to obtain an undue advan-

reason why a certain class of sellers and brokers should not disclose offsite matters that materially affect the value of property."<sup>129</sup>

Additionally, the court analyzed whether a nearby toxic waste dump could qualify as a material condition that should be disclosed. It noted that "the physical effects of abandoned dump sites are not limited to the confines of the dump,"<sup>130</sup> and that "even without physical intrusion a landfill may cause diminution in the fair market value of real property located nearby."<sup>131</sup> Furthermore, in late 1983, the New Jersey Real Estate Commission wrote to the Camden County Board of Realtors, stating that "[b]ecause of the potential effects on health, and because of its impact on the value of property, location of property near a hazardous waste site [sic] is a bit of information that should be supplied to potential buyers."<sup>132</sup> Additionally, a real estate broker is required under his state licensing guidelines to "make reasonable effort[s] to ascertain all pertinent information concerning every property for which he accepts an agency. . . . The licensee shall reveal all information material to any transaction to his client or principal and when appropriate to any other party."<sup>133</sup> The court stated, that based on these sources, "professional sellers should have been aware of some changing duty requiring them to be more forthcoming with respect to conditions affecting the value of property."<sup>134</sup>

The court undertook great pains to leave open the limits of materiality of different off-site conditions under the new rule.<sup>135</sup> The court was further satisfied that on the facts of this case, the plaintiffs had stated a cause of action.<sup>136</sup> Although, the court

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tage therefrom). 432 A.2d at 524.

129. *Strawn II*, 657 A.2d at 430.

130. *Id.* at 430 (citing *Ayers v. Township of Jackson*, 525 A.2d 287 (N.J. 1987) (toxics from a landfill contaminated the water supply of residents of nearby homes)).

131. *Strawn II*, 657 A.2d at 430.

132. *Id.*

133. N.J. ADMIN. CODE. tit. 11, § 5-1.23(b) (1996).

134. *Strawn II*, 657 A.2d at 431.

135. *Id.*

136. *Id.*

stated that they “need not debate the outer limits of the duty to disclose,”<sup>137</sup> they later limited their statement:

We do not hold that sellers and brokers have a duty to investigate or disclose transient social conditions in the community that arguably affect the value of property. In the absence of a purchaser communicating specific needs, builders and brokers should not be held to decide whether the changing nature of a neighborhood, the presence of a group home, or the existence of a school in decline are facts material to the transaction.<sup>138</sup>

The court also noted the “stigma” cases from other jurisdictions,<sup>139</sup> but specifically declined to address the materiality of such conditions.<sup>140</sup> Ultimately, the court stated, “a jury will decide whether the presence of a landfill is a factor that materially affects the value of property, . . . and whether the presence of a landfill has indeed affected the value of plaintiffs’ property.”<sup>141</sup>

#### B. *Why Did New Jersey Need the New Statute; What Was Wrong With the Strawn Decision?*

Early versions of the bill included a “Statement” in direct reference to the *Strawn* case.<sup>142</sup> This Statement indicated that the

137. *Id.* at 427.

138. *Id.* at 431.

139. *Id.* at 427 (citing *Reed v. King*, 193 Cal. Rptr. 130 (1983) (holding that property was stigmatized, and value negatively affected, by notoriety of home as site of mass murder); *Stambovsky v. Ackley*, 572 N.Y.S.2d 672 (holding that the fact that house was haunted should have been disclosed) (N.Y. App. Div. 1991)).

140. *Strawn* II 657 A.2d at 427 n.1. The *Strawn* court also defined “stigmatized property” as “property psychologically impacted by an event which occurred or was suspected to have occurred on the property, such event being one that has no physical impact of any kind.” *Id.* See also *Reed v. King*, 193 Cal. Rptr. 130 (1983); *Tobin v. Papparone Constr. Co.*, 349 A.2d 574 (N.J. 1975); *Landriani v. Lake Mohawk Country Club*, 97 A.2d 511 (N.J. 1953); NATIONAL ASSOCIATION OF REALTORS, STUDY GUIDE: STIGMATIZED PROPERTY 2 (1990), quoted in Robert M. Morgan, *The Expansion of the Duty of Disclosure in Real Estate Transactions: It’s Not Just for Sellers Anymore*, FLA. BUS. J., Feb. 1994, at 31. Assuming that the dumping of toxics qualifies as an “event,” the question remains whether the mere presence of a toxic dump in the neighborhood without any contamination leaving the dump’s boundaries, could “stigmatize” property.

141. *Strawn* II, 657 A.2d at 431.

142. 1995 N.J. Sess. Law Serv. 253 (West).

legislature was bothered by ambiguities in the decision: "The New Jersey Supreme Court [has] found that sellers of residential real estate had certain duties to disclose off-site conditions but offered little guidance as to the extent of the duty or what is required to its satisfaction."<sup>143</sup> Moreover, according to news accounts, industry was pressuring the legislature to address the *Strawn* holding.<sup>144</sup>

There are several problems with the *Strawn* decision. First, the duty to disclose conditions occurring beyond the property line appears to be nonexistent. Second, the extent to which the court finds that a duty exists is unclear. Third, although the court attempted to address the element of materiality, the issue has not been adequately delineated.

The duty to disclose on-site material latent defects is already the established law of New Jersey.<sup>145</sup> More specifically, sellers must disclose "on-site defective conditions if those conditions were known to them and unknown and not readily observable by the buyer. Such conditions, for example, would include radon contamination and a polluted water supply."<sup>146</sup> The facts recited in the *Strawn* case indicate that the plaintiffs could have proven at trial both (a) that the underground water supply and surface soil were in fact contaminated, and (b) that the defendants were aware of this fact and failed to disclose it.<sup>147</sup> Therefore, the *Strawn* plaintiffs were likely to recover even without expanding the duty to disclose off-site conditions.

Furthermore, a potable water supply is required by the implied warranty of habitability in New Jersey.<sup>148</sup> Although the plaintiffs inexplicably dropped this claim at the trial stage, the *Strawn* court could have asserted in dicta that the claim was both valid and probably would have been successful.<sup>149</sup> The record is un-

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143. *Id.*

144. See Bruno Tedeschi, *Know Thy Neighborhood; N.J. Requires Disclosure of Hazards*, THE NORTHERN NEW JERSEY RECORD, Sept. 24, 1995 at 4.

145. *Strawn II*, 657 A.2d at 428 (citing its own decision in *Weintraub v. Krobatsch*, 317 A.2d 68 (N.J. 1974)).

146. *Id.* at 428.

147. *Id.* at 423-25.

148. *McDonald v. Miannecki*, 398 A.2d 1238 (N.J. 1979).

149. See *Strawn I*, 638 A.2d 141 (N.J. Super. Ct. App. Div. 1994).

clear as to whether all of the homes in the class were affected by the contaminated water supply, however, this is a fact issue for the jury to decide.<sup>150</sup>

The *Strawn* court could also have substantively raised the warranty issue *sua sponte*. The requirements for raising the issue are either: (1) that the facts are sufficiently well developed such that the question was purely legal, or (2) that the parties are not surprised by the new issue.<sup>151</sup> A surprise may occur if the defendant did not have the opportunity to defend against the charge at trial.<sup>152</sup> Here, the element needed to sustain a claim of the breach of the warranty of habitability was the seller's failure to provide a potable water supply.<sup>153</sup> Although, this might have been an issue for the jury on remand, the *Strawn* court ignored it.<sup>154</sup>

This illustrates the fact that the *Strawn* court did not have to extend the duty to disclose from on-site defects to off-site defects. Moreover, in creating this new duty they failed to properly delineate the nature and extent of the duty. The new duty is improperly delineated for three reasons: (1) whether there is a duty

150. *State v. Ramseur*, 524 A.2d 188, 271 (N.J. 1987).

151. *See, e.g., State v. Choice*, 486 A.2d 833, 834-35 (N.J. 1985). In *Choice*, the criminal defendant appealed the trial court's decision on the basis that the trial court erred by not considering *sua sponte* the lesser included manslaughter charge in the defendant's murder trial. The state Supreme Court, reversed the intermediate appellate court's holding that clear error existed, and held that "[i]t is only when the facts 'clearly indicate' the appropriateness of that charge that the duty of the trial court arises [to raise the new issue]." *Id.* at 835 (quoting *State v. Powell*, 419 A.2d 406, 413 (N.J. 1980)). *See also id.* at 836

([W]here the . . . charge, if given *sua sponte* by the court, would surprise the prosecution (or the defense), that unrequested charge might be inappropriate; at the very least its use may require that opportunity be given to both sides to address the new issue . . . including the opportunity to present further evidence.).

In *Strawn*, the well-documented contamination of the drinking water "clearly indicated" that a habitability issue was appropriate. *See Strawn I*, 638 A.2d 141 (N.J. Super. Ct. App. Div. 1994). Furthermore, because *Strawn* was remanded, the parties could further develop the facts to support or contest the potability issue, or the existence of an alternative water supply.

152. *See Choice*, 486 A.2d at 835-36.

153. *McDonald v. Miannecki*, 398 A.2d 1238 (N.J. 1979).

154. *See Strawn II*, 657 A.2d at 431 n.5.

to *inspect* the area for off-site conditions a buyer may deem "material" in addition to a duty to disclose known defects remains unclear; (2) the limitation to only professional builder-vendors and their brokers is poorly founded; and (3) the question of materiality is also extremely vague.<sup>155</sup>

There is some question whether the court intended to create a duty to investigate as well as a duty to disclose. The court's holding specifically states that the seller need only disclose those defects "known to [the seller yet] unknown and not readily observable by the buyer."<sup>156</sup> However, other parts of the decision indicate a duty to inspect as well.

First, much of the Appellate Division's opinion and, more specifically, its holding, states that the seller has the duty to disclose material off-site defects that "are known *or should have been known* to the seller."<sup>157</sup> Thus, impliedly, there is a duty to inspect for those conditions. While the New Jersey Supreme Court's holding does not include mention of the "should have known" standard, it also does not specifically reject the Appellate Division's language. The supreme court also cites favorably the California case in which the broker's affirmative duty to conduct a reasonable physical inspection of the premises as part of the *definition*<sup>158</sup> of the broker's duty to disclose was borne.<sup>159</sup> The

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155. See *infra*, notes 172-82 and accompanying text for a separate discussion on the materiality question.

156. *Strawn II*, 657 A.2d at 428.

157. *Strawn I*, 638 A.2d 141, 149 (N.J. Super. Ct. App. Div. 1994) (emphasis added).

158. See *infra* note 194 and accompanying text.

159. *Easton v. Strassburger*, 199 Cal. Rptr. 383, 389 (1984)

Not only do many buyers in fact justifiably believe the seller's broker is also protecting their interest in securing and acting upon accurate information and rely upon him, but the injury occasioned by such reliance, if it be misplaced, may well be substantial. . . . [T]he duty we adopt is supported . . . also by the relative ease with which the burden can be sustained by brokers. . . . [Indeed], [t]he Code of Ethics of the National Association of Realtors includes . . . the provision that a broker must not only 'avoid . . . concealment of pertinent facts,' but 'has an affirmative obligation to discover adverse factors that a reasonably competent and diligent investigation would disclose.'

*Id.* (quoting National Assoc. of Realtors, Interpretations of the Code of Ethics, Art. 9 (7th ed. 1978) (footnotes omitted)). The *Easton* court also noted Brady



New Jersey Supreme Court then noted without further comment, that three jurisdictions had "advanced the law of real estate beyond fraud to simple negligence by establishing an affirmative duty to . . . investigate the property for material defects."<sup>160</sup>

The court also took pains to point out the "markedly superior access to information" that builder-vendors and their brokers enjoy.<sup>161</sup> The court found N.J.A.C. § 11.5-1.23(b) instructive in that it requires that a broker "make reasonable effort to ascertain all pertinent information concerning every property for which he accepts an agency. . . ." <sup>162</sup> The court further stated that it did "not hold that brokers have a duty to investigate or disclose transient social conditions," however, the context of the statement clearly indicates that the court's emphasis on what it is excluding as part of the duty is the part about "transient social conditions," and not the part about inspection.<sup>163</sup> The court never directly addresses the "investigate" issue, treating it impliedly, one might argue, as a component of the duty to disclose.<sup>164</sup>

There are three ways to relate the duty to investigate to the duty to disclose. One may say that there is merely the duty to disclose what one already knows, with no duty whatsoever to investigate. One might also say just the opposite, that the seller has two distinct duties; to investigate for material conditions, and then to disclose the results, if any, of that inspection. A third way is to subsume the duty to investigate into the definition of the duty to disclose, as the Appellate Division did when it included the "or should have known" language in its holding.<sup>165</sup> This also

v. Carman, 3 Cal. Rptr. 612 (1960), in which the court held that the broker has a duty to obtain information regarding a pertinent easement on the subject property. *Easton*, 199 Cal. Rptr. at 390.

160. *Strawn II*, 657 A.2d at 428 (quoting Sarah Waldstein, *A Toxic Nightmare on Elm Street: Negligence and the Real Estate Broker's Duty in Selling Previously Contaminated Residential Property*, 15 B.C. ENVTL. AFF. L. REV. 547, 551 (1988)).

161. *Strawn II*, 657 A.2d at 428.

162. *Id.* at 430-31.

163. *Id.* at 431.

164. *See supra* notes 156-60 and accompanying text.

165. *Strawn I*, 638 A.2d at 146.

is the tactic that California chose in *Easton v. Strassburger*<sup>166</sup> where the court stated that:

[t]he primary purposes of the [duty to disclose rules] are to protect the buyer from the unethical broker and seller and to insure that the buyer is provided sufficient accurate information to make an informed decision whether to purchase. These purposes would be seriously undermined *if the rule were not seen to include a duty to disclose reasonably discoverable defects*. If a broker were required to disclose only known defects, but not also those that are reasonably discoverable, he would be shielded by his ignorance of that which he holds himself out to know. . . . Such a construction would not only reward the unskilled broker for his own incompetence, but might provide the unscrupulous broker the unilateral ability to protect himself at the expense of the inexperienced and unwary who rely upon him. . . . [Such a rule] would inevitably produce a disincentive for a seller's broker to make a diligent inspection.<sup>167</sup>

In either case, whether the supreme court meant to impliedly adopt the Appellate Division's broader rule or to limit it to those conditions in which the seller/broker has actual knowledge, (given the trend of shifting the burden in this area of the law from the buyer to the seller) the writing was probably on the wall for the real estate industry. *Strawn's* vagueness on this point only served to reinforce the industry's fears and ultimately led to the passage of the new Statute.<sup>168</sup>

Apart from this lack of clarity as to the scope of the professional seller's duty, the limitation of the duty solely to professional sellers of new homes appears to be poorly founded. The court bases the distinction on the "policies that have shaped the development of the law in this area."<sup>169</sup> These "policies" include the fact that the professional builder-vendor and her broker have "markedly superior access to information" about the property and surrounding area, and thus "enjoy superior bargaining position" over the new home buyer.<sup>170</sup> Although this is undoubtedly true,

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166. *Easton*, 199 Cal. Rptr. at 388.

167. *Id.* (emphasis added).

168. See *supra* Part I for a discussion on this trend.

169. *Strawn II*, 657 A.2d at 428.

170. *Id.*

it is difficult to imagine why the same is not true about an owner selling a used home. Certainly, the home owner has superior knowledge about the on-site conditions, and superior knowledge is precisely why the duty to disclose on-site conditions exists.<sup>171</sup> It is unclear why the owner of a home would not have more information, or even be substantially less likely to have more information about the surrounding area as well.

The issue is given more weight if the *Strawn* rule is construed narrowly to exclude the duty to investigate. The superior access to information that the professional builder-vendor enjoys presumes that the professional will actually use that superior access to information and make an adequate inspection of off-site conditions. Even, if the duty to investigate is rejected, there does not appear to be a good reason to immunize the seller of a used home from liability for failing to disclose facts which he already knew, even if they concern off-site conditions.

The uncertainty created by the lack of a clear rule on the duty to investigate is amplified by the "little guidance"<sup>172</sup> the court gave on what qualifies as a "material" off-site condition. It should be noted immediately that the court could easily have limited its holding to the facts before it — only covering nearby toxic landfills, instead of using the more general "off-site physical conditions . . . of sufficient materiality" language.<sup>173</sup> The fact that it chose the more open-ended rule probably reflects a desire by the court to continue the steady expansion of the doctrine of the duty to disclose in the context of off-site defects.<sup>174</sup> Furthermore, given what one might argue were the egregious facts of this case, the court may have felt compelled to use a more sweeping rule.<sup>175</sup>

The only apparent limitation the court in *Strawn* had in mind was that the defect be of a fixed physical nature<sup>176</sup> (e.g. a land-

171. *Id.*

172. See *McDonald v. Miannecki*, 398 A.2d 1238 (N.J. 1979) and discussion *supra* Part II.

173. *Strawn II*, 657 A.2d at 431.

174. See *supra* Part I.

175. These facts are "egregious" because Defendant *Strawn, Sr.* knew of the health risks involved in putting homes at that site, and was even urged to disclose the landfill's presence by one of his co-defendants. *Strawn II*, 657 A.2d at 423.

176. *Strawn II*, 657 A.2d at 431. The court's treatment of the issue implies

fill) and that it must "affect the habitability, use, or enjoyment of the property and, therefore, render the property substantially less desirable or valuable to the objectively reasonable buyer."<sup>177</sup> Thus, it excluded "transient social conditions, . . . the changing nature of a neighborhood, the presence of a group home, [and] the existence of a school in decline" which might arguably also affect the value of property.<sup>178</sup>

The court's logic is difficult to follow. It is easy to imagine the named conditions affecting the use or enjoyment of the property. Furthermore, recall that the court took note that the mere presence of a nearby landfill can "materially" lower property value, even if no contamination migrates onto the subject property.<sup>179</sup> If one supposes that the presence of a well-contained landfill in the neighborhood, reduces the area property values by ten percent merely because of residents' perceptions about the landfill's potential future threat, (presumably a perception that may be shared by a jury), that would probably qualify as "material" under the *Strawn* analysis.<sup>180</sup> Why, one might ask, is the same not true if the off-site condition were for example, a gang-infested high school (a "school in decline," to use the *Strawn* language<sup>181</sup>), rather than a landfill?

Ultimately, the materiality question is an issue for the jury, but the court's confusing language leaves open more questions than it answers. Combined with the confusion as to the duty to investigate, the unclear standard of materiality, and the clear trend toward greater seller liability, juries may be charged with wide latitude when deciding questions of whether the duty to disclose was breached by a builder-vendor. It is not surprising, then, that the industry appealed to the legislature for relief.<sup>182</sup>

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that the off-site condition must in some sense be a substantial presence in the neighborhood. See discussion *infra* Part II.

177. *Strawn* II, 657 A.2d at 431.

178. *Id.*

179. *Id.* at 430. ("[O]ur precedent and policy offer reliable evidence that the value of property may be materially affected by adjacent or nearby landfills.")

180. *Id.*

181. *Id.* at 431.

182. See *Tedeschi*, *supra* note 3.

## PART THREE: THE LEGISLATIVE REACTION

A. *The New Statute*

The reaction to the *Strawn* decision produced the New Residential Construction Off-Site Conditions Disclosure Act (the "Statute").<sup>183</sup> Although other states have residential disclosure statutes,<sup>184</sup> New Jersey's is the only one to expressly address off-site defects. For example, California's comprehensive real property transfer disclosure law requires only the disclosure of "neighborhood noise problems or other nuisances."<sup>185</sup>

The New Jersey Statute creates an entirely new mechanism for informing buyers of material off-site defects. It does this by first defining precisely what the *Strawn* court left ambiguous, including what an "off-site condition" may include:<sup>186</sup>

1. Sites listed on the National Priority List pursuant to the Federal Comprehensive Environmental Response, Compensation, and Liability Act;<sup>187</sup>
2. Sites known to and confirmed by the state Department of Environmental Protection and listed on the New Jersey master list of known hazardous discharge sites;<sup>188</sup>
3. Overhead electricity transmission lines carrying 240,000 volts or more;
4. Electrical transformer substations;

183. N.J. STAT. ANN. § 46:3C (West 1996).

184. *See, e.g.*, Illinois Residential Real Property Disclosure Act, 765 ILL. COMP. STAT. ANN. 77/1-99 (West 1993 & Supp. 1996); Disclosures upon transfer of real property, CAL. CIV. CODE § 1102 (West 1982 & Supp. 1996).

185. CAL. CIV. CODE § 1102.6 (West 1982 & Supp. 1996). This disclosure is listed in a "Real Estate Transfer Disclosure Statement" form that the seller is required to fill out and deliver to the buyer at the time of contract execution. "Contract execution" is defined as "the making or acceptance of an offer." § 1102.2. The California statute is not meant to abridge or limit any other legal "obligation for disclosure . . . in order to avoid fraud, misrepresentation, or deceit in the transfer transaction." *Id.* § 1102.8.

186. N.J. STAT. ANN. § 46:3C-3 (West 1996).

187. 42 U.S.C. § 9601 (1995).

188. N.J. STAT. ANN. §§ 58:10-23.15 (West 1992).

5. Underground gas transmission lines;<sup>189</sup>
6. Sewer pump stations with capacity of 500,000 gallons or more per day and sewer trunk lines larger than 15 inches in diameter;
7. Sanitary landfill facilities;<sup>190</sup>
8. Public wastewater treatment facilities; and
9. Airport safety zones.<sup>191</sup>

However, mere evidence of these "conditions" is not enough; they must also "materially affect the value of the residential property."<sup>192</sup>

With a novel recording scheme the Statute creates a public repository of lists of the types of "conditions" that occur throughout the state.<sup>193</sup> It requires "any person who owns, leases, or maintains" any of types (3), (4), (5), (6), or (8) of the listed off-site conditions to provide the local municipal clerk's office with the location and type of each off-site condition.<sup>194</sup> The State Commissioner of Environmental Protection is to provide information with regard to types (1), (2), and (7).<sup>195</sup> The Statute does not mention who will provide information as to type (9); presumably the presence of an airport will obviate itself. The municipal clerk, is then required to "receive and make available . . . lists identifying the location of off-site conditions existing within the boundaries of the municipality."<sup>196</sup>

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189. As defined in 49 C.F.R. § 192.3 (1995).

190. As defined pursuant to N.J. STAT. ANN. § 13:1E-3 (West 1991 & Supp. 1996).

191. As defined pursuant to N.J. STAT. ANN. § 6:1-82 (West 1996).

192. N.J. STAT. ANN. § 46:3C-3 (West 1996). The precise level at which depreciation in value becomes "material" is again left open, presumably for the jury. Yet, only these enumerated "conditions" may open the issue for the jury's consideration. *Id.*

193. *Id.*

194. N.J. STAT. ANN. § 46:3C-5-6 (West 1996).

195. N.J. STAT. ANN. § 46:3C-6 (West 1996).

196. N.J. STAT. ANN. § 46:3C-4 (West 1996). An earlier version of the bill used the language "compile and maintain" instead of "receive and make available" and provided for maps of the off-site conditions. *See* 1995 N.J. Sess. Law Serv. 253 (West).

The "duty to disclose off-site conditions," is not the duty to disclose the presence of the actual condition, but to inform the buyer that the lists of conditions are available at city hall.<sup>197</sup> This is done through a form notice provided to the buyer "[a]t the time of entering into [the] contract."<sup>198</sup> The notice includes the disclosure of lists of off-site conditions in the same municipality as the subject property, as well as municipalities within a half-mile of the property.<sup>199</sup> The notice must include a list of the address(es) and telephone number(s) of the municipalities and the offices where the lists are available.<sup>200</sup> It also notifies the purchaser that he has five business days after contract execution to send a notice of cancellation of the contract to the seller, otherwise losing the right to cancellation.<sup>201</sup>

The notice also cautions purchasers to exercise "all due diligence" to obtain more, or more recent, information relevant to their decision to buy.<sup>202</sup> It further "encourages" buyers to undertake their own investigation of the general area around the property to become familiar with any other conditions that might affect the property's value.<sup>203</sup>

The seller's provision of the notice to the buyer is deemed to fully satisfy his disclosure duties as to off-site conditions.<sup>204</sup> This is true even if the lists have yet to be sent to the municipal clerk, if the municipal clerk has yet to receive and make the lists available, or if there is any error, omission, or inaccuracy in the lists as received and made available by the municipal clerk.<sup>205</sup>

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197. N.J. STAT. ANN. § 46:3C-8 (West 1996).

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* In fact, the Statute provides that no seller is required to compile or contribute to the lists to be made available by the municipal clerk, N.J. STAT. ANN. § 46:3C-11 (West 1996), unless otherwise required to do so by N.J. STAT. ANN. § 46:3C-5 (West 1996) as a condition of completeness or approval pursuant to the Municipal Land Use Law, 1975 N.J. Laws c.291, N.J. STAT. ANN. § 40:55D-1, or any other law, rule, or regulation adopted pursuant thereto. N.J. STAT. ANN. § 46:3C-11 (West 1996).

203. *Id.*

204. N.J. STAT. ANN. § 46:3C-10 (West 1996).

205. *Id.*

Hence, the seller is relieved of liability,<sup>206</sup> since the furnishing of the form notice is a defense to any claim that the seller failed to disclose any off-site conditions.<sup>207</sup>

### B. *The Statute's Effect on the Seller/Buyer Relationship*

The Statute, like *Strawn* itself, suffers from a variety of flaws. Most importantly, the Statute is extremely seller-oriented and equally as vague as *Strawn* in several important respects. Most ironically, it probably would not have had a dispositive effect on the *Strawn* case because *Strawn* was overreaching and created a rule that was unnecessary for plaintiffs to prevail.<sup>208</sup> Furthermore, the Statute may not reach all the cases it is meant for, leaving builder-sellers liable for certain instances of nondisclosure. On the other side of this coin, it may function as a shield for bad-faith sellers to avoid liability for poor, even tortious, business decisions.

There are four basic reasons why the Statute probably would not have had any dispositive effect on the *Strawn* case itself. First, the Statute explicitly limits its own scope to "off-site conditions."<sup>209</sup> Latent, on-site defects would still require direct<sup>210</sup> disclosure by the seller.<sup>211</sup> The *Strawn* plaintiffs could still have prevailed on a common-law fraudulent nondisclosure claim because their actual property and water supply were contaminated.<sup>212</sup>

Second, due to this contamination, the plaintiffs could also have pursued a warranty of habitability claim. If they could prove that the groundwater contamination rendered the water unpotable, the plaintiffs would have prevailed even with the Statute in effect because this on-site contamination would probably still leave the

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206. *Id.*

207. *Id.*

208. See *Strawn II*, 657 A.2d 420 (N.J. 1995), and discussion *supra* Part II.

209. N.J. STAT. ANN. § 46:3C-2 (West 1996).

210. Direct disclosure is distinguished from the indirect disclosure obtained by compliance with the statute.

211. *Strawn II*, 657 A.2d at 426 (N.J. 1995).

212. *McDonald v. Miannecki*, 398 A.2d 1283 (N.J. 1979).



*Strawn* defendants liable.<sup>213</sup>

Third, *Strawn* suggests that by mentioning certain positive off-site amenities and failing to mention the off-site defects<sup>214</sup> the defendants violated the state Consumer Fraud Act.<sup>215</sup> It is a violation of the Act to knowingly “omi[t] [a] material fact with the intent that others rely on such omission” in connection with the sale of real estate.<sup>216</sup> The *Strawn* defendants had used promotional brochures and advertisements to portray “the development as located in a peaceful, bucolic setting with an abundance of fresh air and clean lake waters . . . [noting its proximity to] malls, country clubs and train stations,” without mentioning the landfill’s presence.<sup>217</sup> Furthermore, it is clear on the record that the defendants knew of the landfill and its potential for adversely affecting the plaintiffs’ health and safety.<sup>218</sup> Thus, even if the new Statute had been in effect, the *Strawn* plaintiffs would probably have been able to sustain a Consumer Fraud claim. They could have argued that once the seller made particular off-site conditions part of the inducement to buy, and knowingly omitted other material off-site conditions, the sellers were estopped from claiming their full disclosure duties were satisfied because they were engaging in an unfair sales practice violative of the Consumer Fraud Act.<sup>219</sup> Such a defense based on the new Statute, if it were allowed, would countenance just the sort of “sharp practices” the Consumer Fraud Act has as its essential purpose to eliminate.<sup>220</sup>

Finally, even with the Statute in effect, the *Strawn* plaintiffs

213. *Id.*

214. *Strawn II*, 657 A.2d at 429.

215. N.J. STAT. ANN. § 56:8-19 (West 1996).

216. The Statute specifically states that no other New Jersey statutory provision is abridged by its provisions. N.J. STAT. ANN. § 46:3C-10(d) (West 1995). Thus, a Consumer Fraud action would still be viable, even as to off-site conditions. *Id.*; N.J. STAT. ANN. § 56:8-2 (West 1995).

217. *Strawn II*, 657 A.2d at 429.

218. *Id.* at 423.

219. *Id.* at 429 (citing *Tobin v. Paparone*, 349 A.2d 574 (N.J. Super. Ct. Law. Div. 1975)).

220. *Channel Cos., Inc. v. Britton*, 400 A.2d 1221, 1221 (N.J. Super. Ct. App. Div. 1979) (“[L]egislative concern was the victimized consumer, not the occasionally victimized seller.”).

might have prevailed under a claim of common-law fraudulent nondisclosure as to off-site conditions for the same reasons that the Consumer Fraud action would probably succeed. If the defendants' nondisclosure "created a mistaken impression on the part of the purchaser which operated to induce the purchaser to buy," then that silence was a fraudulent misrepresentation.<sup>221</sup> The Statute however, makes this scenario problematic because it explicitly states that the form notice is to serve as a defense to any claim that an off-site condition was not disclosed,<sup>222</sup> and compliance with the Statute's provisions is deemed to be full disclosure as to off-site conditions.<sup>223</sup> The Statute is geared to answer the primary *Strawn* holding which creates an absolute duty to disclose off-site material conditions, whether or not the defendants made any representations or selective omissions as to such off-site conditions.<sup>224</sup>

The absolute duty to disclose ought to be distinguished from a case where the seller "create[s] a mistaken impression" about the off-site environment by mentioning its positive aspects and failing to mention the negative ones.<sup>225</sup> The plaintiffs could raise the same kind of estoppel claim as in the Consumer Fraud action: once the defendants induced the plaintiffs to purchase by mentioning the positive off-site conditions and knowingly omitting the negative conditions, the defendants were estopped from claiming that their off-site disclosure duties were fully satisfied.<sup>226</sup> Nevertheless, whether common-law fraud under silence as an inducement to purchase would be found to fall outside the scope of the Statute is unclear.

Aside from the fact that it probably would have had no dispositive effect on the *Strawn* case, the Statute is presumably seller-oriented because of the Statute's notification procedure.

The Statute's Notification Regarding Off-Site Conditions<sup>227</sup> could potentially shield a bad-faith seller from liability, if the

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221. *Strawn II*, 657 A.2d at 429 (quoting *Tobin v. Paparone*, 349 A.2d 574).

222. See *infra* note 240 and accompanying text.

223. N.J. STAT. ANN. § 46:3C-10 (West 1996).

224. See N.J. STAT. ANN. § 46:3C-10 (West 1996).

225. *Strawn II*, 657 A.2d at 429.

226. *Tobin v. Paparone*, 349 A.2d 574, 580 (N.J. Supr. Ct. Law Div. 1975).

227. N.J. STAT. ANN. § 46:3C-8 (West 1996).

seller buries the Notification in boilerplate language in the sales contract or in the flood of documents at closing. Whereas, the form notice is only a few paragraphs long and includes the "due diligence" language,<sup>228</sup> the Statute contains no conspicuity requirement.<sup>229</sup> The seller is required to give the buyer the form notice "at the time of entering into a contract,"<sup>230</sup> however, the meaning of this provision is unclear. The "enter[ed] into" language suggests a binding effect in which the seller must give notice at the time the offer is given and accepted, at the contract signing, or at closing. Whichever it might be, the "enter[ed] into" language suggests that the negotiations have ceased, and the price and other terms have been set. At that junction the off-site conditions are not part of the negotiation and price-setting process.

Furthermore, the Statute provides only five days for the purchaser to make her investigation at city hall, exercise her "due diligence" to find more recent information, and then if necessary, cancel the contract.<sup>231</sup> The seller's advantage in the transaction is enhanced if he withholds information from the buyer until she is committed to the deal. Only two options remain for the buyer: accept the prior terms after the off-site conditions become known to her or cancel the contract entirely. In addition to being highly seller-oriented in this respect, the Statute may not even protect a good-faith seller whose actions were negligent rather than fraudulent.

For off-site "material conditions," including sites like the Buzby landfill,<sup>232</sup> the Statute's express purpose is to bar an action grounded in fraud, so long as the presence of the lists is disclosed, and no other representations are made about the off-site

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228. See *infra* note 202 and accompanying text.

229. Compare this with the U.C.C. Sale of Goods provisions requiring that sales contracts which modify the implied warranty of fitness have such language be both explicit (using the precise term "warranty of fitness") and conspicuous (using italics or bold type). U.C.C. § 2A-214 (West 1989 & Supp. 1996).

230. N.J. STAT. ANN. § 46:3C-8 (West 1996).

231. N.J. STAT. ANN. § 46:3C-9 (West 1996).

232. It is unclear whether the Statute's inclusion of "sanitary landfills" would be interpreted to include a closed, buried dump or only a facility still in operation.

conditions.<sup>233</sup> A common law action of fraudulent nondisclosure equates silence under the duty to disclose with an affirmative misrepresentation.<sup>234</sup> However, since the Statute specifically defines "duty" in this context as the duty to disclose the location of the lists, once that disclosure is made there is no fraudulent nondisclosure.<sup>235</sup>

The statute may not bar an action in negligence where the seller is claimed to have negligently failed to discover the material off-site defect in the first place;<sup>236</sup> a case, in other words, where the seller "should have known." To draw an on-site analogy, if a developer failed to inspect the soil properly and the houses sank into an undiscovered fill, it would be correct to say that it was negligent to place the houses on unsuitable soil; it would be incorrect to say that the developer failed to *disclose* that the houses were placed on unsuitable soil.<sup>237</sup> Using a prior off-site example, even if a seller did not know that she built a housing development near the underground plume of a closed toxic waste dump (until the buyers were in ill health and suing) she would still be negligent in building the houses in that location.<sup>238</sup> It would be incorrect to say however, that she did not negligently fail to disclose the presence of the toxic waste dump because she did not know about it.

In such a case, the negligence is centered on the placement of the houses in the particular location.<sup>239</sup> Either the builder negligently failed to inspect the entire area for the suitability of the development (including the availability of a potable water supply<sup>240</sup> or unstable fill),<sup>241</sup> or negligently carried out that inspection. Under the negligence rubric, the seller's duty of care

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233. See *infra* notes 219-225 and accompanying text.

234. *Id.*

235. N.J. STAT. ANN. § 46:3C-10 (West 1996).

236. See, e.g., *Easton v. Strassburger*, 199 Cal. Rptr. 383 (1984).

237. *Id.*

238. For example, she would be negligent for failing to inspect the site for suitability.

239. This negligence is measured by the standard of reasonableness. See RESTATEMENT (SECOND) OF TORTS § 283 (1977).

240. *McDonald v. Mianeki*, 398 A.2d 1283, 1283 (N.J. 1979).

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

is to disclose all material conditions which are known or "should have been known to seller."<sup>242</sup> In other words, her duty is to inspect and disclose the results of that inspection. In the above example, the breach of the duty is the failure to inspect properly. The statute specifically exempts sellers<sup>243</sup> from any duty to inspect for off-site defects,<sup>244</sup> but does not protect a seller who could be said to have negligently chosen a particular site.<sup>245</sup>

The Statute would probably reach the case where the builder makes the inspection but negligently fails to communicate the results of the inspection. This could occur, for example, where the builder confuses or loses the site records. Here the negligence duty was breached when the seller failed to disclose the results of the inspection. Assuming *arguendo* that the statutory requirements were met, an action on the negligent failure to disclose the results of the inspection would be barred by the Statute.<sup>246</sup> Note, however, that such a case would look *very much* like fraudulent non-disclosure, not mere negligence.<sup>247</sup>

As noted above, the Statute also probably does not reach a Consumer Fraud action.<sup>248</sup> The New Jersey Consumer Fraud Act is designed to abolish unfair sales and advertising practices.<sup>249</sup> An action under the Consumer Fraud Statute, therefore, arises when the seller uses unfair sales practices such as the use of advertisements and promotional materials that speak of posi-

242. *Strawn II*, 657 A.2d 420, 424-425 (N.J. 1995).

243. The statute also exempts a broker selling a new house under the same circumstances. *See* N.J. STAT. ANN. § 46:3C-5, 10, 11 (West 1996). There is negligence in the failure to discover the condition, not the failure to disclose it.

244. The owner/manager of the listed kinds of off-site conditions also has the "duty to inspect." *Id. See also, id.* § 3C-12. Note that if the statute were interpreted to include such cases, or if it were explicitly amended to do so, it would effectively reduce the duty of the developer to ensure that houses belong where she intends to put them.

245. Note that this is very similar to the earlier warranty of habitability example. *See* discussion *supra* Part II. For example, if the seller negligently failed to discover the underground toxic plume, and as a result the water supply turned out to be unpotable, the seller would not be protected by the Statute.

246. *See supra* Part II B. for a discussion on scope and satisfaction of duty.

247. *See supra* Part III for a discussion on nondisclosure.

248. *Strawn II*, 657 A.2d at 420.

249. *See supra* text accompanying note 166.

tive, property value-enhancing off-site conditions, but fails to disclose the negative off-site conditions.<sup>250</sup>

The Statute also suffers from one of *Strawn's* major defects: vagueness. This is true in two respects. First, the Statute lists what may be included as an off-site material condition, and adds that these conditions must "materially affect the value of the residential . . . property."<sup>251</sup> However, the Statute does not define what amount of diminution in value is considered "material."

Second, the "due diligence" duties of buyers are referred to in several places within the Statute.<sup>252</sup> In the form Notification, the Statute "encourages" buyers to "exercise all due diligence to obtain any additional or more recent information that they believe may be relevant in their decision to purchase the residential real estate."<sup>253</sup> No case in New Jersey was found to explain what "due diligence" in this context was supposed to mean. The Statute provides no guidance on whether "due diligence" includes a phone call, a record search beyond the Statute lists, or a physical inspection of the surrounding area. The only New Jersey case that discusses the duty of a buyer to inspect the premises holds that the buyer who failed to inspect at all could still recover for latent material defects.<sup>254</sup>

Furthermore, in light of the steady erosion of the doctrine of *caveat emptor*, where sellers are liable for all on-site latent defects, the "due diligence" responsibilities of buyers at modern common law are limited to inspection for patent defects — those

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250. See N.J. STAT. ANN. § 56:8-1 to -66 (West 1989 & Supp. 1996). The Consumer Fraud statute is analogous to the common law fraud doctrine. Common law fraud provides that once a seller elects to speak, he must speak the (entire) truth. This is because the seller speaks of the positive off-site conditions to induce the buyer into signing the sales contract. By making the off-site conditions a material element within the transaction (if it didn't induce the buyer it wouldn't be material), the seller acts unfairly by not disclosing all of the off-site conditions, including those that affect the property negatively. This differs from the case where the seller has an absolute duty to disclose the presence of a landfill, even if off-site conditions are not disclosed. *Id.*

251. N.J. STAT. ANN. § 46:3C-3 (West 1996).

252. *Id.* § 3C-2,8.

253. *Id.* § 3C-8.

254. *Levy v. C. Young Constr. Co.*, 134 A.2d 717, 720 (N.J. Super. Ct. App. Div. 1957).

readily observable by a layperson.<sup>255</sup> In *Tipton v. Nuzum*, the condition at issue was a leaky basement.<sup>256</sup> The court found that “the existence of a sump pump and the fact that a hill slopes toward the house” were sufficiently obvious conditions such that it was the buyer’s obligation to “(1) make further inquiry of the owner . . . or (2) seek the advice of someone with sufficient knowledge to appraise the defect.”<sup>257</sup> Essentially, the court ruled that these elements rendered the leaky basement a patent defect, making it the buyer’s responsibility to discover.

Therefore, common law “due diligence” for off-site defects would also be limited to the buyer’s duty to inspect for patent, readily observable defects. Presumably, neither a buried, closed toxic landfill, nor underground and groundwater contamination would be deemed patent, and would probably fall outside the “due diligence” responsibilities of the buyers as they relate to off-site conditions.<sup>258</sup>

It is further plausible that the term “due diligence” is, in this context, a legally meaningless admonition to buyers that is meant to cast the psychological burden of the dead doctrine back to the buyer.

Finally, the Statute offers little protection to a buyer who relies on incomplete or inaccurate lists at city hall. There is no cause of action available to the buyer against an owner or manager of an off-site condition who fails to provide information about the condition to the municipal clerk as required by the Statute. The only cause of action available to a buyer is against the municipality or the DEP if either withholds or omits facts about the off-site conditions causing damage to the buyer.<sup>259</sup> However, since the plaintiff is required to prove that the DEP or municipality knowingly or intentionally omitted or withheld the facts,<sup>260</sup> the buyer is left without recourse, if he cannot prove the mens rea.

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255. See *Tipton v. Nuzum*, 616 N.E.2d 265 (Ohio 1992).

256. *Id.* at 267.

257. *Id.* at 269.

258. See *Strawn II*, 657 A.2d 420, 426 (N.J. 1995) (suggesting items not readily observable by the buyer).

259. N.J. STAT. ANN. § 46:3C-12 (West 1996).

260. *Id.*

## CONCLUSION

Overall, the Statute is a good way to disseminate the locations of certain kinds of fixed environmental hazards to members of the community. A critical weakness in the Statute is the ineffectiveness of the Notification procedure. First, the duty for the broker is fulfilled in a mere two-paragraph notification, that is potentially buried in the flood of documents at contract-signing, or in boilerplate language within the contract itself.

Second, the buyer who was unaware of his "due diligence" duties as to off-site conditions is now saddled with the burden of inspection. This is a classic example of *caveat emptor*, at least in the "beyond the property line" context.

The Statute's essential purpose is to provide a specific medium for notifying buyers of the locations of certain material off-site conditions. If the Statute fails to effectively do this, all is for naught. The Statute should be amended to require an oral disclosure from seller to buyer, or a printed conspicuity requirement so that the buyer is truly and effectively notified of the availability of the lists. In addition, a requirement to disclose at a date earlier than "the time the contract is entered into," would allow that information to be part of the negotiation process.

Currently, the Statute is biased to protect sellers by requiring the disclosure at a time when all negotiations have ceased and the terms have been set. Furthermore, it only provides five days for the buyer to go down to the municipal clerk's office, look up the lists, weigh the information, and cancel the contract. The notification should be made in the same promotional materials or oral disclosures that inform buyers of other material points of the transaction.

Ironically, even though the Statute's reach may not extend as far as the legislature intended, or even to the specific case that inspired it, it has the effect of reviving the ancient doctrine of *caveat emptor*. *Caveat emptor* was killed in the modern context for a reason; it is unfair to buyers.

Ultimately, this statute was made necessary by a vague and poorly written court decision. The resultant clamor by industry interests to the legislature for relief from a vague and flawed common law decision begat a flawed and vague statute. In one fell swoop, it eliminates a newly-created bit of common-law con-



sumer protection and effects a revival of a dead doctrine.

If the Statute were amended to fix some of its flaws, most notably the Notification procedure, it would be a workable solution to a real and emerging problem. By infusing more information into the sales transaction, both parties will be able to deal with one another more effectively and fairly, undeniably reducing post-transaction litigation.