Litigating Fraud Claims
Between Buyers and Sellers of Real Estate

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Litigating Fraud Claims
Between Buyers and Sellers of Real Estate*

I. COMMON LAW

A. Overview of "Fraud" at Common Law

"Fraud consists of anything calculated to deceive, whether by single act or combination, or by suppression of truth, or suggestion of what is false, whether it be by direct falsehood or innuendo, by speech or silence, word of mouth, or look or gesture. . . . It is any artifice by which a person is deceived to his disadvantage. . . . It may be by false or misleading allegations or by concealment of that which should have been disclosed, which deceives or is intended to deceive another to act upon it to his detriment." Silverman (quoting Delahanty). See also Reichert's Estate.

Pennsylvania courts have recognized at least three distinct species of "fraud" in connection with the sale of real property:

- "Intentional (or 'Positive') Misrepresentation": intentionally or recklessly making a false representation as to any fact regarding the transaction.
- "Concealment": concealing facts in a manner calculated to deceive.
- "Non-Privileged Failure To Disclose": failing to disclose a fact that the seller has a preexisting obligation to disclose.

DeJoseph, Roberts, Sewak, Sevin, Blumenstock, Fleishman. The courts have also recognized a related cause of action:

- "Innocent Misrepresentation": making a misrepresentation (without knowing that the representation is false and without intending to deceive) that proves to be material to the buyer's decision to proceed with the transaction.

Boyle, DeJoseph (citing, inter alia, Restatement of Contracts § 476), LaCourse. This has sometimes been called "Constructive Fraud." Whether it should be treated as a species of "fraud" is debatable because, unlike the other three, it does not require scienter. There is no need to show "anything calculated to deceive."

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B. Elements and Examples

1. Intentional Misrepresentation.

a. Overview

The elements of "Intentional Misrepresentation" have been expressed variously:

> Stated as five elements: (1) a misrepresentation (2) that is fraudulently uttered, (3) with intent to induce recipient to act, (4) resulting in justifiable reliance by recipient (5) proximately causing damage. Sevin, Lokay, Woodward, Delahanty, Bortz.

> Stated as six elements: (1) a misrepresentation (2) that is material to the transaction at hand, (2) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false, (4) with the intent of misleading another into relying on it, (5) resulting in justifiable reliance upon it (6) that proximately causes injury. Sewak (quoting citing Gibbs), GMH Associates, Blumenstock, Mill Run Associates.

Scienter is required; the plaintiff must show that the representation was made with knowledge of its falsity, or in conscious ignorance of the truth, or with reckless disregard for the truth. Delahanty, Silverman. A misrepresentation can be deemed fraudulent if the seller either (i) knows that he or she does not have the confidence stated or implied by his or her representation in the truth of the facts asserted, or (ii) knows that he or she does not have the basis, stated or implied by his or her representation, to make the representation. Connelly (citing Restatement of Torts § 526).

b. Facts Held To Be Actionable

- Representing that basement grey water drained to a field under the driveway, when it actually drained, via an illegal toll, into a nearby creek. Potter.

- Representing that a house was in "good condition, in need of only minor repairs that could be done by anyone handy with tools," when in fact the house was termite-ridden and in a weakened and generally run-down condition. Connelly (seller happened to be professional real-estate agent).

- Knowingly misrepresenting that the boundary line of the property fronted on a public highway, when in fact the state had condemned a strip of land between the property and the highway. Horridge (court noted that "single misrepresentation as to the boundary line . . . suffice[d] to establish the element of fraud").

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- Representing that an entire parcel was zoned commercial, when a portion was actually zoned residential. Silverman.

- Representing, in response to buyers' inquiry as to the property's well-water supply, that the buyer "wouldn't have to worry about it" and that the water supply was fully adequate for the house, when in fact the seller had instructed its well digger to stop at 140 feet (at which point the well produced only half a gallon of water per minute). Musser.

- Marketing property as having two income-producing rental units when the municipality had never approved the property for multiple rental units. Floyd.

c. Facts Held To Be Non-Actionable

- Misrepresenting that the price for which the buyer was being offered a new home was the "lowest" price for which homes of that model had been offered, when in fact other homes of the same model had sold for $3,000 less. Bowman.

- Misrepresenting the ethnic make-up of a neighborhood. McCrory.

- Describing the installation of two sump pumps as having been a "precaution," without explaining that the sump pumps were sometimes necessary to keep the property dry. Blumenstock (buyers alleged that the fact that the sump pumps sometimes were needed meant that there was a "water problem" and that they would not have purchased the property had they been aware of it).

- Responding generically that there were "no problems" with a commercial property when, in fact, stagnant water consisting of run-off and sewage occasionally accumulated on one portion of the property. Youndt.

d. Miscellany

i. A misrepresentation must regard a positive fact; a misrepresentation is not actionable if it is a statement of law or mere "sales talk," "trade talk," "puffing," or a general statement of opinion. Connor, Field (citing, inter alia, Penn-Allen), Richardson. But the circumstances of the representation (e.g., representation that an adjoining house would be torn down) can lead to the inseparable, and therefore actionable, "blending" of fact and opinion or of fact and law. Hughes, LaCourse, Lake.

ii. A breach of a promise to do something in the future cannot provide the basis for a claim of fraudulent misrepresentation. Cella.

iii. It has sometimes been said that an intentional misrepresentation (or concealment or non-disclosure) is actionable even if the

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factual issue was not material to the transaction (i.e., that the misrepresentation/concealment/non-disclosure was not an inducement to the plaintiff in entering the contract). DeJoseph (citing, inter alia, Restatement of Contracts §§ 470, 471, 476), Silverman. General tort principles of fraud, however, require at least a modicum of "materiality," because the plaintiff must prove justifiable reliance. Woodward, Borelli (citing Restatement of Torts § 525), Silverman (citing, inter alia, Restatement (Second) of Torts § 537 & comment (a)). "Materiality" is, indeed, an expressed element in the six-element formulation (set forth above) of Gibbs.

iv. A recipient of a fraudulent misrepresentation is justified in relying upon it, even though in its absence he or she might have ascertained the truth through investigation, unless the recipient knows the representation to be false or its falsity would become obvious upon "a cursory examination or investigation." Silverman (citing Restatement (Second) of Torts §§ 540, 541 & comment (a)). See also Fatich.

v. Third parties whose reliance on a fraudulent misrepresentation was "specifically foreseeable" have a direct cause of action for damages therefor. Woodward.

2. Concealment

a. Overview

Active "Concealment" of defects that the seller knows to be material to the buyer is legally equivalent to a positive misrepresentation that the item is not defective. Byler (citing, inter alia, Restatement (Second) of Torts § 550), Mongelluzzo, Silverman (quoting Delahanty and Neuman), Clement. Concealment frequently is found in statements made or actions taken by sellers in response to buyers' inquiries, as inquiries evidence the materiality of the matters at issue.

b. Facts Held To Be Actionable

- Painting over, spackling, covering, and otherwise disguising termite damage. DeJoseph, Garofalo, Baker.

- Skillfully patching and re-plastering cracks in walls to hide structural defects, and placing furniture and other items near the walls to prevent inspection (coupled with misrepresentation that the house was in "A-1" condition and built on solid ground). Della Penna.

- Greatly understating, in response to a buyer's inquiry about water damage, the property's susceptibility to floods. Arcari.

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- Indicating, in response to a buyer's inquiry about drainage and sewage conditions, that the property had no drainage problem and that the buyers would have no trouble obtaining septic permits from the municipality, without indicating that (as the seller knew) septic problems were prevalent in the immediate area. Hughes.

- Indicating, in response to a buyer's direct inquiry about whether there was trouble with the water supply to a rural property (given the seller's representation that the property was served by a well), that there was "no problem" with the system, when, in fact, the sole source of water was a spring located 200 yards off the property. Mongelluzzo.

- Indicating, in response to the plaintiffs' inquiry as to whether there were any major problems with the house, that there were holes in some screens and a leaky faucet, when, in fact, the house was so susceptible to floods that during any heavy rainfall water flowed through part of the recreation room wall to an average depth of one inch until it reached an outside drain. Bare.

- Studiously avoiding disclosure of the fact, and actively taking measures to prevent buyer from discovering, that condemnation of adjoining land had cut off access from highway to property. Horridge.

- Filling in a hole on property with debris, and not advising a buyer that the property was not suitable for buyer's intended trucking business. Byler.

- Hurrying buyer's inspection of areas near roof that had suffered water damage (on pretense that lingering would disturb tenants), and placing furniture on burn mark caused by defect in fireplace. Ward.

- Disclosing that a condominium association had a "pending dispute with the Courtyard Association pending to be resolved prior to sale closing," but not disclosing the additional details that judgments had been entered against the entity that actually owned the courtyard of the condominium complex, those judgments eventually resulting in a foreclosure sale of the courtyard because the efforts to "resolve" the "dispute" proved to be unsuccessful. Futcher.

c. Facts Held To Be Non-Actionable

Fact that the prior owner had committed suicide in the residence (by gunshot leaving a blood stain that was covered). Bukoskey.

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3. Non-Privileged Failure To Disclose

a. Overview

Liability for "Non-Privileged Failure To Disclose" is an exception to the general rule that "mere silence" by a real-estate seller is not actionable; liability for non-disclosure has been imposed only when the courts have concluded that the seller had a *duty* to speak (destroying the "privilege" to remain silent). Roberts, Sevin.

Generally, the courts have imposed a duty to disclose defects that are known to the seller, latent (i.e., not readily apparent from an inspection of the property), and dangerous.

b. Circumstances Held To Require Disclosure

- Structural defects creating a risk of collapse. Person.
- Termite infestation. Glanski, Quashnock.
- A defect in a sewer system causing "inundation of the basement with human excrement and other waste material." Shane.
- Blocked sewage lateral. Williams.
- The fact that a basement is susceptible to eight-foot-high flooding. Long.
- The fact that radon levels had exceeded standards — even though seller had reduced the levels below the standards (by installing mitigation devices). Snyder.
- Malfunctioning sewage-disposal system from which black odorous sewage seeped. Anderson (court acknowledged testimony that seller thought repairs had resolved the problem, but the court concluded that, because, inter alia, the seller had undertaken the repairs itself, without obtaining proper permits and approvals, the seller should be charged with knowledge of the fact that the problems persisted).
- Several municipal code violations (as required by the Real Estate Seller Disclosure Act). Floyd.

c. Circumstances Held Not To Require Disclosure

- Unrecorded easement that had been granted by the seller to extend the municipality's underground water line through the property. Sevin.

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- Existence of a carcinogen, chlordane (which had been used to treat termites), in well water. Smith (noting that the buyer had not produced any evidence that the seller or its agents knew that chlordane had been used and that it had seeped into the well water).

- Fact that prior owner had committed suicide in the residence by gunshot wound leaving a blood stain that was covered) was not a "legal [ ]issue affecting title or that would interfere with use and enjoyment of the property." Bukoskey. (Note: The Plaintiff in Bukoskey apparently did not bring a claim under the Act, but the court referred to the Act in deciding whether the defendants were liable under the common law).

- Fact that murder-suicide had occurred in the house was not a fact that had to be disclosed under the Act. Milliken (Pa. Supreme Court, reported 7/21/14; affirming 6-3 en banc panel of the Pa. Superior Court).

d. Miscellany

i. Recognition of a "duty to disclose" in certain circumstances is consistent with at least three provisions of the Restatement (Second) of Torts:

- § 550, which subjects a party to liability for pecuniary loss resulting from concealment "or other action" that intentionally prevents another party from obtaining information material to a transaction. Roberts, Sevin.

- § 551, entitled "Liability for Nondisclosure," which (in subdivision (1)) requires that a duty be recognized before imposing liability upon a party for "fail[ing] to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction" and (in subdivision (2)) specifies five circumstances in which such a duty is to be recognized. Quashnock (Spaeth, J. concurring) (arguing that the duty to disclose termite infestation is encompassed within the fifth paragraph of § 551(2): "facts basic to the transaction" that a buyer, given "the customs of the trade or other objective circumstances," would "reasonably expect" the seller to disclose).

- § 353, which expressly regards "Undisclosed Dangerous Conditions Known to Vendor":

  "(1) A vendor of land who conceals or fails to disclose to his vendee any condition, whether natural or artificial, which involves unreasonable risk to persons on the land, is subject to liability to the

vendee and others upon the land with the consent of the vendee or his subvendee for physical harm caused by the condition after the vendee has taken possession, if

(a) the vendee does not know or have reason to know of the condition or risk involved, and

(b) the vendor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to believe that the vendee will not discover the condition or realize the risk."

Shane, Glanski, Quashnock.

ii. The broadest statement of the "duty to disclose" might be found in the majority opinion in Quashnock: The duty arises "whenever justice, equity, and fair dealing demand it." (This statement of the rule has not been adopted, generally, by other courts.)

iii. Though the courts have generally required actual knowledge (Sevin), at least one court (Anderson) has held that, in certain circumstances, the knowledge can be imputed. See also Sewak.

iv. The duty has been held to extend to a seller's real-estate agent. Stephenson. (It is unclear whether or the extent to which, as applied to residential transactions, this principle survived the December 2001 statutory changes described below in Section II.A.)

v. The duty does not extend to municipalities when they sell properties at tax sales. Frey.

vi. No reported Pennsylvania decision has expressly imposed upon sellers an obligation to disclose to buyers information about dangerous conditions on neighboring properties. The courts of New Jersey, however, have recognized that a professional has a limited duty to disclose such "off site" conditions. Both a "professional seller" (e.g., a developer-builder (as opposed to a private seller)) and its real-estate agent have an obligation to disclose "such off-site physical conditions known to them and unknown and not readily observable by the buyer if the existence of these conditions is of sufficient materiality to affect the habitability, use or enjoyment of the property and, therefore, render the property substantially less desirable or valuable to the objectively reasonable buyer." Strawn (N.J.) (ruling that subdivision developer and its real-estate agent

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had an obligation to disclose nearby landfill). (The Strawn decision was effectively codified by New Jersey's "New Residential Construction Off-Site Conditions Disclosure Act." N.J. Stat. 46:3C-1 *et seq.* (requiring disclosure of, e.g., published waste-disposal sites, electric-transformer substations, underground gas-transmission sites, and providing 5-day rescission right). See also, Monaco (N.J.) (commercial landlord had duty to warn invitees of dangerous sign owned by municipality and dangling off adjoining property, even if the landlord did not own the sign and could not correct the problem).

vii. A New Jersey appellate court declined to extend the reasoning of Strawn to require disclosure of hostile neighbors. Kramer Group (N.J.).

viii. A Connecticut appellate court has affirmed a judgment against a real-estate agent and salesperson under Connecticut's Unfair Trade Practices Act for representing, in response to the buyer's inquiry about the nature of the adjoining lot to the rear that was actually a former landfill, that the adjoining property was open space and that it was owned by the municipality and designated as open space and would never be built on. Tanpiengco (Conn.).

4. Innocent Misrepresentation ("Constructive Fraud")

a. Overview

An "innocent" misrepresentation — i.e., a representation that the utterer mistakenly believes to be correct — is actionable if the fact misrepresented was "material" to the buyer. DeJoseph (citing, inter alia, Restatement of Contracts § 476), LaCourse, Roberts, Boyle. The "materiality" of a fact can be evidenced by either the buyer's words or the buyer's acts. Gruss (including roof and termite certification requirements in agreement of sale established the materiality of those matters).

b. Facts Held To Be Actionable

- Handbill advertisement that the property was "splendid for apartments" when zoning restrictions prohibited its use for anything other than as a single residence. LaCourse.

- Auction description, incorporated into the agreement of sale, that the property had a bath on both the first and second floors, when in fact there was only one bath, and that the property had hot-water heat, when in fact it had vapor heating. Keefer.

- Incorrectly representing that a private road on which the property was situated would soon be opened as a public thoroughfare. Serafine.

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- Stating that land about to be conveyed was a certain tract containing timber, when the actual land to be conveyed was adjacent thereto and contained no timber. Brownawell.

- Stating that septic-system test had revealed that a previously acknowledged defect had been corrected when in fact the test results were self-contradictory and ambiguous (it later being discovered that the results were incorrect and that fixing the persistent problem would cost $15,000). Bortz.

5. Liability for Misrepresentations Made "Negligently"?

Until recent there was little or no common-law support in Pennsylvania for recognizing a separate cause of action for a seller's "negligence" in making a representation in connection with the sale of real property. See generally Igoe. This may reflect the fact that there was little demand, logically, for such a cause of action. A seller could be held liable for innocently misrepresenting a material fact, without any showing of negligence. One might argue that proving negligence could expand the remedies or compound the damages available to the buyer, but there does not appear to be any Pennsylvania precedent for that result involving cases of simple negligence (i.e., culpability short of the recklessness that is required, at a minimum, to establish Intentional Misrepresentation).

In contrast, there was a logical basis for holding a seller's real-estate agent liable for loss to a buyer resulting from the agent's negligent misrepresentations. Restatement (Second) of Torts § 552 specifies that one who "in the course of his business, or profession or employment" or in "any other transaction in which he has a pecuniary interest" supplies "false" information for the guidance of others in their business transactions is subject to liability for pecuniary harm caused to them by their reliance upon the information if the provider failed to exercise "reasonable care and competence in obtaining and communicating the information." Accordingly, Pennsylvania courts repeatedly recognized that a real-estate agent can be held liable for "Negligent Misrepresentation": (1) a misrepresentation of a material fact (2) made under circumstances in which the misrepresenter ought to have known its falsity, (3) with the intent to induce another to act upon it, (4) resulting in justifiable reliance that causes injury. Bortz, Mill Run Associates, Mill-Mar, Six, Sevin, Cambridge Chase, Wassel.

As will be addressed more fully in II.B below, the passage of Pennsylvania's Real Estate Seller Disclosure Law laid the foundation for recognizing Negligent Misrepresentation claims against sellers. At least one recent trial court decision has done so, Glover, although the court did not expressly note that it was breaking new ground; it may not have realized the authorities it cited involved claims against professionals.

Might liability under § 552 extend to a seller's lawyer? There are no Pennsylvania cases so holding, although one trial court decision has recognized (without citing § 552) that buyers of real estate had a cause of action in negligence against a lawyer who had been selected by their lender, but who they were required by the lender to pay, as a result of the attorney's failure to point out (as part of his title review) that the subdivision plan had noted that

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the parcel at issue was "susceptible to sliding." Lang. An Ohio appellate decision has gone further, holding that a buyer of a lot on which the buyer planned to build a prefabricated house did state a proper § 552 "negligent misrepresentation" claim against the lawyer of the developer-seller, even though the lawyer had never even spoken with the plaintiff-buyer (who had communicated only with the developer's agent). The lawyer had drafted the development's restrictive covenants. It appears that, in a communication with a developer's sales agent (and son of the buyer) in which the lawyer was asked about the scope of the restrictions, the lawyer mistakenly concluded that the restrictions would not prohibit construction of a pre-fabricated home.

C. Remedies/Damages

1. In General

A buyer who establishes fraud (other than "constructive fraud") in connection with the sale of real property has a choice of remedies:

- rescission, with recovery of the full purchase price and all restitution costs (i.e., expenses, such as taxes, insurance, interest paid on mortgage, necessary to restore plaintiff to status quo ante);

or (not and)

- damages, which should include compensation for (i) the difference between the value of what the plaintiff has received and the purchase price or other value given therefor; and (ii) pecuniary loss proximately caused by the transaction.

Silverman (citing, inter alia, Restatement (Second) of Torts § 549), Roberts. See also Mongelluzzo (holding that damages should not include both diminution in value and cost to repair), Boyle, Cambridge Chase (explaining that amounts awarded with rescission are not "damages" but "restitution."

It is generally prudent to declare the election as soon as possible, because there is precedent for the proposition that the right to rescind can be lost/waived in at least two situations:

- if the buyer does not exercise it promptly (because such delay can constitute conclusive proof that the buyer affirmed the transaction), Fischera; and

- if the buyer, after acquiring knowledge of the fraud, manifests an intention to affirm the contract, Garofalo (citing Restatement of Contracts § 484), Long Estate.

More recent cases have established, however, that a failure to make the election before or during the pleadings process is not fatal to the claims; the plaintiff can seek damages and rescission as separate causes of action. Cambridge Chase (citing Boyle and Roberts).

The law governing the exact measure of damages recoverable in a fraud case is somewhat unsettled. Under one rule, a buyer is afforded the "benefit of the bargain": the difference between the actual value of the house (with all defects disclosed and considered) and the value that the house would have had (regardless of what the buyer agreed to pay) if the house had been "as represented" by the seller. Sands. See also Aiello, Glanski. Other courts appear to ignore the fair market value of the property "as represented" and focus on the difference between the actual value (with all defects disclosed and considered) and what the buyer had been fraudulently induced to pay. Neuman. Others avoid the differential issue altogether and focus on the cost to repair the defect. Gruss, Wade, Humphrey's (citing Gadbois). See also Kirkbride (use valuation tests if repair cost would exceed value).

2. Lesser Damages for "Constructive Fraud" (Innocent Misrepresentation)

When a claimant establishes "constructive fraud" (i.e., an innocent misrepresentation of a fact that proved to be material to the purchaser's decision to move forward with the transaction), the claimant faces the same election — rescission (with restitution) or damages — as the claimant would have faced upon establishing any of the other species of fraud. Adams, DeJoseph, Silverman, Jeffrey Structures, Wedgewood Diner. However, should the claimant elect damages, the amount of such damages might properly be limited to the difference between the contract price and the value received. See Restatement (Second) of Torts § 552C(2). Also, the class of potential plaintiffs might properly be limited to those whom the utterer intended to induce into action or inaction by making the misrepresentation.

3. Punitive damages

Establishing "simple" fraud (even if intentional) does not warrant imposition of punitive damages. Instead, the seller's conduct must have been malicious, wanton, or oppressive. Harris (citing Golumb and Feld), Smith ("for punitive damages to be awarded there must be acts of malice, vindictiveness, and a wholly wanton disregard of the rights of others"). See also Restatement (Second) of Torts § 908(2) (damages awarded if tortfeasor's motive is evil/malicious or if tortfeasor acted with reckless indifference to rights of others), Kirkbride (following Restatement rule).

A party electing rescission may not obtain punitive damages, because the award of punitive damages is considered appropriate only when the plaintiff also recovers compensatory damages. Roberts, Wedgewood Diner.

D. Limiting Liability Through the Agreement of Sale: The Effect of "As Is" Clauses and Integration Clauses

1. Overview — The LeDonne Balancing Test

Many agreements of sale seek to limit a buyer's right to bring claims based upon alleged misrepresentations (whether oral or written, and whether intentional, unintentional, or reckless) by a seller or upon a seller's non-privileged failure to disclose facts that the buyer discovered after the closing. Typically this is done through two provisions:

- an "as is" clause, specifying that the buyer is accepting the property in its existing condition, based upon the buyer's own inspection of the property; and

- an "integration" clause, specifying that the document embodies the entire agreement of the parties and that it specifically supersedes and renders unenforceable any prior oral representations, agreements, or understandings.

Whether such clauses are effective in precluding claims of fraud has been litigated extensively. In the LeDonne decision in 1978, the Superior Court of Pennsylvania articulated a "balancing test" that has been cited frequently: A court must

> "balance the extent of a party's knowledge of objectionable conditions derived from a reasonable inspection against the extent of the coverage of the contract's integration clause in order to determine whether that party could justifiably rely upon oral representations without insisting upon further contractual protection or the deletion of an overly broad integration clause."

LeDonne (attempting to reconcile differences between cases (e.g., Bardwell) that permit parol evidence of fraud only when the plaintiff alleges "fraud in the execution" of the instrument (e.g., fraud by the seller in effectuating the documentation and execution of the agreement) and cases (e.g., Berger) that also permit such evidence in cases alleging "fraud in the inducement" of the transaction (regardless of whether the plaintiff alleges or can prove any fraud in the way the agreement was executed)).

LeDonne was followed frequently during the 1980s and early 1990s. See, e.g., Myers (parol evidence rule need not bar claim based upon misrepresentation as to adequacy of water supply). Its logic builds upon the general common-law principle that a buyer may reasonably rely upon an assumption that the seller has not concealed defects that cannot readily be ascertained by the buyer. Borelli. On the other hand, "a purchaser is required to use his senses, and cannot recover if he blindly relies upon a misrepresentation, the falsity of which would be patent to him if he realized his opportunity to make a cursory examination or investigation." Bowman.

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2. Effect of 1726 Cherry Street

In 1995 the Superior Court reviewed the Bardwell/Berger/LeDonne line of cases and concluded that (i) LeDonne should be limited to cases involving "defective real estate" and (ii) in all other contexts a general integration clause preclude parol evidence of "fraud in the inducement." 1726 Cherry Street (noting, conversely, that a general integration clause does not preclude parol evidence of "fraud in the execution").

The 1726 Cherry Street court's comment that LeDonne should apply in "defective real estate" cases did not distinguish between residential and commercial real estate. Nevertheless, subsequent real-estate decisions have tended to allow evidence of "fraud in the inducement" (after application of the LeDonne test) far more readily in cases involving residential property. See, e.g., Cambridge Chase (applying LeDonne to allow evidence of fraud in the inducement of a residential sale), Jeffries-Baxter (residential case applying LeDonne and allowing evidence of mold), Wassel (residential case allowing parol evidence and following a LeDonne balancing analysis with regard to subterranean defects in septic system; seller had disclosed same problems with water leakage in basement and with the septic system, and therefore before the sale the sellers (at the demand of the buyer's lender) made certain repairs to the septic system, but post-sale excavation revealed that defects remained); Youndt (commercial case pointing out that LeDonne involved residential property and noting that, in any event, the integration clause in LeDonne disclaimed only defects that would be "apparent" through a visual inspection), Banks (commercial case refusing to allow evidence of fraud in the inducement).

There have also been some aberrant decisions. Fraud in the inducement of a residential sale was disallowed in one residential case in which the court, without even taking note of LeDonne, pointed out, among other factors, that the buyer's attorney had drafted the agreement of sale that contained written disclosures that contradicted the alleged prior misrepresentation. Lenihan. See also Blumenstock (residential case noting that the trial court had not applied the LeDonne balancing test in residential case, but affirming trial court's ruling that alleged misrepresentations were insufficient to justify relief). Conversely, at least one court has recognized the possibility of a claim of fraud in the inducement of a commercial contract, without mentioning LeDonne or 1726 Cherry Street (although the court rejected the claim under the facts presented). Mill Run Associates. Cf. School House Lane (commercial case recognizing that an element of the plaintiff's claim was that the defendant "induce[ed]" the plaintiff into signing an agreement of claim, but rejecting statute-of-frauds defense on the ground that the plaintiff had alleged that the defendant "fraudulently omitted" representations from the contract).

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E. Other Common-Law Causes of Action

1. Breach of Warranty

a. Express Warranty

Provisions in an agreement of sale (e.g., a promise to deliver major systems of the property in "good working order") can constitute express warranties. Best.

A provision requiring a seller to produce a termite certificate is not a warranty by the seller that the property will be delivered free of termites. Stephenson.

The "as is" resale of a property that had originally been conveyed subject to an express warranty can nullify the warranty. Rendon. (citing PBS Coals v. Burnam Coal Co., 384 Pa. Super. 323, 558 A.2d 562, 564 (Pa. Super. 1989).

b. Implied Warranty

Pennsylvania law implies a "warranty of habitability" as to all new homes sold by the builder, but not as to any other residential-home sales. Elderkin, Fetzer, Groff, Ecksel. The warranty extends to any unknown defects not apparent to an ordinary buyer as a result of a reasonable inspection. Tyus.

Before 2014 a number of trial courts had held that privity of contract is not required to assert a breach of this warranty and that even a remote purchaser can sue the builder-vendor. Galbraith, Spencer, Skretvedt. In 1990, the Pennsylvania Superior Court ruled that the warranty extends from the builder to the initial user even when the builder is not the seller (i.e., where the builder sold to a party that, without using the property. Resold the property to the initial user). Spivack.

In 2014, the Pennsylvania Supreme Court unanimously ruled (overturning a 2012 Pa. Superior Court opinion) that the implied warranty of habitability does not extend to subsequent users. Conway. Writing for the majority, Judge Seamus McCaffery declared that privity of contract is required for a claim that the warranty has been breached. Any extension of that cause of action to subsequent users, he explained, must come from the legislature.

Privity of contract is not required to assert a breach of this warranty; even a remote purchaser can sue the builder-vendor. Galbraith, Spencer, Skretvedt. See also Spivack (holding that implied warranties extend from the builder to the initial purchaser-user even when the builder is not the seller).

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2. Strict Liability

Builder-sellers may be strictly liable for latent defects that have, in an "accidental and calamitous" manner, resulted in personal injury; such liability would not encompass economic injury. Galbraith (citing Pa. Glass).

F. Liability of, and Liability Resulting from Acts of, Real-Estate Agents

1. Vicarious Liability for Acts or Omissions of a Real-Estate Agent

"[A] principal is liable to third parties for the frauds, deceits, concealments, misrepresentations, torts, negligence and other malfeasances of his agent . . . , even though the principal did not authorize, justify, participate in or know of such conduct or even if he forbade the acts or disapproved of them, as long as they occurred within the agent's scope of employment." Aiello (citing, inter alia, Restatement of Agency §§ 257-58), Roberts (citing Aiello to hold seller liable for torts of real-estate agent).

A real-estate agent's knowledge that the seller had an obligation to disclose the presence of a latent and dangerous condition (viz., UFFI insulation) may be imputed to a seller when the agent intentionally refrains from disclosing it. Cambridge Chase.

2. Liability of the Real Estate Agent

a. Independent Liability to Third Parties

A real-estate agent is directly liable to third parties for his or her torts; the law of agency does not shield the agent from such liability. The seller's ratification of the tort merely makes the seller jointly liable for it; such ratification does not relieve the agent of liability. Aiello, Roberts (citing Restatement (Second) of Agency § 348), Shane, Sprague, Jeffries-Baxter, Restatement (Second) of Agency §§ 343, 348, 360.

Having enjoyed no immunity for the torts they commit during the course of their agency, real-estate agents regularly have been held liable to buyers for fraud. Rulings against real-estate agents have arisen in cases involving Non-Privileged Failure To Disclose (Long, Quashnock), Positive Misrepresentation (Silverman, Shane, Horridge) Concealment (Roberts), and Negligence (in providing information) (Igoe). But see Hollin ("agent cannot be subject to liability in tort for having innocently made representations on the strength of false information given to it by its principal"), Gozon (agent's actions in giving buyers what turned out to be extremely conservative estimate to repair pool did not constitute misrepresentation that pool could actually be repaired for estimate amount).

b. Intra-Agency Relationship

The relationship of a real-estate agent to his or her salesperson may, given the requirements of the Pennsylvania statute governing the licensure of real-estate agents,

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necessarily be one of principal-agent, even if the real-estate agent considers the salesperson to be an "independent contractor." Aiello. See 63 Pa. Stat. § 455.604(a)(16).

c. Breach of Fiduciary Duty to Buyer (as Non-Principal)

Courts frequently justify imposing agent-to-buyer liability in the absence of an agency relationship by recognizing a limited fiduciary obligation of real-estate agents to deal with prospective buyers ethically, honestly, and fairly. See, e.g., Jones (holding that real-estate agents owe at least a duty of "candor" towards buyers; "in light of the real estate profession's impact on society, high standards of competency and fair play should be maintained"). The doctrine is defended various ways: the real-estate agent's license is a privilege that is conferred in consideration (among other things) of the real-estate agent's agreement to act honestly and fairly; the real-estate agent's special position in society and superior expertise necessarily invite public trust and reasonably instill an expectation that the real-estate agent possesses the "requisites of an honest, ethical man," Zichlin (Fla.); real-estate agents' own codes of ethics impose such an obligation.

As noted above, Restatement (Second) of Torts § 551(2) endorses an affirmative obligation of parties to business transactions to disclose "material" information in a variety of circumstances, such as

- when the other party is in a fiduciary or similar relation of trust entitling him or her to know the information (id. at (a));
- when he or she knows that the other is about to enter into the transaction under a mistaken assumption as to facts that are "basic to the transaction," and that the other, because of the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts (id. at (e)).

Both provisions arguably impose upon real-estate agents an obligation to disclose material facts to buyers, even in the absence of an agency relationship, as the real-estate agent arguably is in a limited "fiduciary" relationship with the buyer. Courts elsewhere have, in fact, imposed such a requirement upon real-estate agents, e.g., Turnbull (Ak.), Lingsch (Cal.). See also Reed (Cal.) (holding real-estate agent liable to buyer for failure to disclose that multiple murders had occurred in house). Pennsylvania courts, too, have suggested that real-estate agents should be held liable for failing to make § 551(2) disclosures. See Slaybaugh (stating that section 551(2) and comment (1) thereto established basis for cause of action) (citing Jones).

In Pennsylvania, real-estate agents have been held liable for failing to disclose known facts about flooding (Long), termites (Glanski), septic-system defects (Shane), and radon (Snyder). As a general principal, however, real-estate agents are not expected to be experts on the physical quality of property. Henry.

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d. Failure to Discover Material Facts

California's 1984 Easton decision, which alarmed real-estate agents nationwide, was the first to impose upon real-estate agents the "affirmative duty to conduct a reasonably competent and diligent inspection of the residential property listed for sale and to disclose to prospective purchasers all facts materially affecting the value or desirability of the property that such an inspection would reveal." The Easton decision, in other words, required agents not only to disclose to buyers known material facts, but to discover them. The decision was followed (at least initially) by courts in at least two other states. Gouveia (N.M.), Secor (Utah). See also Johnson (Kan.) (holding agent liable for failing to identify absence of sewer hook-ups; seller had advised real-estate agent that hook-ups existed but agent, under circumstances, should have inquired further). The panic prompted by Easton subsided, however, when the California legislature clarified that the duty is not nearly expansive as the state's real-estate agents first feared. See Cal. Civ. Code §§ 2079, 2079.2, 2079.3 & 2079.5. The Kansas legislature reacted similarly to Johnson. K.S.A. 1988 Supp. §§ 58-3034 & 3068(a). See Frank (Kan.).

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II. STATUTORY LAW

A. Real Estate Seller Disclosure Act, 68 Pa. Stat. §§ 7301-7315 (Set Forth in Full as Appendix C)

1. Historical Note

The current version of the Act, which became effective Dec. 20, 2001, was an amendment and recodification of 68 Pa. Stat. §§ 1021 et seq., which had become effective on Aug. 31, 1996. The amendment and recodification went virtually unnoticed. Perhaps the lack of attention is not surprising, considering the media's focus upon world affairs during the last few months of 2001.

2. Transactions Governed by the Act

The Act applies to all residential real estate transactions except (i) transfers by a fiduciary in the course of administration of a decedent's estate and (ii) transfers of newly constructed residences (provided, in the latter instance, that the buyer receives a builder's warranty extending at least one year, the construction has been inspected under any applicable building code (or, in the absence of such a code, under a nationally recognized model code), and the municipality has issued a certificate of occupancy or of code compliance). § 7302(a).

3. Parties Subject to the Act

The original version of the Act contained a provision specifying that the Act applied to all "[i]ndividuals, partnerships, corporations, trustees," or any "combination thereof." § 1022 (setting forth separate but substantially identical definitions of "Buyer" and "Seller"). The Act as recodified in 2001 contains no such specification. The apparent intent of the Legislature was to broaden the scope of the Act by precluding the argument (in accordance with the maxim expressio unius est exclusio alterius) that the Act did not apply to categories of persons (e.g., unincorporated "associations" and "limited liability companies") that were not expressly identified.

4. Actions Required by the Act

a. Written Disclosure Statement

Before the buyer and seller sign any agreement of sale (or any other "written agreement by the seller and prospective buyer that would, subject to the satisfaction of any negotiated contingencies, require the prospective buyer to accept a transfer of the residential real property"), the seller shall fill out, sign, date, and deliver to the buyer a disclosure statement (in the form prescribed by the Act). § 7304. (The form of disclosure statement prescribed by the Act shall hereinafter be referred to as the "Form Disclosure Statement" or the "Completed Disclosure Statement," as the context requires. The transactional agreement to which the Act

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refers shall hereinafter be referred to as the "Transfer Agreement," though that term is not used in the Act.)

i. Service, Generally.

The Completed Disclosure Statement can be delivered in any of the several common methods for making service (including ordinary mail), § 7305(a), but prudence dictates that the seller obtain either a written acknowledgment of receipt (or some other evidence thereof). § 7305(b). (The Form Disclosure Statement includes an acknowledgment block for the buyer.)

ii. Service Upon Agent.

The Completed Disclosure Statement can be served upon the buyer's "agent." § 7305(b).

> Caution: As noted above, most real estate agents and salespersons involved in residential real estate transactions — including the real-estate agents/salespersons who develop cozy "personal" relationships with prospective buyers and who travel with them to the various MLS listings of other real-estate agents — are (appearances notwithstanding), as a matter of law (in the absence of a formal "buyer's brokerage" or "dual agency" agreement), agents (or subagents) of the seller.

b. Amending the Statement

The seller may amend the Completed Disclosure Statement, but the amendment must occur before the Transfer Agreement is signed. § 7312. This section appears to apply only to the correction of disclosures that were inaccurate at the time they were made (prior to settlement), because a separate section, § 7307, addresses what a seller must do when something accurately disclosed becomes inaccurate: The seller must call the inaccuracy to the buyer's attention.

The Act does not specify how (if at all) it should apply to a seller who, after the parties have signed the Transfer Agreement, suddenly remembers a defect that he or she had failed to describe in the Completed Disclosure Statement. It is hard to imagine, however, that a court would not allow a seller to treat such "refreshed recollections" the same as the new (concrete) information about defects, which (as described below) the seller has a continuing obligation to disclose.

c. Discharging Continuing Obligation

The seller has a continuing obligation to notify the buyer, before and after the Transfer Agreement is signed, of any ways in which "information disclosed" by the seller in the

Completed Disclosure Statement becomes "inaccurate" as a result of any subsequent "act, occurrence or agreement." § 7307.

> Note: The obligation to report "inaccuracies" applies, literally, only to matters affirmatively disclosed by the seller that subsequently become inaccurate; it does not extend to (A) information about new defects or (B) new information as to pre-existing defects of which the seller had no prior knowledge (at least, in the latter case, if the seller specifically disclaimed any knowledge about the matter). (As described below, the Act permits a seller, in certain circumstances, to refrain from making a full disclosure as to certain items.) Indeed, another provision of the Act (described below) indicates that a seller has no duty to disclose "defects which . . . develop[] after the signing" of the Transfer Agreement. § 7314.

d. Contents of Disclosure Statement

As originally enacted, the Act included a categorical statement of the scope of the Completed Disclosure Statement: "material defects": "problem[s]" with the property that would either

- have a "significant adverse impact" on the value of the property;

or

- involve an "unreasonable risk" to people on the property.

§§ 1022 (definition of "material defect"), 1024 (rescinded). That specification was dropped with the December 2001 re-codification, but the language was preserved in the Form Disclosure Statement that, pursuant to the recodified Act (§ 7304), was promulgated by the Pennsylvania Real Estate Commission. See Appendix D.

The original Act also listed specific categories to be addressed by the Completed Disclosure Statement. 68 Pa. Stat. § 1025 (rescinded). The recodified Act did not abandon that feature, but it revised the list. The Disclosure Statement must now cover the following items:

- Seller's expertise in contracting, engineering, architecture or other areas related to the construction and conditions of the property and its improvements.
- When the property was last occupied by the seller.
- Roof.
- Basements and crawl spaces.

- Termites/wood destroying insects, dry rot and pests.
- Structural problems.
- Additions, remodeling and structural changes to the property.
- Water and sewage systems or service.
- Plumbing system.
- Heating and air conditioning.
- Electrical system.
- Other equipment and appliances included in the sale.
- Soils, drainage and boundaries.
- Presence of hazardous substances.
- Condominiums and other homeowners associations.
- Legal issues affecting title or that would interfere with use and enjoyment of the property.

§ 7304(b).

The seller may add disclosures modifying the prescribed statement to add other provisions that either (i) describe the items at issue (e.g., specifications as to the type of heating system, the source of drinking water, and the nature of the sewage or septic system) or (ii) help the prospective buyer assess the risk of future problems (e.g., the age of the roof or of the major systems, the date and nature of any repair work done thereto, and whether or not there is a current termite/pest-control contract affecting the property). § 7304(a).

e. Effect of Residential Real Estate Transfers Law

When the Act was recodified, the Legislature added a definitional section, known as the Residential Real Estate Transfers Law, 68 Pa. Cons. Stat. §§ 7101-7103. The definitions apply not only to the Act but also the Home Inspection Law, 68 Pa. Cons. Stat. §§ 7501-7512. The definitions include a definition of "Material Defect" that is apparently broader than the definition in the Act. Under 68 Pa. Cons. Stat. § 7102, a "material defect" is a "problem with a residential real property or any portion of it that would have a significant adverse impact on the value of the property or that involves a reasonable adverse risk to people on the property." The dissent in Milliken pointed out that the majority had overlooked this definition.

5. Extent/Nature of the Seller's Obligation To Obtain/Ascertain the Information Solicited — Whether the Seller May (or Should) Rely on What the Seller Already Knows, or Whether the Seller Must Obtain Additional Information to Complete the Disclosure Statement

Several provisions of the Act address, directly or indirectly, the seller's obligations (if any) to conduct investigations into the matters addressed by the Form Disclosure Statement and the buyer's correlative right (if any) to rely upon the disclosures.

a. The Seller's Right Not To "Investigate"

The Act specifies that a "seller is not obligated make any specific investigation or inquiry in an effort to complete the disclosure statement." § 7308. As originally enacted, the Act appeared to contradict that disclaimer by specifying that a seller could disclaim knowledge of a fact only if the seller has made "an effort to ascertain it." 68 Pa. Stat. § 1027 (repealed). The latter provision did not survive the December 2001 recodification. The omission of that provision is perhaps the most important change effected by the recodification, because the inclusion of it led readily to the conclusion, purely as a matter of logic, that a seller must make some effort, short of a formal "investigation," to discharge the duty to "ascertain" facts about matters addressed directly in the disclosure statement.

b. The Seller's Exculpatory Provision

Completing the Form Disclosure Statement in accordance with the requirements of the Act gives the seller a limited immunity from any errors in the statement. Assuming that neither the seller nor his agent knew or had reason to know that the statements were "false, deceptive or misleading" (§ 7308), the seller will not be held liable for any "error, inaccuracy or omission" in the disclosure if:

A) the seller had "no knowledge" of the error, inaccuracy, or omission;

B) the seller knew that the defect (or other matter) at issue had existed but made the statement based upon the "reasonable belief" that the material defect or matter not disclosed had been corrected;" or

C) the seller had no knowledge of the error, inaccuracy, or admission, and the seller based the disclosures at issue upon information that had been provided by a public agency or by certain professionals (viz., an engineer, surveyor, pest-control firm, home inspector, or contractor) within the scope of the professional's expertise.

§§ 7309, 7503(a). See Blumenstock (noting that the disclosure statement is "not a warranty of any kind").

The seller is not permitted to rely upon information provided by professionals (other than public agencies), however, unless that information is provided to the buyer in writing. § 7309(c).

c. The Buyer's Acknowledgment

Though the preprinted disclosure portions of the Form Disclosure Statement advise the buyer that "the seller alone is responsible for the accuracy of the information contained in this statement," the form also requires the buyer to "acknowledge[] that this statement is not a warranty and that, unless stated otherwise in the sales contract, the buyer is purchasing the property in its present condition." Acknowledgment block at end of Form Disclosure Statement (specifying further that "[i]t is the buyer's responsibility to satisfy himself or herself as to the condition of the property" and that "[t]he buyer may request that the property be inspected, at the buyer's expense and by qualified professionals, to determine the condition of the structure or its components").

The preamble of the Form Disclosure Statement contains an advisory to the same effect:

> "This statement discloses the seller's knowledge of the condition of the property as of the date signed by the seller and is not a substitute for any inspections or warranties that the buyer may wish to obtain. This statement is not a warranty of any kind by the seller or a warranty or representation by any listing broker, any selling broker or their agents. The buyer is encouraged to address concerns about the conditions of the property that may not be included in this statement."

(Emphasis added).

> Note: The difference (in the underlined copy above) between the disclaimer as to the seller ("statement is not a warranty of any kind") and the real-estate agents ("statement is not . . . a warranty or representation") is, for the reasons outlined more fully below, significant.

d. The Agent's Exculpation

Consistent with its theme that the "seller alone" is responsible for the accuracy of the Completed Disclosure Statement, the Act specifically exculpates all agents involved in the transaction for "any violation" of the Act (including, presumably, deliberate misstatements and intentional nondisclosures by the seller). § 7310. That exculpation, however, is not absolute; it does not protect real-estate agents or their salespersons from misrepresentations or nondisclosures relating to material defects as to which they had actual knowledge. Id. See Alhaj (also ruling that the real-estate agent is not obligated to make a specific investigation or inquiry to complete the disclosure statement), Jeffries-Baxter.

Note: As noted earlier, the preamble to the Form Disclosure Statement specifies that the information therein does not constitute either a "warranty" or a "representation" by the agents involved in the transaction. That statement seems a bit overbroad, given the Act's specification that an agent can be liable for misrepresentations or nondisclosures relating to material defects as to which the agent has actual knowledge. In other words, at least to the extent that an agent assists the seller in preparing the Completed Disclosure Statement and/or in delivering it to the buyer, the Completed Disclosure Statement does (effectively) constitute a "representation" by the agent that the agent knows of no material defects other than those described therein.

6. Survival of Common Law

The Form Disclosure Statement poses an umbrella inquiry as to whether the seller is "aware of any material defects to the property, dwelling or fixtures which are not disclosed elsewhere on this form." (Question 16(vi)). That concept is repeated in the introductory paragraphs of the form, and it is articulated directly in substantive provisions of the Act: §§ 7307 and 7308. The latter provision reaffirms the seller's common-law duty not to "make any representations which he or his agent know or have reason to know are false, deceptive, or misleading . . . ."

7. Remedies

a. In general

The Act "preserves any obligation for disclosure created by any other provision of law or which may exist in order to avoid fraud, misrepresentation or deceit," § 7313(a), and it also preserves "other remedies applicable under other provisions of law." § 7311. The Act therefore creates a separate (statutory) cause of action that does not supersede the common law. The damages available under the Act (described below), however, may coincide with the damages recoverable under common law causes of action, and the courts will almost certainly forbid a "double" recovery.

b. Damages, But Not Rescission

A violation of the Act does not entitle a buyer to rescind the transaction. Rather, the buyer may recover actual damages suffered as a result of any willful or negligent failure by "any person" to "perform any duty" prescribed by the Act. § 7311(a).

c. Punitive Damages and Attorney Fees

The Act does not create a separate basis for awarding punitive damages, but it specifically mentions them and explains that it neither expands nor restricts the power of a court

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to award them. § 7311(a). It appears that a court could impose punitive damages in an action brought under the Act (regardless of whether the action also encompassed common-law counts) if the defendant's malfeasance was sufficiently egregious to warrant punitive damages under the common-law tests. See Harris, Smith.

The Act makes no specific reference to attorney fees.

8. Statute of Limitations

Actions under the Act must be brought within two (2) years, beginning with the date of "final settlement" on the transfer transaction. § 7311(b). It's not clear whether that period governs only claims based upon the Act or whether, instead, it applies to all actions for non-disclosure (and/or for other claims of "fraud").

9. Miscellany

a. Effect on Condominiums & Cooperative Units.

The Act applies, expressly, to transfers of condominiums and cooperative units. § 7302(b). The seller of such a unit must make the disclosures mandated by the Act "only with respect to the seller's own unit" and not with respect to "any common elements or common facilities." Id. The Act does not, however, supersede or limit the obligations imposed upon the seller to make any additional disclosures, and to take any additional acts (e.g., producing a certificate, in accordance with 68 Pa. Cons. Stat. § 4409 or 68 Pa. Cons. Stat. § 3407, prescribed by the Uniform Condominium Act or the Unit Property Act).

b. Fiduciaries as Sellers.

Given the Act's exclusion of "[t]ransfers by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship or trust," the Form Disclosure Statement provides a signature box by which executors, administrators, and other trustees can disclaim "the personal knowledge necessary to complete this disclosure statement."

c. Agent To "Advise" Seller and Supply Form.

The Act imposes two affirmative obligations upon an "agent representing a seller": (A) to "advise" the seller of the seller's obligations under the Act; and (B) to provide the seller with a copy of the Form Disclosure Statement. § 7313(c).

> Note: Though the Act's obligations literally extend to all "agents," it is doubtful that the courts will enforce them against "sub-agents" — i.e., against the selling real-estate agents (as opposed to listing real-estate agents).

d. Agent's Other Obligations.

The Act specifies that the obligations it imposes upon real-estate agents supplement (and do not abrogate or limit) the obligations imposed upon real-estate agents and salespersons under the Real Estate Licensing and Registration Act. § 7313(a).

e. PREC-Approved Form.

The form most recently promulgated by the Pennsylvania Real Estate Commission is set forth at length below as Addendum D.

10. Effect of the Act.

a. Interplay with Other Causes of Action

The Act does not abridge or limit the obligations of all parties to the transaction under other applicable laws. To a certain extent, the remedies otherwise available at law are the same as those available under the Act. Some causes of action, however, will survive with particular vigor, either because they are not redundant of the causes of action encompassed within the Act or because they seek relief unavailable under the Act.

b. Specific Causes of Action Unaffected

The Act does not abridge or limit the obligations of all parties to the transaction under other applicable laws, including but not necessarily limited to the following:

i. Federal, state, and local lead-paint disclosure requirements;

ii. Unfair Trade Practices and Consumer Protection Law, § 73 Pa. Stat. § 201-1 et seq;

iii. Pennsylvania Sewage Facilities Act, 35 Pa. Stat. § 750.1 et seq;

iv. Real Estate Licensing and Registration Act, 63 Pa. Stat. §§ 455 and the regulations promulgated thereunder;

v. Interstate Land Sales Disclosure Act, 15 U.S.C. §§ 1701 et seq.

c. New Causes of Action Recognizable

i. **Seller's "Statutory Fraud"**

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Although the Act effectively codifies certain causes of action that already exist under the common law, the Act arguably imposes at least one additional obligation upon sellers: a duty to exercise due care in making the disclosures contemplated by the Act. A seller's failure to fulfill that duty can, arguably, give rise to a separate "statutory" cause of action for fraud.

> Note: The Act's reference to "negligenc[e]" as a triggering event for damages, § 7311(a), increases the likelihood that buyers will assert claims against seller under the Act akin to "negligent misrepresentation" — a claim that heretofore was easier to assert against a real-estate agent than a seller. See Glover.

ii. New Cause of Action Against Real-Estate Agents?

One of the principal purposes of the Act was to reduce the potential liability of real-estate agents and their salespersons in typical residential real-estate transactions. See § 7310 (specifying that a real-estate agent shall not be held liable under the Act unless the agent has actual knowledge of a material defect that is not disclosed). See also Blumenstock (noting that a disclosure statement is "not a warranty of any kind"). Though the Act may prove to be successful in that regard, one provision may actually create a new cause of action against the agents: breach of the agent's duty to "advise a seller of the seller's responsibilities" under the Act and to provide the seller with a copy of the prescribed disclosure form. § 7313(c). An agent who fails to discharge that duty could, arguably, subject himself or herself to liability not merely to the seller but also to the buyer (as an intended beneficiary of the disclosures at issue).

> Note: The Act does not explain what a real-estate agent must do to discharge the duty to "advise a seller of the seller's responsibilities under the [A]ct," but clearly that "advice" is more limited than, say, legal advice. Perhaps the Act requires the real-estate agent merely to tell the seller to try to fill out the Form Disclosure Statement to the best of the seller's ability. (And perhaps the real-estate agent would be well advised not to hazard too much advice in response to the seller's likely follow-up question: "Does that mean I have to do something to try to figure out the answers to some of these questions?")

d. Causes of Action Impaired

The Act was, to a large extent, conceived, drafted, promoted, and enacted by and on behalf of real-estate agents (real-estate agents and their salespeople) as a way to limit their liability in typical residential real-estate transactions. The Act will probably accomplish that objective, given its general requirement that sellers prove that agents have knowledge of material defects (and despite the survival of general common-law principles), with regard to at least two causes of action that have heretofore been brought against real-estate agents: actions for "negligent misrepresentation," and actions for misrepresentations based on knowledge imputed to the real-estate agent.

e. Observations/Predictions

i. Codification of Common Practice

With regard to many transactions now expressly subject to the Act, the Act will (in one sense) change nothing. Before the Act was passed, many Pennsylvania real-estate agents already required their clients, as a matter of policy, to complete a form similar to that now mandated by the Act.

ii. Effect of Integration Clause

The fact that an agreement of sale contains an integration clause does not preclude a claim made under the Act. Vaughn.

iii. Fewer Actions Against Real-Estate Agents.

Requiring all sellers to provide disclosures (not exempt from the Act), and specifying that their agents shall be liable for errors/omissions/misstatements only to the extent that they regarded material defects as to which the real-estate agents had actual knowledge, should reduce the causes of action against real-estate agents for "negligent misrepresentation" and for misrepresentations based upon knowledge imputed to the real-estate agent.

iv. More Actions Against Sellers.

By imposing upon sellers an affirmative duty to "ascertain" certain facts, by suggesting that sellers can be held liable for "negligently" failing to discharge that duty (or to take other measures required by the Act), and by simply soliciting more representations from sellers under the Act, the Act (while possibly reducing the volume of actions against sellers for "failure to disclose" material facts) may ultimately increase the number of intentional- and negligent-misrepresentation claims against sellers.

v. The Plight of the "FSBO."

Perhaps the most interesting (and difficult to predict) effect of the Act will prove to be its applicability to sales by "FSBOs": properties "for sale by owner," which in most cases do not involve any agents. Not having the help of real-estate agents (who would be statutorily obligated to advise them of the need to comply with the Act and to provide them with copies of the Form Disclosure Statement), many FSBO sellers — particularly those who sell to buyers who, likewise, are unrepresented by real-estate agents — simply may not become aware of the Act. The Act does provide buyers an express right to rescind agreements of sale for properties as to which the sellers did not provide disclosures mandated by the Act. However, the mere fact that the Act mandates the disclosures may make it easier for aggrieved buyers to assert "failure to disclose" claims against the seller. Before the Act — a seller had an obligation to disclose only "known, latent, and dangerous" defects. The Act arguably extends that duty to other

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"material defects" — matters that, though not regarding latent and dangerous defects, may nevertheless have a "significant adverse impact on the value of the residential real property" or "involve[] an unreasonable risk to people on the land."

vi. Halfway to Easton?

In an important sense, the Act codifies a rejection of the thinking that prompted the courts of California to impose upon real-estate agents a "duty to investigate" matters material to residential real-estate transactions. By specifying that "the seller alone" is responsible for the accuracy of the information disclosed, and by requiring the agent only to provide the seller with a copy of the Form Disclosure Statement and to provide some "advice" to the seller with regard thereto, the legislature has made it clear that real-estate agents, independently, have no "duty to investigate" hidden defects or problems with property.

From the seller's perspective, by contrast, the Act is a step in the direction of Easton. Although the Act clearly doesn't impose upon sellers the broad "duty to discover" defects suggested by the original Easton decision, the Act reflects the spirit embodied in the California legislature's codification of Easton: that someone (other than the buyer) conduct a "reasonably competent and diligent visual inspection of the property offered for sale and . . . disclose . . . all facts materially affecting the value or desirability of the property that an investigation would reveal . . . ." Cal. Civ. Code § 2079(a).

11. Interpretive Rulings

Disclosure Not Required

- The Act did not require a seller to disclose the fact that an adjacent property was used as a group home for low-IQ adults. Colaizzi.

- Real-estate agent is not liable for defects as to which the agent had no actual knowledge, and the agent is not obligated to make a specific investigation or inquiry to complete the disclosure. Alhaj.

- Real-estate agent is not liable for non-disclosure of a mold problem about which the agent had no actual knowledge. Jeffries-Baxter.

- Home vendor's filing of complaint against her insurer, two days before closing on sale of home, alleging insurer had not indemnified vendor for all costs of repairing roof which had been damaged by fallen tree did not establish vendor's violation of her duty to update her disclosures to purchasers of defects in home; vendor had disclosed to purchasers that roof had been damaged and repaired, vendor's complaint against insurer did not necessarily indicate repairs were inadequate, and purchasers' complaint against vendor did not allege any problems with roof as repaired. Rock.

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- Sellers were not liable for nondisclosure of a "water problem" based upon the fact that they had responded "no" to disclosure questions about whether there was any "water leakage, accumulation, or dampness within the basement or crawl space," despite the fact that there had been two sump pumps installed in the basement that occasionally were needed to keep the basement dry. The buyers had learned of the sump pumps and had asked about them, in response to which the sellers' real-estate agent stated that the pumps had been installed as a "precaution." The court rejected the buyers' argument that the mere fact that the pumps had to operate to keep the basement dry constituted a "water problem." Blumenstock.

- Fact that prior owner had committed suicide in the residence (by gunshot wound leaving a blood stain that was covered) was not a "legal [ ] issue affecting title or that would interfere with use and enjoyment of the property." Bukoskey. (Note, the Plaintiff in Bukoskey apparently did not bring a claim under the Act, but the court referred to the Act in deciding whether the defendants were liable under the common law).

- Fact that murder-suicide had occurred in the house was not a fact that had to be disclosed under the Act. Milliken (Pa. Supreme Court, reported 7/21/14; affirming 6-3 en banc panel of the Pa. Superior Court).

B. Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. § 201-1 et seq.

1. Scope

"Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce . . . ." § 201-3. Applicable to real-estate sales, Gabriel, Sammartino, and to residential leases, Monumental Properties, Zisholtz, Colaizzi. Though one could argue that the UTPCPL has no application outside commercial cases (on the theory that only commercial sellers are in a "trade"), at least one Pennsylvania decision has permitted residential purchaser to assert a UTPCPL claim against the buyer's "one time" seller (on the theory that protecting residential buyers from "hidden defects," as to which they are at a distinct disadvantage, is consistent with the UTPCPL). Bonaccorsi.

2. Provisions Applicable (or Potentially Applicable) to Real Estate

- Representing that goods . . . are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another. § 201-2(4)(vii).

- Failing to comply with the terms of any written guarantee or warranty given to the buyer at, prior to, or after a contract for the purchase of goods or services. Id. at (xiv).

- Knowingly misrepresenting that services, replacements, or repairs are needed. Id. at (xv).

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- Engaging in any other fraudulent conduct which creates a likelihood of confusion or of misunderstanding. Id. at (xxi).

3. Conduct Held Actionable

- Falsely representing the quality of a property, or failing to disclose defects with the property. Gabriel.

- Breaching warranty in agreement of sale that plumbing, heating and electrical systems are in "good working order." See §§ 201-2(4)(xiv), 201-3. Anderson.

- Failing to disclose that a property's water supply might be inadequate for a buyer's purposes. Best.

- Failing to disclose that the sellers had caused a steel column that was the main structural support of a home to be removed. Sewak (court noted that sellers had taken steps to conceal the lack of structural support).

4. Conduct Held Non-Actionable

- Failing to disclose that the prior owner had committed suicide in the residence (by gunshot wound leaving a stain that was covered). Bukoskey. (Claim was asserted against real estate agents.)

5. Applicability to Real-Estate Agents

Real-estate agents may be held liable under the UTPCPL. Best.

6. Remedy

Minimal recovery:

Greater of actual damages or $100,

plus (in the court's discretion) additional damages up to three times actual damages,

plus (in the court's discretion) "additional relief" as it deems necessary or proper,

and (in court's discretion) "costs and reasonable attorney fees."

Id. § 201-9.2(a). (Amended in Dec. 1996, effective Feb. 1997, to include fee provision.) The trebling of damages is appropriate (in the court's discretion) even when the buyer has elected to rescind the agreement (i.e., even if the amount awarded constitutes "restitution" rather than

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ordinary damages). Cambridge Chase, Metz. But not all courts have exercised their discretion to award treble damages and, in refusing to do so, at least once trial court provided no explanation of its reasoning. Floyd.

The Superior Court of Pennsylvania has articulated a four-part test for determining whether to award attorney fees under the UTPCPL:

(1) the time and labor involved, the novelty or difficulty of the questions involved, and the requisite skill;

(2) the customary charges of the bar for such services;

(3) comparison of attorney time and resultant client benefit; and

(4) the contingency or certainty of the compensation.

Croft, McCauslin.

7. Statute of Limitations

Six years (under PA's "catch-all" SOL, 42 Pa. Cons. Stat 5525). Gabriel.

C. Other Statutes.

1. Pennsylvania Sewage Facilities Act, 35 Pa. Stat. § 750.1 et seq.

The act requires that any agreements of sale for a lot as to which no currently existing community sewage system is available must (i) contain a disclosure of that fact, (ii) specify that operating a private sewage system requires a permit, and (iii) explain, if a permit has not already been obtained, the procedures the buyer must follow to obtain a private sewage system. 33 Pa. Stat. § 750.7a. The seller's failure to make these disclosures renders the agreement unenforceable by the seller, and the buyer cannot waive its right to the disclosures. Miller. The Superior Court has applied the act to rescind a deed (and award damages) in a post-closing action by buyer who had discovered lack of public sewer when trying to resell the property. Kiec (court focusing on adequacy of the disclosure in the original agreement of sale, not on propriety of the rescission of the deed).

2. Interstate Land Sales Act, 15 U.S.C. §§ 1701 et seq.

a. General Scope.

Sometimes known as the "Interstate Land Sales Full Disclosure Act," the Act provides a federal cause of action against sellers of lots in large subdivisions who:

- "employ any device, scheme, or artifice to defraud";

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- attempt to "obtain money or property by means of any untrue statement of a material fact, or any omission to state a material fact necessary in order to make the statements made (in light of the circumstances in which they were made and within the context of the overall offer and sale or lease) not misleading, with respect to any information pertinent to the lot or subdivision";

- engage in "any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser"; or

- represent that the developer will provide or complete certain utilities or amenities when such representation is not, in fact, incorporated into the agreement of sale or lease.

15 U.S.C. § 1703(a)(2).

b. Obligations of Seller.

The Act requires sellers/lessors to

A) file with the Secretary of Housing and Urban Development (who has regulatory authority under the Act) a lengthy disclosure statement describing the subdivision, id. §§ 1704-1705; and

B) provide to the state a written "property report" containing certain information that had been filed with the legislation statement, id. § 1708.

c. Remedies of Buyer.

The act provides a general seven-day rescission right, applicable in all non-exempt cases, id. § 1703(b), and specifies that, if a seller or lessor has not provided the mandated property report, the buyer or tenant can rescind an agreement of sale or lease for a period of two years, id. § 1703(c). The act also permits aggrieved buyers or tenants to seek damages or other relief (e.g., specific performance). Id. § 1709(a). However, the plaintiff who has elected to rescind the agreement cannot also seek compensatory damages. Gaudet (E.D. La.). In all cases, however, the plaintiff can obtain "interest, court costs, and reasonable amounts for attorneys' fees, independent appraisers' fees, and travel to and from the lot." Id. § 1709(c). The rights and remedies of the act are "in addition to any and all other rights that may exist at law or equity." Id. § 1713. Willful violations of the act, moreover, are subject to both civil (§ 1717(a)) and criminal penalties (§ 1717).

d. Agents' Liability.

Real-estate agents, promoters, and other "agents" are subject to the Act. See id. § 1703(a). (Formerly, HUD regulations specified that "[b]rokers selling lots for different

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individuals who do not own enough lots to come within the jurisdiction established by the act generally would not be considered to be offering lots pursuant to a common promotional plan." 24 C.F.R. Pt. 1710, App. A, at 75).

e. Excluded Transactions.

Designed to stem fraud in impersonal large-scale transactions (promoted inter-state or otherwise affecting interstate commerce), typically involving lot sales in subdivisions and, historically common in Florida), the act excludes most typical residential transactions, including (but not limited to) the following:

(i) sales or leases of improved land (or unimproved land already subject to construction contracts "obligating" seller to complete the homes within two years (although courts will assess contract provisions/contingencies carefully to determine whether builder is truly "obligated" to complete the home (Becherer));

(ii) sales or leases within subdivisions with fewer than 100 lots;

(iii) sales or leases to person engaged in the business of constructing residential, commercial, or industrial buildings.

Id. §§ 1702(a), 1702(b).

Separate sellers of lots (such as contiguous lots) can be held subject to the act (even if they do not own enough lots, individually, to be subject to the act) by selling or promoting the lots in concert, though at least one court has suggested that the burden of proving such concerted action is high. See Orsi (4th Cir.).

III. OTHER MATTERS AFFECTING LITIGATION OF FRAUD CLAIMS

A. Issues for Trial

In "failure to disclose" cases, the trier of fact must decide whether the plaintiff had been reasonable/justified in relying upon the representations that were made and whether the defendant has fulfilled a duty to disclose. Neuman.

B. Effect of Buyer's Own Negligence

At least one Pennsylvania appellate court has suggested that in typical "fraud" actions the "comparative" negligence of the buyer is irrelevant. Silverman. The claims in Silverman, however, were not based expressly on "negligence," and the defendant's allegation that the Silverman plaintiff-buyer had been negligent (by failing to check zoning records) conflicted with a distinct common-law principle (viz., that a buyer does not have the duty to review public records prior to closing (LeCourse)). If the plaintiff's claim is based expressly upon negligence, however, the defendant may be able to defeat the claim under either Pennsylvania's comparative-negligence statute (applicable to actions seeking recovery for injury to person or property), 42 Pa. Stat. § 7102(a), or Pennsylvania's general contributory negligence doctrine (applicable when the plaintiff seeks recovery solely for economic loss). Under comparative-negligence standard, the plaintiff's claim will be defeated if the plaintiff's own negligence was greater than the defendant's negligence. Under contributory-negligence standard, the plaintiff's negligence claim will be defeated if the plaintiff was negligent in any measure. See generally Rizzo.

C. Joint and Several Liability of Seller and Real-Estate Agent

Under Uniform Contribution Among Tortfeasors Act, 42 Pa. Cons. Stat. §§ 8321-8326, seller and agent can be held jointly and severally liable if (but only if) they both commit the actionable conduct — i.e., if liability of principal-seller is not based merely upon principle of vicarious liability. Mamalis. See also Baird (Cal.).

D. Limitations Period

A two-year statute governs actions for "fraud." 42 Pa. Cons. Stat. § 5524(7). At common law, that period probably began to run with the signing of an agreement of sale, because before an agreement is signed the buyer has (arguably) suffered no loss.

The limitations period will be tolled if and for such time as the plaintiff could not through exercise of "reasonable diligence" have been "discovered" a fact essential to the cause of action. Today's Express. The issue of whether the first "symptom" of defect constitutes notice is, ordinarily, for the jury; the court can decide that issue summarily only when the facts lead inescapably to the conclusion that the length of time it took the plaintiff to discover the defect was unreasonable as a matter of law. Beaudreau.

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E. "Gist of the Action" Doctrine

Sellers have sometimes argued that fraud claims resulting from the sales of real property should be barred by the doctrine that tort claims should not be heard when the "gist of the action" is contractual. Banks. Recent decisions have recognized that the doctrine might be applicable when the tort claim "essentially duplicates a breach of contract claim" but have held that "fraud in the inducement of a contract is not covered by the doctrine because fraud [committed] to induce a person to enter into a contract is generally collateral to . . . the actual terms of contract." School House Lane.

F. "Economic Loss" Doctrine

Likewise, sellers have argued that liability for fraud committed in connection with the sale of real estate should be barred by the "economic loss" doctrine, which precludes the recovery of economic losses in tort by a plaintiff whose "entitlement to such recovery 'flows only from a contract,'" because "tort law 'is not intended to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement.'" School House Lane. This argument, too, has been rejected when the fraudulent acts alleged were misrepresentations made to induce the buyer to sign the agreement of sale. Id.

G. Administrative Regulation of Real-Estate Agents

Courts in Pennsylvania (e.g., Roberts) and elsewhere (e.g., Easton (Cal.), Menzel (Iowa)) have, in defining the professional standards to which the law should hold real-estate agents, examined ethical codes and standards to which real-estate agents have, through their professional associations, voluntarily bound themselves.

Real-estate agents also must fulfill the obligations prescribed by the licensing schemes established by state statute or by the regulations promulgated thereunder. In Pennsylvania, those obligations include, inter alia, the obligation not to commit any of the following acts (specified in 63 Pa. Stat. § 455.604(a)):

> "(1) Making any substantial misrepresentation.
>
> "(2) Making any false promise of a character likely to influence, persuade or induce any person to enter into any contract or agreement when he could not or did not intend to keep such promise.
>
> "(3) Pursuing a continued and flagrant course of misrepresentation or making of false promises through salesperson, associate broker, other persons, or any medium of advertising, or otherwise.
>
> . . .

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"(11) Inducing any party to a contract, sale or lease to break such contract for the purpose of substitution in lieu thereof of a new contract, where such substitution is motivated by the personal gain of the licensee.

. . .

"(13) Failing to disclose to an owner in writing his intention or true position if he directly or indirectly through a third party, purchased for himself or acquires or intends to acquire any interest in or option to purchase property which has been listed with his office to sell or lease.

. . .

"(16) In the case of a broker licensee, failing to exercise adequate supervision over the activities of his licensed salespersons or associate brokers within the scope of this act.

. . .

"(20) Any conduct in a real estate transaction which demonstrates bad faith, dishonesty, untrustworthiness, or incompetency."

Violations of these provisions can result in fines, imposed by the State Real Estate Commission, of up to $1,000. Id. § 455.305. The statute provides no private cause of action for violations thereof, Marra, but it establishes a "Real Estate Recovery Fund" from which aggrieved buyers or sellers can seek payment (of up to $20,000 per claim) after they have obtained a final judgment against the real-estate agent in an action based on "fraud, misrepresentation, or deceit." Id. §§ 455.801.-803.

H. Liability of Other Participants in Action

Pennsylvania courts have recognized that other participants in the typical real-estate transaction, whether or not acting expressly as an agent of the seller, can be held liable to the buyer in tort:

- Contractors. Woodward.
- Title Abstractors. Romagano.
- Title Agencies/Settlement Clerks. Bortz.

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I. Privity

Courts have not required a showing of "privity" with the buyer to impose liability upon a defendant who participated in the transaction, such as by providing repair work required to fulfill the seller's obligations, at least when the buyer's damages were "specially foreseeable." Woodward, Valley Forge, Bortz.

J. Recognition — or Emergence — of Duty to Investigate Accuracy of Representation by Others

In a controversial ruling, a divided panel of the Superior Court has held that a seller's real-estate salesperson committed constructive fraud by relaying to a buyer a title agent's comment that a septic-system test had revealed that the septic-system contractor's recent repairs had fixed a problem, when, in fact, the contractors report was somewhat ambiguous (because of contradictory statements) and, as was later discovered, the problem had not been repaired. The majority concluded that the real-estate salesperson owed a duty not to rely on the title agent's interpretation of the report but, rather to obtain the report and undertake some inquiry to resolve the seeming ambiguity. Bortz.

Appendix A:

RESTATEMENT PROVISIONS CITED IN CASES

Restatement of Agency

Section 257. Misrepresentation; In General

A principal is subject to liability for loss caused to another by the other's reliance upon a deceitful representation of an agent if the representation is:

(a) authorized;

(b) apparently authorized; or

(c) within the power of the agent to make for the principal within the rules stated in §§ 160-162 and 194-196.

[The Restatement (Second) version requires that representation be "tortious" rather than deceitful, and does not reference any rules regarding the scope of the power of the agent.]

Section 258. Incidental Misrepresentations

Except as stated in § 260, a principal authorizing an agent to enter into negotiations to which representations concerning the subject matter thereof are usually incident is subject to liability for loss caused to the other party to the transaction by tortious misrepresentations of the agent upon matters which the principal might reasonably expect would be the subject of representations, provided the other party has no notice that the representations are authorized.

[The Restatement (Second) version excepts from rule not § 260 situations but rather situations in which there was an exculpatory agreement.]

Restatement (Second) of Agency

Section 256. Knowledge of Principal When Agent Innocently Makes a Representation

If a principal knows facts unknown to a servant or other agent and which are relevant to a transaction which the agent is authorized to conduct, and, because of his justifiable ignorance, the agent makes a material misstatement of facts, the principal

(a) is subject to liability for an intentional misrepresentation, if he believed the agent would make the statement, or for a negligent misrepresentation, if he had reason to know the agent would make the statement.

(b) is not subject to liability in tort if he had no reason to know that the agent would enter into such a transaction, or if, after acquiring the information, he had no way of communicating with the agent.

Section 343. General Rule

An agent who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal, except where he is exercising a privilege of the principal, or a privilege held by him for the protection of the principal's interests, or where the principal owes no duty or less than the normal duty of care to the person harmed.

Restatement of Contracts

Section 470. Definition of Misrepresentation; When Misrepresentation Is Material

(1) "Misrepresentation" in the Restatement of this Subject means any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts.

(2) Where a misrepresentation would be likely to affect the conduct of a reasonable man with reference to a transaction with another person, the misrepresentation is material, except as this definition is qualified by the rules stated in § 474.

[The Restatement (Second) provision, § 159, streamlines the definition of misrepresentation to "an assertion that is not in accord with the facts," and defines a representation as "material" if it is likely to "induce a reasonable party to manifest his assent," § 162(1)," or if the misrepresenter knows that such inducement is likely, § 162(2).]

Section 471. Definition of Fraud

"Fraud" in the Restatement of this Subject unless accompanied by qualifying words, means

(a) misrepresentation known to be such, or

(b) concealment, or

(c) non-disclosure where it is not privileged, by any person intending or expecting thereby to cause a mistake by another to exist or to continue, in order to induce the latter to enter into or refrain from entering into a transaction; except as this definition is qualified by the rules stated in § 474.

[Restatement (Second) of Contracts contains no corresponding provision. The Restatement (Second of Torts, however, contains three provisions, §§ 525, 550, and 551(1), that, respectively, encompass the rules of subsections (a), (b), and (c) above.]

Section 476. Effect of Fraud or Misrepresentation That Induces Acts Affecting Contractual Relations

(1) Where a party is induced to enter into a transaction with another party that he was under no duty to enter into by means of the latter's fraud or material misrepresentation, the transaction is voidable as against the latter and all who stand in no better position, subject to the qualifications stated in §§ 480, 481, 486, and with the exceptions stated in Subsections (2, 3).

(2) Where a transaction is voidable because of a misrepresentation innocently made and the facts become in accordance with the representation before notification by the deceived party of an intent to avoid the transaction, it is no longer voidable.

(3) Where a transaction entered into by an agent or by one who purports to be an agent is induced by his fraudulent misrepresentation of authority and he obtains authority before notification by the deceived party of an intent to avoid the transaction, it is no longer voidable.

[The Restatement (Second of Contracts) provision corresponding to subsection (1) above is § 164(1), which (i) makes no reference to duty, (ii) deletes all qualifications and exceptions, and (iii) provides that contract avoidance is justified only when the party who seeks to avoid it was justified in relying on the other party. The Restatement (Second) provision corresponding to subsection (2) above is § 165, which omits reference to the "innocence" of the misrepresentation, and adds an exception allowing avoidance of the contract if the recipient has been harmed by reliance on the misrepresentation. The Restatement (Second) appears to contain no provision corresponding to subsection (3) above.]

Section 484. Loss of Power of Avoidance by Affirming Transaction

The power of avoidance for fraud or misrepresentation is lost if the injured party after acquiring knowledge of the fraud or misrepresentation manifests to the other party to the transaction an intention to affirm it, or exercise dominion over things restoration of which is a condition of his power of avoidance, except as stated in § 482.

[The Restatement (Second of Contracts) provision requires, in the case of innocent misrepresentation, that the injured party has reason to know (as opposed to actual knowledge) of the mistake or of the misrepresentation, and it specifies that the injured party will not forfeit his right to rescind if he "act[] with § 380(2) with respect to anything that he has received in a manner inconsistent with disaffirmance."

Restatement of Torts

Section 525. Liability for Fraudulent Misrepresentation

One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or refrain from action in reliance thereon in a business transaction is liable to the other for the harm caused him by his justifiable reliance upon the representation.

[The Restatement (Second) provision deletes requirement that representation be made "in a business transaction."]

Section 526. Conditions Under Which Misrepresentation Is Fraudulent (Scienter)

A misrepresentation in a business transaction is fraudulent if the maker

(a) knows or believes that the matter is not as he represents it to be,

(b) does not have the confidence in the accuracy of his representation that he states or implies, or

(c) knows that he does not have the basis for his representation that he states or implies.

[The Restatement (Second) provision is the same.]

Restatement (Second) of Torts

Section 353. Undisclosed Dangerous Conditions Known to Vendor

(1) A vendor of land who conceals or fails to disclose to his vendee any condition, whether natural or artificial, which involves unreasonable risk to persons on the land, is subject to liability to the vendee and others upon the land with the consent of the vendee or his subvendee for physical harm caused by the condition after the vendee has taken possession, if

(a) The vendee does not know or have reason to know of the condition or the risk involved, and

(b) the vendor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to believe that the vendee will not discover the condition or realize the risk.

(2) If the vendor actively conceals the condition, the liability stated in Subsection (1) continues until the vendee discovers it and has reasonable

opportunity to take effective precautions against it. Otherwise the liability continues only until the vendee has had reasonable opportunity to discover the condition and to take such precautions.

Section 537. General Rule

The recipient of a fraudulent misrepresentation can recover against its maker for pecuniary loss resulting from it if, but only if,

(a) he relies on the misrepresentation in acting or refraining from action, and

(b) his reliance is justifiable.

Comment:

(a) The recipient of a fraudulent misrepresentation can recover from the maker for his pecuniary loss only if he in fact relies upon the misrepresentation in acting or in refraining from action, and his reliance is a substantial factor in bringing about the loss. (See § 546 and Comments). If the recipient does not in fact rely on the misrepresentation, the fact that he takes some action that would be consistent with his reliance on it and as a result suffers pecuniary loss, does not impose any liability upon the maker.

Section 540. Duty to Investigate

The recipient of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation.

Section 541. Representation Known to Be or Obviously False

The recipient of a fraudulent misrepresentation is not justified in relying upon its truth if he knows that it is false or its falsity is obvious to him.

Comment:

(a) Although the recipient of a fraudulent misrepresentation is not barred from recovery because he could have discovered its falsity if he had shown his distrust of the maker's honesty by investigating its truth, he is nonetheless required to use his senses, and cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation. Thus, if one induces another to buy a horse by representing it to be sound, the purchaser cannot recover even though the horse had but one eye, if the horse is shown to the purchaser before he buys it and the slightest inspection would have disclosed the defect. On the other hand, the rule stated in this Section applies only when the recipient of the

misrepresentation is capable of appreciating its falsity at the time by the use of his senses. Thus a defect that any experienced horseman would at once recognize at first glance may not be patent to a person who has had no experience with horses.

Section 549. Measure of Damages for Fraudulent Misrepresentation

(1) The recipient of a fraudulent misrepresentation is entitled to recover as damages in an action of deceit against the maker the pecuniary loss to him of which the misrepresentation is a legal cause, including

(a) the difference between the value of what he had received in the transaction and its purchase price or other value given for it; and

(b) pecuniary loss suffered otherwise as a consequence of the recipient's reliance upon the misrepresentation.

(2) The recipient of a fraudulent misrepresentation in a business transaction is also entitled to recover additional damages sufficient to give him the benefit of his contract with the maker, if these damages are proved with reasonable certainty.

Section 550. Liability for Fraudulent Concealment

One party to a transaction who by concealment or other action intentionally prevents the other from acquiring material information is subject to the same liability to the other, for pecuniary loss as though he had stated the nonexistence of the matter that the other was thus prevented from discovering.

Comment:

(a) The rule stated in this Section is commonly applied in two types of situations, although it is not limited to them. The first occurs when the defendant actively conceals a defect or other disadvantage in something that he is offering for sale to another. Thus a defendant is subject to liability for a fraudulent misrepresentation if he paints over and so conceals a defect in a chattel or a building that he is endeavoring to sell to the plaintiff, and thus induces the plaintiff to buy it in ignorance of its defective character. So also, he is subject to liability if he reads a contract to the plaintiff and omits a portion of it, or if he so stacks aluminum sheets that he is selling as to conceal defective sheets in the middle of the pile.

Section 551. Liability for Nondisclosure

(1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he

has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.

(2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,

(a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and

(b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and

(c) subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so; and

(d) the falsity of a representation not made with the expectation that it would be acted upon, if he subsequently learns that the other is about to act in reliance upon it in a transaction with him; and

(e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

Comment:

(1) ...The continuing development of modern business ethics has, however, limited to some extent this privilege to take advantage of ignorance. There are situations in which the defendant not only knows that his bargaining adversary is acting under a mistake basic to the transaction, but also knows that his adversary, by reason of the relations between them, the customs of the trade, or other objective circumstances, is reasonably relying upon a disclosure of the unrevealed fact if it exists. In this type of case good faith and fair dealing may require a disclosure.

Section 552. Information Negligently Supplied for the Guidance of Others

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable

reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction on that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

Section 552C. Misrepresentation in Sale, Rental or Exchange Transaction

(1) One who, in a sale, rental or exchange transaction with another, makes a misrepresentation of a material fact for the purpose of inducing the other to act or to refrain from acting in reliance upon it, is subject to liability to the other for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation, even though it is not made fraudulently or negligently.

(2) Damages recoverable under the rule stated in this section are limited to the difference between the value of what the other has parted with and the value of what he has received in the transaction.

Appendix B:

CASES

Adams	Adams v. Euliano, 299 Pa. Super. 348, 445 A.2d 788 (Pa. Super. 1982)
Aiello	Aiello v. Ed Saxe Real Estate, 508 Pa. 553, 499 A.2d 282 (1985)
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Appendix C:

REAL ESTATE SELLER DISCLOSURE LAW,
68 Pa. Cons. Stat. §§ 7301-7315 (as of October 2006)

§ 7301. Short title of chapter

This chapter shall be known and may be cited as the Real Estate Seller Disclosure Law.

§ 7302. Application of chapter

(a) General rule.--This chapter shall apply to all residential real estate transfers except the following:

(1) Transfers by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship or trust.

(2) Transfers of new residential construction that has not been previously occupied when:

(i) the buyer has received a one-year or longer written warranty covering such construction;

(ii) the dwelling has been inspected for compliance with the applicable building code or, if there is no applicable code, for compliance with a nationally recognized model building code; and

(iii) a certificate of occupancy or a certificate of code compliance has been issued for the dwelling.

(b) Limitations in the case of condominiums or cooperatives.--Any seller of a unit in a condominium created under Subpart B of Part II (relating to condominiums) or a similar provision of prior law or a cooperative as defined in section 4103 (relating to definitions) 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. The provisions of section 3407 (relating to resales of units) shall control disclosures a seller is required to make concerning common elements in a condominium, and section 4409 (relating to resales of cooperative interests) shall control disclosures a seller is required to make concerning common elements in a cooperative.

§ 7303. Disclosure of material defects

Any seller who intends to transfer any interest in real property shall disclose to the buyer any material defects with the property known to the seller by completing all applicable items in a property disclosure statement which satisfies the requirements of section 7304 (relating to disclosure form). A signed and dated copy of the property disclosure statement shall be delivered to the buyer in accordance with section 7305 (relating to delivery of disclosure form) prior to the signing of an agreement of transfer by the seller and buyer with respect to the property.

§ 7304. Disclosure form

(a) General rule.--A form of property disclosure statement that satisfies the requirements of this chapter shall be promulgated by the State Real Estate Commission. Nothing in this chapter shall preclude a seller from using a form of property disclosure statement that contains additional provisions that require greater specificity or that call for the disclosure of the condition or existence of other features of the property.

(b) Contents of property disclosure statement.--The form of property disclosure statement promulgated by the State Real Estate Commission shall call for disclosures with respect to all of the following subjects:

(1) Seller's expertise in contracting, engineering, architecture or other areas related to the construction and conditions of the property and its improvements.

(2) When the property was last occupied by the seller.

(3) Roof.

(4) Basements and crawl spaces.

(5) Termites/wood destroying insects, dry rot and pests.

(6) Structural problems.

(7) Additions, remodeling and structural changes to the property.

(8) Water and sewage systems or service.

(9) Plumbing system.

(10) Heating and air conditioning.

(11) Electrical system.

(12) Other equipment and appliances included in the sale.

(13) Soils, drainage and boundaries.

(14) Presence of hazardous substances.

(15) Condominiums and other homeowners associations.

(16) Legal issues affecting title or that would interfere with use and enjoyment of the property.

(c) Transitional rule.--Until a form of property disclosure statement has been promulgated by the commission, the form prescribed under the act of July 2, 1996 (P.L. 500, No. 84), known as the Real Estate Seller Disclosure Act, shall be deemed to be the form contemplated under subsection (b).

§ 7305. Delivery of disclosure form

(a) Method of delivery.--The seller shall deliver the property disclosure statement to the buyer by personal delivery; first class mail; certified mail, return receipt requested; or facsimile transmission to the buyer or the buyer's agent.

(b) Parties to whom delivered.--For purposes of this chapter, delivery to one prospective buyer or buyer's agent is deemed delivery to all persons intending to take title as co-tenants, joint tenants or as a tenant by the entireties with the buyer. Receipt may be acknowledged on the statement, in an agreement of transfer for the residential real property or shown in any other verifiable manner.

§ 7306. Information unavailable to seller

If at the time the disclosures are required to be made, an item of information required to be disclosed is unknown or not available to the seller, the seller may make a disclosure based on the best information available to the seller.

§ 7307. Information subsequently rendered inaccurate

If information disclosed in accordance with this chapter is subsequently rendered inaccurate prior to final settlement as a result of any act, occurrence or agreement subsequent to the delivery of the required disclosures, the seller shall notify the buyer of the inaccuracy.

§ 7308. Affirmative duty of seller

The seller is not obligated by this chapter to make any specific investigation or inquiry in an effort to complete the property disclosure statement. In completing the property disclosure statement, the seller shall not make any representations that the seller or the agent for the seller knows or has reason to know are false, deceptive or misleading and shall not fail to disclose a known material defect.

§ 7309. Nonliability of seller

(a) General rule.--A seller shall not be liable for any error, inaccuracy or omission of any information delivered pursuant to this chapter if:

(1) the seller had no knowledge of the error, inaccuracy or omission;

(2) the error, inaccuracy or omission was based on a reasonable belief that a material defect or other matter not disclosed had been corrected; or

(3) the error, inaccuracy or omission was based on information provided by a public agency, home inspector, contractor or person registered or licensed under an act referred to in section 7503(a) (relating to relationship to other laws) about matters within the scope of the agency's jurisdiction or such other person's occupation and the seller had no knowledge of the error, inaccuracy or omission.

(b) Delivery of information by public agency.--The delivery of any information required to be disclosed by this chapter to a prospective buyer by a public agency or other person providing information required to be disclosed under this chapter shall be deemed to comply with the requirements of this chapter and shall relieve the seller or the agent of the seller from any further duty under this chapter with respect to that item of information.

(c) Report by expert.--The delivery of a report or opinion prepared by a home inspector, contractor or person registered or licensed under an act referred to in section 7503(a) dealing with matters within the scope of the person's registration, license or expertise shall be sufficient compliance for application of the exemption provided under subsection (a)(3) if the information is provided to the prospective buyer in writing.

§ 7310. Nonliability of agent

An agent of a seller or a buyer shall not be liable for any violation of this chapter unless the agent had actual knowledge of a material defect that was not disclosed to the buyer or of a misrepresentation relating to a material defect.

§ 7311. Failure to comply

(a) General rule.--A residential real estate transfer subject to this chapter shall not be invalidated solely because of the failure of any person to comply with any provision of this chapter. However, any person who willfully or negligently violates or fails to perform any duty prescribed by any provision of this chapter shall be liable in the amount of actual damages suffered by the buyer as a result of a violation of this chapter. This subsection shall not be construed so as to restrict or expand the authority of a court to impose punitive damages or apply other remedies

applicable under any other provision of law.

(b) Statute of limitations.--An action for damages as a result of a violation of this chapter must be commenced within two years after the date of final settlement.

§ 7312. Amendment of disclosure

Any disclosure made pursuant to this chapter may be amended in writing by the seller prior to the signing of an agreement of transfer by the seller and buyer.

§ 7313. Specification of items for disclosure no limitation on other disclosure obligations

(a) General rule.--The specification of items for disclosure in this chapter or in any form of property disclosure statement promulgated by the State Real Estate Commission does not limit or abridge any obligation for disclosure created by any other provision of law or that may exist in order to avoid fraud, misrepresentation or deceit in the transaction.

(b) Responsibility of licensee.--Nothing in this chapter shall abrogate or diminish the responsibility of a licensee under the act of February 19, 1980 (P.L. 15, No. 9), known as the Real Estate Licensing and Registration Act.

(c) Duty to provide form.--An agent representing a seller must advise a seller of the seller's responsibilities under this chapter and must provide the seller with a copy of the form of property disclosure statement.

§ 7314. Cause of action

A buyer shall not have a cause of action under this chapter against the seller or the agent for either or both of the seller or the buyer for:

(1) material defects to the property disclosed to the buyer prior to the signing of an agreement of transfer by the seller and buyer;

(2) material defects that develop after the signing of the agreement of transfer by the seller and buyer; or

(3) material defects that occur after final settlement.

§ 7315. Preemption of local requirements

(a) General rule.--Except as provided in subsection (b), a municipality or local authority shall not have the power to mandate that:

(1) a seller or an agent of either or both the seller and the buyer make any particular disclosures to the buyer in connection with a residential real estate transfer; or

(2) provisions on any particular subject be included in an agreement of transfer.

(b) Exception.--Subsection (a) shall not apply to an ordinance or regulation adopted by a municipality or local authority before the effective date of this section, and such an ordinance or regulation shall continue in full force and effect, except that the municipality or local authority shall not have the power after that date to amend the ordinance or regulation in a manner that:

(1) imposes new or expanded disclosure requirements;

(2) increases the scope of any provision that must be included in an agreement of transfer; or

(3) imposes new requirements on any agent, buyer or seller involved in a residential real estate transfer.

Appendix D:

FORM OF SELLER DISCLOSURE STATEMENT APPROVED BY THE PENNSYLVANIA REAL ESTATE COMMISSION

Property address: _____

Seller: _____

A seller must disclose to a buyer all known material defects about property being sold that are not readily observable. This disclosure statement is designed to assist the seller in complying with disclosure requirements and to assist the buyer in evaluating the property being considered.

This statement discloses the seller's knowledge of the condition of the property as of the date signed by the seller and is not a substitute for any inspections or warranties that the buyer may wish to obtain. This statement is not a warranty of any kind by the seller or a warranty or representation by any listing real estate broker, any selling real estate broker or their agents. The buyer is encouraged to address concerns about the conditions of the property that may not be included in this statement. This statement does not relieve the seller of the obligation to disclose a material defect that may not be addressed on this form.

A material defect is a problem with the property or any portion of it that would have a significant adverse impact on the value of the residential real property or that involves an unreasonable risk to people on the land.

(1) **Seller's expertise**. The seller does not possess expertise in contracting, engineering, architecture or other areas related to the construction and conditions of the property and its improvements, except as follows: _____

(2) **Occupancy**. Do you, the seller, currently occupy this property? ____ yes ____ no

If "no," when did you last occupy the property? _____

(3) **Roof**.

(i) Date roof was installed: _____ Documented? ____ yes ____ no ___ unknown

(ii) Has the roof been replaced or repaired during your ownership? ___ yes ___ no

If "yes," were the existing shingles removed? ___ yes ___ no ___ unknown

(iii) Has the roof ever leaked during your ownership? ___ yes ___ no ___ unknown

(iv) Do you know of any problems with the roof, gutters or downspouts? ___ yes ___ no

Explain any "yes" answers that you give in this section: _____

_____

_____

(4) **Basements and crawl spaces (complete only if applicable).**

(i) Does the property have a sump pump? ___ yes ___ no ___ unknown

(ii) Are you aware of any water leakage, accumulation or dampness within the basement or crawl space? ___ yes ___ no

If "yes," describe in detail: _____

_____

(iii) Do you know of any repairs or other attempts to control any water or dampness problem in the basement or crawl space? ___ yes ___ no

If "yes," describe the location, extent, date and name of the person who did the repair or control effort: _____

_____

(5) Termites/wood destroying insects, dry, rot, pests.

(i) Are you aware of any termites/wood destroying insects, dry rot or pests affecting the property? ___ yes ___ no

(ii) Are you aware of any damage to the property caused by termites/wood destroying insects, dry rot or pests? ___ yes ___ no

(iii) Is your property currently under contract by a licensed pest control company? ___ yes ___ no

(iv) Are you aware of any termite/pest control reports or treatments for the property in the last five years? ___ yes ___ no

Explain any "yes" answers that you give in this section: _____

_____

_____

(6) **Structural items.**

(i) Are you aware of any past or present water leakage in the house or other structures? ___ yes ___ no

(ii) Are you aware of any past or present movement, shifting, deterioration or other problems with walls, foundations or other structural components? ___ yes ___ no

(iii) Are you aware of any past or present problems with driveways, walkways, patios or retaining walls on the property? ___ yes ___ no

Explain any "yes" answers that you give in this section.

When explaining efforts to control or repair, please describe the location and extent of the problem and the date and person by whom the work was done, if known: _____

_____

_____

(7) **Additions/remodeling**. Have you made any additions, structural changes or other alterations to the property? ___ yes ___ no

If "yes," please describe: _____

_____

(8) **Water and sewage**.

(i) What is the source of your drinking water?
_____ public _____ community system
_____ well on property ____ other

If "other" please explain: _____

_____

(ii) If your drinking water source is not public:
when was your water tested? _____
what was the result of the test? _____
Is the pumping system in working order? ___ yes ___ no
If "no," please explain _____

_____

(iii) Do you have a softener, filter or other purification system?
___ yes ___ no

If "yes," is the system: ____ leased _____ owned

(iv) What is the type of sewage system?
____ public sewer _____ private sewer
____ septic tank _____ cesspool ____ other

If "other," please explain: _____

(v) Is there a sewage pump? ___ yes ___ no

If "yes," is it in working order? ____ yes ____ no

(vi) When was the septic system or cesspool last serviced?

_____

(vii) Is either the water or sewage system shared? ___ yes ___ no

If "yes," please explain: _____

(viii) Are you aware of any leaks, backups or other problems relating to any of the plumbing, water and sewage-related items? ___ yes ___ no

If "yes," please explain: _____

(9) **Plumbing system.**

(i) Type of plumbing: ____ copper ___ galvanized ___ lead ___ PVC ____ unknown _____ other

If "other," please explain: _____

(ii) Are you aware of any problems with any of your plumbing fixtures (including, but not limited to: kitchen, laundry or bathroom fixtures, wet bars, hot water heater, etc.)? ___ yes ___ no

If "yes," please explain: _____

(10) **Heating and air conditioning.**

(i) Type of air conditioning: ___ central electric ___ central gas ____ wall ___ none

Number of window units included in sale: _____

Location: _____

(ii) List any areas of the house that are not air

(iii) Type of heating: ___ electric ___ fuel oil ___ natural gas ___ other

If "other," please explain: _____

(iv) List any areas of the house that are not heated: _____

_____

(v) Type of water heating: ___ electric ___ gas ___ solar ___ other

If "other," please explain: _____

(vi) Are you aware of any underground fuel tanks on the property?
___ yes ___ no

If "yes," please describe: _____

Are you aware of any problems with any item in this section? ___ yes ___ no

If "yes," please explain: _____

(11) **Electrical system**. Are you aware of any problems or repairs needed in the electrical system? ___ yes ___ no

If "yes," please explain: _____

_____

(12) **Other equipment and appliances included in sale (complete only if applicable)**.

(i) ____ Electric garage door opener
Number of transmitters _____

(ii) ____ Smoke detectors. How many? ___
Location: _____

(iii) ___ Security alarm system
___ owned ___ leased
Lease information: _____

_____

(iv) ___ Lawn sprinkler
Number ___ Automatic time ___

(v) ___ Swimming pool ___ Pool heater ___ Spa/hot tub
List all poolspa equipment: _____

_____

(vi) ___ Refrigerator ___ Range ___ Microwave oven ___ Dishwasher
___ Trash compactor ___ Garbage disposal ___

(vii) ___ Washer ___ Dryer

(viii) ___ Intercom

(ix) ___ Ceiling fans ___ Number
Location: _____

(x) Other: _____

Are any items in this section in need of repair or replacement? ___ yes ___ no ____ unknown

If "yes," please explain: _____

---

(13) **Land (soils, drainage boundaries).**

(i) Are you aware of any fill or expansive soil on the property? ___ yes ___ no

(ii) Are you aware of any sliding, settling, earth movement, upheaval, subsidence or earth stability problems that have occurred on or that affect the property? ___ yes ___ no

NOTE TO BUYER: Your property may be subject to mine subsidence damage. Maps of the counties and mines where mine subsidence damage may occur and mine subsidence insurance are available through:

Department of Environmental Protection
Mine Subsidence Insurance Fund
3913 Washington Road
McMurray, PA 15317
412-941-7100

(iii) Are you aware of any existing or proposed mining, strip mining or any other excavations that might affect this property? ___ yes ___ no

(iv) To your knowledge, is this property or part of it located in a flood zone or wetlands area? ___ yes ___ no

(v) Do you know of any past or present drainage or flooding problems affecting the property? ___ yes ___ no

(vi) Do you know of any encroachments, boundary line disputes or easements? ___ yes ___ no

NOTE TO BUYER: Most properties have easements running across them for utility services and other reasons. In many cases, the easements do not restrict the ordinary use of the property, and the seller may not be readily aware of them. Buyers may wish to determine the existence of easements and restrictions by examining the property and ordering an abstract of title or searching the records in the Office of the Recorder of Deeds for the county before entering into an agreement of sale.

(vii) Are you aware of any shared or common areas (for example, driveways, bridges, docks, walls, etc.) or maintenance agreements? ___ yes ___ no

Explain any "yes" answers that you give in this section: _____

_____

_____

(14) **Hazardous substances.**

(i) Are you aware of any underground tanks or hazardous substances present on the property (structure or soil), including, but not limited to, asbestos, polychlorinated byphenyls (PCBs) radon, lead paint, urea-formaldehyde foam insulation (UFFI), etc.? ___ yes ___ no

(ii) To your knowledge, has the property been tested for any hazardous substances? ___ yes ___ no

(iii) Do you know of any other environmental concerns that might impact upon the property? ___ yes ____ no

(15) **Condominiums and other homeowners associations (complete only if applicable).**

Type: _____ condominium* ___ cooperative ___ homeowners association ___ other

If "other," please explain: _____

_____

NOTICE REGARDING CONDOMINIUMS AND COOPERATIVES:

According to section 3407 of the Uniform Condominium Act (68 Pa. C.S. § 3407 (relating to resales of units) and 68 Pa. C.S. § 4409 (relating to resales of cooperative interests), a buyer of a resale unit in a condominium or cooperative must receive a certificate of resale issued by the association in the condominium or cooperative. The buyer will have the option of canceling the agreement with return of all deposit moneys until the certificate has been provided to the buyer and for five days thereafter or until conveyance, whichever occurs first.

(16) **Miscellaneous.**

(i) Are you aware of any existing or threatened legal action affecting the property? ___ yes ___ no

(ii) Do you know of any violations of Federal, State or local laws or regulations relating to this property? ___ yes ___ no

(iii) Are you aware of any public improvement, condominium or homeowner association assessments against the property that remain unpaid or of any violations of zoning, housing, building safety or fire ordinances that remain uncorrected? ___ yes ___ no

(iv) Are you aware of any judgment, encumbrance, lien (for example, comaker or equity loan) or other debt against this property that cannot be satisfied by the proceeds of this sale? ___ yes ___ no

(v) Are you aware of any reason, including a defect in title, that would prevent you from giving a warranty deed or conveying title to the property? ___ yes ___ no

(vi) Are you aware of any material defects to the property, dwelling or fixtures which are not disclosed elsewhere on this form? ___ yes ___ no

A material defect is a problem with the property or any portion of it that would have a significant adverse impact on the value of the residential real property or that involves an unreasonable risk to people on the land.

Explain any "yes answers that you give in this section: _____

The undersigned seller represents that the information set forth in this disclosure statement is accurate and complete to the best of the seller's knowledge. The seller hereby authorizes any agent for the seller to provide this information to prospective buyers of the property and to other real estate agents. The seller alone is responsible for the accuracy of the information contained in this statement. The seller shall cause the buyer to be notified in writing of any information supplied on this form which is rendered inaccurate by a change in the condition of the property following the completion of this form.

SELLER _____ DATE _____
SELLER _____ DATE _____
SELLER _____ DATE _____

EXECUTOR, ADMINISTRATOR, TRUSTEE

The undersigned has never occupied the property and lacks the personal knowledge necessary to complete this disclosure statement.

_____

_____ DATE _____

_____

_____

RECEIPT AND ACKNOWLEDGEMENT BY BUYER

The undersigned buyer acknowledges receipt of this disclosure statement. The buyer acknowledges that this statement is not a warranty and that, unless stated otherwise in the sales contract, the buyer is purchasing this property in its present condition. It is the buyer's responsibility to satisfy himself or herself as to the condition of the property. The buyer may request that the property be inspected, at the buyer's expense and by qualified professionals, to determine the condition of the structure or its components.

SELLER _____ DATE _____
SELLER _____ DATE _____
SELLER _____ DATE _____