BYU Law Review

Volume 2006 | Issue 4 Article 2

11-1-2006

Off-Site Conditions and Disclosure Duties: Drawing the Line at the Property Line

Florrie Young Roberts

Off-Site Conditions and Disclosure Duties: Drawing the Line at the Property Line

Florrie Young Roberts[*]

I. INTRODUCTION

A. The Duty To Disclose Defects

In a majority of jurisdictions, a seller of real property has an affirmative obligation to make certain disclosures to the buyer concerning the condition of the property being sold.[1] This is a reversal of the old rule of caveat emptor, "let the buyer beware," that governed sales of real property until the middle of the twentieth century.[2] Under the doctrine of caveat emptor, as long as the seller did not affirmatively misrepresent the condition of the property or conceal a defect, he could without liability remain silent and fail to disclose the existence of defects to the buyer.[3]

The doctrine of caveat emptor was abandoned for reasons of fairness and efficiency. As one court noted, modern notions of good faith and fair dealing are inconsistent with a seller escaping liability for the existence of a latent defect of which he knows and declines to disclose to a diligent buyer.[4] Accordingly, most states now impose a duty on sellers to disclose certain defects to buyers. Generally, a defect must be disclosed if it is known to the seller, not observable to

* Professor of Law, Loyola Law School, Los Angeles, California; B.A. 1971, Stanford University; J.D. 1974, University of Southern California. The author wishes to thank her research assistants, Lior Kosovski and Carrie Frederickson, for their valuable contributions to this Article.

1. *See, e.g.*, Johnson v. Davis, 480 So. 2d 625 (Fla. 1985); Thacker v. Tyree, 297 S.E.2d 885 (W. Va. 1982).

2. Leo Bearman Jr., *Caveat Emptor in Sales of Realty—Recent Assaults upon the Rule*, 14 VAND. L. REV. 541, 542–43 (1961).

3. *See* Haskell Co. v. Lane Co., 612 So. 2d 669, 671 (Fla. Dist. Ct. App. 1993) ("The doctrine of caveat emptor . . . provides that . . . [a]bsent an express agreement, a material misrepresentation or active concealment of a material fact, the seller cannot be held liable for any harm sustained by the buyer or others as the result of a defect existing at the time of the sale.").

4. *Johnson*, 480 So. 2d at 628.

the prospective buyer, and materially affects the value of the property.[5]

B. The Problem of Off-Site Conditions

An unresolved issue regarding the scope of the seller's obligation to disclose conditions affecting the property concerns the *location* of the alleged defect. The initial cases overturning caveat emptor, and by far the majority of cases imposing a disclosure duty, have involved defects located within the boundaries of the property being sold. Such defects are referred to as "on-site conditions" and include, for example, a leaky roof,[6] a cracked foundation,[7] cockroach infestation,[8] defective sewage disposal,[9] and asbestos on the property.[10]

However, some disappointed buyers have sued sellers for failure to disclose defects when the alleged defect was external to the property itself. Such defects are called "off-site conditions." Examples of off-site conditions include noisy neighbors,[11] a nearby highway,[12] an adjacent wastewater treatment plant,[13] construction of an apartment complex in the area,[14] a neighbor's plans to build a tennis court,[15] and a toxic waste contamination problem on a neighboring property.[16]

5. *E.g.*, Shapiro v. Sutherland, 76 Cal. Rptr. 2d 101, 107 (Ct. App. 1998). For a discussion of the general duty to disclose defects, see Florrie Young Roberts, *Disclosure Duties in Real Estate Sales and Attempts To Reallocate the Risk*, 34 CONN. L. REV. 1, 3 (2001).

6. *Johnson*, 480 So. 2d at 626.

7. Thacker v. Tyree, 297 S.E.2d 885, 886 (W. Va. 1982).

8. Weintraub v. Krobatsch, 317 A.2d 68, 71 (N.J. 1974).

9. Anderson v. Harper, 622 A.2d 319, 324–25 (Pa. Super. Ct. 1993).

10. Heider v. Leewards Creative Crafts, Inc., 613 N.E.2d 805, 809 (Ill. App. Ct. 1993).

11. *See, e.g.*, Shapiro v. Sutherland, 76 Cal. Rptr. 2d 101, 105 (Ct. App. 1998).

12. *See, e.g.*, DiNunzio v. Jenkins, No. 97-0706B, 1999 Mass. Super. LEXIS 300, at *2–3 (July 21, 1999).

13. Ribak v. Centex Real Estate Corp., 702 So. 2d 1316, 1317 (Fla. Dist. Ct. App. 1997).

14. Blaine v. J.E. Jones Constr. Co., 841 S.W.2d 703, 704 (Mo. Ct. App. 1992).

15. Tobin v. Paparone Constr. Co., 349 A.2d 574, 576 (N.J. Super. Ct. Law Div. 1975).

16. Urman v. S. Boston Sav. Bank, 674 N.E.2d 1078, 1080 (Mass. 1997).

C. Summary of Article

Courts use various approaches when the alleged defect is an off-site condition. Part II outlines these differing methods. Some jurisdictions use the same test as they would if the defect were on the property itself.[17] Other jurisdictions have formulated specific rules applicable to off-site conditions.[18] Similarly, jurisdictions have adopted different legislative approaches to off-site conditions which are explored in Part III. Some statutes require disclosure of certain off-site conditions,[19] while others appear to limit the disclosure duty to on-site defects.[20] Part IV briefly mentions the treatment of two problematic off-site conditions—stigma defects and the presence of a sex offender in the neighborhood. After exploring the various judicial and statutory approaches, Part V argues that non-professional sellers[21] of real estate should have no duty to disclose off-site conditions. Such a bright-line rule of no disclosure would provide predictability and promote judicial efficiency without compromising fairness.[22]

17. *See infra* Part II.A.

18. *See infra* Part II.B.

19. *See infra* Part III.A.

20. *See infra* Part III.B.

21. Some of the cases and statutes discussed in this article apply to brokers, developers, or professional sellers. These cases are mentioned to illustrate the various approaches that courts and legislatures have used. The policies and the proposed rule discussed in Part V of this Article are meant to apply specifically to non-professional sellers of real property. This article does not consider whether additional duties should be placed on brokers or professional sellers.

22. The rule proposed by this Article applies to a seller's failure to disclose defects and does not address the situation where a seller makes an affirmative misrepresentation. Just as the doctrine of caveat emptor did not protect a seller who made affirmative misrepresentations about on-site defects, Westover Court Corp. v. Eley, 40 S.E.2d 177, 179 (Va. 1946) (holding that a buyer is entitled to recover damages due to a seller's misrepresentations), a bright-line rule of non-disclosure with regard to off-site defects should not protect a seller who misrepresents information to a buyer or falsely responds to a buyer's questions.

For example, in *O'Leary v. Industrial Park Corp.*, the seller was aware that two buyers intended to use the purchased land for chemical storage and represented to the buyers that the land would be suitable for such a purpose. 542 A.2d 333, 334–35 (Conn. App. Ct. 1988). After closing, the city refused to allow the buyer to build because the well of a nearby town could have been polluted as a result. *Id.* at 335. The court concluded that a jury could reasonably find that the seller's misrepresentation induced the buyers to purchase the land. *Id.* at 337. Similarly, in *M/I Schottenstein Homes, Inc. v. Azam*, the plaintiff claimed that the seller represented to him that a parcel of land located approximately five hundred feet away was a natural preserve. 813 So. 2d 91, 92 (Fla. 2002). After closing, the buyer discovered that the county planned to build a school on that parcel. *Id.* The court concluded that the questions of whether a seller made fraudulent misrepresentations and whether a buyer was justified in

II. JUDICIAL APPROACHES TO DISCLOSURE OF OFF-SITE CONDITIONS

A. Off-Site Defects Treated the Same as On-Site Defects

A number of courts have utilized an approach that makes no distinction between disclosure duties for on-site and off-site conditions. The same test is used for a seller's duty to disclose defects, irrespective of the physical location of that defect.

1. Parameters of the common law disclosure duty

Most states that impose a common law duty on sellers to disclose defects look to similar factors to determine what defects must be disclosed. Disclosure is required for defects that are (1) known to the seller, (2) unknown and not readily observable by the buyer, and (3) material.[23] A defect is material if it objectively affects the value or desirability of the property.[24] For purposes of this Article, this test will be referred to as the "general disclosure duty" test or the "general" test.

The cases in which this general test originated involved major physical defects in the property being sold. For example, in *Clauser v. Taylor*, an early California case imposing a duty on the seller to disclose defects, the seller failed to disclose that the property had been filled with debris and then covered over.[25] Similarly, in *Johnson v. Davis*, the first case imposing a duty to disclose defects in Florida and calling the doctrine of caveat emptor "unappetizing,"[26] the seller had failed to disclose a badly leaking roof.[27]

relying on such misrepresentations are questions of fact to be determined on a case-by-case basis. *Id.* at 94. Accordingly, the court affirmed the court of appeals' reversal of a motion to dismiss that was previously granted in favor of the sellers. *Id.* at 96.

Similarly, beyond the scope of this Article is a discussion of the law in those states that still adhere to the doctrine of caveat emptor in real estate sales. For a discussion of the law in these jurisdictions, see Roberts, *supra* note 5, at 13–14. Since these jurisdictions do not even require disclosure of on-site conditions, they would not require disclosure of off-site conditions.

23. *E.g.*, Johnson v. Davis, 480 So. 2d 625, 629 (Fla. 1985).

24. Lingsch v. Savage, 29 Cal. Rptr. 201, 204 (Ct. App. 1963).

25. 112 P.2d 661, 662 (Cal. Ct. App. 1941).

26. *Johnson*, 480 So. 2d at 628.

27. *Id.* at 626. Following a heavy rain, the plaintiff homeowners discovered water "'gushing' in from around the window frame, the ceiling of the family room, the light fixtures,

2. Cases where courts used the general test and required disclosure of off-site conditions

Some courts have applied the traditional analysis for the duty to disclose on-site conditions to determine whether sellers also have a duty to disclose off-site conditions. In *Ribak v. Centex Real Estate Corp.*, residential homebuyers brought suit against a developer/seller alleging that the seller had failed to disclose the existence of a wastewater treatment plant adjacent to the purchased property.[28] The trial court granted partial summary judgment stating that Florida law did not impose on a seller an obligation to disclose off-site conditions.[29] The appellate court disagreed and reiterated the general disclosure duty test that disclosure is required where the seller of a home knows of facts materially affecting the value of the property that are not readily observable and not known to the buyer.[30] Thus, the *Ribak* court espoused the same test for the disclosure of off-site conditions as it uses for on-site conditions. It made no distinction based on the location of the condition and held the seller liable for nondisclosure.

California also takes this approach of treating on-site and off-site conditions similarly. California's common law imposes the broad disclosure duty under the general test[31] that requires sellers to disclose to a buyer all material defects in the residential property actually known to the seller but unknown and unobservable to the buyer. While many cases have dealt with physical defects in the property being sold, only one California case has considered the

the glass doors, and the stove in the kitchen." *Id.*

28. 702 So. 2d 1316, 1317 (Fla. Dist. Ct. App. 1997). Twenty-two residential homebuyers sued the developer/seller for conspiracy, fraud, negligent supervision, negligent misrepresentation, breach of duty to disclose material facts, and violation of the Florida Land Sales Practices Act. *Id.*

29. *Id.* The trial court held that *Johnson v. Davis* did not impose a duty to disclose conditions that are off-site or open and obvious. *Id.* The trial court also specifically declined to follow *Strawn v. Canuso*, 657 A.2d 420 (N.J. 1995), because that case "involved an extreme set of facts involving a toxic landfill" and because *Strawn* was inconsistent with Florida law. *Ribak*, 702 So. 2d at 1317.

30. *Ribak*, 702 So. 2d at 1317 (citing *Johnson*, 480 So. 2d at 629). According to the *Ribak* court, a seller's liability under *Johnson* is measured against whether the seller possessed knowledge of material facts affecting the value of the property that were not disclosed to an "unsuspecting buyer." *Id.* The appellate court reversed the trial court's order granting summary judgment to the developer/seller because the issue of materiality is one for the jury. *Id.*

31. *See* Lingsch v. Savage, 29 Cal. Rptr. 201 (Ct. App. 1963).

common law duty to disclose an off-site condition. In *Shapiro v. Sutherland*, the court examined the off-site condition of neighborhood noise and applied both the common law and a statutory disclosure duty.[32] The court utilized the same general test for this off-site condition as is used for on-site conditions and held that a seller should disclose a neighborhood noise problem if the noise "materially affects the value or desirability of the property."[33] In other words, the court held that a seller is required to disclose an off-site condition if the elements of the general test are met.[34]

Although not a suit by a buyer against a seller for failure to disclose an off-site condition, another California case stated that a seller would be required to disclose on the statutory disclosure form a neighbor's noisy activity. In *Alexander v. McKnight*, the plaintiffs filed an action seeking equitable relief and damages due to their neighbors' disagreeable behavior and violation of private restrictions.[35] The disagreeable behavior included the use of a noisy tree chipper for a tree trimming business the neighbors operated out of their home, late-night basketball games, too many cars parked on their property, and motor oil poured on their roof.[36] The plaintiff claimed that if and when he sold the property, he would need to disclose the noise problems, which would diminish the purchase price for his property.[37] The court agreed, holding that if the conduct amounted to a nuisance and had a negative impact on the value of the property, the conduct would need to be disclosed by the plaintiff under California's disclosure statute upon sale of the house.[38]

32. 76 Cal. Rptr. 2d 101 (Ct. App. 1998); *see* CAL. CIV. CODE §§ 1102–1102.17 (West 2005). California's disclosure form mandated by statute enumerates mostly on-site conditions, but also requires disclosure of neighborhood noise problems or "other nuisances." *Id.* § 1102.6. *See infra* text accompanying notes 129–43.

33. *Shapiro,* 76 Cal. Rptr. 2d. at 107.

34. The court specifically stated that sellers had a common law and statutory obligation to make a full disclosure as to these disturbances caused by the neighbors "if they *in fact* occurred and were of sufficient import as to materially affect the value or desirability of their property and/or amounted to a 'neighborhood noise problem' or a 'nuisance'" *Id.* at 108.

35. 9 Cal. Rptr. 2d 453, 455 (Ct. App. 1992).

36. *Id.*

37. *Id.* The trial court in a bench trial awarded plaintiffs injunctive relief and damages of $28,000. *Id.* at 454. The defendants appealed only $24,000 of the monetary award. *Id.*

38. *Id.* at 454–55. However, the appellate court denied awarding "diminution in property value" damages in addition to injunctive relief as it would constitute unjust enrichment on the plaintiff's part. *Id.* at 456. Assuming that the neighbors would obey the

Similarly, New Jersey's common law disclosure duty did not initially depend on whether the defects were on- or off-site. In *Tobin v. Paparone Construction Co.*, the builder/seller was found liable for failing to disclose an adjacent neighbor's plans to build a tennis court and a high fence that would obstruct the buyer's view.[39] The court held that the builder/seller had a duty to disclose these plans since the buyer could not have discovered them.[40] The court cited judicial trends in other jurisdictions to justify requiring higher accountability from builder/sellers based on the disparity of experience and the superior access a builder/seller has to information.[41] The location of the defect did not appear to be a relevant factor in the court's analysis.

Twenty years later in *Strawn v. Canuso*, the New Jersey Supreme Court specifically considered whether sellers had a disclosure duty with respect to off-site conditions.[42] In *Strawn*, the buyers of homes sued the developer and marketing brokers for failing to disclose the existence of a nearby hazardous waste dump.[43] The trial court had rejected the need to disclose an off-site condition stating that "there is no duty that the owner of lands owe[s] to a prospective purchaser to disclose to that prospective purchaser the conditions of somebody else's property."[44] The New Jersey Supreme Court disagreed and held that a builder/developer of residential real estate or a broker can be liable for failing to disclose off-site physical defects. Liability attaches for failure to disclose those off-site physical conditions known to the developer or broker and "unknown and not readily observable by the buyer if the existence of those conditions is of sufficient materiality to affect the habitability, use, or enjoyment of the property and, therefore, render the property substantially less desirable or valuable to the objectively reasonable buyer."[45] This is

injunction to cease the noisy activity, the plaintiff would not suffer a decrease in property value when he eventually sold his house. *Id.* at 457.

39. 349 A.2d 574, 580 (N.J. Super. Ct. Law Div. 1975). The tennis court came within one foot of plaintiff's property line and was surrounded by a ten-foot high chain link fence. *Id.* at 575–76.

40. *Id.* at 577.

41. *Id.* at 578 (citing Schipper v. Levitt & Sons, Inc., 207 A.2d 314 (N.J. 1965)).

42. 657 A.2d 420, 423 (N.J. 1995).

43. *Id.*

44. *Id.* at 424.

45. *Id.* at 431.

the same test for disclosure of defects generally, so the court made no distinction between on-site and off-site conditions.

The decision in *Strawn* was limited to professional builder/developers of real estate or brokers representing such projects and did not pertain to non-professional sellers of residential or commercial property.[46] The court imposed the duty on professional sellers, developers, and brokers because of their superior bargaining power and their access to information, as well as the recent trends in other jurisdictions requiring a broker to investigate the property for material defects.[47] The court exempted non-professional sellers from this duty because such sellers are on equal footing with buyers.[48]

Only five months after the decision in *Strawn*, the New Jersey legislature showed its disapproval of the case by passing a statute limiting the disclosure duty.[49] Under the statute, a professional seller need only provide written notice to buyers of the existence of a list of certain off-site conditions and is not liable for failing to disclose off-site defects.[50]

3. Rationales used by courts applying the general test to find no duty to disclose a condition that is off-site

Most of the cases where the courts have used the same rule for off-site conditions as is used for on-site conditions have actually resulted in a determination that disclosure of the condition was not required. In other words, even within the parameters of the general disclosure rule requiring a seller to disclose all off-site conditions that are material, latent, and within the seller's knowledge, the courts

46. *Id*. at 428.

47. *Id*.

48. *Id*. at 426 (citing Schipper v. Levitt & Sons, Inc., 207 A.2d 314 (N.J. 1965)). For criticism of the *Strawn* decision, see Robert Kwong, *Fraud and the Duty To Disclose Off-Site Land Conditions: Actual Knowledge vs. Seller Status,* 24 B.C. ENVTL. AFF. L. REV. 897, 918–23 (1997) (arguing that *Strawn*'s limitation to professional sellers was inconsistent with New Jersey's case law, which applied the disclosure duty to all sellers).

49. *See* New Jersey New Residential Construction Off-Site Conditions Disclosure Act, N.J. STAT. ANN. §§ 46:3C-1 to -12 (West 2004).

50. A "seller's responsibility to disclose those conditions that may materially affect the value of the residential real estate, but which are not part of the project, shall be fully met when notice is provided in accordance with the provision of [the act]." *Id*. § 46:3C-10(b) *See infra* notes 117–36 and accompanying text.

usually find that these criteria are not satisfied when the condition is off-site.

a. Information available to buyer or defect is readily observable. Courts have frequently found that off-site conditions need not have been disclosed because information about such defects was equally available to both the buyer and the seller. For example, a Michigan court held that a seller of commercial land was not liable for failure to disclose state plans to construct a highway bypass which would divert traffic, and thus customers, away from the property.[51] The court did not base its holding on the fact that the defect was off-site, but instead exonerated the seller because the construction plan was a patent condition which a reasonable investigation by the buyer would have revealed.[52]

In a Massachusetts case, *DiNunzio v. Jenkins*, the sellers did not have to disclose the existence of a highway approximately 300–500 feet off the property because it was a "readily observable, known physical condition" excluded from the seller's disclosure duty.[53] The court found that the highway was easily visible to the buyers during their many visits to the property,[54] as was the noise level and its resulting effect on the property's value.[55] Again, the court analyzed this off-site condition in the same manner as on-site defects without explicitly distinguishing between the two and focused on the

51. McMullen v. Joldersma, 435 N.W.2d 428, 430 (Mich. Ct. App. 1988).

52. *Id.* at 431. The court noted that the information was in the public records and that the buyers admitted taking note of a "rickety old bridge" presently there. *Id.* The court also held that a seller cannot be found liable for future possibilities; at the time of the sale, the bypass project was still contingent upon federal approval and funding, and therefore the sellers' failure to disclose it did not constitute a fraudulent omission. *Id.* at 431–32.

53. No. 97-0706B, 1999 Mass. Super. LEXIS 300, at *5 (July 21, 1999). In this case, the buyers sued the sellers' real estate agent for violation of a state disclosure law that imposes liability when "any person" fails to disclose to a buyer any fact, the disclosure of which may have influenced the buyer not to enter into the transaction. *Id.* The court affirmed summary judgment for the agent because he did disclose the proximity of the highway in the disclosure form by describing the property as "near" the highway. *Id.* at *8. Even assuming that there was inadequate disclosure, the agent "did not have a duty to disclose because the proximity of I-495 to the property was a readily observable, known physical condition." *Id.* at *5. It seems that in interpreting this statute, the court applied a test similar to the general disclosure duty test.

54. The buyers visited the property seven times over a four-month period. *Id.* at *2. The court also noted that cars passing on the nearby highway could be seen from the street in front of the property. *Id.* at *2.

55. *Id.* at *8.

obviousness of the condition as opposed to its location off the property.

The court in *Saslow v. Novick* reached a similar conclusion, holding that a seller was not liable for failing to disclose an off-site defect that could have been discovered by the buyer.[56] In that case, the city transit authority attempted to eliminate an adjacent subway station that provided substantial value to the business located on the purchased property.[57] Even though the seller-defendants knew of the city's plans, such information was a matter of public record and up to the diligent buyer to discover since the location of the subway was an essential issue to the transaction.[58]

Neighborhood parking problems have similarly been found to constitute obvious defects. In *Matthews v. Kincaid*, the court found that the seller was under no duty to disclose the absence of off-site parking since it was an obvious, readily observable defect which the buyer was expected to discover through "ordinary inspection and inquiry" before purchasing the property.[59]

b. Defect is not material. Sometimes courts have found that an off-site condition was simply not sufficiently material to give rise to a duty to disclose. In *Sleasman v. Sherwood*, the buyer discovered after his purchase that loud noises were coming from a nearby rock-crushing operation.[60] Finding for the defendants, the trial court, sitting without a jury, concluded that the noise level at the subject property prior to and at the time of the sale "was not loud or unusual and was not a material fact that should have been disclosed to the plaintiff."[61] The appellate court affirmed this holding.[62]

56. 191 N.Y.S.2d 645, 648–49 (Sup. Ct. 1959).

57. *Id.* at 648. It was undisputed that the defendants knew of the attempt to remove the subway station, and that if the station was moved, the store would lose most of its value. *Id.* at 647.

58. *Id.* at 649.

59. 746 P.2d 470, 472 (Alaska 1987).

60. 622 N.Y.S.2d 360, 361 (App. Div. 1995). The buyer sought rescission of the transaction and alleged four causes of action: "(1) fraudulent misrepresentation that the property was fit for use as a summer recreational facility, (2) intentionally failing to disclose the existence of industrial noise . . . , (3) mutual mistake of fact due to the parties' ignorance that the noise existed, and (4) negligent misrepresentation that the property was suitable for summer rentals." *Id.* (numbering added).

61. *Id.* Apparently, the seller also had no knowledge at all about the defect. *Id.* This would have been an independent ground for precluding a duty to disclose. *See infra* Part II.A.3.c.

The court in *Strawn v. Canuso* also discussed the issue of materiality.[63] The court stated that the issue of materiality typically would be a question for a jury,[64] but held that some conditions—namely "transient social conditions" in the community—are not material to a transaction as a matter of law, and in the absence of a specific inquiry, a seller has no duty to disclose them.[65] Such conditions include, but are not limited to, "the changing nature of a neighborhood, the presence of a group home, or the existence of a school in decline."[66] The court did not elaborate on its standard for "transient social conditions," perhaps leaving such determinations for courts to decide on a case-by-case basis. This standard is quite broad and elastic, as demonstrated by the subsequent cases attempting to apply it. For example, in *Levine v. Kramer Group*, the buyer argued that the defendant-professional sellers[67] were liable for failing to disclose the complaints of a neighbor who was adjacent to the property upon which the buyer was building its home.[68] The court agreed with the defendants that under *Strawn*, the neighbor's complaints were not an off-site condition requiring disclosure because the complaints were unrelated to the subject property and the neighbor merely lived on a neighboring lot and expressed concerns about the new home being built.[69] As such, the complaints fell under the category of transient social conditions, which there is no obligation to disclose.[70]

62. *Id*. at 362.

63. 657 A.2d 420 (N.J. 1995).

64. *See id*. at 431.

65. *Id*. The court noted that Florida courts held a representation is "material" when the transaction would not have been entered into had the representation been made. *Id*. at n.4 (citing Morris v. Ingraffia, 18 So. 2d 1, 3 (Fla. 1944)). The court also cited the RESTATEMENT (SECOND) OF TORTS, § 538(2), which deems a matter "material" when "a reasonable man would attach importance to its existence" or "the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it." *Id*.

66. *Strawn*, 657 A.2d at 431.

67. The *Strawn* decision applied only to professional sellers and brokers.

68. 807 A.2d 264, 265 (N.J. Super. Ct. App. Div. 2002). The neighbor exhibited harassing behavior due to his unhappiness with the height of the buyer's foundation, including writing disparaging letters to the mayor, the defendants, and the buyer. *Id*. at 265–66.

69. *Id*. at 269.

70. *Id*. The court also found that the condition was unknown to the seller, and therefore, even if it was material, there would be no duty to disclose it. *Id*.; *see infra* Part II.A.3.c. The New Jersey legislature later limited the court's holding in *Strawn* by enacting the New Jersey New Residential Construction Off-Site Conditions Disclosure Act. N.J. STAT.

c. Seller lacks sufficient knowledge. A court might find that a seller was unaware of an off-site condition and thus cannot be found liable for failure to disclose it to a buyer. Although not specifically applying the general disclosure test, the court in *Urman v. South Boston Savings Bank* utilized this rationale when a seller failed to disclose that nearby property was polluted with toxic waste that potentially contaminated the groundwater near the purchased property.[71] The buyer asserted a cause of action based upon a general consumer protection law[72] pursuant to which the attorney general had adopted a regulation requiring disclosure much like the common law general disclosure rule. The regulation provides that a violation occurs if "any person . . . fails to disclose to a buyer . . . any fact, the disclosure of which may have influenced the buyer . . . not to enter into the transaction."[73] The court found the seller had no obligation to disclose due to the seller's "limited state of knowledge."[74] The evidence established only that the seller-bank had been made aware of an undefined contamination problem that had affected a

ANN. §§ 46:3C-1 to -12 (West 2004). *See supra* notes 56–57 and accompanying text; *infra* notes 117–133 and accompanying text.

71. 674 N.E.2d 1078, 1080–81 (Mass. 1997). In August 1989, the Massachusetts Department of Environmental Protection had declared the area near the property a "priority" because of evidence that toxic materials were entering the nearby school from contaminated groundwater flowing under the school. *Id.* at 1080. The school was then closed for seven months for the purpose of cleanup. *Id*. Further investigation revealed that the subject property was located between the contamination source and the contaminated school. *Id*. The property itself was sold in December 1990. *Id*.

72. *See* MASS. GEN. LAWS ANN. ch. 93A, § 2(c) (West 2005). On a related cause of action based on fraud, the Massachusetts Supreme Judicial Court affirmed the trial court's summary judgment for the seller because in Massachusetts, "[s]ilence does not constitute a basis for claiming fraud and misrepresentation, even where a seller may have knowledge of some weaknesses in the subject of the sale and fails to disclose it." *Urman*, 674 N.E.2d at 1081 (citation omitted). The buyer alleged that "[t]he previous owner had told the bank that he had difficulty selling the [property] because of a hazardous . . . waste problem at [a nearby] school." *Id.* at 1080. Nevertheless, the bank did not inform the buyer that there had been a contamination problem in the vicinity, that the school had been closed, or that the previous owner found it difficult to sell the unit. *Id*. at 1080–81.

73. 940 MASS. CODE REGS. 3.16(2) (1994). The court acknowledged that in appropriate circumstances, where the seller is aware of material off-site physical conditions that are neither known to the buyer nor readily observable, there could be a duty to disclose pursuant to the consumer protection law. *Urman*, 674 N.E.2d at 1082. However, this case did not represent such appropriate circumstances. *Id.*

74. *Urman*, 674 N.E.2d at 1082.

neighborhood school.[75] However, the problem had been remedied, and the school reopened prior to the plaintiff's purchase of the property from the bank.[76] As far as the bank knew, the contamination was not an ongoing problem; therefore, the bank had no duty to disclose it.[77]

In *Sleasman v. Sherwood*, where the court held that noise from a nearby rock-crushing operation was not a material fact warranting disclosure by the sellers to plaintiff-buyers, the court noted, among other factors, the sellers' claim that they were unaware of the condition.[78] Similarly, in *Levine v. Kramer Group*, the court held that the sellers were under no duty to disclose harassing behavior by a neighbor,[79] not only because the defect was immaterial as a transient social condition, but also because the sellers were not aware of any potential harm from the neighbor.[80]

B. Judicial Approaches Specifically Applicable to Off-Site Conditions

Some courts use tests for the duty to disclose defects that have the effect of treating off-site conditions differently than on-site conditions. Several approaches are worth noting.

1. The off-site defect must affect the physical condition of the property

Urman v. South Boston Savings Bank demonstrates that unless an off-site condition actually affects the subject property itself, it need not be disclosed.[81] The buyers of a foreclosed condominium unit alleged that the seller failed to disclose to them a toxic waste contamination problem on a nearby property.[82] The trial court held that, as a matter of law, the condition need not be disclosed because it was off-site.[83] While the appeals court affirmed the summary

75. *Id*.

76. *Id*.

77. *Id*. The court also rejected a third cause of action for a negligent infliction of emotional distress because the bank owed no duty to the buyer. *Id*. at 1083.

78. 622 N.Y.S.2d 360, 361 (App. Div. 1995); *see supra* notes 70–73 and accompanying text.

79. 807 A.2d 264, 265–66 (N.J. Super. Ct. App. Div. 2002); *see supra* notes 68–70 and accompanying text.

80. *Id*. at 269.

81. 674 N.E.2d at 1082.

82. *Id*. at 1080. For a full discussion of the facts, see *supra* text accompanying note 72.

83. *Urman*, 674 N.E.2d at 1081–82.

judgment, it held that "the case [did] not turn exclusively on the fact that the alleged problem was off-site, although that [was] a factor to be considered."[84] Nevertheless, the appellate court agreed that disclosure was not warranted in this case.[85] Not only did the seller lack sufficient knowledge, the court emphasized that the off-site defect never physically affected the property itself.[86] Thus, this analysis suggests that a purely off-site environmental condition that does not physically affect the property would not need to be disclosed.

2. The off-site condition exists on adjacent property owned by the seller

An Iowa court imposed a duty on sellers to disclose an off-site condition when that condition exists on property owned by the seller that is adjacent to the property the buyer is purchasing. In *Timm v. Clement*, the seller sold part of his commercial property to buyers but did not disclose the existence of two underground storage tanks.[87] The court found the seller liable for failing to disclose these tanks even if they were off-site.[88] However, the court made it clear that it only imposed a duty on a seller to disclose off-site latent defects *located on other property owned by the seller*.[89] The court specifically declined to extend its holding requiring disclosure to visible off-site conditions located on property owned by a party *outside the contract*.[90] Thus, the court distinguished between the duty to disclose off-site conditions on property owned by the seller and

84. *Id*. at 1082.

85. *See supra* text accompanying notes 72–73; *see also* 940 MASS. CODE REGS. 3.16(2) (1994).

86. *Urman*, 674 N.E.2d at 1082. The court stated that "[i]n view of . . . the fact that the condition had not affected the condominium, and the absence of any demonstrable future danger to the condominium, we conclude, as a matter of law, that the bank is not liable . . . ." *Id*.

87. 574 N.W.2d 368, 370 (Iowa Ct. App. 1997). There was a dispute as to whether the tanks were actually located on defendant's or plaintiff's property, but that fact was immaterial to the holding. *Id*. There was also evidence that the seller made affirmative misrepresentations. *Id*. at 372. At closing, it "signed a groundwater hazard statement stating that there were no underground storage tanks or hazardous waste on the [sold] property." *Id* at 370.

88. *Id*. at 371–72.

89. *Id*. at 372. The court stated that "we do not go as far to impose a duty when the off-site conditions are visible and owned by a party outside the contract . . . ." *Id*. at 371–72. Moreover, the duty only exists when the off-site defect may materially affect the market value or desirability of the property to be sold. *Id*. at 372.

90. *Id*.

off-site conditions on property owned by a third party such as a neighbor.

3. Seller's knowledge that existence of off-site condition is important to buyer

One New Jersey court limited a seller's liability for failing to disclose an off-site condition to situations where the seller is aware that the existence or nonexistence of an off-site condition is important to a particular buyer. As described above, previously in New Jersey the disclosure duty was the same for on-site and off-site conditions.[91] However, in the more recent case of *Capano v. Borough of Stone Harbor*, a federal court applying New Jersey law held that a seller was not liable for failing to disclose that there was no swimming access at a nearby beach.[92] The court emphasized that the condition complained of was "external to both the property and the contract to purchase."[93] The court distinguished this case from *Tobin* noting that in the absence of direct communication by the buyer of a desire for a swimming beach, the seller "could not have known" whether "non-existence of [an off-site] swimming beach would render the property undesirable to the plaintiff."[94]

4. The location of the defect as a factor to be considered

A Missouri court has taken an approach that gives weight to the fact that the condition is off-site, resulting in the court being less likely to find a disclosure duty for an off-site as opposed to an on-site condition.[95] In *Blain v. J.E. Jones Construction Co.*, buyers sued developers for failure to disclose their intent to build an apartment complex nearby.[96] Even if the developers intended to build the nearby complex when they sold the homes to plaintiffs, and thus had knowledge superior to that of the buyers, the court agreed with the developers that they had no duty to disclose their intention to

91. *See supra* text accompanying notes 39–41.

92. 530 F. Supp 1254, 1263 (D.N.J. 1982). The suit involved many complex issues, including estoppel, the Equal Protection Clause, and the public trust doctrine. *Id.* at 1257–58.

93. *Id.* at 1263.

94. *Id.* This case was also distinguished from *Tobin* since *Tobin* involved a misrepresentation while no such claim was brought here. *Id.*

95. Blain v. J.E. Jones Constr. Co., 841 S.W.2d 703, 708 (Mo. Ct. App. 1992).

96. *Id.* at 704.

build.[97] The court considered a number of factors to determine whether a seller has a duty to disclose.[98] The fact that the defect was off-site played a significant role in the decision. The court stated that "[i]n sales contracts, if the vendor conceals an intrinsic [on-site] defect not discoverable by reasonable care, there is a greater likelihood that a duty to disclose will be found than if the fact is something extrinsic [off-site] to the property likely to affect market value."[99] Moreover, the court stated that while a developer's intent to build a nearby apartment complex could have an effect on a buyer's decision to buy a house, "the significance of this fact is lessened by its extrinsic [off-site] nature."[100]

III. LEGISLATIVE APPROACHES TO DISCLOSURE OF OFF-SITE CONDITIONS

Legislatures in numerous states have imposed statutory duties requiring sellers to disclose the existence of defects when they sell their property. Various rules have been promulgated that are applicable to off-site conditions.

A. Statutes Requiring Disclosure of Certain Off-Site Conditions

Some states' disclosure statutes contain broad catch-all provisions that could be interpreted as including off-site conditions. As an example, Iowa requires a seller to "[d]isclose all known conditions materially affecting this property."[101] Nebraska,[102] Florida,[103]

97. *Id.* at 707–08.

98. *Id.* at 707. The court gave a non-exclusive list of factors considered in the jurisdiction, including "the relative intelligence of the parties to the transaction, the relation the parties bear to each other, the nature of the fact not disclosed, the nature of the contract, whether the concealer is a buyer or seller, the importance of the fact not disclosed," and the parties' "respective knowledge and means of acquiring knowledge." *Id.*

99. *Id.* at 708.

100. *Id.* Additionally, the court held that there was no intelligence gap between the parties, no evidence of fiduciary or confidential relationship, the contract was at arm's length, and the existence of multi-family zoning and a proposed layout of the multi-family buildings were part of the public record. *Id.* at 708–10. Thus, this information was accessible to the buyers. *Id.* at 708.

101. IOWA ADMIN. CODE r. 193E-14.1(543B) (2005).

102. Nebraska requires disclosure of "any defects that materially affect the value of the real property or improvements." NEB. REV. STAT. § 76-2, 120(4)(f) (2005).

103. Florida requires real estate brokers to "[d]isclos[e] all known facts that materially affect the value of residential real property and are not readily observable to the buyer." FLA. STAT. § 475.278(2)(a)(4) (2005).

Virginia,[104] Delaware,[105] Oregon,[106] Washington,[107] and Louisiana[108] have similar broad provisions. The New Jersey Consumer Fraud Act prohibits any unconscionable commercial fraud, misrepresentation, or knowing concealment or omission of any material fact regarding the sale of any real estate.[109]

Other statutory schemes require that sellers use disclosure forms that include broad language about specific types of conditions that could apply to off-site as well as on-site conditions. For example, Washington requires disclosure of "any study, survey project, or notice that would adversely affect the property."[110] Hawaii's disclosure form requires disclosure of whether the property is in a "noise exposure area."[111] Oklahoma requires disclosure of the existence of "hazardous or regulated material and other conditions having an environmental impact."[112] Texas requires disclosure of "any lawsuits directly or indirectly affecting the [p]roperty."[113]

A different approach is taken by states whose statutory disclosure forms specifically include certain off-site conditions in a list of conditions that must be disclosed. For example, in California the legislature enacted a statutory disclosure law requiring a seller and

104. Virginia requires disclosure of "other material defects known to the owner." VA. CODE ANN. § 55-519(A)(2)(viii) (2005).

105. Delaware provides that "a seller transferring residential real property shall disclose . . . all material defects of that property . . . ." DEL. CODE ANN. tit. 6, § 2572(a) (2005).

106. Oregon's disclosure form asks, "[a]re there any other material defects affecting this property or its value that a prospective buyer should know about?" OR. REV. STAT. § 105.464 (2005).

107. WASH. REV. CODE § 64.06.020 (2005).

108. Louisiana's real property form requires disclosure of "other adverse materials or conditions." Louisiana Residential Property Disclosure (2006), http://www.lrec.state.la.us/forms/Residential Property Disclosure 2006 Legal.pdf.

109. N.J. STAT. ANN. § 56:8-2 (West 2005). The purpose of this statute has been interpreted as protecting the public from "sharp practices" in real estate that could victimize the buyer by inducing him or her to purchase through deceptive or fraudulent practices. Daaleman v. Elizabethtown Gas Co., 390 A.2d 566, 569 (N.J. 1978).

110. WASH. REV. CODE § 64.06.020.

111. HAW. REV. STAT. § 508D-15 (2005). The statute requires disclosure that the residential real property lies in a "noise exposure area" according to maps prepared by the department of transportation or within an Air Installation Compatibility Use Zone, officially designated by the military and found adjacent to military airports. *Id.* Therefore, information about neighboring properties is relevant.

112. OKLA. STAT. tit. 60, § 833(B)(1)(g) (2005). Presumably, these conditions could be off-site.

113. TEX. PROP. CODE ANN. § 5.008(b) (Vernon 2005). Such lawsuits could potentially involve other properties in the area.

any involved broker of a new or used residence to provide the buyer with a disclosure statement.[114] This disclosure form enumerates mostly on-site conditions but also requires disclosure of "[n]eighborhood noise problems or other nuisances."[115] Tennessee's disclosure form includes the duty to disclose "known neighborhood noise . . . or other nuisances" and whether there are "[a]ny authorized changes in road, drainage, or utilities [either] affecting . . . or contiguous to the property."[116] Michigan's disclosure form requires disclosure of a "farm or farm operation in the vicinity; or [the] proximity to a landfill, airport, or shooting range, etc."[117] Indiana requires the seller to disclose that "an airport is located within a [certain] geographic distance from the property."[118] Delaware requires the seller to notify the buyer whether the "cost of repairing and repaving the streets adjacent to the property" is to be paid by the property owner, noting that "[r]epairing and repaving of the streets can be very costly."[119] Wisconsin's disclosure form requires disclosure by a seller who is "aware of a defect caused by unsafe concentration of, unsafe conditions relating to, or the storage of, hazardous or toxic substances on neighboring properties."[120] Georgia requires broker-sellers to disclose all material facts pertaining to existing adverse physical conditions of the property and "[a]ll material facts pertaining to existing adverse physical conditions in the immediate neighborhood within one mile of the property."[121]

114. CAL. CIV. CODE § 1102.6 (West 2005).

115. *Id.*; *see also* Alexander v. McKnight, 9 Cal. Rptr. 2d 453 (Ct. App. 1992); *supra* text accompanying notes 35–38.

116. TENN. CODE ANN. § 66-5-210 (2005).

117. MICH. COMP. LAWS ANN. § 565.957 (West 2006).

118. IND. CODE § 32-21-5-7 (2005) (The Indiana real estate commission determines the appropriate geographic distance.).

119. DEL. CODE ANN. tit. 6, § 2578 (2005). This specific requirement is in addition to the catch-all provision requiring that "a seller transferring residential real property shall disclose . . . all material defects of that property . . . ." *Id.* § 2572(a).

120. WIS. STAT. § 709.03 (2005).

121. GA. CODE ANN. § 10-6A-5 (2005). Conditions requiring disclosure are those that are "actually known to the broker and which could not be discovered by the buyer upon a diligent inspection of the neighborhood or through the review of reasonably available governmental regulations, documents, records, maps and statistics." *Id.* Enumerated examples include land-use maps and plans, zoning ordinances, recorded plats and surveys, transportation maps and plans, maps of flood plains, and tax maps. *Id.* The statute does not "create any duty [by] a broker to discover or seek to discover either adverse material facts pertaining to the physical condition of the property or existing adverse conditions in the immediate neighborhood." *Id.*

Other jurisdictions delegate creation of the disclosure form to the state real estate commission.[122] Some give the commission wide discretion as to what conditions require disclosure.[123] Such delegation allows the state's real estate commission to expand the disclosure duty by including off-site conditions in the disclosure form.[124]

New Jersey takes a different legislative approach. Citing ambiguity in the disclosure duties of residential real estate sellers, the New Jersey legislature sought to define the seller's disclosure duties and to create a public record of relevant off-site conditions that a buyer may access.[125] The New Residential Construction Off-Site Conditions Disclosure Act, applicable only to professional sellers[126] and builders who sell newly constructed residential units,[127] requires the municipal clerk to make available lists identifying the location of such off-site conditions within the municipality and any other municipality within one-half mile of the real estate.[128] "Off-site conditions" are those that "may materially affect the value of residential real estate property"[129] and are limited to nine enumerated conditions.[130] A professional seller need only provide a

122. *E.g.*, IOWA CODE § 558A.4 (2004); LA. REV. STAT. ANN. § 9:3198 (2005); MD. CODE ANN., REAL PROP. § 10-702(c)(2) (West 2006); OKLA. STAT. tit. 60, § 833 (2005); S.C. CODE ANN. § 27-50-40 (2005); *see also* DEL. CODE ANN. tit. 6, § 2578 (2005).

123. Kentucky requires that the disclosure form must include a list of on-site conditions and "[o]ther matters the commission deems appropriate." KY. REV. STAT. ANN. § 324.360(3) (West 2005). Indiana provides discretion over "[o]ther areas that the Indiana real estate commission determines are appropriate." IND. CODE § 32-21-5-7 (2005).

124. Leroy Gatlin II, Note, *Reforming Residential Real Estate Transactions: An Analysis of Oklahoma's Disclosure Statute,* 22 OKLA. CITY U. L. REV. 735, 754 (1997) (stating that "pursuant to its authority under the Act, the Oklahoma Real Estate Commission could make the disclosure form more effective by requiring the disclosure of known neighborhood nuisances").

125. N.J. STAT. ANN. § 46:3C-2 (West 2005).

126. A professional seller is a real estate broker, salesperson, and broker-salesperson. *Id.* § 45:15-3.

127. As defined in N.J. STAT. ANN. § 46:3B-2.

128. *See id.* §§ 46:3C-4, -8.

129. *Id.* § 46:3C-3.

130. *Id.* The conditions are: (1) listings in the Department of Environmental Protection sites included on the National Priorities List; (2) sites known and confirmed by Department of Environmental Protection and included on New Jersey's master list of known hazardous waste sites; (3) overhead electric utility transmission lines conducting 240,000 volts or more; (4) electric transformer stations; (5) underground gas transmission lines; (6) sewer pump stations of a capacity equal to or in excess of 0.5 million gallons per day and sewer trunk lines in excess of fifteen inches in diameter; (7) sanitary landfill facilities; (8) public wastewater treatment

written notice to the buyer of the existence of these lists at the time the contract is executed and is not required to compile or provide its own list or contribute to the municipality's list.[131] Upon delivery of the notice to the buyer, the seller is relieved of any further obligation and is not liable for failing to disclose actually known off-site conditions. [132] Thus, by statute, the broad common law disclosure duty for professional sellers set forth in *Strawn v. Canuso*[133] was significantly limited.

B. Statutes Appearing To Limit Disclosure to On-Site Conditions

Several states limit a seller's disclosure duties to physical defects within the boundaries of the property being sold. Such language seems to preclude the necessity of disclosing off-site conditions. For example, the Maryland statute calls for the residential property disclosure statement prepared by the seller to disclose items about the physical conditions in the property.[134] Other states similarly limit disclosure to defects "on" or "within" the property.[135]

facilities; and (9) airport safety zones. *Id.*

131. *Id.* § 46:3C-8.

132. *Id.* §§ 46:3C-8, -11. Section 46:3C-10(b) states that "[a] sellers responsibility to disclose those conditions that may materially affect the value of the residential real estate, but which are not part of the project, shall be fully met when notice is provided in accordance with the provisions of [the act]." *Id.* § 46:3C-10(b); *see also* Nobrega v. Edison Glen Assocs., 772 A.2d 368, 376 (N.J. 2001) ("The legislative history demonstrates that the Disclosure Act was passed in order to overturn *Strawn* . . . .").

133. 657 A.2d 420 (N.J. 1995); *see supra* notes 42–48 and accompanying text.

134. *See* MD. CODE ANN., REAL PROP. § 10-702(d) (West 2006). The statute also enumerates on-site conditions that must be disclosed such as water and sewer systems, insulation, plumbing, hazardous material, and "any other material defects known to the vendor." *Id.* § 10-702(e).

135. *E.g.*, LA. REV. STAT. ANN. § 9:3196 (2005) (defining "known defects" as conditions found "within the property"); s*ee also* OHIO REV. CODE ANN. § 5302.30(D) (West 2006) (limiting disclosure to "material matters relating to the physical condition of the property"). Tennessee's legislation contains language relieving a seller from liability for failing to disclose any "act or occurrence which had no effect on the physical structure of the real property, its physical environment or the improvements located thereon." TENN. CODE ANN. § 66-5-207 (2005). There seems to be contradictory language in another Tennessee statutory provision which requires disclosure of known neighborhood noise or other nuisances and whether there are any authorized changes in road, drainage, or utilities affecting the property or contiguous to the property. *Id.* § 66-5-210.

IV. CERTAIN PROBLEMATIC OFF-SITE CONDITIONS

Two types of off-site conditions are worth noting separately: stigma defects and the presence of a sex offender. Although they could be analyzed under whatever applicable standard is used in the jurisdiction, they are problematic because they are somewhat different than other off-site conditions.

A. Stigma Defects

Certain properties might be considered defective because of non-physical, psychological conditions or circumstances concerning the property's history. These conditions include any condition that is psychological in nature. Among such conditions are circumstances involving the property's history, such as a previous owner dying of AIDS or cancer, or a murder being committed on the property. Some courts and legislatures have dealt with the issue of whether a seller must disclose such stigma defects when they occur in the property being sold and have specifically excluded this type of on-site condition from a seller's duty to disclose.[136]

Accordingly, to the extent that a seller would not be required to disclose stigma defects in the property itself, he would likewise not be required to disclose such conditions if they occurred off-site. In fact, Oregon's legislature explicitly exempts sellers from disclosing that a *neighboring* property was "the site of a death by violent crime, by suicide or by any other manner" or was "the site of a crime, political activity, religious activity or any other act or occurrence that does not adversely affect the physical condition of or title to real property."[137]

Conversely, some jurisdictions do not exempt on-site stigma defects from disclosure. In Ohio, sellers are liable for non-disclosure of stigma defects if the buyer has made a specific inquiry. *Van Camp v. Bradford*, for example, involved stigma defects that were both on-

136. *See, e.g.*, ARIZ. REV. STAT. ANN. § 32-2156(2) (2006); *see also* FLA. STAT. ANN. § 689.25(b) (West 2005) (characterizing a previous murder, suicide, or death on the property as an immaterial fact that does not warrant disclosure); KY. REV. STAT. ANN. § 207.250 (LexisNexis 2005); N.C. GEN. STAT. § 39-50 (2005) (characterizing a previous occupant's status as a sufferer of AIDS as a fact immaterial for purposes of disclosure). Similarly, Louisiana exempts a seller or an agent from liability for failing to disclose such conditions. LA. REV. STAT. ANN. § 37:1468.

137. OR. REV. STAT. ANN. § 93.275 (West 2003).

site and off-site.[138] The complaint alleged that defendant-seller knew that rapes occurred in the neighborhood and on the premises itself, yet failed to disclose this fact even after a specific inquiry by the buyer.[139] Even though at the time Ohio still applied the doctrine of caveat emptor with regard to real estate sales,[140] the court created an exception and held that misrepresentation, concealment, or non-disclosure of a latent material fact by a seller of a residential property, when a specific inquiry is made, is evidence for a breach of duty by the seller.[141] The court stated that claims for "psychologically tainted property [are] the natural culmination of the trend regarding property disclosure in Ohio, and [would] be upheld by th[e] court."[142] The court also held that the stigma defect at issue was a latent property defect that was not readily discoverable.[143] Such a defect could become material if a buyer communicates the importance of the subject to the seller.[144] In its holding, the court did not make any distinctions between on-site and off-site stigma defects.[145]

While this case was limited in its application because it only dealt with non-disclosure where there was a specific inquiry by the buyer,[146] it opens the door to including off-site stigma defects in a duty to disclose.

B. Presence of a Sex Offender

Little case law exists on whether a common law disclosure duty extends to the off-site condition of the presence of a sex offender in

138. 63 Ohio Misc. 2d 245, 249–50 (Ct. Com. Pl. 1993).

139. *Id.* A second cause of action in this case alleged affirmative misrepresentation by the seller who was asked by the buyer about the purpose and necessity of bars on the windows. *Id.* The seller replied that while a break-in occurred sixteen years earlier, the residence was currently safe. *Id.*

140. *Id.* at 252. Ohio enacted a disclosure statute, but it was not in effect at the time of this sale. *Id.*

141. *Id.* at 254.

142. *Id.*

143. *Id.* at 253. ("Checking police records in order to ascertain the relative safety of a neighborhood or a particular residence would not be an action undertaken by even the most prudent of purchasers.").

144. *See id.* at 255. The misrepresentation is material "regardless of its significance to a reasonable person under similar circumstances." *Id.*

145. *See id.* at 254–55.

146. *See id.* at 250.

the neighborhood.[147] So far, New York is the only jurisdiction to address the factual issue, but did so in the context of a limited disclosure duty. In *Glazer v. LoPreste*, the court refused to require a seller to disclose that a registered sex offender lived across the street.[148] This case, however, does not necessarily indicate how this type of defect would be considered in a jurisdiction that uses the general disclosure test. At the time *Glazer* was decided, New York law did not impose a duty to disclose defects on sellers, except if the seller or his agent was either in a confidential or fiduciary relationship with the buyer, or if he actively concealed information.[149] The court refused to require disclosure of the presence of the sex offender because, on the facts of the case, there was no such relationship or active concealment, and the information was readily discoverable because local newspapers had published many articles about the neighbor's record as a sex offender.[150] Furthermore, the buyer made no effort to discover information about the neighborhood, and the seller and broker did not try to prevent the buyer from conducting his own investigation.[151]

Some statutory disclosure duties pertain to the duty to disclose the presence of sex offenders in the neighborhood. While Montana requires brokers, but not regular sellers, with actual knowledge of registered sexual or violent offenders relevant to the transaction to disclose such information,[152] other states completely shield both sellers and brokers from liability because such information is

147. There are no cases dealing directly with whether the presence of a sexual predator in the neighborhood should be considered a material defect. *See* Flavio L. Komuves, Comment, *For Sale: Two-Bedroom Home with Spacious Kitchen, Walk-In Closet, and Pervert Next Door*, 27 SETON HALL L. REV. 668, 698 (1997); Lori A. Polonchak, Comment, *Surprise! You Just Moved Next to a Sexual Predator: The Duty of Residential Sellers and Real Estate Brokers To Disclose the Presence of Sexual Predators to Prospective Purchasers*, 102 DICK. L. REV. 169, 194 (1997).

148. 717 N.Y.S.2d 256, 258 (App. Div. 2000). In March, 2002, a statutory disclosure duty became effective in New York. *See* N.Y. REAL PROP. LAW § 461 (McKinney 2002). It requires a seller to complete and sign a property condition disclosure statement to be delivered to a buyer or buyer's agent prior to the signing by the buyer of a binding contract of sale. *Id.* § 462. The disclosure form enumerates only on-site conditions. *See id.*

149. *Glazer*, 717 N.Y.S.2d at 257.

150. *Id.* at 258.

151. *Id. But see* Komuves, *supra* note 147, at 700 ("Real estate experts seem to indicate that the presence of a sex offender in a neighborhood, just as any other off-site defect, will decrease the fair market value of a home. Accordingly, courts will probably recognize the presence of a sex offender as a material fact.") (footnotes omitted).

152. *See* MONT. CODE ANN. § 37-51-105 (2005).

immaterial to the transaction. For example, North Carolina deems the presence of a sex offender an immaterial condition and does not require disclosure, even though "no seller may knowingly make a false statement regarding any such fact."[153] Similarly, South Carolina provides that "[a]n owner is not required to disclose the fact or suspicion that a property may be or is psychologically affected," including "public information from the sex offender registry."[154] Likewise, Arizona's disclosure statute exempts sellers from disclosing the proximity of a sex offender.[155]

Other jurisdictions require only that the seller disclose to the buyer where to get information about registered sex offenders, thereby turning such information into a patent condition a buyer is expected to discover. For example, California requires disclosure of the existence of the state sex offender registry,[156] but shields both sellers and brokers from a duty to provide any additional

153. N.C. GEN. STAT. ANN. § 39-50 (West 2005).

154. S.C. CODE ANN. § 27-50-90(a) (2005).

155. *See* ARIZ. REV. STAT. ANN. § 32-2156 (2006). Some commentators have argued that shield statutes that protect sellers from disclosing the close proximity of a sex offender have created an apparent conflict with the goal of protecting the public by making available lists of neighborhood sex offenders as evidenced by Megan's law. *See generally* Shelley Ross Saxer, *"Am I My Brother's Keeper?": Requiring Landowner Disclosure of the Presence of Sex Offenders and Other Criminal Activity*, 80 NEB. L. REV. 522, 560–61 (2001); Tracey A. Van Wickler, Legislative Review, *H.B. 2564: The Real Estate Disclosure Act Threatens Arizona's Children with Becoming "Megan" Victims*, 32 ARIZ. ST. L.J. 367 (2000). As an example of this conflict, North Carolina shields sellers from liability for failing to disclose that a sex offender resides in or near the property, N.C. GEN. STAT. ANN. § 39-50, while the legislature provides in N.C. GEN. STAT. § 14-208.5 that sex offenders pose significant threats to the community, which justifies release of personal information about such offenders to law enforcement agencies.

156. CAL. CIV. CODE § 2079.10a(a) (West 2006). Most states have enacted some type of registration requirement for released sex offenders. *E.g.*, ALA. CODE § 15-20-22 (2005) ("The responsible agency shall require the adult criminal sex offender to declare, in writing . . . the actual address at which he or she will reside or live upon release . . . ."); *see* GA. CODE ANN. § 42-9-44.1 (2005) (requiring the sex offender to give notice of his or her name, address, crime convicted of, and date of parole to the superintendent of the public school district where he or she will reside and to the county sheriff); *see also* ARIZ. REV. STAT. ANN. § 13-3821; ARK. CODE ANN. § 12-12-901 (West 2006); CAL. PENAL CODE § 290 (West 2006); COLO. REV. STAT. ANN. § 18-3-412.5 (West 2005); DEL. CODE ANN. tit. 11, § 4120 (2005); FLA. STAT. ANN. § 944.606 (West 2005); IDAHO CODE ANN. §§ 18-8301 to -8328 (2005); KAN. STAT. ANN. §§ 22-4902 to -4912 (2005); KY. REV. STAT. ANN. § 17.510 (West 2005); LA. REV. STAT. ANN. §§ 15:540–:544 (2005); MICH. COMP. LAWS ANN. §§ 28.721–.732 (West 2006); MINN. STAT. ANN. § 244.052 (West 2005); MISS. CODE ANN. §§ 45-33-21 to -57 (West 2005).

information.[157] Michigan,[158] Connecticut,[159] Alaska,[160] Minnesota,[161] and Washington[162] similarly require disclosure of only the existence of public information regarding sex offenders.

V. OFF-SITE CONDITIONS SHOULD BE EXEMPTED FROM DISCLOSURE

As noted above, courts and legislatures use varied rules to determine which off-site conditions a seller must disclose to a buyer. This Article suggests a very simple approach: the seller[163] should not be responsible for disclosing any off-site conditions to the buyer. The disclosure duties imposed on sellers in recent years should apply only to conditions on the real property being sold, and should not be extended to conditions existing beyond the property lines. The

157. CAL. CIV. CODE § 2079.10a(b). The California statute provides that the following language must be included in every lease agreement and contract for sale of residential real property: "Notice: The California Department of Justice, sheriff's departments, police departments . . . maintain for public access a database of the locations of [registered sex offenders]. The database is updated on a quarterly basis and is a source of information about the presence of these individuals in any neighborhood." *Id.* § 2079.10a(a)(1).

158. Michigan's disclosure form provides, "[b]uyers are advised that certain information compiled pursuant to the Sex Offenders Registration Act . . . is available to the public. Buyers seeking that information should contact the appropriate local law enforcement agency or sheriff's department directly." MICH. COMP. LAWS ANN. § 565.957 (typeface altered from original).

159. Connecticut limits its disclosure requirement by requiring only that the disclosure form include "[a] statement that information concerning the residence address of a person convicted of a crime may be available from law enforcement agencies or the Department of Public Safety and that the Department of Public Safety maintains a site on the Internet listing information about the residence address of persons required to register [as sex offenders], who have so registered." CONN. GEN STAT. § 20-327b(d)(2)(G) (2004).

160. *See* ALASKA STAT. § 34.70.050(1)–(2) (2006).

161. Minnesota requires a broker to disclose that information on registered sex offenders may be maintained and by whom and if the broker has actual knowledge of sexual or violent offender registration information that pertains to the subject property. MINN. STAT. ANN. § 82.22.

162. Washington's disclosure form includes a notice to the buyer that law enforcement has information on registered sex offenders. The notice is "not an indication of the presence of registered sex offenders." WASH. REV. CODE ANN. § 64.06.020 (West 2005) (typeface altered from original).

163. The policies and the proposed rule discussed in this section of the Article are meant to apply specifically to non-professional sellers of real property. Although cases and statutes discussing professional sellers and brokers were set forth in previous sections to illustrate approaches taken by courts and legislatures, this Article does not consider whether additional duties of disclosure should be placed on brokers or professional sellers.

advantages of this proposed rule lie in its certainty, ease of administration, and fairness.

This proposed rule that the seller should not be required to disclose off-site conditions will be referred to as the "property line rule." For purposes of analysis, it will be compared to the "general test" discussed earlier, namely, that a seller must disclose defects that are latent, known to the seller, and materially affect the value of the property, even if the defect is off-site.[164]

A. Policy Considerations Favoring the Property Line Rule

1. Certainty

A benefit of the property line rule is that it is a "certain" or "bright-line" rule. It provides a clear and unambiguous result with respect to off-site conditions. If the alleged defect is an on-site condition, it will have to be disclosed if the requirements for disclosure under the general test are met. However, if the alleged defect is not within the property line, it need not be disclosed. Rules that are certain are advantageous to the parties and the legal system for several reasons.

a. Predictability. (1) Advantages. One major benefit of rules that are certain is that their clarity results in predictability. People will know in advance what the law expects of them and can model their behavior in accordance with the rule. The courts' affinity for rules that are certain can be seen in cases involving many different areas of the law. For example, in *Benvenuto v. Mahajan*, the court adopted a bright-line rule on an issue involving attorney's fees, stating that one of the benefits of such a rule is that it gave "clear guidance" to the parties.[165] Similarly, in *General Electric Co. v. Lowe's Home Centers, Inc.*, the court opted for a strict application of the "economic loss" rule for lost profits because the strict rule provides the advantages of "certainty of a bright-line rule" and "predictability to courts and parties alike."[166] Thus, "[o]bjective standards and bright-line rules .

164. *See supra* Part II.A.

165. 715 A.2d 743, 745 (Conn. 1998).

166. 608 S.E.2d 636, 639 (Ga. 2005). The plaintiff sought to recover tort damages after hazardous material was discovered on property it contracted to acquire in order to expand its existing store. *Id.* at 637. The "economic loss rule" generally provides that a contracting party

. . are the very keys to predictability" because "everyone knows or can discover the rules in advance of their application."[167] Various other courts have opted for bright-line rules in a diverse range of matters including attorney negligence in drafting a will,[168] worker compensation benefits,[169] right to counsel,[170] choice of law,[171] and U.C.C. Article 9.[172]

(2) Application to disclosure duty. The property line rule advocated by this Article would bring the advantage of predictability of bright-line rules to this area of the law that is presently very

can recover in tort only those economic losses resulting from damages to property it already owns. *Id*.

167. Lai v. Sagle, 818 A.2d 237, 248 (Md. 2003) (quoting DeBusk v. Johns Hopkins Hosp., 677 A.2d 73, 76 (Md. 1996)). The court in this case had to decide whether the plaintiff's lawyer's statement to the jury that the defendant had been previously sued warranted a mistrial. *Id*. at 239. Because such evidence was inadmissible, the court opted for a bright-line rule that a mistrial was necessary. *Id*. at 248–49. The court noted that "[t]he advantage of a bright line rule lies in its certainty and uniformity in application." *Id*. at 248.

168. In *Beauchamp v. Kemmeter*, the court refused to expand a general rule providing that attorneys are not liable to third parties for negligent acts committed within the scope of an attorney-client relationship unless the attorney "acts negligently in drafting or supervising the execution of a will resulting in a loss to a beneficiary named therein." 625 N.W.2d 297, 299 (Wis. Ct. App. 2000) (quoting Auric v. Cont'l Gas Co., 331 N.W.2d 325, 329 (Wis. 1983)). The court emphasized that this bright-line rule "facilitates predictability in estate planning." *Id*. at 301.

169. In *Ametek, Inc. v. O'Connor*, the court imposed a bright-line rule that any credit for payment that an employer made prior to an increase in a workers' compensation award should be calculated on a weekly basis. 771 A.2d 1072, 1081 (Md. 2001). The court emphasized the advantage of predictability in that area of law. *See id*.

170. The issue in *McCambridge v. State* was when the "critical stage" in the criminal process begins and the right to counsel attaches. 778 S.W.2d 70, 72 (Tex. Crim. App. 1989). The court established a bright-line rule that a critical stage in criminal proceedings does not occur until formal charges are brought against a suspect. *Id*. at 75–76. In support of its bright-line rule, the court noted that "the creation of [this] bright line rule results in predictability." *Id*. at 76.

171. *E.g.*, McMillan v. McMillan, 253 S.E.2d 662 (Va. 1979). The Virginia Supreme Court maintained its bright-line rule that in tort cases, where there is a conflict of law, the law of the situs of the tort governs. *Id*. at 664. The court chose not to abandon the benefits of uniformity, predictability, and ease of application of the Virginia rule "in exchange for a concept which is so susceptible to inconstancy . . . ." *Id*.

172. McFarland v. Brier, 850 A.2d 965 (R.I. 2004). The main issue in this case was whether a certificate of deposit constituted an "instrument" under Article 9 of the U.C.C., notwithstanding the fact that it bore a "nontransferable" legend. *Id*. at 975–76. The court applied a bright-line rule in holding that certificates of deposit constitute "instruments" for Article 9 purposes: "Predictability, clarity, and certainty are the key benchmarks in this area of the law . . . ." *Id*. at 977 n.7.

uncertain. With the property line rule, a seller would know that he need not worry about disclosing defects beyond the property line. A buyer would know that he could not rely on the seller to tell him about anything outside of the property boundaries. The parties could structure their transaction in light of this rule.

The general test has the opposite effect. A seller does not know what off-site conditions he needs to disclose, which exposes the seller to a great deal of uncertainty. For example, assume that the neighborhood children often play basketball in a neighbor's yard. The thump of the basketball and the noise of the children can clearly be heard from the seller's property. The seller would not know whether this is something he must disclose. To some people the sound of children playing is a nuisance. To others, it is music to their ears. Under the general rule, a court might find it to be a material condition affecting the value of the property. To be on the safe side, the seller would need to disclose it. However, it might never cross a seller's mind that this might be considered a defect. Suppose this condition exists a block away, but the noise can still be heard. The seller would face the same dilemma. Under the general test, the seller must consider all of the conditions existing in the area from noise problems to parking issues to prospective development, and make a determination of whether they are close enough and significant enough to require disclosure. The law provides little guidance to sellers, while at the same time exposing them to potential liability.

b. Judicial economy. (1) Advantages. It is an important policy of the law to discourage litigation.[173] Rules that are certain provide clear outcomes and thereby effectuate a policy of efficient judicial administration. Parties are less likely to litigate when they know what the outcome will be. Furthermore, if litigation is brought, the certainty of the outcome will lead to quicker settlement or resolution by the court at the pretrial stage. Thus, among the virtues of a certain rule are less expense, faster resolution of disputes, and judicial economy.

In many situations, clear rules have been adopted because their certainty will reduce litigation. For example, in applying a bright-line rule in interpreting coverage of an insurance policy indemnification

173. Stambaugh v. Superior Court, 132 Cal. Rptr. 843, 846 (Ct. App. 1976).

provision, the California Supreme Court explained that "by increasing certainty and decreasing uncertainty about the duty to indemnify, [the rule] serves to deter some litigation on the issue and to conclude what it does not deter expeditiously and soundly."[174] The policy of using bright-line rules to reduce litigation is also evident in an Illinois case in which the court refused to displace its rule that prevents children under the age of seven from being found contributorily negligent in accidents.[175] The court retained its strict age-limit rule in order to enhance predictability and judicial economy, emphasizing that a bright-line rule "relieves the jury of the burden of determining what standard of care" to apply in a particular case.[176]

In the real property arena, additional examples can be found in the law of easements, where many courts have chosen to adopt the rule that the owner of a servient estate cannot substantially alter or relocate an easement without the consent of the owner of the dominant estate.[177] Among the benefits cited by the court of this rule is that it closes the door to increased litigation over "reasonableness" issues.[178] Likewise, when establishing a rule for restrictive covenants, a court adopted a standard of strict interpretation in order "to reduce litigation by increasing certainty."[179]

(2) Application to Disclosure Duty. To illustrate the judicial economy of the property line rule, assume that after a sale, a buyer

174. Certain Underwriters at Lloyd's of London v. Superior Court, 16 P.3d 94, 107 (Cal. 2001).

175. Chu v. Bowers, 656 N.E.2d 436, 439 (Ill. App. Ct. 1995). The plaintiff in this case, a six-year-old girl, was riding her bicycle when the defendant's car struck her. The defendant asserted the affirmative defense of comparative negligence. The plaintiff moved to strike this defense because under the tender-years doctrine in Illinois, a child under seven years of age cannot be contributorily negligent. *Id.* at 437–38.

176. *Id.* at 439. The court so held, despite recognizing that several other jurisdictions have rejected the doctrine primarily because of the arbitrariness of any age limit. *Id.*

177. *See, e.g.*, Roaring Fork Club, L.P. v. St. Jude's Co., 36 P.3d 1229, 1231 (Colo. 2001).

178. *See* Herren v. Pettengill, 538 S.E.2d 735, 736 (Ga. 2000).

179. Yogman v. Parrott, 937 P.2d 1019, 1023 (Or. 1997). The court reasoned that a maxim of strict construction of restrictive covenants when ambiguity exists prevents imposing a restriction that a buyer is not reasonably expected to know, allows full use of property, reduces litigation, and enhances uniform interpretation of similar covenants. *Id.* Other examples abound. *See, e.g.*, State v. Hartley, 511 A.2d 80, 88 (N.J. 1986) (noting that a bright-line interpretation of the requirement for a suspect to be given fresh Miranda warnings before resumption of custodial interrogation will help avoid "confusion and conflict in future cases").

learns that the owners of property several blocks away are planning to build a discount store. The store will generate traffic, some of which will pass by the buyer's property, thereby detracting from the quiet nature of the neighborhood. Does the disappointed buyer have a cause of action against his seller for failure to disclose this off-site condition? Under the property line rule the answer is clearly in the negative. Nothing needs to be litigated. If the buyer does bring a lawsuit, any claims for nondisclosure can be summarily rejected at the pretrial stage of litigation.

In contrast, the general test is quite uncertain and can result in much litigation. For example, on the facts of the hypothetical set forth above, the buyer does have a cause of action under the general test. Whether the buyer's lawsuit will be successful will depend on numerous factors that will need to be litigated. Among these are whether the fact that a store will be built is material,[180] whether it was readily observable,[181] whether the information was equally available to the buyer,[182] or whether the seller knew about it.[183]

Furthermore, these relevant factors of the general test are all questions of fact that, when present, prevent disposal of the case at the pretrial stage of litigation, such as by a demurrer, a motion to dismiss, or a motion for summary judgment.[184] These factual inquiries of the general rule usually compel a full trial, resulting in increased litigation expense and utilization of judicial resources.

The case of *Sleasman v. Sherwood* demonstrates the expensive litigation resulting from the application of the general test to off-site conditions.[185] Even though the defendant-sellers won, they endured a lengthy trial where they had to call numerous witnesses.[186] Only

180. *See supra* text accompanying notes 60–62.

181. *See supra* text accompanying notes 53–59.

182. *See supra* text accompanying notes 51–52.

183. *See supra* text accompanying notes 71–80.

184. Roberts, s*upra* note 5, at 20. Summary judgment is granted only when no triable issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. *See, e.g.*, CAL. CIV. PROC. CODE § 437(c) (West 2006). Accordingly, in reversing a summary judgment in favor of a seller and requiring the case to go to trial, the court in *Ribak v. Centex Real Estate Corp.* stated "[i]f the evidence raises any issues of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issues, it should be submitted to the jury as a question of fact to be determined by the jury." 702 So. 2d 1316, 1317 (Fla. Dist. Ct. App. 1997).

185. 622 N.Y.S.2d 360 (App. Div. 1995).

186. Defendants not only had to testify themselves that they never heard any industrial noise, they also had to call six witnesses, including former renters of the cabins, to testify that

after an appeal did the sellers determinatively prevail on the issue that the defect was not material and thus did not need to be disclosed.[187] Similarly, in *Matthews v. Kincaid*, the defendant-seller was exonerated of liability only after the case reached the Alaska Supreme Court, which reversed the trial court's finding and held that lack of off-site parking was readily observable to the buyer.[188]

c. Costs of real estate transactions. The unpredictability of the general test may result in increased costs of real estate sales. The more risk of litigation imposed on sellers as a result of their sale, the greater the likelihood that sellers will respond by raising the price of the property. Under the general test, a seller runs the risk that after the sale he might be sued for failure to disclose an off-site condition. He is likely, therefore, to compensate for this risk by increasing the price. The property line rule, on the other hand, eliminates one of the risks of litigation faced by a seller after he sells his property and may result in lower transaction costs.

2. Fairness

Of course, certainty, predictability, and judicial economy should not be the only determinants in deciding which rule to apply. If these were the only considerations, all legal rules would be bright-line rules involving no discretion by a finder of fact. Often, flexible rules are called for in order to reach fair results. In deciding whether to use a certain rule such as the property line rule or a flexible rule such as the general test, the relevant question becomes whether the benefits of flexibility warrant the increased uncertainty and expense.[189]

they heard no industrial noise prior to the closing. *Id.* at 361.

187. *Id.*

188. 746 P.2d 470, 472 (Alaska 1987). The plaintiff had prevailed at the trial court level and was awarded $98,258.20 in damages. *Id.* at 471.

189. For example, in deciding an issue of subject matter jurisdiction, the United States Supreme Court valued the need for certainty and simplicity over individualized justice in each particular case. *See* Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 465 n.13 (1980). See also Christina L. Wu, Comment, *Noncompete Agreements in California: Should California Courts Uphold Choice of Law Provisions Specifying Another State's Law?*, 51 UCLA L. REV. 593 (2003), where the author argues for California to adopt a bright-line rule upholding choice of law provisions in out-of-state non-compete agreements. The author emphasizes that while a bright-line rule is less "sensitive" to factual distinctions, "it would nevertheless satisfy the ultimate goal of producing fair and consistent outcomes." *Id.* at 596. Also, in *McMillan v.*

a. The benefits of a flexible rule do not warrant the cost. There are few benefits to the flexibility provided by the general test for disclosure of off-site conditions. Even under the general test, situations where a court would conclude at the end of litigation that the seller should have disclosed an off-site condition are very rare. In fact, no currently viable case has actually found a seller liable for failure to disclose an off-site condition.[190] The general test requires that the off-site condition materially affect the subject property, would not be discovered by the buyer, is known to the seller, and is material.[191] It is difficult to imagine a purely off-site condition a seller would know about that the buyer could not reasonably find that would materially affect the subject property. For example, cases applying the general rule have concluded that a nearby industrial rock-crushing plant,[192] the unavailability of off-street parking,[193] and plans to build a highway bypass[194] were all reasonably discoverable and thus did not require disclosure.[195] Location of toxic waste sites and registered sex offenders residing in the community are generally

McMillan, the Virginia Supreme Court chose to retain a bright-line rule for choice of law in torts cases, stating it did not wish to abandon the benefits of the uniformity, predictability, and ease of application of the Virginia rule in exchange for a concept "which is so susceptible to inconstancy." 253 S.E.2d 662, 664 (Va. 1979).

190. Two cases held that liability should be imposed *if* the conditions were material. The court in *Shapiro v. Sutherland* reversed a summary judgment in favor of the seller and remanded the case to the trial court for a determination of materiality, holding that the seller would be liable for the failure to disclose neighborhood noise if the noise was material. 76 Cal. Rptr. 2d 101, 111 (Ct. App. 1998). Similarly, the court in *Ribak v. Centex Real Estate Corp.* reversed a summary judgment and remanded the case for a jury determination of the issue of whether failing to disclose that "a water treatment plant" was also a "wastewater treatment plant" was material. 702 So. 2d 1316, 1316 (Fla. Dist. Ct. App. 1997). As mentioned above, there were two cases in New Jersey where professional sellers were found liable for failing to disclose off-site conditions. *See* Strawn v. Canuso, 657 A.2d 420 (N.J. 1995); Tobin v. Paparone Constr. Co., 349 A.2d 574 (N.J. Super. Ct. Law Div. 1975). These cases, however, are not good law since they were superseded by a statute under which professional sellers are only required to notify buyers that a list of certain off-site conditions within the municipality exists. *See* New Jersey New Residential Construction Off-Site Conditions Disclosure Act, N.J. STAT. ANN. § 46:3C-10(b) (West 2004). For more information, see *supra* notes 39–50 and accompanying text.

191. *See* Lingsch v. Savage, 29 Cal. Rptr. 201, 204 (Ct. App. 1963); *supra* Part II.A.1.

192. Sleasman v. Sherwood, 622 N.Y.S.2d 360, 361 (App. Div. 1995).

193. *Matthews*, 746 P.2d at 471.

194. McMullen v. Joldersma, 435 N.W.2d 428, 430–31 (Mich. Ct. App. 1988).

195. *See supra* Part II.A.3.a. *But see Ribak*, 702 So.2d at 1316. (appearing not to require inspection by the buyer to discover an adjacent wastewater plant).

available in public records. Landfills are usually surrounded by fences with marked signs, and other nearby conditions could be discovered by simply driving through the neighborhood. These cases illustrate that defects that are off-site and are significant enough to be material are usually not latent. Since buyers can discover them with reasonable diligence, the defects would not need to be disclosed even under the general test.

Of course, situations requiring disclosure under the general test could arise under particular fact patterns. For example, a seller might know of something that is going to happen in the neighborhood that is not yet a matter of public record, such as the seller learning of a neighbor's intention to develop his property in a manner that would adversely affect the seller's property before the neighbor has applied for a building permit or publicly disclosed his plans. Another example would be unusual conditions that a buyer would not suspect or be expected to discover, such as a neighbor who repeatedly makes loud noises in the middle of the night. However, precedent shows that courts are reluctant to grant relief to a buyer even in these types of situations. An argument could be made that the neighbor's plans to develop his property need not be disclosed because the zoning laws allowing for such future development are equally discoverable by the buyer.[196] The neighbor who makes noises in the night could be labeled a "transient social condition" that need not be disclosed.[197]

As set forth above, the costs of applying the general test to off-site conditions are high. Because there are so few cases where a flexible rule such as the general test is needed to protect a buyer, the costs of applying the general test are not warranted.

b. The property line rule affords protection to sellers. Considerations of fairness do not only involve the interests of buyers; the situation of sellers must also be given weight. The general test requires a seller to disclose any latent, material, off-site condition that is known to the seller. However, under this test, the seller is uncertain at the time of

196. *See McMullen*, 435 N.W.2d at 430–31 (finding that plans for the construction of a highway bypass were discoverable by the buyer).

197. *See* Strawn v. Canuso, 657 A.2d 420, 431 (N.J. 1995). The New Jersey Supreme Court held that in the absence of a specific inquiry, there is no obligation to disclose a "transient social condition" such as "the changing nature of a neighborhood, the presence of a group home, or the existence of a school in decline." *Id.*

sale whether an off-site condition is one that he must disclose. This uncertainty is compounded because there are no limits in the general test regarding the proximity of the defect to the property being sold. The seller may be required to disclose anything a buyer might discover and later allege is material. What is material to one buyer may not be material to another. As discussed earlier, even under the best scenario, sellers will be burdened by lengthy and costly litigation.[198] In contrast, this uncertainty will be eliminated under the property line rule. This rule will eliminate the risk to the seller of facing litigation over off-site conditions and will put buyers on notice that they are responsible for investigating the neighborhood to satisfy themselves.

3. Off-site conditions are distinguishable from on-site conditions.

This Article is not advocating the abolition of the general test with regard to the disclosure of on-site conditions, even though a rule of "no duty to disclose" would of course promote the goals of predictability and judicial economy. Considerations of fairness that are the basis of the general test with respect to on-site conditions do not apply with equal force to off-site conditions. With on-site conditions, the rationale for requiring disclosure is that a seller who has lived on the property is thought to have knowledge about the condition of the property superior to that of a buyer.[199] Therefore, it is reasonable to impose a duty on sellers to disclose latent, material defects about which they are aware.[200] This rationale is substantially diminished when the conditions are off-site. There should be no expectation that by simply living in a neighborhood, a seller would know about off-site conditions such as contamination of a nearby property[201] or an attempt by a city transit authority to eliminate a subway station.[202] Moreover, off-site conditions are not hidden behind a lock and key and can often be easily discovered by prospective buyers.

Furthermore, if an off-site condition turns into an on-site condition, it will be subject to the general test and not the property

198. *See supra* text accompanying notes 180-183.

199. Roberts, *supra* note 5, at 12.

200. *Id.*

201. *See* Urman v. S. Boston Sav. Bank, 674 N.E.2d 1078 (Mass. 1997).

202. *See* Saslow v. Novick, 191 N.Y.S.2d 645 (Sup. Ct. 1959).

line rule. This comports with considerations of fairness, because then the seller would be more likely to have superior knowledge of the condition. An example of a condition that originates off-site and then becomes on-site is something that ultimately physically intrudes upon the subject property, such as a nearby toxic waste spill that eventually leaks onto the seller's property.[203]

B. Judicial and Statutory Approaches Support the Property Line Rule

1. Disclosure cases and statutes

Several judicial and statutory approaches to a seller's duty to disclose defects support the property line rule. For example, the approach of limiting disclosure obligations to off-site defects that affect the physical condition of the property is tantamount to saying that the defect must be on-site. This approach was employed in *Urman v. South Boston Savings Bank*, where the court did not impose liability on a seller for failure to disclose a toxic contamination in a nearby property and emphasized that the off-site defect never physically affected the property itself.[204] Several states have enacted statutes that impose this limitation. For example, in Ohio, the residential property disclosure law requires disclosure of defects limited to "material matters relating to the physical condition of the property."[205] Tennessee's legislation relieves a seller from liability for failing to disclose any "act or occurrence, which had no effect on the physical structure of the real property, its physical environment or the improvements located thereon."[206]

Another approach supporting the property line rule is the limitation on disclosure of off-site defects to those that exist on adjacent property owned by the seller. Not only does this approach show judicial concern for the location of defects, but it also follows the rationale that it is a seller's superior knowledge of the conditions on the property that triggers a disclosure duty. The Iowa Court of Appeals used this test in *Timm v. Clement*, where it stated that

203. *See supra* Part II.B.2.

204. 674 N.E.2d 1078, 1082 (Mass. 1997); *see supra* notes 72-77.

205. OHIO REV. CODE ANN. § 5302.30(d) (West 2006); *see supra* note 135.

206. TENN. CODE ANN. § 66-5-207 (2005); *see supra* note 116; *see also* MD. CODE ANN., REAL. PROP. § 10-702(d) (West 2003); MINN. STAT. § 513.55 (2003) (requiring only disclosure of "all material facts pertaining to adverse physical conditions in the property").

disclosure was required because the latent off-site defects were located on property also owned by the seller.[207]

2. Non-disclosure cases: Environmental stigma cases

Courts have used a property line rule in analyzing claims unrelated to disclosure duties. These cases involve claims by landowners for devaluation of their property due to environmental contamination that is not on their property but rather on other property in the neighborhood. In other words, the contamination is an off-site condition. Many courts have held that these "environmental stigma" damages are unrecoverable because the contamination did not physically intrude on the plaintiff's property.[208] For example, in *Adams v. Star Enterprise*, a major discharge of oil occurred at the defendant's facility with a "plume" of oil extending underground toward the plaintiffs' town.[209] Although the plaintiff-homeowners' properties were not physically affected, they sued for diminution in property value due to the proximity of the plume.[210] The court affirmed dismissal of the diminution of value claim because the plaintiffs failed to demonstrate actual physical encroachment on their properties.[211]

VI. CONCLUSION

The demise of the doctrine of caveat emptor and the imposition of a duty on sellers to disclose defects in property being sold left unresolved the issue of whether sellers should be obligated to disclose off-site conditions as well. Extending a seller's disclosure duty to off-site conditions ignores the inherent differences between on-site and off-site conditions. With off-site conditions, a disclosure duty is not justified by a seller's superior knowledge or a buyer's lack of opportunity to inspect. Moreover, applying the general disclosure

207. 574 N.W.2d 368, 372 (Iowa Ct. App. 1997); *see supra* text accompanying notes 87–90.

208. *See, e.g.*, Ramirez v. Akzo Nobel Coatings, Inc., 791 N.E.2d 1031, 1034 (Ohio Ct. App. 2003).

209. 51 F.3d 417, 421 (4th Cir. 1995).

210. *Id.*

211. *Id.* at 425; *see also* Adkins v. Thomas Solvent Co., 487 N.W.2d 715 (Mich. 1992) (holding that landowners must still show that contamination physically intruded on their land where negative publicity creates fear of potential future contamination).

duty test to off-site conditions will result in uncertainty, costly waste of judicial resources, and unfairness to sellers.

Adopting instead the property line rule that requires no disclosure of off-site conditions will promote fairness and stability in real estate transactions. Sellers will not have to fear the prospect of lengthy litigation and potential liability for failure to disclose an off-site condition arising after the sale. Buyers will necessarily pay more attention themselves to the surrounding neighborhood before purchase knowing that a judicial remedy is unavailable.

The costs of requiring disclosure of off-site conditions are too high to warrant the problems associated with such a rule. Accordingly, in the absence of misrepresentation, courts should adopt the rule that a seller is not liable for failure to disclose off-site conditions. A certain and bright-line rule for a seller's duty to disclose defects should be drawn at the property line.