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FRAUD AND THE DUTY TO DISCLOSE OFF-SITE LAND CONDITIONS: ACTUAL KNOWLEDGE VS. SELLER STATUS

Robert Kwong*

I. INTRODUCTION

Consider the following scenario: two separate families are seeking to purchase independently owned, adjacent properties in the same New Jersey neighborhood. The land that interests Family A is being sold through a professional broker, while the land that interests Family B is being sold directly by the owner. Both families diligently inspect their respective properties for potential defects. Satisfied that there are no obvious problems with the lands, both buyers decide to purchase the properties. Because both families find nothing out of the ordinary with the lands, they sign standard purchase and sale agreements that are devoid of any special express warranties or provisions. Unbeknownst to the buyers, but known to both the sellers, an abandoned hazardous waste dump located a few miles away from the area has been leaking toxic chemicals into the local ground water. Neither vendor mentions anything about the dump's proximity because disclosure of the landfill would diminish substantially the asking price for each of the two properties.

Only after closing the sales and moving onto the land do Families A and B discover the existence of the nearby landfill. Neither wishes to reside near a toxic dump, and each attempts to sell their newly-purchased properties to someone else. Unfortunately, most people do not want to live near a landfill either, so both buyers are saddled with

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virtually worthless land. In an effort to recoup their investments, both families sue their respective land sellers for common-law fraud, alleging that the vendors had deceived them deliberately by withholding material information.

Oddly enough, even though both vendors knew about the nearby dump, and both vendors failed to disclose exactly the same information to the buyers, there could be different results to the common-law fraud charges. In New Jersey, Family A would probably win its case and Family B would probably lose because the New Jersey Supreme Court recently decided that professional real estate vendors have a duty to disclose material information about off-site land conditions, while non-professional land sellers have no such disclosure duty.¹

Many people would agree that the refusal to disclose is fundamentally unfair, regardless of the seller's professional or non-professional status. Indeed, recognizing the basic inequity of non-disclosure in land transactions, a number of jurisdictions have enacted statutes to protect unsuspecting land purchasers from deceptive sales practices.² In California, Illinois, New York, Wisconsin, and a handful of other states, the state legislatures have adopted statutes that require all property sellers, professional or not, to disclose material information to purchasers.³ Those jurisdictions impose an affirmative duty on vendors to disclose all relevant information to purchasers, making failure to disclose an act of fraud.⁴

Unfortunately, the vast majority of jurisdictions in the United States have not yet enacted legislation compelling information disclosure to buyers.⁵ In the absence of these legislative shields, land purchasers must resort to case law for a remedy.⁶ As such, many frustrated

² N.J. STAT. ANN. § 56:8–2 (West 1976); N.J. ADMIN. CODE tit. 11 § 5–1.23 (Supp. 1995).
buyers have turned to the common law for relief after being swindled by unscrupulous sellers.\textsuperscript{7}

Historically, courts have been very reluctant to provide land purchasers with any protection via the fraud doctrine.\textsuperscript{8} Courts tended to side with sellers instead by strictly enforcing the common-law doctrine of \textit{caveat emptor} in land transactions.\textsuperscript{9} Over time, however, courts began scaling back the doctrine of \textit{caveat emptor} and began granting land purchasers more protection under the common law.\textsuperscript{10} As part of the trend toward protecting land purchasers, courts recognized common-law fraud as a powerful foil against the traditional doctrine of \textit{caveat emptor}.\textsuperscript{11}

The expansion of common-law fraud in land sales can be divided roughly into four categories.\textsuperscript{12} The first type of fraud recognized by courts concerned affirmative seller misrepresentations of on-site land conditions.\textsuperscript{13} The second category of fraud recognized by courts revolved around affirmative vendor misrepresentations about off-site land conditions.\textsuperscript{14} The third type of fraud courts recognized was seller refusal to disclose material information about on-site land conditions.\textsuperscript{15} The fourth category of fraud was vendor refusal to disclose material information about off-site land conditions, which was recently established by the New Jersey Supreme Court in \textit{Strawn v. Canuso}.\textsuperscript{16}

In the first three categories of fraud, liability extends to any property seller—professional, non-professional, or agent—having actual knowledge of a material fact, who fails to disclose that fact to a purchaser.\textsuperscript{17} The category of common-law fraud established by the

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\textsuperscript{8} Paul G. Haskell, \textit{The Case for an Implied Warranty of Quality in the Sales of Real Property}, 53 Geo. L. J. 633, 635 (1965).

\textsuperscript{9} See \textit{Strawn}, 657 A.2d at 425.

\textsuperscript{10} See, \textit{e.g.}, T & E Industries v. Safety Light Corp., 587 A.2d 1249, 1256 (N.J. 1991); see also Wamhoff, supra note 7, at 556.

\textsuperscript{11} See, \textit{e.g.}, T & E Industries, 587 A.2d at 1256; Michaels v. Brookchester, Inc., 140 A.2d 199, 200 (N.J. 1958).


\textsuperscript{13} See \textit{Katz}, 598 A.2d at 926–27.

\textsuperscript{14} See \textit{Roberts}, 85 A. at 246.

\textsuperscript{15} See \textit{Weintraub}, 317 A.2d at 74.

\textsuperscript{16} See \textit{Strawn}, 657 A.2d at 431.

\textsuperscript{17} See \textit{Katz}, 598 A.2d at 926–27; \textit{Roberts}, 85 A. at 246; \textit{Weintraub}, 317 A.2d at 74.
\end{flushleft}
Strawn decision, however, is qualitatively different from the other three fraud categories. Under Strawn, only professional sellers, such as real estate brokers, are liable for withholding information about material off-site conditions from the purchaser. The New Jersey Supreme Court explicitly exempted non-professional sellers of real estate from the common-law duty to disclose material off-site information.

This Comment examines the underpinnings for the development of common-law fraud in land sales, and explores why the limited Strawn holding does not go far enough in protecting land purchasers. Section II charts the history of the caveat emptor doctrine and the initial common-law exceptions to caveat emptor. Section III examines the evolution of the fraud doctrine in relation to the general decline of caveat emptor as the dominant paradigm in land transactions. Section IV analyzes the legal inconsistency of the Strawn decision in relation to the other three categories of fraud. As part of that Section, the ideological and practical problems with the Strawn holding are also explored. Finally, the Comment concludes that although the Strawn decision takes a step in the right direction by expanding the common law of fraud in land transactions, its restrictive holding permits a large class of vendors to continue swindling purchasers.

II. History and Overview of the Caveat Emptor Doctrine in Land Sales

The ancient doctrine of caveat emptor in real estate transactions is still the touchstone in most jurisdictions today. Caveat emptor is an abbreviated form of the Latin expression “caveat emptor, qui ignorant non debuit jus alienum emit,” which literally translates as, “Let a purchaser, who ought not be ignorant of the amount and nature of the interest which he is about to buy, exercise proper caution.” The more familiar translation of caveat emptor is, “Let the buyer beware.” Under the traditional doctrine of caveat emptor, courts protected land sellers and required purchasers to protect their own interests by

18 Strawn, 657 A.2d at 428.
19 Id.
20 Id.
21 Wamhoff, supra note 7, at 552.
22 H. BROOM, LEGAL MAXIMS 769 (7th ed. 1874).
making an independent investigation of any assertions regarding the property.24

A. Caveat Emptor as the Dominant Paradigm in Land Transactions

According to the original rule of caveat emptor, a land seller is not liable to a buyer or to others for the conditions of the land existing at the time of the transfer in the absence of express agreements that guarantee otherwise.25 If a buyer wishes to have extra protection, such as a clause guaranteeing the quality of construction, the buyer has the option of obtaining express warranties in the deed.26 Once the purchaser accepts a deed from the seller, the contractual relationship between the parties is terminated. The language of the deed alone determines the rights and liabilities of the parties.27

Some scholars have observed that the maxim of caveat emptor was more than merely a rule of non-liability.28 Caveat emptor reflected a laissez-faire philosophy that placed a premium on individual bargaining skills and minimal government interference in standards of fair play.29 Peek v. Gurney, an English case, was one of the earliest in a long line of decisions to set forth the standard that a land seller had no duty to disclose facts about his land, however morally censurable the non-disclosure.30 During this era, courts upheld the doctrine of caveat emptor in part because trade was simple and often on a face-to-face basis between neighbors who had first-hand knowledge about each other's land.31 The burden allocation of caveat emptor was appropriate for commonplace land transactions in which both buyer and seller had equal access to information and were at roughly equivalent bargaining positions.32 In these ordinary land transactions, a buyer could make an informed decision because all relevant facts were avail-

26 Wamhoff, supra note 7, at 559.
27 Grand, supra note 6, at 44.
28 Wamhoff, supra note 7, at 552.
29 Id.
30 6 L.R.-E. & I. App. 377, 378 (1873) (directors of corporation, who issued prospectus that did not disclose important facts, were held not liable to purchasers who relied on prospectus).
31 Wamhoff, supra note 7, at 552.
32 Id.
able and accessible once the buyer made a reasonable effort to investigate.\textsuperscript{33}

The ancient maxim of \textit{caveat emptor} retained much of its original force over the centuries.\textsuperscript{34} Even when principles of commercial marketability began filtering into personal property transactions, courts afforded purchasers of real property with little protection.\textsuperscript{35} The persistent, continued application of \textit{caveat emptor} to real property transactions may have been due to the great significance that courts attached to the deed of conveyance.\textsuperscript{36} As with any written contract, courts interpret the deed as representing the full agreement of the parties, and excluding all other terms and liabilities.\textsuperscript{37}

\textbf{B. Exceptions to the Blanket Rule of Caveat Emptor}

In the twentieth century, courts gradually began shifting protection from land sellers to land purchasers.\textsuperscript{38} Because strict application of \textit{caveat emptor} often led to harsh and inequitable results, its continued existence was cast in doubt.\textsuperscript{39} The harsh consequences resulting from the application of \textit{caveat emptor} in land sales were striking in contrast to the development of consumer protection in the sale of personal goods.\textsuperscript{40} One writer observed that the law offered greater protection to the purchaser of a seventy-nine cent dog leash than to the purchaser of a $40,000 home.\textsuperscript{41} If the dog leash were defective, and led to some harm, the purchaser could sue the seller for a refund or damages.\textsuperscript{42} The home purchaser, on the other hand, had no legal recourse if he found out after the sale that his basement leaked.\textsuperscript{43}

Consequently, courts began carving out exceptions to the blanket rule of \textit{caveat emptor} in response to modern concepts of fair dealing and changing societal conditions.\textsuperscript{44} Although the doctrine of \textit{caveat

\begin{itemize}
  \item \textsuperscript{33} Tracy, supra note 23, at 172.
  \item \textsuperscript{34} Id.
  \item \textsuperscript{36} Id.
  \item \textsuperscript{37} Id.
  \item \textsuperscript{38} See Wamhoff, supra note 7, at 552.
  \item \textsuperscript{39} Id.
  \item \textsuperscript{40} Id.
  \item \textsuperscript{41} See Haskell, supra note 8, at 633.
  \item \textsuperscript{42} See Wamhoff, supra note 7, at 548.
  \item \textsuperscript{43} Id.
  \item \textsuperscript{44} See Schipper v. Levitt & Sons, 207 A.2d 314, 325 (N.J. 1965); Michaels v. Brookchester, 140 A.2d 199, 202 (N.J. 1958).
\end{itemize}
emptor was appropriate for face-to-face land transactions between parties of equal knowledge, many land transactions were no longer being conducted between familiar and knowledgeable neighbors, but rather, were between unwary and uninformed strangers.45

The judicial trend against caveat emptor started innocently enough, when the Supreme Court of New Jersey ruled in Michaels v. Brookchester that a property lease included an implied covenant to repair.46 In Michaels, a landlord had leased an apartment with steel kitchen cabinet fixtures.47 Although the landlord had been aware that the cabinet had a loose door, he did nothing about it.48 Consequently, the door came loose and struck one of the tenants.49

Although there were no express agreements in the lease requiring the landlord to make timely repairs, the Michaels court found that the landlord had a duty to maintain the leased premises in good condition.50 In deciding whether to find an implied covenant to repair, the Michaels court relied on public policy concerns of “advanc[ing] justice” and fairness.51

The Michaels decision was significant because a land lease, up to that point in time, had been viewed as a sale of an interest in land, and thus governed by the doctrine of caveat emptor.52 If caveat emptor applied, there could be no common-law remedy for the lessees because the burden was on them to investigate for defects and to protect themselves in the contract.53 The court, however, rejected the caveat emptor doctrine and broke away from precedent, noting that caveat emptor was conceived in an agrarian setting that lagged behind changes in dwelling habits and economic realities.54

Exceptions to caveat emptor developed in land sales shortly after the Michaels ruling.55 The decline of the caveat emptor doctrine in real estate sales began with the judicial establishment of implied warranties.56 In Schipper v. Levitt & Sons, the Supreme Court of New Jersey

45 See Wamhoff, supra note 7, at 556.
46 Michaels, 140 A.2d at 201.
47 Id. at 200.
48 Id.
49 See id. at 202.
50 Id.
51 Michaels, 140 A.2d at 201.
52 See id.
53 Id.
54 Id.
56 See Grand, supra note 6, at 45.
held that an implied warranty of habitability bound a builder-vendor of mass-produced homes.\(^{57}\) In this instance, the builder-vendor designed, built, and sold houses in a development complex.\(^{58}\) The builder-vendor had constructed a water distribution system for the houses that issued unusually hot water from the faucets.\(^{59}\) As a result of the defective plumbing system, an infant was scalded badly.\(^{60}\)

The *Schipper* court found that the vendor was liable for damages to the home buyer on a theory of warranty, or strict liability.\(^{61}\) Although the builder-vendor had made no express guarantees regarding the quality of the house to the buyer, the builder-vendor was still liable for damages due to the unreasonably dangerous design of the water heating system.\(^{62}\) In making its ruling, the *Schipper* court stated that the rule of *caveat emptor*, where the deed embodied all the rights and responsibilities of the parties, disregarded the realities of the situation.\(^{63}\) *Caveat emptor* had developed at a time when the buyer and seller were at equal bargaining strengths, and each party could be expected to protect themselves in the deed.\(^{64}\) In reality, however, modern buyers of mass-produced houses were not on an equal footing with builder-vendors and were often vulnerable to sharp business practices.\(^{65}\) The *Schipper* court rejected the rule of *caveat emptor*, finding that purchasers of real property were analogous to purchasers of chattel.\(^{66}\) Since an automobile manufacturer could be held liable for injuries caused by defective parts, a mass builder of houses should likewise be held accountable for defective components.\(^{67}\)

The New Jersey Supreme Court extended implied warranties to cover home construction contracts in *McDonald v. Mianecki*.\(^{68}\) A house builder had contracted to build and sell a new home that included a new well system to supply water for the home.\(^{69}\) After the construction was completed, the builder noticed that the well water had an

\(^{57}\) *Schipper*, 207 A.2d at 314–15.

\(^{58}\) *Id.* at 316.

\(^{59}\) *Id.* at 316–17.

\(^{60}\) *Id.* at 317.

\(^{61}\) *Id.* at 325.

\(^{62}\) See *Schipper*, 207 A.2d at 326.

\(^{63}\) *Id.*

\(^{64}\) *Id.*

\(^{65}\) *Id.*

\(^{66}\) *Id.* at 321.

\(^{67}\) See *Schipper*, 207 A.2d at 321.

\(^{68}\) 398 A.2d 1283, 1290 (N.J. 1979).

\(^{69}\) *Id.* at 1284–85.
unacceptably high iron content.\textsuperscript{70} To remedy the problem, the builder installed a water conditioning device.\textsuperscript{71} The state granted a certificate of occupancy to the builder and a family purchased the house a short time later.\textsuperscript{72}

After the family moved in, they noticed problems with the water supply.\textsuperscript{73} The water stained sink and toilet fixtures and had a bad odor and taste.\textsuperscript{74} The seller made several attempts to fix the well, but he was unsuccessful.\textsuperscript{75} Left with undrinkable water, the family sued the seller for selling a house with a non-potable water supply, alleging breach of implied warranty of habitability.\textsuperscript{76}

The \textit{McDonald} court upheld the implied warranty and struck down the doctrine of \textit{caveat emptor} as an "anachronism patently out of harmony with modern home-buying practices."\textsuperscript{77} The court noted that \textit{caveat emptor} did not adversely affect the typical buyer of a new home during the nineteenth century.\textsuperscript{78} In those times, the home buyer often hired a professional architect to design and supervise contractors who built the house in stages.\textsuperscript{79} If there were any defects with the home, the house buyer could sue either the architect or the building contractors for negligence.\textsuperscript{80}

However, the court remarked that, because the nature of the building industry had changed so dramatically since the nineteenth century, public policy could not support the continued application of \textit{caveat emptor} in home sales.\textsuperscript{81} The advent of mass home production and prefabricated homes made obsolete the practice of hiring a personal architect to oversee house construction.\textsuperscript{82} As such, the land purchaser had no way to ensure the quality of what he purchased.\textsuperscript{83}

The \textit{McDonald} court also noted that property purchasers relied heavily on the greater expertise of the builder-vendor to ensure a

\textsuperscript{70} \textit{Id.} at 1285.
\textsuperscript{71} \textit{Id.}
\textsuperscript{72} \textit{Id.}
\textsuperscript{73} \textit{McDonald}, 398 A.2d at 1285.
\textsuperscript{74} \textit{Id.}
\textsuperscript{75} \textit{Id.} at 1286.
\textsuperscript{76} \textit{Id.}
\textsuperscript{77} \textit{Id.} (quoting \textit{Humber v. Morton}, 426 S.W.2d 554, 562 (Tex. 1968)).
\textsuperscript{78} \textit{McDonald}, 398 A.2d at 1287.
\textsuperscript{79} \textit{Id.}
\textsuperscript{80} \textit{Id.}
\textsuperscript{81} \textit{See id.}
\textsuperscript{82} \textit{See id.}
\textsuperscript{83} \textit{See McDonald}, 398 A.2d at 1287.
suitable product. The buyer often had inferior bargaining power because he or she was less informed than the seller. Moreover, from a practical perspective, the builder-vendor was in a better position to prevent the occurrence of major problems than was the purchaser. Because of these policy considerations, the court found that there was an implicit expectation that builder-vendors warranted reasonable workmanship and habitability.

In summary, courts have questioned the justification for the rule of *caveat emptor* in different contexts over time. With changes in society and people's living habits, *caveat emptor* simply could not retain its original validity. *Caveat emptor* could not be immutable or inflexible and remain consistent with the public policy of promoting fair and just dealing.

The evolving doctrine of implied warranties in the sale of personal property was a catalyst for the decline of *caveat emptor* in real property sales. Courts increasingly regarded the common law distinction between real and personal property as anomalous. Not surprisingly, willingness to protect purchasers in land sales paralleled the development of consumer protection in personal property sales.

Good faith had been a part of mercantile obligation since American law began. Purchasers of personal property began to receive protection from the legislature as well as through the courts. In calling for securities reform in his message to Congress in 1933, President Franklin D. Roosevelt suggested that to the rule of *caveat emptor* be added, "Let the seller also beware."
III. Development of the Fraud Doctrine

The most significant exception to *caveat emptor* was the common-law fraud doctrine. 97 *Caveat emptor* did require purchasers to protect their own interests by making an independent investigation of the facts. 98 However, the law also long has recognized that a person who is the victim of a fraudulent misrepresentation can undo the transaction by rescinding it or by obtaining damages in a tort action of fraud. 99

The general rule of fraud is that one who makes a fraudulent misrepresentation is liable to a party whom he intends or has reason to expect will act or refrain from action in reliance upon the misrepresentation. 100 A misrepresentation is simply an assertion not in accord with the facts. Under the common law, fraud essentially consists of five elements: 1) misrepresentation of the facts; 2) fraudulent utterance of such misrepresentation; 3) the maker's intent that the recipient be induced to act; 4) the recipient's justifiable reliance on the misrepresentation; and 5) damage to the recipient proximately caused by the misrepresentation. 101

The *Restatement* clearly implies that the doctrine of *caveat emptor* cannot be used as a shield to commit an act of fraud. 102 If a seller were permitted to misrepresent facts, he could frustrate the buyer's attempts to gather relevant information. 103 Subsequently, the courts have recognized that the recipient of a fraudulent misrepresentation is justified in relying on its truth. 104 Even though the recipient might have ascertained the falsity of a statement had the recipient made an investigation, there is no duty on a buyer to investigate seller misrepresentations unless the falsity was obvious. 105

A. Affirmative Misrepresentations as Fraud

Courts generally have held parties who make affirmative misrepresentations to buyers about on-site land conditions liable for fraud. 106

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97 See Wamhoff, supra note 7, at 556.
98 Powell, supra note 24, at 131.
99 Id. at 130.
100 See Restatement (Second) Of Torts, §§ 525–49 (1977) [hereinafter Restatement].
102 Restatement, supra note 100, § 525 cmt. b.
103 Id.
104 Id. §§ 540–41.
105 Id.
In *Katz v. Schacter*, for example, a purchaser successfully sued exterminators for fraud when the exterminators misled the buyer about a house's termite problem. The original owners of a house discovered that they had a termite infestation and hired exterminators to treat the house. Although the exterminators successfully eliminated the termite problem, the termites had already damaged the house's physical structure. Rather than make substantive repairs to correct the problem, unknown agents of the seller made cosmetic changes to conceal the problem.

The subsequent purchaser bought the house after relying on misstatements by the exterminators that there was no termite damage. When the purchaser discovered the substantial termite damage later and sued for fraud, the exterminators employed *caveat emptor* as a defense. The New Jersey Superior Court held the exterminator liable for fraud for making factual misrepresentations to the buyer because the purchaser relied on those misstatements to his detriment.

Liability for fraudulent utterances is not limited to misstatements made about on-site land conditions, but can include misstatements made about off-site land conditions and surroundings. As long as the on-site or off-site misrepresentations are material to the transaction, buyers who rely on them can sue the person making the misstatement.

According to the *Restatement (Second) of Torts*, a matter is material if a reasonable person would attach importance to the matter's existence or nonexistence in determining his or her choice of action in the transaction. A matter also can be material if the maker of the misrepresentation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining the choice of action, although a reasonable person would not so regard it.

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107 *Id.* at 925.
108 *Id.* at 924.
109 *Id.*
110 *Id.* at 925-26.
111 *Katz*, 598 A.2d at 926.
112 *Id.* at 926-27.
113 *See* Roberts v. James, 85 A. 244, 246 (N.J. 1912).
114 *Id.*
115 *See* Restatement, *supra* note 100, § 538(b).
116 *Id.* § 538 (2)(a).
In *Roberts v. James*, a land vendor induced a purchaser to buy empty lots in a field after promising that development of the surrounding area was imminent.\(^{118}\) More specifically, the seller falsely promised that there were going to be houses, sidewalks, parks, hotels, and train stations built which would make the now-empty lots more valuable in the future.\(^{119}\) None of the promised development occurred, and the purchaser was left with profitless land.\(^{120}\) The New Jersey Court of Errors and Appeals noted that the seller knew at the time of the sale that there would be no development, and that his promises were fraudulent.\(^{121}\) Therefore, the sales contract was induced by fraud and could be rescinded.\(^{122}\) The fact that the seller had made no mis-statements concerning the plot of property itself was irrelevant, since the promised development around the land was material to the buyer.\(^{123}\) Courts have recognized that location is the universal benchmark of land value and desirability.\(^{124}\) Off-site conditions often are very important to buyers.\(^{125}\)

Fraud liability extends to any harm that results from the deception of the buyer.\(^{126}\) In *Landriani v. Lake Mohawk Country Club*, a landowner induced a purchaser to buy a cottage adjoining a lake by falsely representing that the purchase would entitle the buyer to a membership in a nearby resort club.\(^{127}\) At the same time, the seller conspired with the club owner to bar the buyer from obtaining membership.\(^{128}\) Relying on the seller's misrepresentations, the purchaser bought the property and later was denied membership.\(^{129}\) When the buyer sued, the vendor asserted that the promise of club membership was entirely unconnected to the sale of the property.\(^{130}\) The New Jersey Supreme Court disagreed and found the seller liable for fraud, stating that a false inducement of any kind that caused damage was actionable for fraud.\(^{131}\)

\(^{118}\) See *Roberts*, 85 A. at 244.

\(^{119}\) Id.

\(^{120}\) Id. at 246.

\(^{121}\) Id.

\(^{122}\) Id.

\(^{123}\) See *Roberts*, 85 A. at 246.


\(^{125}\) See id.


\(^{127}\) Id.

\(^{128}\) Id.

\(^{129}\) Id. at 513.

\(^{130}\) Id.

\(^{131}\) See *Landriani*, 97 A.2d at 512; *Roberts v. James*, 85 A. 244, 246 (N.J. 1912).
In summary, as long as the fundamental elements of fraud are proven—deliberate material misrepresentation, buyer reliance on the misrepresentation, and damage proximately caused—the maker of those misrepresentations is liable for damages. Courts draw no distinction between lies about on-site or off-site property conditions if the falsehoods are material and induce the buyer to purchase. Once a land purchaser relies on a misstatement to his detriment, the common law of fraud provides him with a remedy.

B. Non-Disclosure of On-Site Property Conditions as Fraud

Although courts long have considered affirmative misstatements acts of fraud, courts were slow to recognize non-disclosure as an act of fraud. For a number of years, courts adhered strictly to the traditional common law definition of fraud, which required that there be an affirmative act. Under this narrow interpretation of the common law, a land seller who refused to disclose material information to a purchaser was not liable for fraud. Silence, by definition, could not qualify as an utterance.

In Swinton v. Whitinsville Savings Bank, the Massachusetts Supreme Judicial Court held that a seller had no duty to disclose information about termite infestation to a purchaser. In that particular instance, the seller had made no verbal or written mention about termite infestation to the buyer. Because disclosure would have lowered the value of the house, the seller deliberately refused to inform the buyer. The buyer purchased the house and belatedly discovered the extensive termite infestation. The Swinton court stated that even though there might have been a moral obligation for the vendor to speak, the law had not reached the point of imposing idealistic standards of morality on people. In response to the judi-

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133 See Katz, 598 A.2d at 929–30; Landriani, 97 A.2d at 512–13.
134 See Katz, 598 A.2d at 929–30; Landriani, 97 A.2d at 512–13.
136 See id. at 74–75.
137 See Wamhoff, supra note 7, at 554.
138 See id.
139 See Swinton, supra note 7.
140 Id. at 808–09.
141 Id.
142 Id.
143 See id.
ciary's refusal to find non-disclosure fraudulent, one commentator remarked that permitting a seller to take advantage of a buyer's ignorance so long as he was not actively misled was "singularly unappetizing."\textsuperscript{144}

Courts gradually rejected the analysis and decision of the Swinton court because non-disclosure did not conform with notions of justice and fair dealing.\textsuperscript{145} Citing public policy concerns, courts started expanding common-law fraud liability to cover land sellers who failed to disclose unfavorable on-site property conditions to purchasers.\textsuperscript{146} In Weintraub v. Krobatsch, for example, a homeowner sold a roach-infested house to an unsuspecting buyer.\textsuperscript{147} When the buyer tried to rescind the sales contract, the seller claimed that she was under no duty to speak and that consequently, there was no legal grounding for the fraud complaint by the purchasers.\textsuperscript{148} The district court dismissed the purchaser's complaint, but the Supreme Court of New Jersey reversed and remanded.\textsuperscript{149} The court pointed out that "silence may be fraudulent" and that relief may be granted to one contractual party where the other suppressed facts which the party "under the circumstances, is bound in conscience and duty to disclose to the other party, and in respect to which he or she cannot, innocently, be silent."\textsuperscript{150}

Gradually, the common law evolved to include non-disclosure and silence as fraud.\textsuperscript{151} According to the Restatement (Second) of Torts, one who fails to disclose to another a fact that he knows may justifiably induce the other to act is subject to the same liability to the other as though he made an affirmative misrepresentation if, and only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.\textsuperscript{152} Therefore, before there can be liability for non-disclosure, the buyer must prove the existence of a duty to disclose.\textsuperscript{153}

The Restatement notes that a duty can arise in at least two distinct manners.\textsuperscript{154} First, a seller has a duty to disclose facts basic or material to the transaction, if he or she knows that the other party is ignorant

\textsuperscript{145} See, e.g., Weintraub v. Krobatsch, 317 A.2d 68, 75 (N.J. 1974).
\textsuperscript{146} See id. at 71.
\textsuperscript{147} Id. at 70.
\textsuperscript{148} Id. at 71.
\textsuperscript{149} See id. at 68.
\textsuperscript{150} Keen v. James, 39 N.J. Eq. 527, 540 (N.J. 1885).
\textsuperscript{151} See RESTATEMENT, supra note 100, § 551.
\textsuperscript{152} Id. § 551 (2)(a).
\textsuperscript{153} See id.
\textsuperscript{154} See id.
of those facts. The official Comments clarify when this first type of duty arises. The Comments observe that there is a duty to disclose when the advantage taken of a party's ignorance is so shocking to the ethical sense of community, and is so extreme and unfair, as to amount to a form of swindling, in which a party is led by appearances into a bargain that is a trap, of whose essence and substance he is unaware. Therefore, a land seller cannot withhold basic information about the land from an ignorant purchaser without violating a duty to disclose.

The Weintraub court determined that there were two criteria that had to be established before a common-law fraud claim involving non-disclosure could be successful. First, a seller had to know about the condition and deliberately remain silent. Second, the concealment had to be of a significant or material nature to the purchaser. Minor conditions which ordinary sellers and purchasers reasonably would regard as of little or no materiality in the transaction would clearly not call for judicial intervention.

According to the Restatement, a duty to disclose also can arise generally when there is a special relationship between parties. A party to a business transaction is under a duty to exercise reasonable care to disclose, before the transaction is consummated, matters known to him that the other is entitled to know because of a fiduciary or similar relationship of trust and confidence between them. Thus, if there is a duty to speak arising from a special trust relationship between the buyer and the seller, the suppression of truth is equivalent to the expression of a falsehood.

Along this line, several scholars have asserted that whether or not a duty exists is ultimately a question of fairness or policy. Prosser has observed that, "There is a duty if the court says there is a duty... Duty is only a word with which we state our conclusion that there is or is not to be a liability... The inquiry involves a weighing of the

155 Id. § 551 (2)(e).
156 See Restatement, supra note 100, § 551 cmt. k.
157 Id. § 551 cmt. l.
158 See id.
160 Id.
161 Id.
162 Id.
163 Restatement, supra note 100, § 551 (2)(a).
164 See id.
165 See id.
166 See Wamhoff, supra note 7, at 556.
relationship of the parties and the public interest in the proposed solution.”\textsuperscript{167} Keeton also has noted that “it would seem that the object of law . . . should be to impose on parties to the transaction a duty to speak whenever justice, equity, and fair dealing demand it.”\textsuperscript{168}

Following the lead of the scholars, courts began looking to modern concepts of justice and fair dealing in deciding whether there was a duty to disclose.\textsuperscript{169} In \textit{Hopkins v. Fox & Lazo Realtors}, the New Jersey Supreme Court confirmed that actual imposition of tort duty and formulation of standards defining such duty derived from considerations of public policy and fairness.\textsuperscript{170} In \textit{Hopkins}, a professional real estate broker invited prospective buyers to tour a house.\textsuperscript{171} One of the potential buyers slipped on a step that was partially camouflaged and broke her ankle.\textsuperscript{172} Although the case involved a negligence claim, a central issue explored by the \textit{Hopkins} court was determining the limits of the duty of care.\textsuperscript{173}

The court noted that whether a person owes a duty of reasonable care toward another turns on whether such a duty satisfies an abiding sense of basic fairness under all circumstances in light of considerations of public policy.\textsuperscript{174} That inquiry involves identifying, weighing, and balancing several factors: the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution.\textsuperscript{175} The court further stated that the determinations must lead to solutions that properly and fairly resolve specific cases and generate intelligible and sensible rules to govern future conduct.\textsuperscript{176}

1. The Wide Scope of Materiality

Once a duty to disclose is established, materiality has to be proven.\textsuperscript{177} Materiality has the same definition whether the case involves affirmative misstatements or non-disclosure of information.\textsuperscript{178} Information is

\textsuperscript{168} W. Page Keeton, \textit{Fraud—Concealment and Non-Disclosure}, 15 Texas L. Rev. 1, 31 (1936).
\textsuperscript{169} See, e.g., Hopkins v. Lazo Realtors, 625 A.2d 1110, 1116 (N.J. 1993).
\textsuperscript{170} See \textit{id.}
\textsuperscript{171} Id. at 1112.
\textsuperscript{172} Id. at 1112–13.
\textsuperscript{173} See \textit{id.} at 1112–14.
\textsuperscript{174} Hopkins, 625 A.2d at 1116.
\textsuperscript{175} Id.
\textsuperscript{176} Id.
\textsuperscript{177} See \textit{Restatement}, supra note 100, § 551.
\textsuperscript{178} See \textit{id.}
material if a reasonable person would attach importance to a fact's existence or nonexistence in determining his or her choice of action in the transaction.179 The duty to disclose applies to any material fact, including conditions which are intangible in nature.180 In *Stambovsky v. Ackley*, a purchaser unwittingly bought a house widely reputed to be possessed by poltergeists.181 The seller had known about the alleged apparitions and had even helped spread the house's reputation.182 Once the purchaser discovered this information, he sued the seller for common-law fraud.183 The New York Supreme Court decided that, while *caveat emptor* was still the standard doctrine of the state, equity and tenets of fair dealing required that the contract be rescinded.184 The *Stambovsky* court stated that where a condition is peculiarly within the knowledge of the seller or unlikely to be discovered by a prudent purchaser, the seller should disclose the information.185

Something as intangible as negative land reputation also can be a material fact.186 In *Reed v. King*, the California Third District Court of Appeals sustained an action of fraud by a land buyer who was not told that his newly purchased house had been the scene of a mass murder several years earlier.187 The commercial broker, who knew about the stigmatized quality of property, had refused to inform the buyer about the land's negative reputation.188 The fact that there was no physical or legal defect with the property did not concern the court.189 The *Reed* court declared that reputation and history could have a significant effect on the value of realty.190 Ill-repute or "bad will" would be a material fact if it depressed the value of property.191 Failure to disclose such a negative fact where it will have a foreseeably depressing effect is a fraudulent act.192

179 Id.
181 Id. at 674.
182 Id. at 677.
183 Id.
184 See id. at 676.
185 *Stambovsky*, 572 N.Y.S.2d at 678.
187 Id.
188 Id. at 131.
189 Id. at 133.
190 Id.
191 *Reed*, 193 Cal. Rptr. at 133.
192 RESTATEMENT, *supra* note 100, § 551 illus. 11.
In determining the existence of a land seller's duty to disclose on-site land conditions, the focus of the inquiry involves policy concerns of fundamental fairness. If a seller refuses to disclose material information to a buyer, the non-disclosure is fraudulent.

2. Duty to Disclose On-Site Land Conditions Applies to All Types of Sellers-Professionals, Non-Professionals, and Agents

Both professional real estate sellers, as evidenced by the Reed case, and non-professional land sellers, as demonstrated by the Weintraub decision, were held liable for fraud when they failed to disclose information about on-site conditions.

The duty to disclose on-site land conditions extends to agents as well as to the seller whom the agent represents. In Lingsch v. Savage, the California First District Court of Appeals determined that the real estate agent or broker representing the seller is a party to the business transaction, and therefore, potentially liable for fraud. In that case, buyers who purchased a dilapidated house were unaware that the state had condemned the property. The real estate broker who sold them the land deliberately had not informed the purchasers about the condemnation. The Lingsch court decided that when a seller's agent knows facts materially affecting the value or desirability of the property, and the agent also knows that such facts are not known to, or within the reach of diligent attention and observation of a buyer, the agent has a duty to inform a buyer.

The court noted that even though the landowner whom the broker represented had not informed the broker about the condemnation, the broker did acquire the information independently of the seller. Regardless of how a broker acquires material information, he or she is obligated to disclose that information. The broker could not remain

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193 See Reed, 193 Cal. Rptr. at 132.
195 See Reed, 193 Cal. Rptr. at 131.
197 RESTATEMENT, supra note 100, § 551.
199 Id. at 205.
200 Id. at 203.
201 Id.
202 Id. at 205.
203 Lingsch, 29 Cal. Rptr. at 205.
204 Id.
silent on an issue just because the seller had failed to tell him about it. The broker and the seller are jointly and severally liable because they both share an interest in the transaction.

**C. Non-Disclosure of Off-Site Property Conditions as Fraud**

Although there is a relatively clear common-law trend requiring disclosure of material on-site land conditions by professional and non-professional vendors, courts did not impose a duty to disclose material off-site conditions until *Strawn v. Canuso*. The New Jersey Supreme Court held in *Strawn* that a professional seller who failed to disclose off-site land conditions that materially affected the value of land was liable for fraud. In *Strawn*, a family purchased a plot of property, not knowing that a toxic waste dump one half-mile away from the property was leaking chemicals into the water table. The broker who sold the property clearly knew about the proximity of the noxious dump, but had refused to inform the family because notice of the landfill would reduce land value. The court ruled that there was no difference between withholding information about on-site problems or off-site problems, because both materially could affect the value and desirability of the purchased property.

The *Strawn* court decided that failure to disclose the dump was fraudulent based on the past development of common-law fraud and public policy concerns. The court noted that there already was a clear common-law trend requiring disclosure of on-site conditions that materially affect the value of land. There was no logical reason why a knowledgeable broker should not have to disclose off-site conditions, the court reasoned, because the physical effects of the abandoned dump site were not limited to the confines of the dump. Because the dump caused a diminution in surrounding land prices, there did not have to be a physical connection between the dump and the land.

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205 *Id.*
206 *Id.*
208 *Id.*
209 *Id.* at 423.
210 *Id.*
211 *Id.* at 428.
212 *Strawn*, 657 A.2d at 430.
214 *Strawn*, 657 A.2d at 430.
215 *Id.*
The *Strawn* court also noted that case law already had sustained a cause of action for both affirmative misrepresentations concerning on-site and off-site land conditions.\(^{216}\) The policy underpinnings of fair play, justice, and equity that justified those decisions should likewise support the judicial trend to compel disclosure of material on-site and off-site conditions.\(^{217}\)

Although the court recognized a duty to disclose material off-site conditions that affected the value of land, there were three restrictions limiting that duty.\(^{218}\) First of all, the duty to disclose off-site conditions only applied to professional sellers and commercial brokers of residential housing.\(^{219}\) In deciding to limit the duty to disclose, the *Strawn* court looked to two principal factors: the difference in bargaining power between the professional seller of real property and the typical purchaser of such housing, and the difference in access to information between the buyer and the commercial seller.\(^{220}\)

The court asserted that professional sellers of residential housing generally enjoyed an advantage over buyers in the bargaining process.\(^{221}\) Commercial land brokers had a level of sophistication that most home buyers lacked.\(^{222}\) That sophistication enabled brokers to assess better the marketability of properties near conditions such as landfills, a planned superhighway, or an office complex approved for construction.\(^{223}\) Brokers were more qualified than the average layperson to evaluate the true value of property by considering all off-site conditions.\(^{224}\)

Along those lines, professional land sellers also had superior access to information not available to most purchasers.\(^{225}\) With superior knowledge, such sellers had a duty to disclose to home buyers the location of off-site physical conditions that objectively reasonable and informed buyers would deem material to the transaction.\(^{226}\) The *Strawn* court defined materiality as any condition that substantially affected the value or desirability of property.\(^{227}\)

\(^{217}\) See id. at 148.
\(^{218}\) *Strawn*, 657 A.2d at 428.
\(^{219}\) Id.
\(^{220}\) Id.
\(^{221}\) Id.
\(^{222}\) Id. at 432.
\(^{223}\) *Strawn*, 657 A.2d at 430.
\(^{224}\) Id.
\(^{225}\) See id.
\(^{226}\) Id. at 431.
\(^{227}\) See id. at 428.
The second restriction on the duty to disclose was actual knowledge of the condition. Professional sellers only needed to disclose matters about which they had some degree of personal knowledge and that appreciably may affect the land's value. Sellers had no duty to investigate or disclose transient social conditions in the community.

Third, professional sellers only need to disclose matters not reasonably ascertainable by the buyer. In the absence of a purchaser communicating specific needs, brokers should not be held to decide whether the changing nature of the neighborhood, the presence of a group home, or the existence of a school in decline are facts material to a transaction. If a purchaser has no known specific needs, then the broker is not obligated to disclose anything more than what would matter to an average, reasonable purchaser.

Thus, Strawn established that there was an affirmative duty for professional vendors of residential land to inform buyers about material off-site conditions that affect the value of the property. Non-professional sellers, on the other hand, were exempt from the duty to disclose material off-site land conditions. House purchasers would presumably be on an equal footing, information-wise, with non-professional house vendors. Thus, there was no need for the courts to provide protection against non-professional sellers.

IV. Determining the Existence of a Duty to Disclose Based on a Seller's Actual Knowledge Instead of a Seller's Professional Status

The Strawn holding does much to expand the common-law doctrine of fraud in land sales. The case establishes, for the first time, a common-law duty for land sellers to disclose material off-site conditions to land purchasers. Full and frank disclosure of off-site land

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228 See Strawn, 657 A.2d at 431.
229 Id.
230 Id.
231 See id. at 429.
232 See id. at 431.
233 Strawn, 657 A.2d at 431.
234 Id. at 428.
235 Id.
236 See id. at 431.
237 Id. at 428.
238 See Strawn, 657 A.2d at 429.
239 Id. at 428.
conditions logically complements the common-law duty to disclose material on-site land conditions set forth in cases like *Weintraub*.240

Unfortunately, the *Strawn* court’s decision to exempt non-professional land vendors from this disclosure duty is inconsistent with the legal and policy concerns underlying the purchaser protection movement.241 A legal duty to disclose can arise either by virtue of an unequal relationship between parties or by virtue of unequal information between parties.242 The *Strawn* court should have based a duty to disclose on the parties’ unequal access to information, not just on a professional-layperson relationship.243

Although it is true that a duty to disclose can arise from the special nature of the relationship between two parties, there are other ways a duty can arise.244 A duty to disclose can arise when one party is ignorant of the facts basic to the transaction, regardless of the absence of a special relationship between the parties.245 The “actual knowledge” standard is superior to the “professional status” standard because it provides more protection for land purchasers, is more clearly defined, and is more consistent with public policy concerns of justice and fair play.246

1. Problems with the Professional Status Standard

The *Strawn* court specifically limited the duty to disclose off-site conditions to professional land sellers.247 The court reasoned that professionals owe a higher degree of duty to purchasers than non-professionals do because professional sellers have greater bargaining power and greater access to information than average home-buyers, while non-professional sellers are often on equal footing with the average home-buyer.248 At first glance, the court’s distinction between commercial and non-commercial vendors appears to be reasonable.249 However, upon further analysis, this distinction is problematic.250

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241 See *Strawn*, 657 A.2d at 428; *Restatement*, supra note 100, § 551.
242 See *Restatement*, supra note 100, § 551.
243 *Id.*
244 *Id.*
245 See *id*.
247 *Strawn*, 657 A.2d at 428.
248 See *id*.
249 See *id*.
250 See *id*; *Wamhoff*, supra note 7, at 561.
The court's rationale behind the professional status restriction can be broken down into several smaller issues. First, due to the greater access to information, professionals are better able to find out about off-site conditions. Once they find out about the conditions, professionals are more skilled than laypeople at evaluating whether a condition is material to the average home-buyer. After they have evaluated the condition and have decided it is material, professionals can use their superior skills and bargaining power to mislead unsophisticated buyers.

Although many of the elements are true, they may not matter in light of other legal principles guiding the development of common-law fraud. As the Weintraub and Strawn courts pointed out, a seller cannot be liable for fraudulent non-disclosure unless the vendor has actual knowledge of something that is not disclosed. It would not burden unduly non-professional sellers if courts imposed a duty to disclose conditions about which they had actual knowledge. If a non-professional seller genuinely knew nothing about a particular external condition, there could be no fraudulent intent, and no liability. By enforcing the actual knowledge standard, the courts would prevent scenarios like the one described in the introduction, where a knowledgeable land seller hides behind his non-professional status deliberately to swindle an innocent purchaser.

The Strawn court's assumption that professionals are better able to determine what conditions are material to average buyers is probably true, although it most likely would not make much of a difference in practice. Because the standard for materiality is what the reasonable purchaser would regard as important, a non-professional land seller is equally able to assess materiality because a non-professional is no less of a reasonable person than a professional vendor. Any non-professional seller with common sense would be able to discern

251 See Strawn, 657 A.2d at 428.
252 See id.
253 See id.
254 See id at 430.
255 See Wamhoff, supra note 7, at 561.
257 See Weintraub, 317 A.2d at 74; Strawn, 657 A.2d at 428.
258 See Weintraub, 317 A.2d at 74; Strawn, 657 A.2d at 428.
259 See supra Section I.
260 See Strawn, 657 A.2d at 428.
261 See RESTATEMENT, supra note 100, § 551.
what is material and what is not. Moreover, the courts already implicitly acknowledge that a non-professional seller is capable of determining what issues are material when they find non-professionals liable for fraud in not disclosing material on-site conditions like termite damage, roach infestation, and leaky basements.

The distinction between professional and non-professional sellers cannot be defended on the basis of differing sophistication between them. Adhering to the duty to disclose material, off-site land conditions does not require a skilled and knowledgeable seller, but merely requires an honest one. Materiality is an objective standard that does not depend on the seller as much as it does on the buyer. Any given issue is just as material to a purchaser whether a professional or non-professional is selling the land. In Strawn, the toxic dump near the purchased property would not have been less offensive to the buyer had he bought the land from a non-commercial vendor instead of from a professional one.

The final assumption made by the Strawn court is that professional vendors have superior skills and bargaining powers that can be used to mislead unwary purchasers. Although this assumption is true in instances involving affirmative misrepresentations, skill disparity would not matter when dealing with the issue of non-disclosure. It takes no special skill to remain silent. The status distinction is also unduly rigid, and inconsistent with past case law. When courts have imposed an affirmative duty on sellers to disclose material on-site conditions to purchasers, that duty applies to all sellers, regardless of their professional or non-professional status. In Lingsch v. Savage, the professional broker was liable for fraud because he had actual knowledge that the property

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262 See id.
264 See Strawn, 657 A.2d at 428.
265 See Wamhoff, supra note 7, at 561.
266 See RESTATEMENT, supra note 100, § 551 (1977).
267 See id.
268 See Strawn, 657 A.2d at 428.
269 See id.
272 See, e.g., Katz, 598 A.2d at 926–27; Weintraub v. Krobatsch, 317 A.2d 68, 74 (N.J. 1974); Roberts v. James, 85 A. 244, 246 (N.J. 1912).
273 See, e.g., Katz, 598 A.2d at 926–27; Weintraub, 317 A.2d at 74; Roberts, 85 A. at 246.
was condemned, not because he was a professional. The essence of any fraud claim is the fraudulent act itself.

2. Advantages of Applying the Actual Knowledge Standard

As explained previously, the balance of legal protection has steadily tilted away from the land seller and toward the purchaser. Many jurisdictions have expressly rejected the ancient rule of *caveat emptor*. The driving force behind the development of the common-law fraud doctrine is judicial acknowledgment of public policies and societal conceptions of justice.

Whether a vendor is a professional or a non-professional, the actual harm that a swindled buyer suffers is the same. The *Strawn* ruling, however, leaves an entire class of land sellers, namely non-professional vendors, with no duty to disclose material off-site conditions. With no duty to disclose, the *de facto* governing doctrine is *caveat emptor*, which means that the harsh inequities of *caveat emptor* remain in force.

Imagine the frustration of the home purchaser who finds that, though both he and his neighbor were not told that the properties they bought were near a toxic dump, his neighbor had the good fortune of having purchased his home through a commercial vendor and thus was afforded a common-law remedy. The first home buyer could only hope that some other unsuspecting person would buy from him, or go without a remedy. This scenario is clearly inconsistent with the ideals of justice and fair dealing that courts have been trying to pursue. It would be fairer to hold both professionals and non-professionals responsible for disclosing information basic to a transaction.

Prominent scholars have agreed that whether or not a duty exists is ultimately a question of fairness or policy. Since there is strong

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275 See *Restatement*, supra note 100, § 551.
276 See supra notes 8–12 and accompanying text.
278 See *Weintraub*, 317 A.2d at 74.
279 See *Wamhoff*, supra note 7, at 562.
281 See *id*.
282 See *Wamhoff*, supra note 7, at 562.
283 See *id*.
284 See *id*.
285 See *id*.
286 See *id*.
public interest in preventing swindling, it should be the object of law to pursue policies that promote justice, equity, and fair dealing.\textsuperscript{287} Land purchasers would benefit because they would be assured protection regardless of who sold them the land.\textsuperscript{288} Full information disclosure would also encourage stability and efficiency in the real estate market.\textsuperscript{289}

V. Conclusion

Courts should adopt an actual knowledge standard in determining liability for non-disclosure of material off-site land conditions rather than adhering to a professional status standard. By only requiring professional sellers to disclose information, it leaves the door open for a knowledgeable layperson to swindle unsuspecting purchasers. Moreover, there is no reason why professionals alone should have a duty to disclose when the average, reasonable person is also able to discern issues of materiality.

\textsuperscript{287} See Prosser, \textit{supra} note 167, at 15; Keeton, \textit{supra} note 168, at 31.

\textsuperscript{288} See Prosser, \textit{supra} note 167, at 15; Keeton, \textit{supra} note 168, at 31.

\textsuperscript{289} See Prosser, \textit{supra} note 167, at 15; Keeton, \textit{supra} note 168, at 31.