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REAL ESTATE DEVELOPMENT

NEW YORK'S PROPERTY CONDITION DISCLOSURE ACT: EXTENSIVE LOOPHOLES LEAVE BUYERS AND SELLERS OF RESIDENTIAL REAL PROPERTY GOVERNED BY THE COMMON LAW

PHILIP LUCREZIA†

INTRODUCTION

What good is a car without a motor or a house without a roof? Consider a hawk without its razor-sharp beak or a shark without teeth. Because each part is essential to the operation of the whole, one concludes, “the whole is greater than the sum of its parts.”1 Whether it is a personal asset or a predatory animal, none of these entities can serve its intended purpose if it is not properly equipped. The shark and the hawk cannot hunt; the car cannot move; the house cannot shelter. Only because the parts co-exist and complement each other can the entity function. Without this fundamental balance, the whole cannot serve its purpose—take away one or more parts and the whole fails miserably.

The New York Property Condition Disclosure Act (the “Act”),2 which went into effect on March 1, 2002, is unfortunately

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1 This phrase was coined by Aristotle, the Greek philosopher, educator, and scientist whose influence has shaped Western culture. He analyzed the parts of living organisms in terms of the purposes they serve. The phrase describes the combining of individual parts in a manner in which they depend on each other to form something of greater value, e.g., an automobile. See generally ARISTOTLE, PARTS OF ANIMALS (A. L. Peck trans., Harvard University Press 1968).

failing as a whole. This new law, requiring sellers of residential real estate to complete and deliver a forty-eight question disclosure statement to buyers, is riddled with loopholes because it is missing many parts. The New York legislature asserted that the buying and selling of residential homes is “complicated by misunderstandings arising from an ad hoc transfer process and conflicting information.” It therefore presented this statute as a “mechanism intended to increase [buyers’ and sellers’] ability to obtain information concerning a home purchase and sale.” In its current form, however, it is doubtful that sellers in New York will ever provide the disclosure statement, and in the event that they do, it is unlikely to facilitate an improvement in the information transfer. Although the intent was noble, the instrument is feeble.

Part I of this Note begins with an overview of caveat emptor, New York’s traditional rule regarding the transfer of real estate. It then presents New York’s common law exceptions to this rule, the nationwide policy favoring disclosure legislation, and the drive for legislation within New York. Part II examines the inherent problems that cause New York’s legislation as a whole to fail in its objective. This examination is facilitated by a nationwide survey comparing similar legislation in all states that have such laws. A close look at the varying legislation reveals where New York failed to adopt effective provisions used by other states and, conversely, where shortcomings by other states were recognized, but not corrected, by New York.

This Note affirms the proposition that the loopholes in the legislation impair its effectiveness as a means of increasing buyers’ and sellers’ “ability to obtain information concerning a [residential transaction and eliminate] misunderstandings arising from an ad hoc transfer process.” At most, New York’s legislation only eliminates the risk of liability on the part of brokers who, arguably, are in the best position to inspect the premises, discover defects, and make disclosures to purchasers.

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3 Id. § 462.
4 Ch. 456, § 1, 2001 N.Y. Laws 898 (McKinney).
5 Id.
6 See infra app. I and accompanying notes.
7 2001 N.Y. Laws at 898.
8 Due to the frequency with which brokers view homes, they are considerably more likely to notice defects or problems than the average person. See, e.g., Lori A. Polonchak, Comment, Surprise! You Just Moved Next to a Sexual Predator: The
Some critical changes can potentially give this statute some bite; nevertheless, in its current form, the common law will inevitably control.

I. BACKGROUND

A. An Overview of Caveat Emptor

Traditionally, the Latin phrase "caveat emptor" has been interpreted to mean "let the buyer beware." It is an ancient maxim that places the risks of dealing at arm's length completely within the realm of a buyer, "summariz[ing] the rule that a purchaser must examine, judge, and test for himself." With regard to real estate, it is "shorthand for a rubric of affirmative legal defenses . . . available to sellers of real property to effectively thwart claims by disappointed purchasers." While contemporary courts' employment of the maxim predominantly surfaces in real estate cases, many scholars recognize its origins in an early English case dealing with the sale of a jewel.

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Duty of Residential Sellers and Real Estate Brokers to Disclose the Presence of Sexual Predators to Prospective Purchasers, 102 DICK. L. REV. 169, 185 n.110 (1997) (citing Kathy Barrett Carter, State Justices to Decide if Developer Should Have Told Buyers of Landfill, STAR-LEDGER (Newark, N.J.), Jan. 5, 1995, at 20 (noting that people use real estate agents because they possess the expertise to recommend good values)).

9 BLACK'S LAW DICTIONARY 215 (7th ed. 1999). This well-known "doctrine hold[s] that purchasers buy at their own risk." Id.


11 Alan M. Weinberger, Let the Buyer Be Well Informed?—Doubting the Demise of Caveat Emptor, 55 MD. L. REV. 387, 390 (1996). For example:

Among these defenses were the statute of frauds, the parol evidence rule, and the doctrine of merger by deed. In its essence, the doctrine of caveat emptor provided that sellers of real property, dealing at arm's length with prospective purchasers, owed no duty to disclose unfavorable information about the property. Vendors, therefore, incurred no legal liability by withholding their knowledge of defective conditions. The law required buyers to fend for themselves by exercising a healthy modicum of skepticism as to a property's value and quality. In a very real sense, purchasers were expected to govern themselves by the philosophy that every acquisition of real property represented a gamble.

Id. (footnotes omitted).

12 See Weinberger, supra note 11, at 392–93 for a discussion of the maxim's origin. He wrote:

In Chandelor, a London goldsmith sold a jewel to a foreign merchant for £100, a substantial sum of money at the time. The goldsmith asserted that the jewel was a rare "bezar stone." The purchaser, complaining it was not a bezar stone, filed suit for breach of warranty. The court denied relief,
Though it may be difficult to extract the origins of caveat emptor from the English court's comprehensive discussion of fraud and warranty claims, scholarly interpretations have confirmed the theory.\(^{13}\) Over the years, the maxim has been frequently applied to a range of scenarios in which sellers seek to evade liability from disgruntled purchasers\(^ {14}\) and has become very well established in both the United States and England.\(^ {15}\) It has even come to be used more frequently by our courts\(^ {16}\) than those of its native England.\(^ {17}\)

New York especially abides by the principle of caveat emptor with respect to real estate and "imposes no duty on the seller to disclose any information concerning the premises when the parties [have dealt] at arm's length."\(^ {18}\) By this principle, it is holding that the goldsmith had merely affirmed and not warranted the character of the stone. The decision came to be cited for the proposition that English courts were not interested in enforcing the fairness of an exchange because they thought contracting parties should handle such matters themselves.

\(^{13}\) See Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133, 1166–78 (1931) (discussing the long history of how tribunal interpretation of *Chandeler* gave rise to the notion that it created the doctrine of caveat emptor by holding the buyer to be without recourse in the absence of a warranty or proof of fraud).

\(^{14}\) See, e.g., Haskell Co. v. Lane Co., 612 So. 2d 669, 674 (Fla. Dist. Ct. App. 1993) (finding that the doctrine of caveat emptor applies to leases of commercial real property but not to leases of residential property); Bormann v. Simpson, 359 N.E.2d 824, 826 (Ill. App. Ct. 1977) (observing that the maxim of caveat emptor strictly applies to the judicial sale of a tractor); Latham v. Powell, 103 S.E. 638, 642 (Va. 1920) (commenting that "the maxim caveat emptor applies, so far as quality is concerned, ... to ... sales of specific chattels").

\(^{15}\) See Barnard v. Kellogg, 77 U.S. (10 Wall.) 383 (1870). The Court stated: No principle of the common law has been better established, or more often affirmed, both in this country and in England, than ... the maxim of *caveat emptor*. Such a rule, requiring the purchaser to take care of his own interests, has been found best adapted to the wants of trade in the business transactions of life.

\(^{16}\) See id. at 388–89 ("Of such universal acceptance is the doctrine of *caveat emptor* in this country, that the courts of all the States in the Union where the common law prevails, with one exception (South Carolina), sanction it.").

\(^{17}\) Weinberger, *supra* note 11, at 393 n.50 ("Indeed, *caveat emptor* came to be applied even more vigorously in the United States than in England." (citing Patrick S. Atiyah, *The Rise and Fall of Freedom of Contract* 180 (1979))).

\(^{18}\) Platzman v. Morris, 283 A.D.2d 561, 562–63, 724 N.Y.S.2d 502, 504 (2d Dep't 2001). In *Platzman*, the parties entered into a contract for the sale of a one-family home with three kitchens. *Id.* at 562, 74 N.Y.S.2d at 503. The sellers represented
well established that the seller is under no duty to speak and silence alone will not amount to liability on his or her part.\textsuperscript{19} Even in the case of new construction, where buyers expect a new home in mint condition, New York once stringently adhered to caveat emptor, thereby precluding any liability of builders resulting from their silence concerning defects.\textsuperscript{20} Fortunately, this rule no longer holds true with new construction;\textsuperscript{21}

that "the kitchen in the basement was not legal, but that the kitchen on the second floor was legal." \textit{Id.}, 724 N.Y.S.2d at 503. The contract "provided that the plaintiffs were fully aware of the condition of the property and that they entered into the contract based upon their own inspection and investigation, and not upon any information, or representations, written or oral, given by the sellers." \textit{Id.}, 724 N.Y.S.2d at 503. The court found that the plaintiffs had no remedy against the seller because, absent a warranty, the sale of real estate in New York is governed by caveat emptor. \textit{See} Stambosky v. Ackley, 169 A.D.2d 254, 257, 572 N.Y.S.2d 672, 675 (1st Dep't 1991) (acknowledging that "with respect to transactions in real estate, New York adheres to the doctrine of caveat emptor and imposes no duty upon the vendor to disclose any information concerning the premises").

\textsuperscript{19} \textit{See} Perin v. Mardine Realty Co., 5 A.D.2d 685, 685, 168 N.Y.S.2d 647, 648 (2d Dep't 1957) (mem.), \textit{aff'd}, 6 N.Y.2d 920, 161 N.E.2d 210, 190 N.Y.S.2d 995 (1959). In this case, the seller "failed to volunteer the facts" regarding the illegal placement of the home sewer line. \textit{Id.}, 168 N.Y.S.2d at 648. The court ultimately concluded that "[t]he seller was under no duty to speak. The parties dealt at arm's length, and the mere silence of the seller, without some act or conduct which deceived the purchaser, does not amount to a concealment that is actionable as an active fraud." \textit{Id.}, 168 N.Y.S.2d at 648.

\textsuperscript{20} \textit{See} Moser v. Spizzirro, 25 N.Y.2d 941 (1969) (mem.) (summary of the editors). In this case, the builder had used footings for the foundation of the home that were appropriate for "solid" land, despite the fact that the home was actually built on "filled" land, therefore requiring a different standard of footings. The builder falsely represented to the building department that the home was built on solid land in order to obtain a building permit. The Appellate Division held, and the Court of Appeals affirmed, that "in the absence of any confidential or fiduciary relationship, the mere silence of defendants, unaccompanied by some act or conduct which deceived plaintiffs, was not . . . actionable." \textit{Id.} at 942 (summary of the editors). Note that while the builder was only able to erect the house by fraudulently obtaining the building permit, plaintiffs nonetheless had no cause of action because the fraudulent representations were not made to them directly.

\textsuperscript{21} The legislature has enacted a statute that provides mandatory warranties for new homes built and sold in New York. The statute states:

\begin{enumerate}
  \item Notwithstanding the provisions of section two hundred fifty-one of the real property law, a housing merchant implied warranty is implied in the contract or agreement for the sale of a new home and shall survive the passing of title. A housing merchant implied warranty shall mean that:
    \begin{enumerate}
      \item one year from and after the warranty date the home will be free from defects due to a failure to have been constructed in a skillful manner;
      \item two years from and after the warranty date the plumbing, electrical, heating, cooling and ventilation systems of the home will be free from defects due to a failure by the builder to have installed such systems in a skillful manner; and
    \end{enumerate}
\end{enumerate}
nevertheless, the principle survives in all other arms length dealings.

B. The Evolution of Caveat Emptor in New York

Despite the historic, unrelenting application of caveat emptor in New York, limitations have nonetheless evolved. The two most prominent situations in which New York courts have required sellers to disclose information regarding the premises are when the parties are in a "confidential or fiduciary relationship" or when the seller "actively conceals" facts that

c. six years from and after the warranty date the home will be free from material defects.

N.Y. GEN. BUS. LAW § 777-a (McKinney 2002); see also id. § 777-b (codifying the circumstances under which a seller of a new home may exclude or modify the warranty established under § 777-a). Prior to the enactment of this legislation, a "common-law housing merchant implied warranty" governed disputes over new construction. See Caceci v. Di Canio Constr. Corp., 72 N.Y.2d 52, 526 N.E.2d 266, 530 N.Y.S.2d 771 (1988) (holding that the common law "Housing Merchant" doctrine imposes a warranty that the house would be constructed in a skillful manner free from material defects and specifically rejecting the application of caveat emptor to sale of new real estate); see also Fumarelli v. Marsam Dev., Inc., 92 N.Y.2d 298, 703 N.E.2d 251, 680 N.Y.S.2d 440 (1998) (concluding that General Business Law section 777 is the replacement of the warranty imposed by Caceci). New York has come a long way since Moser in both common law and statutory law for new construction.

The circumstances in which New York will limit the application of caveat emptor and place a seller under a duty to disclose are very few. The Court of Appeals has adequately described the rarity of such limitations:

The law requires disclosure to be made only when there is a duty to make it, and this duty is not raised by the mere circumstance that the undisclosed fact is material, and is known to the one party, and not to the other, or by the additional circumstance that the party to whom it is known, knows that the other party is acting in ignorance of it.


Confidential or "fiduciary duty" is defined as:

A relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship. Fiduciary relationships — such as trustee-beneficiary, guardian-ward, agent-principal, and attorney-client — require the highest duty of care. Fiduciary relationships usually arise in one of four situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer.

BLACK'S LAW DICTIONARY 640 (7th ed. 1999).

See Amend v. Hurley, 293 N.Y. 587, 596, 59 N.E.2d 416, 419 (1944) ("It is not fraud for one party to say nothing on [a] subject where no confidential or fiduciary
would expose a defect. In 1991, however, in the celebrated case of *Stambvosky v. Ackley*, New York took a bold step in expanding a seller's duty to disclose. This case now stands for a famous, narrow exception to caveat emptor in New York:

relation exists and where no false statement or acts to mislead the other are made.”) (citations omitted); *Perin*, 5 A.D.2d at 685, 168 N.Y.S.2d at 648; see also *Moser*, 25 N.Y.2d at 942 (summary of the editors). These cases and many others make reference to the fact that a "confidential or fiduciary relationship" will give the seller a duty to disclose facts that would be of concern to a prospective purchaser of real estate.

This proposition has been cited many times by other New York courts. See generally *Glazer v. LoPreste*, 278 A.D.2d 198, 199, 717 N.Y.S.2d 256, 257 (2d Dep't 2000) (finding that because there was no confidential or fiduciary relationship between buyer and seller, seller had no duty to disclose the presence of a convicted sex offender living next door to the premises); *Levin v. Kissena Manor Corp.*, 17 Misc. 2d 746, 748, 184 N.Y.S.2d 863, 866 (Sup. Ct. Nassau County 1959) (finding that failure to prove the existence of a confidential or fiduciary relationship precluded the plaintiffs from recovering for seller's failure to disclose a change in zoning prior to the closing date).

24 See *Haberman v. Greenspan*, 82 Misc. 2d 263, 368 N.Y.S.2d 717 (Sup. Ct. Richmond County 1975). Departing from the rule of caveat emptor, the court found that defendants were liable to plaintiff because their actions constituted "active concealment" of adverse facts. *Id.* at 265, 368 N.Y.S.2d at 720. The court defined "active concealment" as "either a representation good as far as it goes, but accompanied with such a suppression of facts as makes it convey a misleading impression, or an attempt by one party to draw the other's attention from a fact or to cover it from view." *Id.*, 368 N.Y.S.2d at 720. The problems with the premises were created by improper driving of foundation "piles" that rendered such "piles" of the building "unable to carry the weight of the foundation and superstructure, in violation of the [local] Building Code." *Id.* at 264, 368 N.Y.S.2d at 719. The court concluded:

From the testimony adduced from both engineers, it is patently obvious that the piles for the foundation were evidently not driven to the required depth, that there was inadequate engineering supervision of the driving of the piles, that inaccurate and erroneous pile log statistics were filed with the Department of Buildings after the foundation was constructed, that massive fissures and cracks and severe settlement ensued as a result of such untoward actions, and that the massive fissures, cracks and water condition resulting from such defective construction, and the flanges and I-beams installed to try to hold the foundation together, were concealed and covered up by the erection of the plasterboard in the basement, all under the knowledge and direction of the individual defendants.

*Id.* at 265, 368 N.Y.S.2d at 720; see also *Scharf v. Tisgerman*, 166 A.D.2d 697, 561 N.Y.S.2d 271 (2d Dep't 1990) (finding that seller's representation that the house for sale was a legal three-family dwelling gave rise to a duty to inform prospective purchasers of a pending investigation by the city possibly resulting in revocation of its nonconforming three-family status and failure to do so constituted "active concealment").

Where a condition which has been created by the seller materially impairs the value of the contract and is peculiarly within the knowledge of the seller or unlikely to be discovered by a prudent purchaser exercising due care with respect to the subject transaction, nondisclosure constitutes a basis for rescission as a matter of equity. 26

Though the rule apparently applies strictly to conditions created by the seller, it is most frequently cited for the tenet that sellers must disclose all facts about the premises that are peculiarly within their knowledge and not readily discoverable by prospective buyers upon reasonable inspection. 27

Therefore, as a seller’s duty to disclose is limited to facts not readily discoverable upon a reasonable inspection, the traditional interpretation of caveat emptor as buyer beware is no longer appropriate, as New York attorney Karl Holtzschue 28 has recognized. 29 The full Latin phrase, [c]aveat emptor qui ignorant non debuit quod jum alienum emit, is more appropriate because it requires that a purchaser “who ought not be ignorant of the amount and nature of the interest to be acquired, exercise proper caution.” 30 Consequently, “‘buyer take care’ would be more accurate than ‘buyer beware,’ which might be interpreted to mean that the buyer takes all risks.” 31 Stambovsky and many cases that have followed demonstrate that the buyer should not and does not take all risks. 32

26 Id. at 259, 572 N.Y.S.2d at 676 (emphasis added).
27 See, e.g., Greenfield v. Shapiro, 106 F. Supp. 2d 535, 540 (S.D.N.Y. 2000) (“The rule of caveat emptor is subject to exception in New York in certain narrow circumstances where the seller had a duty to disclose a material fact known to the seller, but unknown to the buyer.” (citing Stambovsky, 169 A.D.2d at 260, 572 N.Y.S.2d at 677)), aff’d, No. 00-9034, 2001 U.S. App. LEXIS 28451 (2d Cir. Feb. 14, 2001); Trustco Bank v. Cannon Bldg. of Troy Assocs., 246 A.D.2d 797, 799, 668 N.Y.S.2d 251, 253 (3d Dep’t 1998) (“It is only where a defect in the property is peculiarly within the knowledge of the seller, and it is not likely to be discovered by a reasonably prudent purchaser, that a duty ‘to disclose will be imposed.” (citing Stambovsky, 169 A.D.2d at 257, 572 N.Y.S.2d at 675)).
28 Karl B. Holtzschue is an attorney in New York City, a member of the Executive Committee of the Real Property Law Section of the New York State Bar Association, an Adjunct Professor at Fordham Law School, an author of books on real estate, and a frequent lecturer. See Karl B. Holtzschue, Caveat Emptor Ain’t What It Used to Be: New Developments, Trends, and Practice Tips, 25 N.Y. REAL PROP. L.J. 3, 3 (1997).
29 Id. at 5 n.11 (quoting Jacqueline S. Leung, Caveat Emptor or Caveat Broker?, 23 REAL EST. REV. 91, 91 n.2 (1993)) (emphasis added).
30 Id. at 3.
C. The Move for Legislation Among the States

As states began to see various inequities arise from applying the common law doctrine of caveat emptor, the view emerged that sellers, and sometimes brokers, ought to have a greater duty to disclose certain conditions about the premises for sale. A 1984 landmark case, *Easton v. Strassburger*, decided by the California Court of Appeal, encouraged legislators in the United States to address these inequities. *Easton* created a common law rule imposing an affirmative duty on brokers of residential real property to "conduct a reasonably competent and diligent inspection of the residential property... and to disclose to prospective purchasers all facts materially affecting the value or desirability of the property that such an investigation would reveal." In 1986, the California legislature codified the rule articulated in *Easton*, developing what has come to be regarded as the most comprehensive disclosure-requiring legislation for both sellers and brokers of residential real estate.

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77 (1st Dep't 1991); Holtzschue, *supra* note 29, at 3–4.


34 199 Cal. Rptr. 383 (Cal. Ct. App. 1984). The case presents the most extreme of circumstances and are concisely stated by the court:

Shortly after respondent purchased the property, there was massive earth movement on the parcel. Subsequent [land] slides destroyed a portion of the driveway in 1977 or 1978. Expert testimony indicated that the slides occurred because a portion of the property was fill that had not been properly engineered and compacted. The slides caused the foundation of the house to settle which in turn caused cracks in the walls and warped doorways. After the 1976 slide, damage to the property was so severe that although experts appraised the value of the property at $170,000 in an undamaged condition, the value of the damaged property was estimated to be as low as $20,000. Estimates of the cost to repair the damage caused by the slides and avoid recurrence ranged as high as $213,000.

Id. at 385.

35 Id. at 390; see also Katherine A. Pancak et al., *Residential Disclosure Laws: The Further Demise of Caveat Emptor*, 24 REAL EST. L.J. 291, 294 (1996) (commenting on how radical a common law duty on brokers to discover and disclose defects in a home was compared to the prior law until that time and remarking that "no appellate court had held that a broker must disclose to a purchaser facts of which the broker was not aware"); Robert M. Washburn, *Residential Real Estate Condition Disclosure Legislation*, 44 DEPAUL L. REV. 381, 410–15 (1995) (discussing in detail *Easton* and the legislation that followed).

36 Many have analyzed the legislation's breadth. Consider Washburn's analysis:

The legislature acted largely in response to outcries from real estate brokers who reacted to the *Easton* court's expansive view of their duties to inspect and disclose. Under the sponsorship of the California Association of
set the stage for a stream of me too legislation by other states; however, none reach as far as California in protecting the buyer.37

D. The Move for Legislation in New York

The property condition disclosure legislation in New York was introduced at the "urging of the New York Association of Realtors as early as 1998 and again in 1999."38 The bill was first introduced in 1998 as Bill Number A.1173, and then again in 1999, as Bill Number S.5039.39 After the Real Property Law Section of the New York State Bar Association objected to many features of the legislation40 and the Task Force on Disclosure for the Real Property Law Section led by Karl B. Holtzschue was developed,41 Governor Pataki vetoed the legislation, though he made clear that "his staff stood ready to work on improvements to the bill."42 Thereafter, the Task Force on Disclosure for the Real Property Law Section of the New York State Bar Association worked jointly with the New York State Association

Real estate, the California legislature approved the first, and still the most comprehensive, real property condition disclosure legislation. It became operative January 1, 1986, with respect to brokers and January 1, 1987 with regard to sellers. The legislature intended to "codify and make precise," but arguably also to limit, certain aspects of the Easton decision. Washburn, supra note 35, at 409 (footnotes omitted).

37 See infra app. I and accompanying notes.

38 Karl B. Holtzschue, Property Condition Disclosure Act Enacted, 30 N.Y. REAL PROP. L.J. 15, 17 (2002). The article comprehensively discussed the legislative history of the Property Condition Disclosure Act and mentioned a nationwide policy announced in 1991 by the National Association of Realtors to encourage enactment of statutes requiring disclosure by sellers. Id. The success of this nationwide policy is evident by the amount of legislation that has subsequently been produced in this area. Id. New York's legislation was also the product of this nationwide policy, though somewhat delayed in its enactment. Id.

39 Id.

40 The New York Bar Association put out legislation reports to object to many features of the legislation including the number of questions, the use of catch-all phrases, the lack of a remedy for a seller who refuses to deliver the form, and the statute's imputation of constructive knowledge of defects to sellers. For a look at these and numerous other objections, see Real Property Law Section, Report No. 76, 28 REAL PROP. L.J. 67 (2000) and Real Property Law Section, Report No. 119, 28 REAL PROP. L.J. 69 (2000).

41 In addition to his countless responsibilities, Karl Holtzschue also serves as chair of the Task Force on Disclosure.

of Realtors for approximately one year to develop modifications for the Act that would be compatible with both groups' interests. The Executive Committee of the Real Property Law Section then voted to approve the draft that evolved from the negotiations. Most of the objections that were mentioned by the Real Property Law Section were addressed in the second version of the bill, which was signed by Governor George Pataki and codified into the current version of the statute. In any case, several concerns remain unresolved and, when coupled with other defects, present several shortcomings in the legislation. This Note asserts that, in its current form, the Act does not benefit buyers of residential real property in the manner in which it was intended to.

II. PROBLEMS WITH NEW YORK’S PROPERTY CONDITION DISCLOSURE ACT

A. $500 Credit to the Buyer Against the Purchase Price in the Event the Seller Fails to Deliver the Completed Disclosure Form

The primary loophole in the legislation is the $500 credit to the buyer in the event that the seller fails to deliver the disclosure statement prior to the buyer’s signing of the real estate contract. This feature of the legislation seems to have generated the most discussion across the state of New York. The apparent consensus is that attorneys representing sellers are counseling their clients to simply provide the $500 credit to buyers rather than subject themselves to possible liability in

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43 See Holtzschue, supra note 38, at 17.
44 Id.
45 Ch. 456, § 1, 2001 N.Y. Laws 898 (McKinney).
47 See id. § 462(2). The legislation reads as follows:
In the event a seller fails to perform the duty prescribed in this article to deliver a disclosure statement prior to the signing by the buyer of a binding contract of sale, the buyer shall receive upon the transfer of title a credit of five hundred dollars against the agreed upon purchase price of the residential real property.
Id.; see also Karl B. Holtzschue, First Case on Property Condition Disclosure Act: Right Result by Faulty Analysis, N.Y. L.J (forthcoming 2003) (stating that "the $500 credit...only applies if the seller fails to deliver the PCDS in a timely manner").
48 See Mark Borten, Property Disclosure Law’s "Opt Out" Provision, N.Y. L.J., July 25, 2002, at 2 (opining that brokers will "persuade a seller to complete and
the future. Consequently, attorneys representing buyers should urge their clients to demand that sellers comply with the statute and deliver the completed form if they are not already doing so. If a seller gives neither the disclosure statement nor the $500 credit, the purchaser can subsequently bring suit upon "closing as a breach of the statute."  

Though many have come to recognize this provision of the statute as a buy-out option, others argue that this portion of the statute requiring a $500 credit is nothing of the sort, but rather a penalty for violating the statute. In practice, however,

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49 Though the statute fails to explicitly provide for a statute of limitations on buyers' remedies, Karl Holtzschue's evaluation concluded that there is, in fact, a statute of limitations. He wrote:

The Real Property Law Section... vigorously supported addition of a one-year statute of limitations on claims under the PCDA. The sponsors refused to agree to this limit on remedies. The result is that the applicable statute of limitations should be three years, under CPLR 214(2) for actions to recover on a liability created or imposed by statute.

Holtzschue, supra note 35, at 17 (footnote omitted).

50 Holtzschue, supra note 47.

51 See Abraham B. Krieger, Property Condition Disclosure Act: Another Interpretation, N.Y. L.J., June 27, 2002, at 4 ("Neither the legislative memoranda nor the statute itself addresses an opt out choice. To the contrary, the seller is affirmatively and expressly obligated to complete the disclosure statement and failure to do so entitles the purchaser to the equivalent of... a private fine for violating the statute.") (emphasis added). Krieger supports his point of view by citing the statute's words: "The language used throughout the statute states: [T]he Property Condition Disclosure Act requires... the seller of residential real property to cause this disclosure statement or a copy thereof to be delivered to a buyer or buyer's agent prior to the signing by the buyer of a binding contract of sale." Id. (alteration in original) (citations omitted). Krieger also leans on the fact that "[t]he $500 is never referred to directly or indirectly as a form of liquidated damages or
regardless of the purported legislative intent or reason for its inclusion, the provision truly has the effect of offering an option for sellers to buy-out of their statutory obligation. When considering the potential liability that may result from certain inquiries logic compels sellers simply to provide the $500 credit rather than expose themselves to risk. Although the statute specifically declares that liability to the buyer may only come to fruition by a "knowingly false or incomplete statement...on [the] form," there is always the risk of litigation, which may result, at a minimum, in costs of defending. When considering the purchase prices of homes in today's market, $500 is not much to sacrifice for this "insurance policy" and the peace of mind it effectuates for sellers.

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52 See Holtzschue, supra note 38, at 16 ("This provision allows the seller to treat
it as a 'buy-out' of the obligation to provide a PCDS and the resulting potential for claims by the buyer.").

53 Several inquiries may turn out to be devastating in terms of liability because they can lead to serious physical injury or even death. For example, the presence of toxic waste underground, the presence of radon, or malfunctioning carbon monoxide detectors are all required to be disclosed under the New York statute. N.Y. REAL PROP. LAW § 462 (McKinney Supp. 2003).

54 Id.

55 Holtzschue, supra note 47 (illustrating a situation where the sellers complied with the statute and nonetheless "got sued and had to pay to defend a litigation").

56 The 2000 census revealed that the average price of a residential dwelling in New York State is $148,700. U.S. CENSUS BUREAU: STATE AND COUNTY QUICKFACTS, http://quickfacts.census.gov/qfd/states/36000.html. (last visited Mar. 1, 2003). It is interesting to note also that 67.9% of the dwellings in New York State are priced at over $100,000. Id. $500 represents .336% of the average purchase price in New York. Id.

57 See Weinstock & Agrippina, supra note 48. These authors opine:

What incentive is there to provide the disclosure when the adverse consequences of completing the disclosure form so far outweigh the penalty for not completing it? Giving the seller the option to buy-out of the disclosure requirement for $500 seems like a small price to pay for the
Consequently, buyers are unlikely to ever receive a disclosure statement; it is simply too easy for sellers to be relieved of their obligations.

Although it is true that this legislation would benefit both buyers and sellers by eliminating the complications caused by "misunderstandings arising from an ad hoc transfer process and conflicting information," the built-in escape hatch methodically promotes non-compliance. This thwarts the legislative intent and severely undermines the statute's effectiveness. Of the thirty-six states that have enacted similar legislation, only Connecticut and Rhode Island have provisions allowing the sellers, in effect, to pay a sum of money to remove themselves from the scope of the legislation. The scarcity of a buy-out provision among other states corroborates the argument that it destroys any compliance that the statute was meant to create.

Rhode Island's legislation drastically diminishes seller compliance with an essentially trivial buy-out price. It provides that a seller's failure to deliver the condition disclosure report "does not void the agreement nor create any defect in title; however, each violation of this statute by [seller or broker] is subject to a civil penalty in the amount of one hundred dollars ($100) per occurrence." Not only is the amount insignificant, it is merely a *civil penalty* rather than a credit against the purchase price to the buyer. In this case, not only is the buyer deprived of a disclosure report, he or she is also deprived of a monetary credit towards the purchase price. Coupled with the fact that a buyer may rescind the purchase agreement in the event he or she discovers a defect not disclosed in the disclosure form, it is difficult to imagine why any seller would comply with the disclosure statute. No rational seller would risk being left with unwanted residential property over a measly $100 civil penalty.

avoidance of potential liability that could be many times more costly.

*Id.*

58 Ch. 456, §1, 2001 N.Y. Laws 898 (McKinney).
59 *See infra* app. I and accompanying notes.
60 *See infra* app. I and accompanying notes.
61 *See R.I. GEN. LAWS §§ 5-20.8-4, 5-20.8-5 (1956).
62 *Id.* § 5-20.8-5
63 *Id.*
64 *See id.* § 5-20.8-4.
Connecticut’s statute, on the other hand, more closely resembles New York’s statute than Rhode Island’s. Its disclosure legislation has a built-in provision requiring that “every agreement to purchase residential real estate, for which a written residential condition report is required . . . shall include a requirement that the seller credit the purchaser with the sum of three hundred dollars at closing should the seller fail to furnish the written residential condition report.”65 Connecticut courts have labeled this credit to the purchaser as a nominal penalty against a seller who fails to provide the report.66 A nominal penalty, however, will not compel compliance with the statute by sellers of residential real estate.67

Though New York’s buy-out option is the highest of the three states, it remains nominal in light of today’s real estate prices.68 The provision merely has the effect of defeating any compliance the law may otherwise have achieved.69 Because the original outline of the Property Condition Disclosure Act did not have this credit, Governor Pataki expressed some apprehension in his veto letter.70 He made clear that something was needed to coerce completion of a disclosure form because “prudent and well-counseled sellers, especially given the potentially enormous

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65 Conn. Gen. Stat. § 20-327c (1999); see also Borten, supra note 48 (commenting on Karl Holtzschue’s statement that New York’s $500 buy-out option is similar to the $300 buy-out that Connecticut has in effect). The provision is basically a compromise arising from “negotiations involving the legislative sponsors, the New York State Bar Association’s Real Property Section Task Force on Disclosure, the National Association of Realtors, and the Governor’s counsel . . . . [The result was a reduction of] the closing credit from $750 to $500.” Id. (citations omitted).

Note that this provision of the Connecticut legislation is phrased as it is because the disclosure form is not statutorily provided, but rather is to be provided by the Consumer Protection Board. Conn. Gen. Stat. § 20-327b (1999). The statute merely sets guidelines with which the board must comply in creating the form. Id.

66 See Steinhoff v. Woodward, No. 549302, 1999 Conn. Super. LEXIS 2076, at *7 (Conn. Super. Ct. Aug. 5, 1999) (“The statute imposes a nominal penalty for the failure to furnish the written residential condition report, but not for misrepresentations made within the report, by requiring that a seller credit the buyer three hundred dollars at the time of closing.”).

67 Both the provisions of Connecticut and New York, which are $300 and $500 respectively, are simply not enough to coerce compliance from sellers of residential real estate.

68 See supra notes 56–57 and accompanying text.

69 See supra notes 56–57 and accompanying text.

consequences stemming from completion of a [property condition disclosure statement], might well determine that the sounder course is to refuse to complete a [property condition disclosure statement]."71 Forcing sellers to give buyers a $500 credit will not achieve this goal; the amount, therefore, should be considerably higher—high enough to make a seller think twice before "opting out."72

Furthermore, Governor Pataki was also quite skeptical about whether or not New York needed to expand the possible liability for sellers of residential real estate.73 Some have made compelling arguments suggesting that the credit is not a worthless buy-out but rather an attempt by the legislature to shift the cost of an engineer's inspection from buyer to seller.74 This could explain why the original suggestion by the Bill's sponsors for an amount of $750 was reduced to $500 after negotiations with Pataki's counsel.75 This argument is further corroborated by the fact that the average cost of a home inspection in New York is more or less equal to the buy-out sum provided for in the legislation.76 Because prospective purchasers are the ones who obtain a home inspection, they are better able to protect themselves from a bad purchase than sellers are able to shield themselves from future liability. When considering the competing interests of each party, leaving buyers to depend on

71 Id.
72 Id.
73 See id. ("[T]he bill would, at the very least, expose sellers to claims of fraud—and the attendant costs of litigation—that cannot be brought under current law. I have not been persuaded that such a significant expansion of the liability of sellers is warranted.").
74 This theory offers a practical explanation for this buy-out option in the Connecticut legislation and has been used by Karl Holtzschue, as well as other prominent people in property law, to explain the inclusion of the similar provision in New York's law. He opines that "[t]he 'buy-out' does not accomplish all the disclosure objectives of the rest of the PCDA, but it does, in effect, provide funding for inspections and tests and for some repairs." Holtzschue, supra note 38, at 16. "[W]hile being far from a perfect disclosure device, [the New York Property Condition Disclosure Act] provides certain buyers with funding for inspections . . . ." Borten, supra note 44.
75 See Holtzschue, supra note 38, at 18 n.9.
76 See infra app. II (demonstrating that the average cost of an inspection in New York is approximately $500). Note that in Connecticut, the buy-out of $300 was equal to the average cost of an inspection at the time the legislation was passed. In Rhode Island, however, this argument would be to no avail because the $100 buy-out is a civil penalty as opposed to a credit to purchaser.
their own home inspection for disclosure and forcing the seller to pay the bill is not such a bad alternative.\textsuperscript{77}

\textbf{B. Failure to Impose Any Duty on Seller to Conduct Investigations or Inspections in Fulfilling His or Her Statutory Obligations}

Another feature of New York's legislation that diminishes its effectiveness is its failure to impose any duty on the seller to investigate or inspect the premises.\textsuperscript{78} First and foremost, the provision is ambiguous on what "investigate or inspect" entails. Until a court has a chance to rule on the scope of this text, its ambiguity will leave sellers uncertain as to how to fulfill their obligation and leave practitioners uncertain as to how best to advise their clients.\textsuperscript{79} Any seller would question whether he or she is absolved from conducting even the most negligible of investigations, such as thumbing through receipts to find an exact date of a roof replacement. Of the thirty-six states with disclosure legislation, only six, including New York, absolve the seller from the duty to perform an independent investigation or inspection of the premises in order to complete the form.\textsuperscript{80} Although the majority of the states never address the issue,\textsuperscript{81} two states have adopted very feasible and effective approaches.

\textsuperscript{77} See Holtzschue, \textit{supra} note 51, at 102 (suggesting that the true purpose of the legislation is to shift the cost of an inspection to the seller since both Governor Pataki and the sponsors of the legislation contemplated and assumed that attorneys would advise sellers of their ability to pay $500 as an alternative to disclosure).

\textsuperscript{78} See N.Y. REAL PROP. LAW § 462(3) (McKinney Supp. 2003) ("Nothing in this article shall require a seller to undertake or provide for any investigation or inspection of his or her residential real property or to check any public records.").

It is logical to absolve the seller from searching public records because such a job is a tedious one, and it is best left to title examiners and insurance companies. With respect to other questions on the disclosure form, a reasonable investigation or inspection would enable the statute to better serve its purpose.

\textsuperscript{79} It is important to note that the only decision regarding the Property Condition Disclosure Act to date did not address this provision, but did however, provide an analysis of the legislation that is faulty in many respects. See Holtzschue, \textit{supra} note 47 (discussing how a Richmond County judge arrived at the right result but gave a faulty analysis of the legislation).

\textsuperscript{80} See \textit{infra} app. I and accompanying notes. These states are Illinois, Maryland, New York, Rhode Island, Tennessee, and Wisconsin. \textit{Id}.

\textsuperscript{81} The failure of a legislature to address this issue of inspection and investigation plausibly implies that a seller is required to perform a reasonable amount of investigation and inspection. For the most part, many questions in the various disclosure statutes cannot be answered without performing some investigation, be it a physical inspection of the premises or retrieval of old
Hawaii, for example, requires the seller to use “good faith and due care” in preparing the disclosure form and explains: “‘In good faith and with due care’ includes honesty in fact in the investigation, research, and preparation of the disclosure statement.” By the text alone, there is no doubt that the legislature intended to impose a duty to investigate on the part of the seller. This approach gives the statute the teeth it needs to assure that disclosure to a prospective purchaser does in fact inform him or her of the conditions of the premises. In the event that sellers are unclear about the level of investigation they are to perform under the statute, Hawaii inserted a provision reading: “[A] seller or seller’s agent shall be under no obligation to engage the services of any person in the investigation, research, or preparation of the disclosure statement.” With unequivocal instructions such as this, sellers and their attorneys recognize that the legislature is not looking for an exhaustive inspection that falls beyond the scope of their abilities or expertise. They are instead looking for a walk-around-and-kick-the-tires-type inspection, which could be performed by the average person.

Idaho also provides for a reasonable degree of inspection by the seller when completing the disclosure statement. Within the stated purpose of the legislation that appears at the top of the disclosure statement, the text reads: “Unless otherwise advised, the Seller has not conducted any inspection of generally inaccessible areas such as the foundation or roof.” Impliedly, this indicates that in completing the statement, the seller will conduct an investigation or inspection of the generally accessible paperwork or invoices.

82 HAW. REV. STAT. ANN. § 508D-9 (Michie Supp. 2002). Note that, like New York, Hawaii also absolves the seller from investigating public records but nonetheless requires good faith investigation and research when making other disclosures regarding the premises. Id. § 508D-15. This is a reasonable alternative to the approach taken by New York and many other states. Absolving the seller from investigating or inspecting the premises diminishes any power the New York statute may have in adequately informing buyer of the condition of the premises to protect them in the transaction.

83 Id. § 508D-9 (emphasis added).

84 This cliché is often used to describe a basic inspection of a used car for a person who is not knowledgeable in automobile mechanics. Hence, it is used here to illustrate that Hawaii requires merely a reasonable inspection that the average seller could perform, particularly, one who is not knowledgeable in real estate.

85 IDAHO CODE § 55-2508 (Michie Supp. 2002).
areas, thus imparting a reasonable responsibility on the seller.\textsuperscript{86} Like Hawaii and almost all other statutes in this area of law, Idaho also requires “good faith” in making the disclosure.\textsuperscript{87}

For sellers in New York who decide to supply the disclosure statement, it is not possible for them to fulfill the requirements of the Property Condition Disclosure Act in a manner satisfying the proclaimed legislative intent without conducting, at a minimum, a reasonable inspection or investigation of the premises.\textsuperscript{88} The majority of the questions ask about areas of the

\textsuperscript{86} Note that while this statute presents an example of a feasible requirement for seller regarding the duty to inspect and investigate the premises, it fails to serve its purpose because of its contradictory language. Although the text of the statute informs the buyer that “the Seller has not conducted any inspection of generally inaccessible areas such as the foundation or roof,” the form goes on to ask seller to “specify problems with the . . . [r]oof condition . . . .” Id. (emphasis added). It can be argued that the form only requires disclosure of defects for which seller has “actual knowledge,” as most states do, however defects for which seller would have “actual knowledge” are limited to those that penetrate the living area, such as a major leak. \textit{Id.} Imagine, for example, a roof whose support beams have been weakened by decay or wood-destroying insects and is ready to collapse under the weight of heavy snow. It is impossible for seller to have actual knowledge of this situation without an inspection. The effect is, then, that disclosure to the buyer is utterly impossible and the legislation does not “promote the public health, safety and welfare and . . . protect consumers” as the legislature intended it to do. \textit{Id.} § 55-2502.

\textsuperscript{87} The requirement of “good faith” actually appears twice in the Idaho Legislation. Section 55-2508, the statutory form that Idaho provides, provides near the bottom that “[t]he Seller is familiar with the residential real property and each \textit{act performed} in making a disclosure of an item of information is made and performed in good faith.” \textit{Id.} § 55-2508 (emphasis added). This infers that the \textit{acts} seller will be \textit{performing} in “good faith” are appropriate investigations and inspections necessary to answer the detailed questions of the disclosure statement.

The same “good faith” requirement also appears in section 55-2516 of the code, which states: “[E]ach act which may be performed in making the disclosure shall be made in good faith. For the purposes of this chapter, good faith means honesty in fact, in the conduct of the transaction.” \textsc{Idaho Code} § 55-2516 (Michie 2000). This text is similar to that of Hawaii, which also defines good faith as honesty in fact. Hawaii, however, removes any ambiguity by defining the “acts” of the seller as “investigation and research” in completing the disclosure form.

\textsuperscript{88} See Ch. 456, § 1, 2001 N.Y. Laws 898 (McKinney) (proclaiming the legislative findings regarding the purpose of the legislation, the problems it seeks to remedy, and what it aspires to do). The legislative findings claim that the “act will significantly improve the transfer process and better serve the interests of all parties to a home purchase.” \textit{Id.} Noteworthy to this discussion is a portion of section 1 which asserts that “[a] uniform disclosure statement will alert both buyers and sellers to aspects of properties which may require attention: environmental, structural, mechanical or other potential problem areas, particularly those not readily observable by a visual inspection of the property.” \textit{Id.} Indeed, when parsing through the disclosure statement, many things about the residence might come to the attention of sellers that would not have otherwise. This is undeniably a good
dwelling that an inhabitant does not come into contact with on a regular basis. For instance, questions twenty-eight and twenty-nine ask the last time a septic tank was pumped and the correct amperage of the electric service. As this information cannot be acquired through a visual inspection of the property, the buyer will ultimately not know the answer unless the seller investigates, learns, and discloses. To answer honestly and in “good faith,” the seller should, at a minimum, take a look at what he or she is about to comment on.

In addition, the Act requires the seller to answer the necessary questions based upon “actual knowledge.” The range of problems to which an owner would have actual knowledge is very limited. While “actual knowledge” is a reasonable standard, without a parallel reasonable investigation or inspection, “actual knowledge” will almost never be sufficient for many of the form’s enumerated items. Consequently, the absence of a duty to investigate coupled with the limited standard of “actual knowledge” impedes the legislative purpose. Though the standard of actual knowledge is appropriate, the feature of the legislation, as it informs sellers of areas which both “require attention” and are not “readily observable.” While the statute completes its function of making seller aware, it fails to facilitate buyer awareness, as sellers are not required even to glance at the particular items that have been brought to their attention.


It could be argued that this provision removing any duty to investigate or inspect the premises is consistent with the seller’s right to answer “unknown” to any question. They could realistically answer “unknown” to any question that requires the slightest bit of investigation or inspection on their part because they are under no duty. Sellers cannot misrepresent and answer “unknown” when the answer is in fact known. In any event, “purchaser[s] who accept[] a PCDS with ‘unknown’ answers should be on notice that the subject matter should be inspected.” Holtzschue, supra note 47.

91 The very first instruction to the seller is to “[a]nswer all questions based upon your actual knowledge.” N.Y. REAL PROP. LAW § 462 (McKinney Supp. 2003). Actual knowledge is defined as “[d]irect and clear knowledge” as opposed to constructive knowledge which is “[k]nowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person.” BLACK’S LAW DICTIONARY 876 (7th ed. 1999). The original bill S.5309 that was presented in 1999 “defined ‘knowledge’ to include constructive knowledge.” Holtzschue, supra note 38, at 17. “Governor Pataki noted that of the twenty-eight states that have enacted similar laws, not one included a constructive knowledge standard.” Weinstock & Agrippina, supra note 48. This is but one of several reasons that Governor Pataki vetoed the first version of the bill.

92 Note that actual knowledge is the standard used by every state with such legislation. See Holtzschue, supra note 47.
legislature should impose, at a minimum, a duty to perform
some reasonable amount of investigation or inspection of the
premises.

C. The Ability of a Prospective Purchaser to Waive His or Her
Rights to a Disclosure Form by Seller

Attributable largely to legislative silence and a booming real
estate market, the ability of a prospective purchaser to waive his
or her rights under the Property Condition Disclosure Act is
apparent. The inflated prices and high demand of today's real
estate market dictate that sellers who refuse to provide
disclosure and also refuse to give a $500 credit to the buyer may
just have their way. Proponents of the legislation and the
legislators themselves could have provided that the disclosure
requirement be non-waivable, as has been done with other New
York laws. Such a provision, however, was not included.

Although it may not be in the best interest of buyers, many
are willing to give up their rights under this legislation if doing
so facilitates obtaining the house they want. In a flourishing
real estate market, chances are that other prospective
purchasers are ready to make offers and willing to waive their
rights. Unfortunately, only five states expressly permit a
buyer to waive their rights under the respective legislation. The
majority of the states, including New York, are silent on the
issue, which leaves open the option depending on market
conditions.

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93 See Weinstock & Agrippina, supra note 48 ("Seller's attorneys should . . .
consider the efficacy of a waiver clause. The PCDA does not state that its
protections are non-waivable. Thus, with proper disclosure and drafting, the parties
can waive all of the effects of the statute.").

94 See Borten, supra note 48. This author wrote:
If the idea behind the PCDA was to achieve meaningful disclosure, the
alternate mechanism of a credit (at a relatively low level) for non-
disclosure merely reflects the political pragmatism involved in enacting the
law. Similarly, had the sponsors wanted to make the PCDA non-waivable,
they could have so provided but ultimately did not. For example, both the
"Used Car Lemon Law" (GBL 198-b) and the "Wheelchair Lemon Law"
(GBL 670) expressly prohibit waivers of their terms. Thus, I conclude that
a buyer may by contract waive the PCDA's provisions.

Id.

95 See Weinstock & Agrippina, supra note 48.

96 Id.

97 See infra app. I and accompanying notes. The more demand there is for
residential homes, the more likely buyers are to waive their rights to disclosure.
Only Maryland and California expressly prohibit a purchaser from waiving his or her rights under the legislation. This ensures that buyers will not be forced into giving up their rights under the pressure of a strong market and also that they can benefit from the legislation as was intended. While a complete ban of waiver appears to be the best-case scenario for buyers, waiver itself is not always adverse to buyer's interests. Evaluating the specific facts of each situation gives a better picture of when waiver is appropriate and when it is not. For example, while waiver between two consumers presumably having equal bargaining power and equal knowledge of the transaction is appropriate, waiver between a consumer and mass developer may not be. Of course, one can argue that the owner of a dwelling will always have superior knowledge about the subject matter of the transaction than a prospective purchaser. In any event, the New York legislature should address the issue

Sellers do not want the hassle or possible liability from disclosure. When there is an abundance of buyers, sellers can sell at the price they want and disclose nothing. Maryland's statute reads: "The rights of a purchaser under this section may not be waived in the contract of sale and any attempted waiver is void." MD. CODE ANN., REAL PROP. § 10-702(j)(1) (Supp. 2001). California, goes a step further and states that "[a]ny waiver of the requirements of this article is void as against public policy." CAL. CIV. CODE §1102(c) (West 2001).

California would seem to have the best prohibition on waiver. However, the court in Loughrin v. Superior Court expressly held that "a knowing and explicit waiver of the benefits of section 1102 et seq. can be effective." 19 Cal. Rptr. 2d 161, 164 (Cal Ct. App. 1993). The logic of the court, which directly contradicts the statute, is rationalized by one line of text appearing in the Legislative Counsel's Digest of the bill "which provides that '[i]f the responsible broker cannot obtain the required disclosures and they are not otherwise delivered or waived, the broker would be required to advise the prospective transferee of his or her rights under the bill.'" Id. To support its view, the court stated:

"Our conclusion that the provisions of sections 1102 et seq. are waivable is enforced by section 1102.13, which provides that a failure to comply with the article will not invalidate the real estate transfer, but will simply subject the person failing to perform to "actual damages suffered by a transferee." The contemplation of failure to abide by the requirements of the statute, as contained within the statute itself, indicates that the purpose of the statute is to facilitate private transactions rather than impose regulations for the general public benefit.

Id. It is apparent that the reasoning of the court is flawed and the inability of prospective purchasers to waive the requirements of the legislation is definite from the statute's plain language. The court here bent over backwards to incorrectly hold that a waiver would be valid only to ultimately find that the parties in this case ineffectively attempted a waiver with an "as is" clause. Id. at 165; see also Lucero v. Van Wie, 598 N.W.2d 893, 897 (S.D. 1999) (citing Loughrin for the proposition that any person may waive an "advantage of a law intended solely for his benefit").
of waiver rather than leaving it wide open as the majority of the states have. Instead, this is yet another weakness in the legislation's present form that gives sellers a way to dodge disclosure.

D. New York's Failure to Include Condominiums and Cooperative Apartments Within the Scope of the Act

Among the thirty-six states legislating in this area, New York is the only state that excludes condominiums and cooperative apartments from the scope of its statute. All other states include such units expressly or, if silent on the issue, in the statutory definition of a residential dwelling. The ability of New York's legislation to provide information for buyers as a class about the condition of their prospective purchase is severely impaired by the fact that large portions of the sales taking place are statutorily excluded. With the applicable legislation excluding the coverage of these units, prospective buyers of such residences are left with no protective legislation, as the condominium association or cooperative corporation has no duty to disclose anything to them. The Real Property Law Section of the New York State Bar Association has expressed concerns over the statute's exclusion of condominiums and cooperatives. Indeed, there are many problems that can develop in such a unit that are the responsibility of the respective owners and should be disclosed by them when attempting to sell.

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99 See infra app. 1 and accompanying notes.
100 All of the legislation on disclosure applies to one to four-family residential dwellings, with the exception of Idaho, which "also applies to real property which has a combined residential and commercial use" in addition to one to four-family residential dwellings. IDAHO CODE § 55-2503 (Michie 2002). By definition, a one-family dwelling will include a condominium and cooperative apartment.
101 "On July 8, 1999, the Real Property Law Section issued a Legislation Report in opposition to Senate Bill S.5039-A, objecting to . . . the exclusion of condominiums and cooperatives. . . ." Holtzschue, supra note 38, at 17 (referring to Real Property Law Section, Report No. 76, 28 REAL PROP. L.J. 67, 68 (2000)). "If disclosure is so important for home sales, why are sales of condominiums and cooperative apartments excluded?" Id.
102 There is a need for disclosure with respect to condominiums and cooperatives. Imagine a condominium with carpet flooring that has been flooded. Although there might not be visible evidence of water damage in the living area, it is inevitable that the moisture in the floor panels and the base of the rug will form mold. This mold can lead to number of problems in the future, such as structural damage and allergic reactions. At the time of sale, neither the seller nor the
Although the disclosure form that New York uses may be excessively comprehensive for condominiums and cooperatives, prospective purchasers of such units should be entitled to the same benefits of disclosure as those purchasing traditional one to four-family dwellings. Realistically, the lower prices of condominium units or cooperative apartments are likely to attract first time purchasers who would most need protective legislation. The only logical rationale that may explain why condominiums and cooperatives are excluded is that the exteriors and many working systems of such units are the responsibility of the condominium association or cooperative corporation. Consequently, a defect discovered after closing would not present a financial burden to the new owner but would nonetheless cause other inconveniences, such as the scheduling of repairs or the necessity of alternate housing while repairs are performed. This type of inconvenience should not be disregarded, as immediate and continuous occupation is often crucial to a buyer’s decision to purchase.

A separate form that requires sellers of condominiums and cooperative apartments to disclose information that is within the scope of their knowledge would seem to be a reasonable solution. It would benefit buyers, for example, if a seller was required to disclose defects such as water damage, smoke damage, rodent or pest infestation, or the condition of the smoke and carbon monoxide detectors. Sensibly, questions such as the presence of toxins in the soil, the presence of lead pipes, and the condition of the plumbing are not within the scope of the seller’s knowledge and should not be included in the statement. Pennsylvania has

condominium association will be required to disclose the flood occurrence. As long as the seller does not make any misrepresentations, active concealments, or comes under a duty to speak, he has no duty to disclose despite his actual knowledge of the damage. The purchasers will have a unit with water damage that may lead to problems later on and which was not discoverable by a reasonable inspection. This result is inequitable and could be prevented if the Property Condition Disclosure Act included condominiums and cooperatives.

Consider the flooded condominium unit, supra note 102. When and if it is discovered that the floorboards and beams underneath the carpet need to be replaced because of decay, the new owner will presumably need to vacate the unit for the duration of the repair, which may take weeks or months. The same can happen with any serious repair. A new buyer should know what he or she is getting into, regardless of whether someone else will pick up the tab.

Oftentimes, if a buyer needs to occupy the dwelling immediately, the ability of a seller to close immediately will sway the buyer to agree, especially if the other potential buyers are unable to close until a later date.
approached this issue in a favorable manner. Pennsylvania's disclosure legislation provides that sellers of condominiums or cooperatives "shall be obligated to make disclosures under this chapter only with respect to the seller's own unit and shall not be obligated by this chapter to make any disclosure with respect to any common elements or common facilities of the condominium or cooperative."\textsuperscript{106} This approach is a feasible and moderate alternative to New York's strict approach. Accordingly, the New York legislature should provide for a similar limitation or adopt a separate disclosure form for the sale of condominiums and cooperative apartments.

\section*{E. Failure of New York to Impose a Duty on Sellers to Disclose Information About Convicted Sex Offenders in the Neighboring Area}

For families with young children, the presence of a convicted sex offender in their neighborhood is a matter of utmost concern.\textsuperscript{106} Although it is praiseworthy that the New York legislature was concerned with the health and safety of prospective purchasers by requiring sellers to disclose the presence of underground toxins, lead, asbestos, and radon, it is unusual that the legislature chose not to address the disclosure of information affecting the safety of young children. The presence of a convicted sex offender is a matter of significant public concern, evidenced by the enactment of Megan's Law by the federal government, which requires such persons to register in the locality in which they live so as to alert neighbors of their presence.\textsuperscript{107} Despite the importance of this disclosure to

\begin{footnotesize}
\textsuperscript{106} 68 PA. CONS. STAT. § 7302 (Supp. 2002).
\textsuperscript{107} For some people, the fact that the home they intend to purchase has been the site of a death, murder, crime, or has been formerly occupied by an H.I.V. patient is of crucial importance, while the presence of convicted sex offenders in the neighborhood may be insignificant. New York's legislation does not address the issue, and the few states that do, maintain that such information is not material to the transaction and therefore need not be disclosed to a prospective buyer. See infra app. I and accompanying notes.
\textsuperscript{107} See 42 U.S.C. § 14071 (2002). The code provides:
\begin{enumerate}
\item In general.
\begin{enumerate}
\item State guidelines. The Attorney General shall establish guidelines for State programs that require—
\begin{enumerate}
\item a person who is convicted of a criminal offense against a victim who is a minor or who is convicted of a sexually violent offense to register a current address for the time period specified in subparagraph (A) of
\end{enumerate}
\end{enumerate}
\end{enumerate}
\end{footnotesize}
prospective purchasers, it can be easily overlooked as browsing buyers become engulfed in other matters such as condition of title, structure, amenities, property taxes, and other matters that drive the real estate market.

New York, unfortunately, follows strict caveat emptor regarding this issue and has ruled accordingly. In the case of Glazer v. LoPreste,108 the Appellate Division, Second Department, held that the seller and broker of a residential home in New York were under no duty to disclose that a convicted sex offender lived across the street.109 The court reiterated the well-known rule that "New York imposes no duty on either the seller or the seller's agent to disclose any information concerning the premises unless there is a confidential or fiduciary relationship between the parties or some conduct on the part of the seller which constitutes active concealment."110 Having been decided in the midst of the legislative debate regarding the Property Condition Disclosure subsection (b)(6) of this section; and
(B) a person who is a sexually violent predator to register a current address unless such requirement is terminated under subparagraph (B) of subsection (b)(6) of this section.

_Id._ 108 278 A.D.2d 198, 717 N.Y.S.2d 256 (2d Dep't 2000).

109 The actual complaint by plaintiff alleged that defendant "fraudulently misrepresented that the house was a good place to raise children, and fraudulently concealed the fact that a sex offender lived in the neighborhood." _Id._ at 198, 717 N.Y.S.2d at 257. The court found that the "plaintiffs failed to state a cause of action for active concealment" and did not present evidence to prove "effort [by them] to discover the character of the surrounding neighborhood, or that the defendants thwarted [their] efforts to discover facts about the neighbors." _Id._ at 199, 717 N.Y.S.2d at 258. The court found that the statements by the seller were merely opinions and "the information . . . allegedly withheld was not 'peculiarly within the knowledge of the seller or unlikely to be discovered by a prudent purchaser exercising due care with respect to the subject transaction.' " _Id._, 717 N.Y.S.2d at 258 (citing Stambovsky v. Ackley, 169 A.D.2d 254, 259, 572 N.Y.S.2d 672, 676 (1st Dep't 1991)). A majority of the court's reasoning rested on the fact that the plaintiff could have easily discovered the information in "[l]ocal newspapers [which] had been publishing articles regarding the charges against the neighbor and his subsequent plea of guilty for at least two years prior to the sale in question." _Id._, 717 N.Y.S.2d at 258; see also William D. Harrington, 2000-2001 Survey of New York Law: Business Associations, 52 SYRACUSE L. REV. 201, 212 (2002) (discussing the Glazer case in terms of the duty owed by the agent to his principal in the broker context).

110 _Glazer_, 278 A.D.2d at 198, 717 N.Y.S.2d at 257 (citations omitted).
Act, it is not unreasonable to expect that this would have been addressed by the legislature; it was not.\footnote{111}

If full disclosure of the presence of a convicted sex offender in the neighborhood was considered an unfair duty to impose on a seller,\footnote{112} a compromise between the competing interests of the buyer and seller would be ideal. Of the many states legislating on disclosure, five states have addressed the issue.\footnote{113} Nevada's statute asserts that information regarding the presence of convicted sex offenders is immaterial to the selling transaction and therefore imposes no duty on sellers to disclose any knowledge in their possession.\footnote{114} Virginia similarly imposes no duty on sellers to disclose this information but informs prospective purchasers that it is their duty to get information regarding the presence of sex offenders in the neighborhood.\footnote{115} Alaska, Connecticut, and California adopt a reasonable approach, requiring the seller to disclose where such information can be located and how a buyer would proceed in retrieving it.\footnote{116} Although a buyer does not get an answer directly from the seller,
this requirement keeps the issue at the forefront of buyers' minds and encourages sellers to find out for themselves. In New York, once sellers have actual knowledge, they are required to answer truthfully if a prospective purchaser specifically inquires about it.\footnote{N.Y. REAL PROP. LAW § 462 (McKinney Supp. 2003).} In essence, while the statute may only require the seller to provide the information that would allow the buyer to investigate the presence of a sex offender, it will, in some cases, have the practical effect of requiring disclosure to the buyer. Regardless, it acts as a reminder to buyers in the event that they overlook it. This type of information should be disclosed to buyers; the safety of children is of paramount importance. Therefore, the state legislature should address this issue accordingly.

CONCLUSION

For all intents and purposes, the New York Property Condition Disclosure Act has too many missing parts to function properly. The buy-out provision is inadequate; the statute imposes no duty on the seller to investigate or inspect the premises. Likewise, the issue of waiver by buyers is not addressed. Additionally, there is neither a disclosure requirement for sellers of condominiums and cooperative apartments nor a requirement to disclose the presence of convicted sex offenders. While this statute's operation as a "whole" seeks to "increase [a buyer's and seller's] ability to obtain information concerning a home purchase and sale,"\footnote{Ch. 456, § 1, 2001 N.Y. Laws 898 (McKinney).} it fails for the lack of these essential parts.

As is the case with all legislation, the individual provisions must work and come together for a unified purpose. In the event that one part is missing, the scheme of the entire legislation will inevitably fail. The Property Condition Disclosure Act fails as a whole because of the abundance of loopholes permitting sellers to evade compliance. The only class actually protected by this legislation is New York's real estate brokers, who have only a duty to "timely inform" both buyers and sellers of their rights and obligations under the Act.\footnote{N.Y. REAL PROP. LAW § 466 (McKinney Supp. 2003). With respect to buyer, "timely" means before buyer's signing of a binding contract of sale. \textit{Id}.} Once a broker completes this duty, he or she "[will] have no further duties under [the Act] and
shall not be liable to any party for a violation [thereof].”120 If the intent of the legislature was truly to increase the flow of information from sellers to prospective purchasers, the statute needs to be overhauled. Until then, the common law of New York will dictate, and this legislation will continually be sidestepped.

120 Id.
APPENDIX I
FIFTY STATE SURVEY ANALYZING REAL ESTATE DISCLOSURE LEGISLATION

The following chart presents a detailed breakdown of critical features in residential disclosure statutes that have been enacted in many states after the first enactment by California. It is specifically designed to compare New York's approach with that of other states regarding several features of the legislation.

### TABLE 1
50 STATE ANALYSIS OF RESIDENTIAL DISCLOSURE LEGISLATION

<table>
<thead>
<tr>
<th>State</th>
<th>Is any investigation/inspection required by seller?</th>
<th>What are the remedies available to a transferee?</th>
<th>Does the statute apply to condos &amp; co-ops?</th>
<th>Is there a statute of limitations?</th>
<th>Is there a penalty for failure to disclose?</th>
<th>Must seller disclose psychological factors (i.e., suicide, murder)?</th>
<th>Might the broker face liability?</th>
<th>When is seller required to disclose?</th>
<th>Can seller provide disclaimer rather than disclosure?</th>
<th>Can buyer waive rights to disclosure?</th>
<th>What are broker's duties under the statute?</th>
<th>Must seller disclose presence of sex offender?</th>
</tr>
</thead>
<tbody>
<tr>
<td>NY(^1)</td>
<td>NO</td>
<td>Actual damages for seller's willful noncompliance</td>
<td>NO</td>
<td>3 years (^2)</td>
<td>$500 credit to purchaser due at closing</td>
<td>N/S</td>
<td>NO</td>
<td>Before contract of sale</td>
<td>N/S</td>
<td>N/S</td>
<td>To inform parties of their rights and obligations</td>
<td>N/S</td>
</tr>
<tr>
<td>AL</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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2. *See supra* note 44.
<table>
<thead>
<tr>
<th>State</th>
<th>Rescission</th>
<th>Before Buyer</th>
<th>NO, but must disclose where information is obtained</th>
</tr>
</thead>
<tbody>
<tr>
<td>AK</td>
<td>Yes, N/S</td>
<td>N/S, N/S, N/S</td>
<td>N/S, N/S, N/S</td>
</tr>
<tr>
<td>AZ</td>
<td>No</td>
<td>N/S</td>
<td></td>
</tr>
<tr>
<td>AR</td>
<td>No</td>
<td>N/S</td>
<td></td>
</tr>
<tr>
<td>CA</td>
<td>No</td>
<td>Yes, 2 yrs, N/S</td>
<td>As soon as practicable before execution of contract, N/S, NO, To inform parties of their rights and obligations</td>
</tr>
<tr>
<td>CO</td>
<td>No</td>
<td>N/S</td>
<td></td>
</tr>
<tr>
<td>CT</td>
<td>N/S</td>
<td>Yes, $300 credit to purchaser due at closing, N/S</td>
<td>N/S, N/S, N/S</td>
</tr>
</tbody>
</table>

3 Alaka Stat. §§ 34.70.010–34.70.200 (Michie 2002).
5 Cal. Civ. Code § 2079 (Deering Supp. 2002). This statute of limitations only applies to actions against brokers who allegedly fail to perform their duty of disclosure. Id.
| DE⁹ | N/S | No cause of action for defects the seller has disclosed or that come up after contract but before closing or defects that come after closing | N/S | N/S | N/S | N/S | Before seller signs the listing agreement | N/S | N/S | To provide disclosure to buyer at the time of buyer's offer (seller may provide) | N/S |
| DC¹⁰ | N/S | Rescission within 5 calendar days after receipt of disclosure | N/S | N/S | NO | N/S | NO | At the time a purchase agreement is signed | N/S | N/S | N/S | N/S |
| FL | No disclosure legislation in this state. |
| GA | No disclosure legislation in this state. |
| HI¹¹ | YES: to investigate and research in good faith, but does not have to search public records | Rescission:  
- Up to 15 days after receipt of disclosure statement  
- Up to 15 days after an amendment to statement  
  Actual damages, attorney fees, court costs:  
  For misrepresentation | YES | 2 years | N/S | Not material and may be excluded from representation | YES: for failure to disclose an adverse fact that is contradictory to the seller's disclosure | 6 months before gr 10 days after entering into a purchase contract | N/S | N/S | To inform the buyer of his rights | N/S |

| ID  | YES: limited to accessible areas; not generally inaccessible places | Recission within 3 days of:  
• Receiving disclosure,  
• Receiving an amendment Damages for willful or negligence noncompliance | YES | N/S | N/S | N/S | YES: all of his other duties remain the same | Within 10 days of seller's acceptance of buyer's offer | N/S | N/S | N/S | N/S |
|-----|------------------------------------------------------------------|---------------------------------------------------------------------------------|-----|-----|-----|-----|------------------------------------------|-------------------------------------------------|-----|-----|-----|-----|
| IL  | NO                                                               | Recission:  
• Up until 3 days after the receipt of the disclosure, OR  
• For failure to provide disclosure  
• After amendment if seller had actual knowledge of problem earlier  
Actual damages for willful violations | YES | N/S | N/S | N/S | Before signing of a written agreement requiring buyer to take property | N/S | N/S | N/S | N/S | N/S |
<p>| IN  | N/S                                                              | Buyer can nullify agreement if a disclosure form submitted after an offer is made to seller discloses a defect | N/S | N/S | N/S | NO | N/S | N/S | N/S | N/S | N/S | N/S |</p>
<table>
<thead>
<tr>
<th>State</th>
<th>Requirement</th>
<th>Action</th>
<th>Action</th>
<th>Action</th>
<th>Action</th>
<th>Action</th>
<th>Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>IA</td>
<td>Revoke the offer or withdraw acceptance if the form is not timely delivered Actual damages for willful violation of the statute</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td>YES: For failure to disclose defects about which broker had actual knowledge and not disclosed by seller</td>
<td>N/S</td>
</tr>
<tr>
<td>KS</td>
<td>Kansas requires only brokers to disclose to all prospective purchasers all adverse material facts actually known by him or her</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td>YES: for assisting seller in disclosure resulting in buyer's detriment At the time of listing agreement N/S N/S</td>
<td>To deliver disclosure to buyer within 72 hours of written and signed offer to purchase</td>
</tr>
<tr>
<td>KY</td>
<td>No disclosure legislation in this state.</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td>YES: for failure to perform duties under statute N/S N/S</td>
<td>To inform parties of their rights and obligations</td>
</tr>
<tr>
<td>ME</td>
<td>Maine only requires brokers to give a written disclosure statement that is meaningful and to disclose to buyer any material defect of which the broker has actual knowledge.</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td>Addressed in broker license laws: Not material and need not be disclosed YES: for failure to perform duties under statute On or before entering into contract</td>
<td>YES NO To inform parties of their rights and obligations</td>
</tr>
<tr>
<td>MD</td>
<td>NO Rescission only if seller does not disclose on or before contract signing</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td>YES: for failure to perform duties under statute N/S N/S</td>
<td>To inform parties of their rights and obligations</td>
</tr>
<tr>
<td>MA</td>
<td>No disclosure legislation in this state.</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td>YES: for failure to perform duties under statute N/S N/S</td>
<td>To inform parties of their rights and obligations</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>State</th>
<th>Disclosure Requirement</th>
<th>Rescission if seller fails to provide disclosure in timely manner</th>
<th>YES</th>
<th>N/S</th>
<th>N/S</th>
<th>N/S</th>
<th>YES: If broker acts in collusion with seller to violate statute</th>
<th>Before binding contract of sale</th>
<th>N/S</th>
<th>N/S</th>
<th>To inform parties of their rights and obligations</th>
<th>N/S</th>
</tr>
</thead>
<tbody>
<tr>
<td>MN</td>
<td>Minnesota requires sellers to disclose only the presence of wells and hazardous materials on the property.</td>
<td>N/S</td>
<td>YES</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td>To inform parties of their rights and obligations</td>
<td>N/S</td>
<td></td>
</tr>
<tr>
<td>MO</td>
<td>No disclosure legislation in this state.</td>
<td>N/S</td>
<td>YES</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td>As soon as practicable before execution of contract</td>
<td>N/S</td>
<td>N/S</td>
<td>To inform parties of their rights and obligations</td>
<td>N/S</td>
</tr>
<tr>
<td>MT</td>
<td>Montana has a very limited disclosure requirement: the seller must disclose results of radon testing only</td>
<td>N/S</td>
<td>Actual damages; attorneys fees; court costs</td>
<td>YES</td>
<td>1 year</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td>On or before entering into a contract</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
</tr>
</tbody>
</table>

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<table>
<thead>
<tr>
<th>State</th>
<th>Legislation</th>
</tr>
</thead>
<tbody>
<tr>
<td>NV</td>
<td>Rescission for failure to disclose; treble damages for failure to disclose known defects</td>
</tr>
<tr>
<td>NH</td>
<td>New Hampshire has a very limited disclosure statute requiring seller to disclose information regarding the water supply and the sewage disposal system only.</td>
</tr>
<tr>
<td>NJ</td>
<td>New Jersey has a very limited disclosure statute requiring seller to disclose the presence of off-site hazards for new construction.</td>
</tr>
<tr>
<td>NM</td>
<td>No disclosure legislation in this state.</td>
</tr>
<tr>
<td>NC</td>
<td>Rescission: right to rescind is waived if not exercised timely</td>
</tr>
<tr>
<td>ND</td>
<td>No disclosure legislation in this state.</td>
</tr>
<tr>
<td>OH</td>
<td>Rescission: upon receipt of an amendment to disclosure after parties have contracted</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>State</th>
<th>Recission</th>
<th>Rescission after buyer receives disclosure form</th>
<th>Actual damages:</th>
<th>2 years</th>
<th>N/S</th>
<th>N/S</th>
<th>NO</th>
<th>Whenever a buyer makes a written offer to purchase</th>
<th>YES: separate form provided</th>
<th>N/S</th>
<th>N/S</th>
<th>N/S</th>
</tr>
</thead>
<tbody>
<tr>
<td>OK</td>
<td>N/S</td>
<td>Rescission:</td>
<td>NO:seller willfully OR negligently violates statute</td>
<td>7 days to revoke</td>
<td>N/S</td>
<td>N/S</td>
<td>NO</td>
<td>YES: for failure to disclose known defects not disclosed to buyer</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
</tr>
<tr>
<td>PA</td>
<td>NO</td>
<td>Actual damages:</td>
<td>Transfer is not invalidated by seller's failure to disclose</td>
<td>2 years</td>
<td>N/S</td>
<td>N/S</td>
<td>YES: for failure to disclose known defects not disclosed to buyer</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td></td>
</tr>
<tr>
<td>RI</td>
<td>NO</td>
<td>Affirmative investigations not required</td>
<td>Not material; seller has no duty to disclose but cannot misrepresent</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td>As soon as practicable, but always prior to signing any agreement</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td></td>
</tr>
</tbody>
</table>

This state has new legislation that has just been enacted on July 1, 2002 and the disclosure form has not yet been released.

34 R.I. Gen. Laws §§ 5-20.8-1 to 5-20.8-11 (2002). This state requires seller to disclose a lead paint report if one has been made. Id. § 5-20.8-2.
<table>
<thead>
<tr>
<th>State</th>
<th>Disclosure</th>
<th>Time Limit</th>
<th>Recovery</th>
<th>Duty to Disclose</th>
<th>Prior to</th>
<th>Common Law Consideration</th>
<th>To inform parties of their rights and obligations</th>
</tr>
</thead>
<tbody>
<tr>
<td>SD</td>
<td>N/S</td>
<td>N/S</td>
<td>NO</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
</tr>
<tr>
<td>TN</td>
<td>NO</td>
<td>N/S</td>
<td>Yes</td>
<td>N/S</td>
<td>N/S</td>
<td>Yes: for failure to disclose known adverse facts</td>
<td>Prior to the acceptance of a real estate contract</td>
</tr>
<tr>
<td>TX</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td>On or before entering into a binding executory contract</td>
<td>YES: waiver will permit seller to give a disclaimer</td>
<td>N/S</td>
</tr>
<tr>
<td>UT</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
</tr>
<tr>
<td>VT</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
</tr>
<tr>
<td>VA</td>
<td>NO</td>
<td>1 year</td>
<td>No</td>
<td>N/S</td>
<td>N/S</td>
<td>Yes: duty to disclose adverse facts actually known by him - not liable for false info provided to him by the seller</td>
<td>Prior to acceptance of real estate purchase contract</td>
</tr>
</tbody>
</table>

---

35 S.D. Codified Laws §§ 43-4-37 to 43-4-44 (Michie 2002).
38 Va. Code Ann. §§ 55-517 to 55-525 (Michie 2002). This state requires disclosures to be made on new homes made when there is a known defect. Id. § 55-524.
<table>
<thead>
<tr>
<th>State</th>
<th>N/S</th>
<th>Rescission events</th>
<th>YES</th>
<th>N/S</th>
<th>N/S</th>
<th>N/S</th>
<th>YES</th>
<th>N/S</th>
<th>N/S</th>
<th>N/S</th>
</tr>
</thead>
<tbody>
<tr>
<td>WA</td>
<td>N/S</td>
<td>Within 3 days of getting report, OR After an unfavorable amendment to disclosure</td>
<td>YES</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td>YES</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
</tr>
<tr>
<td>WV</td>
<td></td>
<td>No disclosure legislation in this state.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>WI</td>
<td>NO</td>
<td>Rescission</td>
<td>YES</td>
<td>N/S</td>
<td>N/S</td>
<td>N/S</td>
<td>NO</td>
<td>Within 10 days of contracting</td>
<td>N/S</td>
<td>YES</td>
</tr>
<tr>
<td>WY</td>
<td></td>
<td>No disclosure legislation in this state.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

38 WASH. REV. CODE ANN. §§ 64.06.005–64.06.900 (West 2002).
40 WIS. STAT. ANN. §§ 709.01–709.08 (West 2002).
APPENDIX II
HOME INSPECTION INFORMATION

Serving the Five Boroughs, Long Island, Rockland & Westchester Counties

INSPECTION INCLUDES:

- Foundations
- Roofs / Gutters
- Exterior Siding
- Windows / Doors
- Attic / Insulation / Ventilation
- Porches / Decks
- Sidewalks / Driveways
- Garage
- Plumbing & Fixtures
- Heating / Cooling
- Electric and Fixtures
- Basement / Crawl Spaces
- Pest Inspection
- Radon Inspection
- Know in advance possibly any costly repairs and alternatives

All for only $525.00
Price List for Homes up to 3000 sq. ft.

A. **General Inspection HT – 1**
Includes:
- Whole House Inspection .................................................. Included
- HVAC ............................................................................... Included
- Pest .................................................................................. Included
- Radon ............................................................................... Included
Total: $525.00 .................................................................... COUPONS ACCEPTED

B. **Townhouse Inspection HT – 2**
Includes:
- Town House Inspection ...................................................... Included
- HVAC ............................................................................... Included
- Pest .................................................................................. Included
- Radon ............................................................................... Included
Total: $395.00 ................................................................. COUPONS ACCEPTED

C. **CoOp / Condos HT – 3**
Includes:
- CoOp / Condo Inspection .................................................... Included
- HVAC ............................................................................... Included
- Pest .................................................................................. Included
Total: ................................................................................ $275.00

**ADDITIONAL INSPECTIONS:**
- Pest Inspection(Insects/wood) ........................................... $125.00
- Radon – Canisters ......................................................... $125.00
- Well .................................................................................. $150.00
- Septic – Dye/Stress Test .................................................... $150.00
Septic – Open Pit Test .................................................. $350.00
Water: Radon, Bacteria .......................................... $150.00 - $300.00
Others ................................................................................. Call

- One call does it all
- Inspections are performed on a timely and professional manner to save you time.
- We guarantee our inspections by holding the realtor harmless of any claims on our part.
- We offer the homebuyer discount coupons redeemable at the time of inspection only.