

THE LIABILITY OF HOME INSPECTORS IN RESIDENTIAL REAL ESTATE SALES

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I. INTRODUCTION

A review of advertisements for the sale of residential real estate leads one to wonder whether houses could be sold were adjectives to disappear. Evidently, few people in the real estate industry follow Mark Twain's advice regarding the use of adjectives.¹ Although exaggeration and puffery are commonplace in many forms of advertising, the real estate industry probably wins the prize for the use of flowery descriptors in the sale of homes,

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1. Mark Twain advised, "[a]s to the Adjective: when in doubt, strike it out." THE WIT AND WISDOM OF MARK TWAIN 2 (Alex Ayres ed., 1989).

whether they be mansions or shacks. Expressions such as “rare opportunity” and “must see” are commonplace, and “cute,” “adorable,” and “charming” become the norm, with the occasional “wow!” to stimulate interest among those whose senses have been deadened through the reading of these flowery ads. Even the most modest homes in need of repair are sometimes described with identifiers such as “unfinished” and “sweat equity opportunity,” and new neighborhoods built on clear-cut, previously wooded land are wonderfully misdescribed with soothing titles such as “Whispering Pines” and “Windy Oaks.”² No one seems to care about the verbiage attached to residential real estate sales because exaggeration and misdescription have become the norm in the industry.³ Only a fussy purist would be bothered by the language or claim that it is false or deceptive. Most buyers know that the only way to proceed is to get beyond the ads and to have a “hands on” experience in order to get a feel for whether the advertisement matches the reality of the neighborhood and house.

In an intriguing way, the language used in advertisements scratches the itch that we all have. We want our home to be a warm, safe, and comfortable place that fills our individual needs and the needs of our family. Cross-stitching, refrigerator magnets, welcome mats, and more are filled with expressions such as “Welcome to Our Home,” “Home Sweet Home,” and “God’s Little Acre.” Having found just the right house is a great pleasure, but it is also true that the pleasure will be equally matched with disappointment and pain should there be a major structural defect in the home discovered after moving in.⁴ The buyer, the mortgage lender, insurer, and other parties who have an interest in the sale all stand to lose if the house proves to be unlivable or in need of costly and inconvenient repairs. And although most people with some seasoning in the residential real estate market know there is no such thing as a “perfect” (defect free) house, they will probably be just as quick to admit that in many cases, buyers stand a chance of getting a bad surprise because, among other things, some defects are difficult

2. Although environmentalists are often tagged “tree huggers,” it is not much of a stretch to say that most builders are “tree haters.” Many are the homeowners who bemoan the fact that builders often clear cut previously wooded land in order to subdivide it and build houses without trees and roots getting in the way of utility lines, subcontractors and “progress.” A wise homeowner who values trees will mark them and insist that the builder protect trees from the damage caused by heavy equipment, soil compaction and careless error. *See* Tree Care Industry Association Frequently Asked Questions About Trees and Construction Damage, http://www.tcia.org/Public/About_faq_treecare3.htm#1 (last visited Sept. 22, 2007). Many trees purportedly “saved” by a builder will die during the first growing season after completion of the home and long after closing, unless roots and areas around the tree receive the same protection. *See id.* Builders will often leave a few trees scattered about in order to add an air of legitimacy to the title applied to the neighborhood, such as Pine Valley or Willow Trace.

3. *See Open House* (CNN television broadcast Oct. 4, 2007), <http://transcripts.cnn.com/TRANSCRIPTS/0709/22/oh.01.html> (“Real estate ads, they read something like this: Cozy, charming, luxury home, conveniently located in a desirable neighborhood. Just available, and a unique find. OK, the description, it sounds great, but what you read may not be what you get.”).

4. *See generally Housewrecked*, CONSUMER REP., Jan. 2004, at 26 (describing a Consumer Reports investigation involving extensive interviews with home buyers, building industry representatives, and others, finding that consumers have spent millions of dollars to repair serious defects in new and “young” homes).

to detect, are easily masked, and may evidence themselves only at certain times of the year, such as in the rainy season or when termites swarm.⁵ In addition to the problems with termites and latent defects, there has been an explosion in mold litigation, with buyers claiming that the mold has had toxic effects on humans and even pets.⁶ It is estimated that there are more than 10,000 mold-related lawsuits pending across the country,⁷ and some problems with mold are easy to temporarily mask if a seller is determined to pull a fast one.⁸

Problems with mold and rot have also surfaced in homes where builders used synthetic stucco.⁹ Although the product may work when properly installed, shoddy and hurried installation has led to many problems and numerous lawsuits.¹⁰ The moisture in the synthetic stucco siding also increases

5. In addition to termite infestation, which is particularly prevalent in the South and Southeastern United States, the most common complaints by homeowners include water intrusion (roofs, windows, doors and balconies), soil and drainage problems, stucco cracks, mold, and general structural problems with the house. Rachel M. Miller, Construction Defect Changes: Changes in Handling Defect Claims and Changing Client Expectation 433–36 (July 19, 2003) (unpublished Vol. I Reference Materials from Association of Trial Lawyers of America 2003 Annual Convention).

6. See Brian J. Clark & Deborah A. Little, “Toxic” Mold Litigation: A Multi-Disciplinary/Proactive Approach, FOR DEF., Nov. 2003, at 29, 29–30; Julie S. Elmer, *A Fungus Among Us: The New Epidemic of Mold Claims*, ALA. LAW., Mar. 2003, at 109, 109.

7. Clark & Little, *supra* note 6, at 30; see also Elmer, *supra* note 6, at 109–11 (noting that causes of action “include negligence against building inspectors, contractors, architects, and remediation firms; breach of implied warranty of habitability against landlords; bad faith against insurers that do not respond promptly or adequately to mold or water damage claims; fraud and suppression against property sellers and real estate agents who do not disclose prior mold or moisture problems; product liability or negligence against building materials and appliance manufactures; and workers’ compensation claims against employers whose employees are exposed to mold in the workplace.”). See generally Mike Bischoff, Comment, *Theories of Toxic Mold Liability Facing Arizona Homebuilders*, 34 ARIZ. ST. L.J. 681, 682 (2002) (discussing “typical issues arising from toxic mold lawsuits, a discussion of construction law in Arizona, and an analysis of significant issues likely to be encountered in future toxic mold claims”); Sylvia Hsieh, *Mold Cleaning Companies Face Lawsuits*, LAW. WKLY. USA, Apr. 14, 2003, at 15, 15 (noting that some mold remediation contractors entered the industry without knowing what they are doing and that the “industry remains almost completely unregulated”); Andrew J. Perel, *As Mold Spores Grow, So Do Contract Clauses*, NAT’L L.J., June 9, 2003, at 29, 29 (discussing representations, warranties, and covenants that borrowers may provide the lender that mold risks have been, and will continue to be, properly handled); Thomas P. Redick & Angela Loehr, *Causation in Mold Cases Continues to Develop*, NAT’L L.J., June 9, 2003, at 29, 29, 34 (discussing issues relating to the use of experts in mold litigation and the “idiosyncratic reaction” defense); John M. Simon & Thomas J. Trautner, Jr., *Mold: Should Your Client Be Worried About It? Don’t Dismiss the Danger*, BUS. L. TODAY, Mar.–Apr. 2004, at 34, 34–35, 37–39 (describing toxic mold litigation and the increasing media coverage of the problem).

8. See *Gifford v. Matejka*, No. 25886-2-II, 2001 WL 819067, at *1 (Wash. Ct. App. July 20, 2001) (finding that sellers were liable to buyers when sellers masked mold problems by contending that they bleached the walls in order to conceal their children’s drawing on the walls).

9. See Virginia Anderson & Susan Harte, *Who’s Getting Stucco-ed?*, ATLANTA J.-CONST., Nov. 10, 1997, at E1 (describing problems associated with rotting stucco and the resulting litigation against builders and synthetic stucco manufactures).

10. See James B. Burns, *Bad Stucco—Who Pays for What?*, FOR DEF., Sept. 2006, at 38 (discussing the position of the insured general contractor and their insurers in recent litigation involving “bad” stucco). See generally Virginia Anderson, *What to Do If It Happens to You*, ATLANTA J.-CONST., Nov. 10, 1997, at E6 (noting that some pest control companies have notified customers in Georgia that unless they eliminated siding to ground contact, the cost of the termite bond would increase or the bond could be voided entirely)[hereinafter Anderson, *What to Do*]; Susan Harte & Virginia Anderson, *Depth of Problem Is Starting to Soak in*, ATLANTA J.-CONST., Nov. 10, 1997, at E6 (describing the blame game between manufacturers and builders).

the likelihood of termite damage.¹¹ Synthetic stucco was used in the construction of many upscale homes before the problem was identified.¹²

Buyers usually enlist the help of real estate agents in the search for a house and some buyers rely heavily on their agent in selecting a home. Agents and buyers also rely heavily on the seller and seller's agent in responding to inquiries regarding the condition of the house. However, the purchase of a house—and most especially a used house—is one of the areas that remains heavily impacted by the doctrine of *caveat emptor*, placing a burden on buyers to fend for themselves in discovering defects.¹³ Although a complete analysis of the law of the fifty states regarding protections afforded to the buyer in the purchase of new and used homes is beyond the scope of this Article, a review of the law across jurisdictions suggests that, although we are said to be in an age of consumer protection in many areas of the law,¹⁴ buyers of used homes need to be aggressive in searching for defects because in simple terms, the law tends to favor sellers.¹⁵

11. See Anderson, *What to Do*, *supra* note 10, at E6 (noting a recent discovery of synthetic stucco's vulnerability to termites).

12. See Anderson & Harte, *supra* note 9, at E1.

13. See generally Bowdy J. Brown, *The Doctrine of Caveat Emptor and the Duty to Disclose Material Defects and Other Conditions in the Sale of Single Family Residential Real Estate: Defining the Home Buyer's Legal Rights*, ALA. LAW., Mar. 2000, at 122, 122 (asserting that "the doctrine of *caveat emptor* no longer applies to the sale of new single family residential real estate and is subject to a number of exceptions with respect to the sale of used single family residential real estate").

14. See, e.g., *Sims v. Lewis*, 374 So. 2d 298, 303 (Ala. 1979) ("Alabama has abolished the doctrine of *caveat emptor* in the commercial sale of a new house by its builder-vendor, and now recognizes instead an implied warranty of fitness and habitability.")

15. See *Graham v. United States*, 441 F. Supp. 741, 742, 747 (N.D. Tex. 1977) (holding, in a case brought under the Federal Tort Claims Act, that *caveat emptor* does not apply to new homes and "there is no implied warranty in Texas for the sale of used homes and that the doctrine of *caveat emptor* is applicable to this fact situation of the vendor-vendee transfer of a used home"); *Whatley v. Reese*, 875 So. 2d 274, 275 (Ala. 2003) (noting that *caveat emptor* still applies for sales of used homes); *Boackle v. Bedwell Constr. Co.*, 770 So. 2d 1076, 1079 (Ala. 2000) (same); *Compass Point Condo. Owners Ass'n v. First Fed. Sav. & Loan Ass'n of Florence*, 641 So. 2d 253, 255 (Ala. 1994) (same); *Hershey v. Rich Rosen Constr. Co.*, 817 P.2d 55, 58–59 (Ariz. Ct. App. 1991) (noting that although implied warranties of habitability and workmanship extend to subsequent purchasers of homes where there is a latent defect caused by the builder, "[t]he rule of *caveat emptor* applies generally to the sale of real estate. . . . However, the general rule is not applied to the construction of residential houses because of the public policy favoring the protection of innocent home purchasers and the accountability of home builders.") (citation omitted); *Miles v. Love*, 573 P.2d 622, 625 (Kan. Ct. App. 1977) ("this protection has never been extended to the sale of used housing; there the doctrine of *caveat emptor* still prevails. In this factual situation, where a basically used house has been newly improved by additions, and where the defects existed prior to the additions and are not the result of additions, this court holds that the doctrine of implied warranty of fitness should not apply. The buyer and seller can deal at arm's length, and each has access to equal knowledge concerning the house; therefore, absent fraud, the doctrine of *caveat emptor* should prevail."); *Layman v. Binns*, 519 N.E.2d 642, 645 (Ohio 1988) (In a sale for a used house the conditions of *caveat emptor* for a structural defect are that "(1) the condition complained of is open to observation or discoverable upon reasonable inspection, (2) the purchaser had the full and unimpeded opportunity to examine the premises, and (3) there is no evidence of fraud on the part of the vendor. [To avoid the application of *caveat emptor*,] purchasers must show an affirmative misrepresentation or a misstatement of a material fact in order to demonstrate fraud . . ."); *Rogers v. Hill*, 706 N.E.2d 438, 439–40 (Ohio Ct. App. 1998) (finding that the doctrine of *caveat emptor* applied to defects in the residential property with an "as is" contract, but not saying if it is new or used or if it is a house or apartment, etc., although the facts make it seem to be a used house); *Hays v. Gilliam*, 655 S.W.2d 158, 161 (Tenn. Ct. App. 1983) ("The facts of this case fall squarely within the rule of *caveat emptor* unless the existing exception is to be broadened to include non-residential, used structures. Such broadening is the province of the Supreme

In increasing numbers, prospective buyers—and in some cases, sellers—hire a home inspector to identify problems, either before listing or putting a contract on the house or at least prior to closing. A “home inspection” is defined by the American Society of Home Inspectors (ASHI) as:

A visual analysis for the purposes of providing a professional opinion of the condition of a building and its carports and garages, any reasonably accessible installed components and the operation of the building systems, including the controls normally operated by the owner, for the following components of a residential building of four units or fewer: heating system, electrical system, cooling system, plumbing system, structural components, foundation, roof covering, exterior and interior components and site aspects as they affect the building.¹⁶

The home inspection industry is a relatively young profession. “Prior to 1985, there was no state regulation of home inspectors or home inspection,”¹⁷ and the states regulate the home inspection industry either not at all, or in different ways based on “licensing, registration, certification and/or practice acts.”¹⁸ Although the prevalence of paid home inspectors varies across the country, it is estimated that in some real estate markets ninety-five percent of buyers have their prospective homes inspected before closing.¹⁹

The housing boom in new construction and the robust resale market experienced from 2000 to 2005 also contributed to the demand for and the income of home inspectors.²⁰ The favorable market was created in part by low interest rates and a relaxation of mortgage lending guidelines, even reaching down into the subprime credit market.²¹ Prospective homebuyers faced a “buyer’s market” for financing and existing homeowners also received regular solicitations for refinancing which triggered appraisals and, in some cases, inspections where the homeowner was eager to have the

Court or the Legislature and not of this Court.”); *Kuczanski v. Gill*, 302 S.E.2d 48, 51 (Va. 1983) (“In sum, the Gills took no actions and made no false representations in an attempt to divert the Kuczanskis from making a prudent inspection of the premises. Indeed, the only misrepresentation attributable to Mr. Gill involved the storm windows. Under the doctrine of caveat emptor, the Kuczanskis were not entitled to rely on this statement instead of ascertaining the true facts for themselves.”).

16. AM. SOC’Y OF HOME INSPECTORS, POSITION STATEMENT ON REGULATION OF HOME INSPECTORS 10 (July 2006), <http://www.ashi.org/documents/pdf/2006-ASHI-Position-Statement.pdf> [hereinafter ASHI POSITION STATEMENT].

17. *Id.* at 2.

18. *See id.* at 2, 9.

19. Ryan Dubosar, *Tougher Home Inspection Laws Are Double-Edged*, PHILADELPHIA BUS. J., Aug. 10, 2001, at 18.

20. *See* Karl E. Case & Robert J. Shiller, *Full House*, WALL ST. J., Aug. 30, 2006, at A10 (noting that the housing boom generated significant “income for . . . brokers, builders, bankers, appliance dealers and construction workers, and kept the economy growing at a strong clip” and explaining that appraisers and home inspectors also benefit from a strong housing market, fed by low interest rates and unconventional mortgage products).

21. *See id.*

home appraised at a higher value.²² In some cases, real estate speculators who were engaged in “flipping” residential real estate, when disappointed with values assigned by real estate appraisers for refurbished property, would enlist the support of home inspectors to provide additional information to support a higher final appraised value.²³

Individuals involved in closings have also reported a shortening in the period of time between the execution of the contract of sale and the closing. Although most people expect that a month (more or less) will pass between the buyer and seller reaching an agreement and the closing, some lawyers note that “more and more contracts call for closings to take place in as little as two or three weeks.”²⁴ This places even more importance on the timeliness, quality, and ramifications of the work done by a home inspector.

This Article explores a number of issues relating to home inspectors, including qualifications, regulation, liability, and litigation relating to home inspectors. It introduces the reader to the history and nature of the business and to the professional organizations that have attempted to educate and credential those who make their living as home inspectors. State statutes which apply to home inspectors will be compared and analyzed. This is followed by a review of the growing body of case law involving home inspectors as defendants. The cases involving home inspectors often have several reoccurring themes, including the extent to which lack of privity will serve as defense, attempts by home inspectors to limit damages to the amount of their fee or some modest amount, common misunderstanding involving the extent of the duties of a home inspector, and classic fraud and misrepresentation claims brought by buyers against home inspectors.

I assert that the reasonable expectation of homebuyers is often far too great, given the limited nature of the duties most home inspectors undertake, and that *caveat emptor* is alive and well in the used residential real estate market, without regard to the increasing use of home inspectors. Most home buyers wrongly equate a home inspection report with something akin to a warranty or assurance that the house is free of material defects, except as noted in the inspector’s report. The question remains whether the gap that exists between the prospective buyer’s expectation and the home inspector’s work product can be cured through more effective disclosure, or whether home buyers will continue to be wishful thinkers, expecting more than home inspectors can deliver. A more sinister spin is that in some cases in-

22. See *id.* (noting that the housing boom between 2000 and 2005 was propelled, in part, by low interest rates which made it very easy for buyers to get financing).

23. See Buy Owner, What You Need to Know About the Real Estate Home Appraisal, http://buyowner.com/learning/What_You_Need_To_Know_About_Home_Inspection.html (last visited Oct. 4, 2007) (noting that home inspections are more detailed than home appraisals, regarding the condition of a home); cf. Dubosar, *supra* note 19 (quoting a home inspector who notes that more people use his home inspection reports to negotiate the sale price since he knows the cost for repairs).

24. Margaret Graham Tebo, *Unconventional Wisdom*, A.B.A. J., June 2005, at 49, 49–51 (noting also that “[t]he array of mortgage loan alternatives now available is a key factor helping to fuel a residential real estate market” and “[t]he growing popularity of electronic closing packages add to the already frantic pace of many closings”).

spectors are responsible for the misunderstanding by directly or impliedly promising more than they can deliver.

The focus of this Article is on the role of home inspectors in the sale of residential real estate before closing. It does not deal with inspectors of commercial real estate, inspectors hired as expert witnesses after litigation has begun,²⁵ or negligent inspection claims against insurers in cases brought by employees against insurers when an insurer undertakes to inspect an insured employer's premises for safety.²⁶ The Article also does not deal extensively with the regulation of and legal claims against appraisers whose assessment of the value of residential real estate is more generally pegged to comparable sales in the relevant market, rather than focusing on specific material defects in the property. As noted by the executive director of ASHI, "[a]n appraisal is not an inspection."²⁷ In 1989, concerns regarding inaccurate and inflated appraisals caused Congress to tighten federal regulation of appraisers used by federally insured banks and thrifts,²⁸ but to date, the regulation of home inspectors has been left to the state legislatures.

II. THE HOME INSPECTION INDUSTRY

A. *Training To Be A Home Inspector*

Although prospective buyers and others are making increasing use of home inspectors in residential real estate sales, the qualifications, technical expertise, and scope of the inspection undertaken by a home inspector vary widely. And as is true in a number of professions, some people make their money training and credentialing home inspectors, even though the credentialing may occur through completion of a home study course taught largely through workbooks and the internet. One website for a company which offers home study distance learning courses describes the qualifications for being a home inspector as follows: "If you're handy around the house, appreciate good craftsmanship and enjoy helping people, a home inspection

25. See, e.g., *Buccaneer Homes of Ala., Inc. v. Pelis*, 43 S.W.3d 586, 588 (Tex. App. 2001) (owners of mobile home "hired a home inspector to specify all of the defects in the home, and used the inspector's list as the basis of their demands in a [Deceptive Trade Practices Act] notice letter sent to [the] [r]etailer and [m]anufacturer.").

26. See, e.g., *Commercial Union Ins. Co. v. DeShazo*, 845 So. 2d 766, 767, 771 (Ala. 2002) (holding that because the insurance companies inspected the employer's facilities "for their own benefit and did not assume the duty to provide a safe place to work, they cannot be held liable for negligent inspection" by the employees of the facilities).

27. Rhonda L. Lipschutz, *HUD Encouraging Home Inspection*, NAT'L MORTGAGE NEWS, Oct. 18, 1999, at 21.

28. See 12 U.S.C. §§ 3331, 3339, 3341 (2000); 12 C.F.R. §§ 34.41-47, 225.61-67, 323.1-7, 564.1-8 (2007). Appraisers, home inspectors, real estate brokers, and others have been cited as conspirators in predatory lending schemes. See, e.g., *Banks v. Consumer Home Mortgage, Inc.*, No. 01-CV-8508 (ILG), 2003 WL 21251584, at *1 (E.D.N.Y. Mar. 28, 2003) (denying motion to dismiss various defendants, "including the seller, the finance company, real estate brokers, an appraiser, an inspector, a contractor and the attorneys involved in closing the deal" in action alleging of fraud and state deceptive practices law related to purchase and financing of property).

career is right for you.”²⁹ The career potential is described as “great,” listing real estate agents, lenders, real estate appraisers, and relocation companies as potential clients.³⁰ Using a search engine, one can find a number of websites offering home inspection training, along with such other areas as appliance repair and even training in floral design offered by the same company.³¹ Most of the training companies take the same approach, selling a textbook with lessons for the week, having a help line where one can ask questions posed to an instructor, selling special starter-kit tools, and offering options for a tuition payment in a lump sum or in installments.³² A representative course of study includes sixteen lessons: (1) roofs, (2) roof-mounted structures, (3) paved areas, lots, and landscaping, (4) walls, windows, and doors, (5) garages, (6) wood-destroying insects and rot, (7) attics and interior rooms, (8) basements and crawl spaces, (9) electrical systems, (10) plumbing systems, (11) heating systems (part I), (12) heating systems (part II), (13) domestic water heaters, (14) air conditioners, (15) energy considerations, and (16) environmental concerns.³³

There is obviously competition not only among home inspectors but also among the companies offering study-at-home training materials.³⁴ One website offering a training book includes the following pitch: “DO NOT SPEND ANY \$\$\$ on home inspection training or home inspection equipment until you’ve read the SECRETS in this exciting new home inspector training guidebook.”³⁵ The advertisement claims that the book not only covers all the basics of a course but also includes material on how to avoid legal trouble and answers to questions on insurance, accounting, and recordkeeping.³⁶ The advertisement is filled with testimonials, notes that the book’s cost is “deductible as a business expense,” and highlights the unregulated nature of the industry in many states.³⁷ In a “Frequently Asked Questions” section,³⁸ the company notes that “[s]ome states have very strict training and experience requirements, while *many* states *have no requirements at all*,”³⁹ and that “[i]n most states, there is no such thing as a ‘certified’ home in-

29. Ashworth University, Learn How to be a Home Inspector!, <http://www.pcdi.com/courses/pp/index.html> (last visited Oct. 6, 2007).

30. Ashworth University, Opportunities in Home Inspection, <http://www.pcdi.com/courses/pp/career.html> (last visited Oct. 6, 2007).

31. See, e.g., Ashworth University, Choose Your Career Course!, <http://www.pcdi.com/courses/> (last visited Oct. 6, 2007).

32. See, e.g., Ashworth University, Learn Practical Skills at Home, <http://www.pcdi.com/courses/pp/outline.html> (last visited Oct. 6, 2007); Ashworth University, Home Inspection Tuition & Fees, <http://www.pcdi.com/courses/pp/tuition.html> (last visited Oct. 6, 2007).

33. Ashworth University, Learn Practical Skills at Home, <http://www.pcdi.com/courses/pp/outline.html> (last visited Oct. 6, 2007).

34. See, e.g., Pompeii Engineers, A Home Inspection & Home Inspector Training Guide, <http://www.homeinspectionbook.com/> (last visited Oct. 6, 2007).

35. *Id.*

36. *Id.*

37. *Id.*

38. Pompeii Engineers, Home Inspector Training: Frequently Asked Questions, <http://www.homeinspectionbook.com/faq.html> (last visited Oct. 6, 2007).

39. *Id.* (emphasis added).

spector.”⁴⁰ This approach, which appears to invite people to become a home inspector by merely slapping a magnetic sign on the side of a truck after minimal training, projects a shady image for the industry and will invite comparisons to horror stories in the home improvement and “tin men” industries, where some fly-by-night operators have caused heartburn for many a homeowner and a considerable amount of litigation.⁴¹

B. Shopping For A Home Inspector

How does a buyer locate a home inspector to try to avoid the problem of purchasing a home with major defects? In some cases, home inspectors advertise directly in the real estate section of classified ads and real estate magazines, the Yellow Pages, and in even more creative ways. It is not uncommon to find signs for home inspection services stuck among the cluster of “For Sale” signs that may be in proximity to the main entrance to a neighborhood that includes many houses for sale. Some of the signs include both local phone numbers and toll free numbers in the event the prospective buyer was touring through town and needed to make a call back from out of town or out of state.

Locating a home inspector on the Internet is also easy, especially with the help of websites that are geared to locating home inspectors.⁴² For each site, all you have to do is either enter your zip code or your city and state, and the search engine locates home inspectors in the area, listing the name, owner, phone number, address, and any affiliation to a national organization.⁴³ Most of the sites have disclaimers encouraging users to research the home inspector on their own and noting that the listing of the inspector does not constitute an endorsement by the website.⁴⁴ It is also interesting that some of the websites will yield different lists of inspectors for the same location.⁴⁵ In other words, there is often no crossover between sites.⁴⁶ In addi-

40. *Id.*

41. See generally Gene A. Marsh, *Lender Liability for Consumer Fraud Practices of Retail Dealers and Home Improvement Contractors*, 45 ALA. L. REV. 1 (1993) (describing deceptive sales practices in the home improvement industry and describing litigation where financiers have been held liable for the fraudulent sales practices of home improvement contractors, aluminum siding salespersons, and other retail dealers).

42. See, e.g., Homeinspection.com, Find a Home Inspector, <http://www.homeinspection.com/Find.asp> (last visited Oct. 6, 2007); Hann Tech Marketing Links, Home Inspector Locator, <http://www.homeinspectorlocator.com> (last visited Oct. 6, 2007).

43. See, e.g., Homeinspection.com, Find a Home Inspector, <http://www.homeinspection.com/Find.asp> (last visited Oct. 6, 2007).

44. For example, www.homeinspectorlocator.com includes the two following disclaimers: “Hann Tech Marketing Links provides the Home Inspector Locator’s listing of Home Inspection Companies but does not guarantee the services provided by the companies listed. The companies listed are provided to help you find Home Inspection companies in your area,” Hann Tech Marketing Links, Home Inspector Locator, <http://www.homeinspectorlocator.com> (last visited Oct. 6, 2007), and “the User acknowledges the information that they post to their own web site is not endorsed by Hann Tech Marketing Links, and such communications shall not be considered reviewed, screened, or approved by Hann Tech Marketing Links.” Hann Tech Marketing Links, Terms of Use Agreement for the “Home Inspector Locator,” http://www.homeinspectorlocator.com/terms_of_use.htm (last visited Oct. 6, 2007).

45. Using the two services noted in *supra* note 42 for Tuscaloosa, Alabama, resulted in two inspec-

tion to help with locating a home inspector, some of the websites include tips on what to look for in hiring a home inspector, question and answer sections, and various articles about home inspection.⁴⁷ One of the articles includes a list of twelve common defects that appear in home inspection reports.⁴⁸

C. Trade Associations

People in the industry and consumer groups recognize that consumers will be harmed and the home inspection industry will suffer if credentialing and regulation are lacking. Although specific states' regulation will be reviewed in Part IV, it is clear that in some states, you are a home inspector if you say you are.⁴⁹ In order to try to get out in front of this problem, there are several well-known national organizations that have promoted qualification and regulation, including the American Society of Home Inspectors (ASHI) and the National Association of Home Inspectors (NAHI). They both have extensive and easily navigable websites which, in addition to being self-promoting, contain information about home inspecting as a business.⁵⁰ ASHI appears to be the more well-established of the two organizations, as its standards are mentioned in many state statutes,⁵¹ and ASHI encourages state legislatures to adopt its model as a template for drafting new laws regulating home inspectors and home inspection practices.⁵² ASHI, founded in 1976, is the oldest and largest non-profit professional association of and for home inspectors⁵³ with chapters in forty-nine states and parts of Canada.⁵⁴ The standards to achieve and retain ASHI membership are fairly high

tion companies listed on one site and four listed on the other, with no crossover listing.

46. See *supra* note 45.

47. See, e.g., Hann Tech Marketing Home Links, Home Inspector Locator, <http://www.homeinspectorlocator.com> (last visited Oct. 6, 2007) (providing a significant amount of information relating to home inspections, home safety, home repair, and relocation resources).

48. Barry Stone, Inspectors in the House: Most Common Defects Found During a Home Inspection, http://www.homeinspectorlocator.com/press/common_defects.htm (last visited Oct. 6, 2007) (noting that the most common defects are roofing problems, ceiling stains, water intrusion from faulty ground drainage, electrical safety violations, rotted wood, building code violations, unsafe fireplaces and chimneys, water heater problems, defective gas furnaces, faulty firewalls in garages, minor plumbing problems, and failed seals around dual pane windows, which cause fogging).

49. Lesley Mitchell, *Utah Lacks Regulations for Home Inspector Profession*, SALT LAKE TRIB., Oct. 11, 2002, at D1 (quoting Nick Gromicko, executive director of the National Association of Certified Home Inspectors: "You are an inspector in Utah if you say you are"; also noting that in the state of Utah, "[o]nly a handful of Utah inspectors out of the hundreds that operate throughout the state belong to" trade associations that require proficiency exams and meet other criteria, such as participating in ongoing education).

50. See American Society of Home Inspectors, Inc., <http://www.ashi.org/> (last visited Oct. 6, 2007); National Association of Home Inspectors, Inc., <http://www.nahi.org> (last visited Oct. 6, 2007).

51. See, e.g., ALA. CODE § 34-14B-3 (1975).

52. ASHI POSITION STATEMENT, *supra* note 16, at 7. The Executive Summary notes that "[p]rior to 1985, there was no state regulation of home inspectors or home inspection." *Id.* at 2.

53. *Id.* at 5.

54. See American Society of Inspectors Local Chapter Search, <http://www.ashi.org/inspectors/chapters.asp> (last visited Oct. 6, 2007).

and laudable, as compared to trade associations in many other markets.⁵⁵ ASHI also publishes *The Standards of Practice and Code of Ethics*⁵⁶ which sets reasonably high standards to guide home inspectors in the performance of their jobs, but also purports to spell out the limitations on what an inspector can reasonably provide in an inspection and report.⁵⁷

In addition to the national organizations, there are also some state professional associations that establish standards for the real estate inspection industry. For example, the California Real Estate Inspection Association (CREIA) is a non-profit, voluntary membership organization that provides education, training and support services to the real estate inspection industry and to the public.⁵⁸ Moreover, “CREIA requires its members to successfully pass a written test of property systems and complete 30 hours of education each year CREIA keeps records to ensure that members are complying with the requirements.”⁵⁹

Because home inspectors in many states are operating without regulation, looking for professional credentials is important in selecting an inspector.⁶⁰ Consumers may also be wise to interview several inspectors and check for references because, in some states, regulation is a misnomer since “regulation” is simply a registration process.⁶¹ Hiring and relying on an unqualified inspector can lead to disastrous results.⁶² Buying a home with a major structural defect is a financial disaster for most middle class families, because insurance may not cover the preexisting problem and the home inspector may be judgment-proof.⁶³ Taking some care in the selection of a

55. ASHI POSITION STATEMENT, *supra* note 16, at 5, notes:

ASHI Members are independent professional home inspectors who have met the most rigorous technical and experience requirements in effect today. To become an ASHI Member, an inspector must pass two written tests, including the National Home Inspectors Examination, and have performed a minimum of 250 professional fee-paid inspections conducted in accordance with the ASHI Standards of Practice. Members are also required to follow the Society’s Code of Ethics, and to obtain 20 continuing education credits per year to keep current with the latest in building technology, materials and professional skills.

56. AM. SOC’Y OF HOME INSPECTORS, INC., *THE STANDARDS OF PRACTICE AND CODE OF ETHICS OF THE AMERICAN SOCIETY OF HOME INSPECTORS* (2006), <http://www.ashi.org/documents/pdf/standards.pdf> [hereinafter ASHI STANDARDS OF PRACTICE AND CODE OF ETHICS].

57. *Id.* at 2 (describing that the “Standards of Practice guide home inspectors in the performance of their inspections,” while the Code of Ethics “stresses the home inspector’s responsibility to report the results of the inspection in a strictly fair, impartial, and professional manner, avoiding conflicts of interest”).

58. *Why Home Inspection Standards of Practice are Important—CREIA Explains*, BUS. WIRE, Jan. 2, 2003, at 52 (noting that the “California Business and Professions Code Section 7196 allows a judicial authority to use the Standards of Practice of the California Real Estate Inspection Association (CREIA), ASHI, or other nationally recognized organizations, as the duty of care applied to a home inspection.”)

59. *Id.*

60. *See Increased Home Inspection Regulation to Continue*, FAIRFIELD COUNTY BUS. J., Sept. 30, 2002, at 15, available at 2002 WLNR 5503538.

61. *Id.*

62. *See, e.g.*, Kevin G. DeMarrais, *New Jersey Lawmakers Debate Home-Inspection Protections*, RECORD, Feb. 23, 2003, available at 2003 WLNR 12467944 (noting a story of a woman “who ended up with a unlivable \$272,000 house . . . that had gotten a clean bill of health from an unqualified inspector”).

63. Kristi Arellano, *Dream Home or Damaged Goods? Inspections Help Homebuyers Find any*

home inspector and paying close attention to the limitations of the report are important precautions, most particularly since *caveat emptor* and case law place such a heavy burden on buyers in the sale of used real estate.

D. Scope and Costs of Home Inspection

Home inspections probably create a false sense of security among many buyers.⁶⁴ Buyers likely assume that all the possible problems with the home will be listed in the report, failing to understand that most home inspections are visual and not invasive.⁶⁵ Most of the actual home inspection contracts reviewed by the author include an extensive "Scope of Inspection" provision⁶⁶ which attempts to put clients on notice that in exchange for the fee (typically ranging from \$125 to \$250, depending on the scope of inspection and size of the house),⁶⁷ the home inspector will conduct a careful visual examination,⁶⁸ but generally will not move furniture, pick up rugs, remove ceiling tiles, move insulation or crawl through crawl spaces.⁶⁹ Most home inspectors recommend that the homeowner or potential buyer be present at the time of the inspection in order to better educate that client, rather than simply producing only a written report.⁷⁰ And in the event an inspection report indicates a possible problem, an inspector should recommend that the homebuyer seek the services of a specialist, such as a structural engineer or air quality expert.⁷¹

III. CONSIDERATIONS IN HIRING AND TIMING OF THE INSPECTION

Most home inspectors are hired by prospective buyers who want the home inspected either before placing a contract on the property or prior to closing. However, in some real estate markets that are "hot," sellers will obtain a home inspection before, or at the time of, the listing.⁷² A seller who has the home inspected prior to listing may be able to address structural problems, minimizing the risk of a deal-killing surprise in an eleventh hour

Problems Early, DENV. POST, Nov. 10, 2002, at E6, available at 2002 WLNR 461308.

64. Harold I. Levine, *Some Thoughts on Home Inspections*, DCBA BRIEF ONLINE, June 2001, <http://www.dcba.org/brief/junissue/2001/art40601.htm>.

65. *Id.*

66. *See, e.g.*, Northland Home Inspections, Inc., Property Inspection Contract, <http://www.northlandhome.com/webcontract.htm> (last visited Oct. 6, 2007).

67. *See Protection You Get from a Home Inspection*, CHANGING TIMES, July 1983, at 64.

68. *See, e.g.*, Northland Home Inspections, Inc., Property Inspection Contract, <http://www.northlandhome.com/webcontract.htm> (last visited Oct. 6, 2007).

69. *See ASHI STANDARDS OF PRACTICE AND CODE OF ETHICS*, *supra* note 56, § 13, at 6.

70. AmeriSpec Home Inspection Service, FAQ for Buyers, <http://www.amerispec.com/index.cfm?docID=23> (last visited Oct. 6, 2007) (including a list of answers for frequently asked questions, which includes the suggestion that homeowners or potential buyers must be present at the inspection).

71. *See ASHI STANDARDS OF PRACTICE AND CODE OF ETHICS*, *supra* note 56, § 2.2(C)(2), at 3.

72. K.P. Dean Harper, Can a Buyer Successfully Sue a Negligent Home Inspector When Inspection Report is Prepared for the Seller?, <http://www.bowlesverna.com/articles/realestate3.html> (last visited Oct. 6, 2007).

inspection report.⁷³ This also “minimize[s] the chance of a buyer renegotiating the purchase price after obtaining a home inspection report.”⁷⁴ Most people who are honest and attentive know there are some defects in their home (dripping faucet, etc.), but there will generally be nothing but unhappiness and disappointment if a major defect is discovered shortly before closing in an inspection paid for by the buyer. So some sellers choose to face the music early on and hire a home inspector on the front end. However, understandably, many sellers would rather avoid the expense and the complications that might come from being made aware of a latent defect and most particularly in jurisdictions where the burden is on the buyer to fend for themselves in inspecting the home.⁷⁵ Real estate agents who list the property are not likely to recommend that the seller hire a home inspector but instead are more likely to expect that the buyer would make the investment before closing on the house.

Having the home inspected is an important safeguard for a buyer, but a prudent buyer will also insist that the purchase contract set forth the rights and duties of the parties, should an inspection turn up the need for significant repairs. Whether couched as a condition precedent or condition subsequent, the contract should be clear on what the responsibilities of the sellers and buyers are in response to a home inspection report. It may be that the seller and the buyer insist on a safety valve, allowing them to walk away from the deal should the inspection report exceed a certain dollar amount for needed repairs. Another alternative is to establish that the contract price will be adjusted or that the buyer and seller will share the expense of needed repairs up to a certain limit in the event both parties want to proceed with sale even though certain needed repairs have been identified. Real estate agents representing the parties should think ahead and protect the investment of their respective parties because differences of opinion may arise over whether repairs are needed.

For example, a seller may completely disagree that the home needs a new roof (shingles) and may in good faith agree that if he or she were to continue to live in the house, the roof would not be an item they would repair or replace in the near future. On the other hand, an anxious buyer might be determined to have the roof replaced or the sales price adjusted should a home inspector identify a potential problem with the roof. Whether the exterior of a house needs new paint or a driveway needs to be resurfaced can be a matter of opinion and most sellers who have landed on a list price after

73. *See id.*

74. *Id.* (noting however that many home inspectors “attempt to limit their liability by inserting a provision in a home inspection report” providing that the liability runs only to the seller-client and not to any prospective buyer).

75. Martha Neil, *Dream Home Nightmares*, A.B.A. J., Feb. 2004, at 47, 49. Recognizing that disputes involving “seller nondisclosure focus on what the seller knew, what the seller was supposed to know, and when the seller knew it,” some real estate practitioners suggest that the less a seller actually knows about the property, the better off she or he may be. *Id.* Thus, “from a legal standpoint,” some suggest that “sellers may be better off not conducting their own inspections of properties they are selling.” *Id.*

some analysis of comparable sales in the market will not be willing to drop the price significantly or write a check for repairs if the suggestion from the home inspector is viewed as “iffy.” It is a rare used home that is not in need of some repair or refurbishing. But in order to avoid surprise, bad feelings, and even a breach of contract action, the contract should be as explicit as possible in identifying the respective rights and duties of the parties after a home inspection report has been received. Loose language that suggests that the buyer’s obligation to go forward is subject to their “satisfaction” with the inspector’s report is an invitation to trouble. The fortunes of the seller should not be subject to the totally unfettered personal satisfaction of the buyer, but the buyer should also have an out in the event there are serious and quantifiable problems identified in the home inspection report. Opportunistic buyers may try to use the inspectors report to negotiate for a lower price, request that repairs be made before closing, or simply try to back out of the deal.⁷⁶

Another issue that is important, but often ignored, is the timing of the home inspection. Many residential real estate contracts stipulate that a home inspection be completed late in the game—sometimes only a day or two before the scheduled closing.⁷⁷ For sellers who are looking forward to realizing the sales price and moving on, no news is good news, so they are not likely to be focused on the home inspection occurring. And in a market where there is a heavy burden on the buyer through application of *caveat emptor*,⁷⁸ the seller realistically has no real incentive to be the activist in the transaction by pushing to identify possible problems.

Similarly, a buyer who has walked through the home several times and detected no problems that would deter them in purchasing the property may be focused on arranging financing, selling their existing home, arranging for movers and so on, allowing the closing date to sneak up without triggering the home inspection. Parents and children who are excited about moving into a house within a few days may be already “in the house” in mind, if not in body, and may be inclined to ignore or run right past some warning language in an inspection report if all the other arrangements have been made, a favorable interest rate has been locked in, and everything else is in place for the move. The point is that all the protections to be gained through hiring a qualified home inspector can be lost unless the home inspection is undertaken in sufficient time prior to the scheduled closing, allowing the parties and their representatives (real estate agents) to react to any problems and move forward with the sale. And although discovery of a serious defect is never good news to real estate agents, what separates the best of them from all the rest in their profession are those who make sure that the inter-

76. Arellano, *supra* note 63.

77. See, e.g., Pride Property Inspections, New Construction, <http://www.pridepropertyinspections.com/newconstruction.html> (last visited Oct. 6, 2007) (displaying results of home inspections conducted “the day before or morning of closing day”).

78. See *supra* notes 13–15 and accompanying text.

ests of all involved are protected in an open and forthright manner. In a profession such as real estate, where word of mouth carries the day as far as professional reputation, a real estate agent who makes sure that an inspection is completed in a timely fashion will be known as a professional who is worthy of trust and confidence.

Although some consumer advocates warn against the selection of a home inspector based on recommendations of a real estate agent,⁷⁹ it is probably realistic and not necessarily a conflict of interest for a real estate agent to help a homeowner identify home inspectors with good qualifications and a reputation for doing a good job. It is wrong and silly to assume that a referral made by a real estate agent will be tainted. In fact, most prospective buyers probably welcome the assistance from the real estate agent, just as they often do in soliciting help for arranging financing, locating a mover, and so on. At the same time, real estate agents and home inspectors should avoid any actual or appearance of any conflict of interest in the referral arrangement for home inspection. Included among the Code of Ethics for the American Society of Home Inspectors is the directive that “[i]nspectors shall not receive compensation for an inspection from more than one party unless agreed to by the client(s)”⁸⁰ and that “[i]nspectors shall not accept compensation, directly or indirectly, for recommending contractors,

services, or products to inspection clients or other parties having an interest in inspected properties.”⁸¹ Included among the ASHI Model Home Inspector Licensing Legislation is the provision that it is a prohibited act “[t]o offer or deliver any compensation, inducement or reward to the owner of the inspected property, the broker or agent, for the referral of any business to the inspector or the inspection company.”⁸² Without regard to whether a home inspector is a member of ASHI, these are working principles that make good sense and will lessen the risk of being a target in litigation.

What a prospective homeowner should expect to get from a qualified home inspector is a written report identifying any deficiencies in the property.⁸³ However, it is important for a buyer to understand the inspection will

79. Arellano, *supra* note 63 (noting that Homeowners Against Deficient Dwellings, a Liberty, Mo. based consumer protection group, “discourages selecting inspectors based on Realtor recommendations because, in rare cases, a Realtor might favor an inspector with a reputation for making sure deals go through”).

80. ASHI STANDARDS OF PRACTICE AND CODE OF ETHICS, *supra* note 56, at 8.

81. *Id.*

82. ASHI POSITION STATEMENT, *supra* note 16, at 17.

83. *See id.* at 11. The ASHI guidelines require that:

[t]he Inspector shall report:

- On those systems and components inspected which, in the professional opinion of the inspector, are significantly deficient or are near the end of their service lives.
- A reason why, if not self-evident, the system or component is significantly deficient or near the end of its service life.
- The inspector’s recommendations to correct or monitor the reported deficiency.

most likely not include a description of “[t]he methods, materials or costs of corrections,” “[t]he market value of the property or its marketability,” and most importantly, “[t]he advisability of the purchase of the property.”⁸⁴ And underscoring the non-intrusive nature of home inspections, ASHI notes that inspectors are not required to undertake any procedure or operation that would be a danger to them, will not move personal property such as furniture, and will not “[d]ismantle any system or component.”⁸⁵ So in hiring a home inspector and studying an inspection report, the prospective buyer should not only be made aware of the extent to which peace of mind comes with the inspection report but also understand that *caveat emptor* is still in play.

IV. STATE REGULATION

As noted above, “[p]rior to 1985, there was no state regulation of home inspectors or home inspection,”⁸⁶ and among the thirty-one states that have some form of regulation today, the rules vary widely on licensing, registration, certification, and permissible practices.⁸⁷ Not only is the home inspection industry a relatively young profession,⁸⁸ but most of the business entities engaged in home inspection are uncomplicated, even more so than those in the home improvement industry.⁸⁹ Most home inspectors operate without

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- Any systems and components designated for inspection in the Standards of Practice which were present at the time of the inspection but were not inspected, and a reason they were not inspected.

Id.

84. *See id.* at 14–15. ASHI’s general exclusions are as follows:

Inspectors are NOT required to determine:

1. The condition of systems or components which are not readily accessible.
2. The remaining life of any system or component.
3. The strength, adequacy, effectiveness or efficiency of any system or component.
4. The causes of any condition or deficiency.
5. The methods, materials or costs of corrections.
6. Future conditions including, but not limited to, failure of systems and components.
7. The suitability of the property for any specialized use.
8. Compliance with regulatory requirements (codes, regulations, laws, ordinances, etc.).
9. The market value of the property or its marketability.
10. The advisability of the purchase of the property.
11. The presence of potentially hazardous plants or animals including, but not limited to, wood destroying organisms or diseases harmful to humans.
12. The presence of any environmental hazards including, but not limited to, toxins, carcinogens, noise, and contaminants in soil, water and air.
13. The effectiveness of any system installed or methods utilized to control or remove suspected hazardous substances.
14. The operating costs of systems or components.
15. The acoustical properties of any system or component.

Id.

85. *Id.* at 16.

86. ASHI POSITION STATEMENT, *supra* note 16, at 2.

87. *Id.* at 2–3.

88. American Society of Home Inspectors, Become an ASHI Home Inspector, <http://www.ashi.org/inspectors/become.asp> (last visited Oct. 6, 2007).

89. For a review of some of the questionable practices in the home improvement industry and some

subcontractors or even employees—“the majority of inspectors are solo operations.”⁹⁰

Although some people associated with the home inspection industry appear to play on the fact that regulation and licensing may be nonexistent or minimal in some states,⁹¹ it is clear that ASHI has promoted the idea of the adoption of effective regulation and a code of ethics in the industry.⁹² In some areas of consumer protection, it is not uncommon to find trade associations actively promoting the adoption of what is labeled “consumer protection” legislation, when in fact what the legislation does is codify and validate what many people consider to be extreme behavior.⁹³ This is particularly true in the subprime credit market and in such market segments as pawnshop lending and check cashing services.⁹⁴ However, the efforts of ASHI appear to be genuine in promoting legislation that will protect the homebuying public.⁹⁵ There is no question that ASHI is also interested in protecting the interests of home inspectors and the home inspection industry,⁹⁶ but this is no different than professional associations in other parts of the economy, such as in consumer lending, where an initiative for full and clear disclosure of credit terms works for the benefit of the consumer and honest providers of credit.⁹⁷

ASHI maintains a webpage which includes a short summary of each state statute and hyperlinks to download the individual laws.⁹⁸ The webpage

attempts at regulation of the industry, see Marsh, *supra* note 41, at 6.

90. Dubosar, *supra* note 19.

91. See *supra* text accompanying note 39.

92. ASHI POSITION STATEMENT, *supra* note 16, at 2. ASHI’s position on state regulation is as follows:

ASHI maintains that where regulation is determined to be advisable for the protection of public health, safety or welfare, any laws regulating home inspection should include standards of practice and a code of ethics, and should require proven experience, continuing education and demonstrated knowledge through passage of a psychometrically valid examination. (According to the Encyclopedia Britannica, psychometrics is the systematic use of tests to quantify psychophysical behavior, abilities and problems and to make predictions about psychological performance.) Legislative proposals that do not include these criteria will not adequately protect the consumer and will be opposed by ASHI.

When a need for regulation is recognized, ASHI is dedicated to working with legislators to enact regulation that will clearly protect the interests of consumers and qualified home inspectors. ASHI has successfully worked with state legislators and regulators to draft, pass and implement legislation and will continue to make its resources available to those states considering the regulation of home inspection as one means of protecting the homebuying public.

Id.

93. See, e.g., U.S. DEP’T OF JUSTICE & THE FED. TRADE COMM’N, REPORT ON COMPETITION IN THE REAL ESTATE INDUSTRY 30–70 (April 2007), available at <http://www.ftc.gov/reports/realestate/V050015.pdf> (analyzing efforts of the real estate industry to push ostensibly consumer protective legislation that would have the effect of reducing competition within the industry).

94. For a review of sharp credit practices in the subprime credit market, including the practices of flipping, credit insurance packing, payday loans, pawn shop lending, and the rent-to-own industry, see generally GENE A. MARSH, CONSUMER PROTECTION LAW IN A NUTSHELL 63–97, 280–321 (3d ed. 1999).

95. See ASHI POSITION STATEMENT, *supra* note 16, at 2, 24.

96. See *id.*

97. See generally MARSH, *supra* note 94, at 135–233.

98. See American Society of Home Inspectors, Existing State Home Inspector Regulatory Legisla-

also includes the name of the state regulatory agency which oversees the home inspection industry with telephone numbers and email addresses for most.⁹⁹ ASHI evaluated the laws of the thirty-one states with some form of regulation of the home inspection industry in June 2006.¹⁰⁰ The methodology included thirteen criteria and weights assigned to each.¹⁰¹ The ASHI ranking, from highest to lowest point totals, is as follows:

1. Louisiana
2. New Jersey/Texas
4. Arizona
5. Massachusetts
6. Connecticut/North Carolina
8. Arkansas
9. Indiana
10. Rhode Island/West Virginia
12. South Dakota/Tennessee
14. Mississippi
15. Virginia
16. Wisconsin
17. Oklahoma
18. Kentucky
19. Alaska/Illinois
21. Alabama/Oregon
23. Maryland
24. New York
25. Nevada
26. Pennsylvania
27. South Carolina
28. Montana
29. North Dakota
30. Georgia
31. California¹⁰²

The ASHI ranking is the product of the consideration of a number of variables, but it is especially impacted by whether the state followed ASHI's lead and patterned its legislation after the ASHI model.¹⁰³

For the most part, the state statutes addressing home inspectors are quite similar, requiring some minimal amount of education or experience, a license usually issued by a state board, and a certain amount of liability in-

tion, <http://www.ashi.org/inspectors/state.asp> (last visited Oct. 6, 2007).

99. *Id.*

100. ASHI POSITION STATEMENT, *supra* note 16, at 3.

101. *Id.* at 3, 20–21. The criteria include education, experience, examination, standards of practice, prohibited acts, definition of home inspector and definition of home inspection, governing board, continuing education requirement, liability, exemptions, reporting requirements, reciprocity, and penalties. *Id.* at 21.

102. *Id.* at 3.

103. *See id.* at 21.

insurance.¹⁰⁴ Further, most states with some form of regulation prohibit an inspector from doing any repairs on a house within a year of the inspector's report, providing an inspection report in which the inspector has a financial interest, accepting any commission or referral fee, or accepting employment when the fee is contingent upon the conclusions in the reports.¹⁰⁵

V. HOME INSPECTORS IN THE COURTS

For the most part, the litigation involving home inspectors as defendants is of very recent vintage.¹⁰⁶ Given the increased use of home inspectors in residential real estate transactions,¹⁰⁷ there are almost certainly a number of other cases in the litigation pipeline.

The cases involving home inspectors are interesting, often filled with "heat" for ready use by the plaintiff's lawyer, and involve a number of issues and parties. Cases destined for the Home Inspectors Litigation Hall of Fame are those such as *Redding v. Tanner*,¹⁰⁸ where the home inspector arrived at the house with no ladder and used binoculars to inspect the roof and eaves.¹⁰⁹ In reversing the trial court's summary judgment for the inspector, the Georgia Court of Appeals emphasized the binocular inspection.¹¹⁰ The cases involving home inspection reflect all the things that can go wrong with a house, all the parties that may be involved, and all the upset, anguish, and cost that follows when a buyer discovers major defects in the home. As noted in Part I, there is no greater trauma in the lives of most consumers than having a problem with their home, which is most likely their largest financial asset. And the frustration among buyers is particularly high if they have gone to the trouble of trying to head off problems with a house in hir-

104. See ALA. CODE §§ 34-14B-1 to -14B-10 (1975); ARIZ. REV. STAT. ANN. § 32-111 (2002); ARK. CODE ANN. § 17-52-301 to -52-322 (Supp. 2005); CAL. BUS. & PROF. CODE §§ 7195-7199 (West Supp. 2007); CONN. GEN. STAT. ANN. §§ 20-490 to -495 (West Supp. 2007); GA. CODE ANN. §§ 8-3-330 to -332 (2004); § 225 ILL. COMP. STAT. ANN. 441/1-1 to 441/999-99 (West 1998); IND. CODE ANN. §§ 25-20.2-5-2 to -5-6 (West Supp. 2007); LA. REV. STAT. ANN. §§ 37:1475-1489 (2000); MASS. GEN. LAWS ANN. ch. 13, §§ 96-97 (West 2002); MISS. CODE ANN. §§ 73-60-1 to -60-45 (West 2004); MONT. CODE ANN. §§ 30-14-1001 to -14-1005 (2004); NEV. REV. STAT. ANN. §§ 645D.010-.900 (LexisNexis 2004); N.J. STAT. ANN. §§ 45:8-61 to :8-77 (West 2004); N.C. GEN. STAT. §§ 143-151.43 to -151.64 (2005); OKLA. STAT. ANN. tit. 59, §§ 858-622 to -634 (West Supp. 2007); OR. REV. STAT. §§ 701.350-.355 (2003); 68 PA. CONS. STAT. ANN. §§ 7501-7512 (West 2004); R.I. GEN. LAWS §§ 5-65.1-2 to .65-1-14 (2004); S.D. CODIFIED LAWS §§ 36-21C-1 to -13 (2003); TENN. CODE ANN. §§ 62-6-301 to -308 (2006); 22 TEX. ADMIN. CODE § 535.201 (1991); VA. CODE ANN. §§ 54.1-500 to -517.2 (2005); WIS. STAT. ANN. §§ 440.97-.979 (West 2005).

105. See, e.g., OR. REV. STAT. § 701.355 (2003).

106. The cases involving home inspectors as defendants range from the home inspector as the primary defendant, to those where the home inspector is mentioned as having been named tangentially, but dismissed before trial.

107. See American Society of Home Inspectors, Become an ASHI Home Inspector, <http://www.ashi.org/inspectors/become.asp> (last visited Oct. 6, 2007).

108. 498 S.E.2d 156 (Ga. Ct. App. 1998).

109. *Id.* at 157.

110. *Id.* at 157-59 (noting, in response to the dissent's argument that the homeowners could have prevented the harm, that the lack of expertise of a person employing an expert is the very reason for the employment).

ing a home inspector before closing. Words such as “Lady, you bought a rotting, falling down dump”¹¹¹ after the homebuyer takes possession will make for a quick trip to a lawyer and will most likely include the home inspector among the defendants. The cases discussed in this Part indicate that, as a general rule, the courts are fairly sympathetic to the homeowners, especially when the liability of home inspectors is a new issue in the jurisdiction. Some of the cases have unusual twists, including cases where the court visited the home in order to reconcile differences in the evidence being offered regarding the nature and magnitude of the defects.¹¹²

Although there are a variety of issues in play in the cases, I have placed the cases into one of four major categories for purposes of discussion. Some of the cases involve a number of issues, any one of which could be or was determinative. Although I introduce the cases after placement in one of the four categories, I touch on the other important issues in the cases as they are introduced. However, the initial grouping is mine, and although not entirely random, it might be recategorized and reordered without doing much harm to the analysis.

The four categories are as follows: (A) Home inspector liability to parties not in privity of contract and other third party liability issues; (B) Consumer reliance on home inspections, substandard home inspections, and misunderstandings regarding what a home inspector does or does not promise; (C) Arbitration provisions and attempts by home inspectors to limit liability and reduce statutes of limitations; and (D) “Other issues,” including whether this line of work is a “profession” or “trade.”

A. Home Inspector Liability to Parties Not in Privity and Other Third Party Liability Issues

Although the buyer who directly contracts with a home inspector is the party most likely to complain if there are problems with the house that were not detected and reported, others may also become complaining parties or get pulled into litigation relating to home inspections. Sellers, real estate

111. Moore v. Prudential Residential Real Servs. Ltd. P’ship, 849 So. 2d 914, 921 (Ala. 2002) (quoting the testimony of a roofer who was asked to repair the roof after the buyers took possession).

112. See, e.g., Zitzkat v. Talotta, No. CV 970569373S, 1999 WL 1273715, at *1, *3-4 (Conn. Super. Ct. Dec. 13, 1999) (visiting the scene and holding inspector not liable for not detecting structural damage in basement where inspector was contracted under the guidelines of ASHI, which limited the inspection to “readily accessible and visible major elements,” and where the only way the significance of the basement cracks “could have been determined at the time of defendant’s inspection would have been to remove the slab which was clearly beyond the terms of the contract, and contrary to standards of the American Society of Home Inspectors”); Palumbo v. Jack A. Halprin Assocs., Inc., No. CV 93-0353094-S, 1994 WL 692739, at *1-2 (Conn. Super. Ct. Nov. 30, 1994) (visiting the scene and awarding damages to homeowner for repairs and installation of water-proofing system where inspector reported in written inspection report that basement was dry, appeared to stay fairly dry, and could be vulnerable to water seepage under extreme conditions, but did not detect that basement had been and would be subject to water seepage into basement in large quantities despite placement of kitchen appliances on two-by-fours, water stain damage to wall endings and door passages, and the lack of visible seam along one basement wall).

agents, and lenders are among those named as defendants in cases where the plaintiff cites problems with the quality of the home inspection and accuracy or clarity of the home inspection report. Through specific contract provisions, ethics codes,¹¹³ and promulgation of model legislation offered to legislatures for adoption,¹¹⁴ the industry has attempted to limit circulation of the written reports and limit liability only to the party who is in privity of contract with the home inspector. However, following the lead of many jurisdictions where professionals who prepare reports have been found liable to parties not in privity,¹¹⁵ some courts have expanded the liability of home inspectors beyond their identified client in the contract.

In *Leko v. Cornerstone Building Inspection Service*,¹¹⁶ the buyers sued the sellers, the seller's real estate agent, and their own agent for negligent nondisclosure of defects and active concealment of "major structural damage caused by the Northridge earthquake in 1994."¹¹⁷ The real estate agents filed a cross-complaint for "equitable indemnity, contribution and declaratory relief" against the home inspector hired by the plaintiff-buyers and two other home inspectors, who had inspected the property and prepared reports for a prospective purchaser approximately one month before the plaintiffs made their offer on the property.¹¹⁸ The home inspector hired by the plaintiff filed for summary judgment on the cross complaint, "argu[ing] that equitable indemnity is available only between tortfeasors who are jointly and severally liable, and posited that it could not be jointly and severally liable for any breach of [the real estate agents'] duty of care to [the] [p]urchasers."¹¹⁹ The two home inspectors who had prepared reports for a previous prospective purchaser "argued that their involvement in the transaction was even more attenuated because they lacked contractual privity" with these plaintiff-purchasers and any other party to this specific transaction.¹²⁰ The trial court granted the motions for all three home inspectors.¹²¹ The California Court of Appeals reversed the grant of summary judgment on the pleadings.¹²²

113. For example, the ASHI Standards of Practice and Code of Ethics provides that "[i]nspectors shall not disclose inspection results or client information without client approval." ASHI STANDARDS OF PRACTICE AND CODE OF ETHICS, *supra* note 56, at 8.

114. ASHI POSITION STATEMENT, *supra* note 16, at 18 (The ASHI Position Statement on Regulation of Home Inspectors provides that "[o]nly a client and no other party shall have an action to recover damages arising from a home inspection or a home inspection report.").

115. For example, accountants were initially liable only when they were negligent in the performance of their duties to individuals who had directly contracted for their services. See Mark H. Fink, *Third-Party Liability of Public Accountants*, 71 MICH. B.J. 1286, 1286 (1992). However, the scope of accountant liability to non-clients has changed significantly, reflecting the changing dynamics of the accounting profession. Jessica P. Gomez, Comment, *Accountants' Accountability to Nonclients in Texas*, 35 ST. MARY'S L.J. 135, 166-67 (2003).

116. 103 Cal. Rptr. 2d 858 (Cal. Ct. App. 2001).

117. *Id.* at 861-62.

118. *Id.* at 862.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 868.

As to the real estate agents' claim for equitable indemnity against the one home inspector hired by the plaintiff, the court held that the real estate agents "may not rely on a home inspection report to avoid its own statutory duty to conduct a reasonable inspection."¹²³ Thus, the failure to disclose a defect may violate the duties owed by the real estate agent, home inspector,¹²⁴ or both. In California, both the real estate agents and the home inspector have an obligation to discover and disclose defects, the failure of each to do so may be a proximate cause of a single, indivisible injury, which may result in joint and several liability to the purchaser for that injury.¹²⁵

The more interesting matter in the case is how the court addressed the possible liability of the home inspectors who did not inspect the property for the plaintiff-purchaser but whose report was provided to the plaintiff by the seller's real estate agent.¹²⁶ The court noted that the real estate agents' "right to seek equitable indemnification from [the two inspectors who had completed their work prior to this transaction] depends on whether those inspection companies owed a duty to" *this* purchaser.¹²⁷ Since the plaintiff in this case was not in privity of contract with the home inspectors who worked for a previous prospective purchaser and had not prepared a report for this plaintiff, the only connection to this plaintiff was through the reports.¹²⁸

The California Court of Appeals cited a case where the California Supreme Court discussed circumstances in which a supplier of information may be liable to a non-client.¹²⁹ The Court of Appeals noted that in *Bily v. Arthur Young & Co.*,¹³⁰ the California Supreme Court adopted § 552 of the Restatement (Second) of Torts¹³¹ and "concluded that while an independent

123. *Id.* at 864–66. The court also noted that:

Real estate agents and brokers involved in the sale of a residential property owe the purchaser of that property a statutory duty to conduct a "reasonably competent and diligent visual inspection of the property offered for sale and to disclose to [a] prospective purchaser all facts materially affecting the value or desirability of the property that an investigation would reveal" The purchaser's agent also owes the purchaser a higher fiduciary duty to act with the utmost care, integrity, honesty and loyalty.

Id. at 863 (ellipsis in original) (citations omitted).

124. *Id.* at 863–64 (noting that "[a] home inspection company retained by the purchaser owes the purchaser a statutory duty to 'conduct a home inspection with the degree of care that a reasonably prudent home inspector would exercise'").

125. *Id.* at 864.

126. *Id.* at 866–68.

127. *Id.* at 867.

128. *See id.*

129. *Id.*

130. 834 P.2d 745 (Cal. 1992).

131. RESTATEMENT (SECOND) OF TORTS § 552 (1977) provides:

(1) One who, in the course of his business, 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 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

accountant did not owe a general duty of care to third parties with respect to the conduct of an audit prepared for its client company, it could be liable for negligent misrepresentation to ‘intended beneficiaries’ who relied on the audit report.”¹³² The court in *Leko* then made a big jump, stating that “[a] reasonable trier of fact could infer that when [the two home inspectors] provided their reports to the listing agent on the property, *they knew with substantial certainty* that those reports would be transmitted to *other* prospective purchasers if the pending deal fell through.”¹³³ And making one more leap, the court stated that “this inference may be drawn even though [one of the home inspector’s] written contract . . . stated that the report could not be used by or transferred to other persons without” consent of the home inspector and previous prospective purchaser.¹³⁴ The court said that the home inspectors “did not establish, as a matter of law, that they believed the inspection reports would be used solely by . . . the previous purchaser.”¹³⁵

The court was careful to point out that in reversing the orders granting summary judgment on the pleadings and summary judgment, it was “express[ing] no opinion about the ultimate merits” of the real estate agents’ claim for indemnity.¹³⁶ However, at every critical juncture, the court offered ideas on how a plaintiff could run the gauntlet through several narrow points of the privity defense, the application of § 552 of the Restatement (Second) of Torts, the expectations of the home inspectors regarding the use of their reports beyond the paying client, and express contractual provisions limiting the use of the reports.¹³⁷ The listing agent, eager to make a sale (as always is the case), evidently had no qualms in supplying a new buyer with the reports that were a month old and prepared for a previous prospective buyer.¹³⁸ These are good facts to ponder in considering how to protect home

(b) through reliance upon it in a transaction 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.

132. *Leko*, 103 Cal. Rptr. 2d at 867.

133. *Id.* at 867–68 (emphasis added). A Colorado court of appeals also used § 552 of the Restatement in reversing and remanding a trial court’s grant of summary judgment for a home inspector where the inspector was hired by the appraiser for the buyer’s lender. *Wolther v. Schaarschmidt*, 738 P.2d 25, 27–29 (Colo. Ct. App. 1986). In *Wolther*, “[t]he appraiser hired by the lender to appraise the property engaged defendant, an engineer, to make a ‘walk through’ inspection of the premises and to render an opinion upon its condition.” *Id.* The buyer saw the home inspector on the property conducting the inspection. *Id.* The plaintiff claimed “that the lender’s approval of the loan led him reasonably to believe that defendant’s report approved the structure’s soundness.” *Id.* at 27. The trial court originally granted a summary judgment for the home inspector on the grounds that the homeowner and inspector were not in privity. *Id.* On appeal, the court held that privity of contract was not required to maintain the negligent misrepresentation claim because a trier of fact could reasonably infer that the inspector knew that the report would influence the loan transaction. *Id.* at 28. The court also noted that under § 552(2), the information provider possessed the necessary knowledge to impose liability on him. *Id.*

134. *Leko*, 103 Cal. Rptr. 2d at 868.

135. *Id.*

136. *Id.*

137. *See id.* at 866–68.

138. *Id.* at 862.

inspectors who may be diligent and careful in their work but who do not wish to extend their liability to non-paying non-clients, who may come along some months after the home inspection and writing of the reports. Some disclaimer language in bold print at the start and end of the contract and inspector's report may be necessary to avoid being hit by an arrow that was shot into the sky some time ago. Further, some express language directed to the listing real estate agent (identified by name) and the seller may be needed in order to avoid having the work product used in a way that was not intended.

In *Burbach v. Radon Analytical Laboratories, Inc.*,¹³⁹ the Supreme Court of Iowa reversed and remanded a decision by the trial court that a home inspection company owed no duty to a buyer who relied on a home inspection report.¹⁴⁰ In the case, the inspection company was hired by a home relocation company to perform a relocation inspection in Dubuque, Iowa.¹⁴¹ The inspection report was provided to the home relocation company "without precise knowledge of whom the ultimate buyer of the property might be or when a purchase might occur."¹⁴² However, the court pointed out that "the report itself contain[ed] language confirming [the inspector's] knowledge that an escrow company [would] likely share the report with prospective buyers."¹⁴³ The home inspector contended that "no privity existed between" it and the purchaser and that the home inspector "had no actual knowledge [that this plaintiff] would rely on the documents when purchasing the home."¹⁴⁴

In holding for the purchaser, the Iowa Supreme Court cited *Larsen v. United Federal Savings & Loan Ass'n of Des Moines*,¹⁴⁵ noting that:

this court relied on section 552 to find that a lender's negligent appraisal report could furnish the basis for a negligence suit by home buyers who relied on the report to their detriment, even though the report was prepared for the lender, not the home buyers. . . . Citing the language of the Restatement, we said liability "may extend to losses sustained by more than one person, as long as the supplier of the information (1) intended to supply the information to that person . . . or (2) knew the recipient intended to supply it." The record revealed that the lender had "every reason to know its appraisal would influence this home purchase transaction."¹⁴⁶

139. 652 N.W.2d 135 (Iowa 2002).

140. *Id.* at 135-36.

141. *Id.* at 136.

142. *Id.* at 138.

143. *Id.*

144. *Id.* at 137.

145. 300 N.W.2d 281 (Iowa 1981).

146. *Burbach*, 652 N.W.2d at 137 (second ellipsis in original) (citations omitted).

Applying the rationale of *Larson*, the court in *Burbach* held that the home inspector owed a duty to a “limited but foreseeable class of persons” (buyers) who relied on the inspection report.¹⁴⁷

In another case involving very similar facts, the home inspector was hired by “Coldwell Banker Relocations Services, Inc. to provide home inspection services,” but the contract provided that the client (Coldwell Banker) might provide the report to “other interested parties.”¹⁴⁸ “Approximately six months after the inspection, the [plaintiffs] received a copy of the [inspection] report and then submitted an offer to buy the house.”¹⁴⁹ After the purchase, the plaintiffs “discovered a defect in the chimney not mentioned in the inspection report” and “brought a claim against [the home inspector] for ‘damages for replacing/repairing chimney and flue’ which were ‘[c]aused when Plaintiffs justifiably relied upon Defendant’s Home Inspection Report.’”¹⁵⁰ After “[t]he trial court concluded that the [plaintiffs] were third party beneficiaries of the contract” between the home inspector and real estate firm, the trial court “awarded them damages for the negligent inspection.”¹⁵¹

The Indiana Court of Appeals affirmed the trial court’s determination that the plaintiffs were third party beneficiaries of the home inspection contract.¹⁵² Although recognizing that the general rule is that:

only a party to a contract or those in privity with him have rights under the contract. One not a party to the contract may directly enforce the contract as a third party beneficiary *only* if the contracting parties *clearly intended to directly* benefit him by *imposing a duty* in his favor.¹⁵³

Given that the contract expressly provided that Coldwell Banker could disclose the content of the report to “other interested parties,”¹⁵⁴ it was not much of a stretch to allow the plaintiffs to recover, most particularly since a representative of the home inspection company acknowledged that the ultimate buyer of the inspected property is “certainly a very interested party.”¹⁵⁵

147. *Id.* at 138.

148. *Real Estate Support Servs., Inc. v. Nauman*, 644 N.E.2d 907, 908 (Ind. Ct. App. 1994).

149. *Id.*

150. *Id.* (second alteration in original).

151. *Id.*

152. *Id.* at 909–12.

153. *Id.* at 909 (citation omitted).

154. *Id.* at 908.

155. *Id.* at 911. An interesting sidebar to the case on appeal was the claim by the home inspector that the \$3,000 in damages was excessive because “the report limit[ed] the inspection to a series of ‘visual’ examinations of various items” and “the conditions discoverable through a visual inspection could be remedied at less than a cost of \$1,500.00.” *Id.* at 912. The court addressed the issue in the following passage:

The inspection conducted in this case was demonstrably not limited to a “visual” examination of various items. The inspector had not limited the inspection of the garage door opener to a visual examination of it and had not limited the inspection of the electrical system to a visual examination of the electrical panel. He had engaged the garage door opener to determine

Occasionally a lender is drawn into litigation involving a home inspection report. In *Glascock v. City National Bank of West Virginia*,¹⁵⁶ the Supreme Court of Appeals of West Virginia reversed a summary judgement granted to the lender.¹⁵⁷ The case involved an inspection report that was completed during the construction of a new home, rather than the sale of a used home.¹⁵⁸ The facts are interesting and fairly representative of the typical relationship between a financial institution and a homeowner, as the construction moved from one funded by a construction loan to a more traditional loan as the project neared completion.¹⁵⁹

In the construction phase, the homeowners had several inspections conducted.¹⁶⁰ At a later date, while the construction project was ongoing, the bank, independent from the homeowners, hired inspector Robert Lemon.¹⁶¹ The court noted that the report was aptly titled (the “Lemon Report”), which detailed numerous problems in the construction.¹⁶² The report was not shared with the homeowners.¹⁶³ The lower court granted summary judgment in favor of the bank, holding “that the bank simply had no duty to disclose the report.”¹⁶⁴ The Supreme Court of Appeals disagreed, noting that “[b]ecause we find that, under the narrow facts of this construction loan case, that a ‘special relationship’ existed between the bank and the Glascocks, we believe that the trial court erred in granting summary judgement, and reverse.”¹⁶⁵

The homeowners in the case certainly had a good point. They argued that had the bank disclosed the problems detailed in the inspector’s report, they never would have converted the construction loan into a more traditional loan and “that they could have avoided many unnecessary expenses

whether it was operable and had removed the front cover from the electrical panel to fully examine it. Further, the inspection report itself shows the inspector inserted dye into the private sewage system, and such conduct is not merely a visual examination even though the inspector also examined the grounds for the dye as a sign of seepage.

The Naumans claim the inspection of the chimney likewise should not have been limited to a visual examination. The trial court determined that to have marked the chimney flues as “adequate,” without first having removed the cap and looked down the chimney, was negligent. The evidence supports this conclusion. Therefore, the trial court’s award to the Naumans is not clearly erroneous even though the damages were not limited to those discoverable only by visual inspection.

Id. at 912–13.

156. 576 S.E.2d 540 (W. Va. 2002).

157. *Id.* at 541.

158. *Id.* at 541–42.

159. *See id.* at 543.

160. *Id.* at 542–43.

161. *Id.*

162. *Id.* at 543.

163. *Id.*

164. *Id.* In conjunction with the construction loan, the homeowners’ “signed a document called a ‘Construction Permanent Commitment Letter,’ which included the statement, ‘[i]nspections required with respect to this loan are solely for the bank’s benefit; borrowers shall receive no comfort or rights with respect to such inspections or bank’s evaluation thereof.’” *Id.* at 542 (alteration in original).

165. *Id.* at 543.

by fixing some or all of the problems at an earlier stage.”¹⁶⁶ The facts in the case were lousy for the bank.

In moving beyond the special facts of the case and discussing the concept of a “special relationship,” the court cited the following language from earlier West Virginia cases:

[t]he existence of a special relationship will be determined largely by the extent to which the particular plaintiff is affected differently from society in general. It may be evident from the defendant’s knowledge or specific reason to know of the potential consequences of the wrongdoing, the persons likely to be injured, and the damages likely to be suffered. Such special relationship may be proven through evidence of foreseeability of the nature of the harm to be suffered by the particular plaintiff or an identifiable class and can arise from contractual privity or other close nexus.¹⁶⁷

The court noted that “it was eminently foreseeable to the bank that withholding the information from the Glascocks could cause the Glascocks harm.”¹⁶⁸ The court noted that this view of the bank’s duty was also consistent “with Justice Cardozo’s celebrated maxim: ‘The risk reasonably to be perceived defines the duty to be obeyed’”¹⁶⁹

It is hard to understand why the bank failed to share with the homeowners the numerous major structural problems detailed in the report. The bank had already made substantial disbursements throughout the process in the construction loan and was essentially throwing good money after bad by withholding this information from the borrower. A homeowner who discovers major structural defects is surely a greater risk to default, and in the event of a foreclosure, the bank would be stuck with trying to sell defective property with knowledge of the defects. There is nothing about that scenario which is good news for the bank.

The court in *Glascock* made it clear that it did not view banks as being in a “special relationship” with borrowers in a typical construction loan process,¹⁷⁰ and noted that the bank’s retention of the report might be viewed by a jury as having caused no harm at all because the homeowner in the case “had their own inspectors examine the home at least half a dozen times, both before and after the Lemon inspection.”¹⁷¹ The court also noted that the ruling “does not ask lenders to be engineers, or architects, or home inspectors.”¹⁷² However, although most cases involving home inspectors as

166. *Id.*

167. *Id.* at 545.

168. *Id.*

169. *Id.* at 544 (quoting *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 100 (N.Y. 1928)) (alteration in original).

170. *Id.* at 546.

171. *Id.* at 545–46.

172. *Id.* at 546. The court stated:

defendants involve the sale of used homes, the rule stated in this case involving a home inspection in the construction of a new home is not surprising and should serve as a tutorial for lenders involved in the financing of new homes. On these facts, the view of the court in describing the position of the lender in being able to foresee likely harm to the borrower is reasonable. Although most litigation involving home inspectors involve complaints by homeowners that the inspection was substandard, in this case the focus was not on a substandard inspection, but an undisclosed report.¹⁷³

In a case where the plaintiffs focused, in part, on the work of an appraiser, hired by the lender, the home purchasers filed suit for fraud, suppression, and negligence after the homeowners discovered “termite infestation, termite damage, excessive moisture, wood-decaying fungus, and wood rot” several months after closing.¹⁷⁴ The buyers, one of whom had worked as a licensed realtor for five years, sued the appraiser, a pest control company, a home inspector company, and the home inspector personally.¹⁷⁵ The subject of the reported opinion was the trial court’s grant of summary judgement on behalf of the appraiser.¹⁷⁶ The claims against the other named defendants were not disposed of by summary judgement and were not reported.¹⁷⁷

In affirming the trial court’s decision regarding the appraiser, the Alabama Supreme Court noted that “at most, [the appraiser] simply placed a value on the home” and “did not guarantee the condition of the house.”¹⁷⁸ The court also focused on the language of an affidavit of the appraiser, wherein he noted that as an appraiser conducting an inspection of property in accordance with the standards of the profession, he is “not a contractor, engineer, termite inspector or professional home inspector, and a real estate appraisal does not purport to provide expert information concerning those

[o]ur ruling should not be taken to mean that a traditional lender is in any way the insurer of the property that is the subject of the loan. Nor is the lender an insurer of the work performed or of an inspection or appraisal conducted on its behalf. Our ruling does not ask lenders to be engineers, or architects, or home inspectors. As we stated, the duty is defined by the risk perceived. If the lender does not have information critical to the integrity of the construction project, then the lender, of course, could not have a duty to disclose.

Banks are, of course, free to lend money to people to buy perfect houses or houses on the verge of collapse as long as that decision is reached by informed parties.

Id.

173. *Id.* at 541.

174. *Brushwitz v. Ezell*, 757 So. 2d 423, 425–26 (Ala. 2000).

175. *Id.* at 425–27.

176. *Id.* at 425–26.

177. *See id.* at 429 n.5.

178. *Id.* at 430. The appraisal notice, signed by the plaintiffs, included the following disclaimer: You should note that:

- 1) The appraisal was performed for the lender’s use to determine the adequacy of the property as security for the loan and not for your use to determine value,
- 2) the appraisal does not guarantee nor imply that the house is free of defects, and
- 3) you need to take whatever steps you feel are necessary to assure yourself that the house is acceptable to you before closing the purchase of the home.

Id. at 426.

items.”¹⁷⁹ And in deposition testimony, one of the plaintiffs testified that, as a person who was once a realtor, she knew that an appraiser was not a termite inspector, that the appraiser was not a home inspector, and that all three of those professions had different roles.¹⁸⁰

This case provides a good lesson on the difference in the role of an appraiser and a home inspector. The difference is highlighted in the appraisal documents signed by the homeowners,¹⁸¹ and is also reinforced through the testimony of the appraiser and a former real-estate agent.¹⁸² While obvious adverse conditions such as an active termite infestation or evidence of other structural problems would likely impact an appraiser’s report, the appraiser in this case noted:

[w]hile I typically note any obvious adverse conditions observed during a visual inspection of the property to the extent that such conditions might impact upon the Fair Market Value, I do not assess latent, hidden or unapparent conditions, and as stated in the appraisal, the appraisal is based upon the assumption that no such conditions exist.¹⁸³

In addressing the claims made by the plaintiffs against the appraiser based on suppression, the Court noted that the elements of suppression, as discussed in previous cases, are “(1) a duty on the defendant to disclose a material fact; (2) the defendant’s concealment or nondisclosure of that fact; (3) inducement of the plaintiff to act; and (4) action by the plaintiff to his injury.”¹⁸⁴ As is true in most jurisdictions,¹⁸⁵ silence is “not considered suppression unless the defendant has an obligation to communicate that fact,” and as the court noted, the obligation “may arise from the confidential relations of the parties or from the particular circumstances of the case.”¹⁸⁶ Thus, the court examined the nature of the relationship between the appraiser and the plaintiffs, just as the *Glasco* court¹⁸⁷ analyzed the nature of the relationship between a lender and homeowner under West Virginia law

179. *Id.* at 428.

180. *Id.* at 427, 431.

181. *Id.* at 426.

182. *Id.* at 428–31.

183. *Id.* at 428.

184. *Id.* at 431.

185. *See, e.g.*, *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983) (noting that fraud may consist of silence in the duty to speak); *Moser v. Spizzirro*, 295 N.Y.S.2d 188, 188–89 (N.Y. App. Div. 1968) (stating that defendants did not commit actionable fraud for concealment by silence if they did not have a fiduciary duty with plaintiff); *Bradford v. Vento*, 48 S.W.3d 749, 755 (Tex. 2001) (stating a general rule that silence may be a false representation and therefore constitute fraud when there is a duty to speak arising from the particular circumstances).

186. *Brushwitz*, 757 So. 2d at 431.

187. *Glasco v. City Nat’l Bank of W. Va.*, 576 S.E.2d 540 (W. Va. 2002); *see* discussion *supra* notes 156–173 and accompanying text.

The Alabama Supreme Court found no such special relationship here.¹⁸⁸ In addressing the claim of the plaintiffs that the appraiser here owed them a fiduciary duty, the court cited previous cases where it had stated that “[a] fiduciary relationship is a confidential relationship in which one person is obligated to act in another person’s best interests.”¹⁸⁹ The court noted that the relationship between the plaintiffs and the appraiser was not a confidential one, relying heavily on the language in the disclaimer signed by the plaintiffs wherein the lender explicitly stated that the appraisal was performed for the lender, and not for the homeowner’s use.¹⁹⁰ This case provides a powerful lesson that the experience and sophistication of the plaintiffs, along with the presence and clarity of disclosures signed by the plaintiffs, provide a strong defense for an appraiser when the buyers take possession and subsequently discover significant problems. But the case does not provide the rest of the story—how the home inspector fared against the claims of the homeowner.

A few years later the Alabama Supreme Court returned to the issue of the relationship between an appraiser and homeowner in *Zanaty Realty, Inc. v. Williams*.¹⁹¹ After the home purchasers moved into the home, they discovered several problems including a plumbing leak and damage in the attic that had been caused by a fire that occurred before they purchased the home.¹⁹² They sued the seller, real estate agent, real estate company, lender and appraiser company.¹⁹³ The claim against the appraiser was for negligent appraisal of the property.¹⁹⁴

The jury returned a verdict against the appraiser in the amount of \$104,400.¹⁹⁵ On appeal the appraiser argued that it was entitled to judgment as a matter of law because as the appraiser employed by the mortgage company, it owed no duty to the buyer.¹⁹⁶ Citing *Brushwitz*,¹⁹⁷ the Alabama Supreme Court agreed.¹⁹⁸ The court noted that the lender, Wells Fargo, hired the appraiser to ascertain the market value of the property “so that Wells Fargo could obtain mortgage insurance through HUD.”¹⁹⁹ The court also highlighted the language in the appraisal report, which clearly distinguished

188. *Brushwitz*, 757 So. 2d at 433.

189. *Id.* at 426, 431.

190. *Id.* at 431–32. In the same passage the court also pointed out that the plaintiffs’ “personal experience in purchasing and selling real estate, in reading and setting up appraisals for those properties, and particularly [the wife’s] background as a real-estate agent provided them with an understanding of appraisal reports.” *Id.* at 432.

191. 935 So. 2d 1163 (Ala. 2005).

192. *Id.* at 1166.

193. *See id.* at 1164, 1166.

194. *Id.* at 1166.

195. *Id.*

196. *Id.* at 1167.

197. *Brushwitz v. Ezell*, 757 So. 2d 423 (Ala. 2000); *see* discussion *supra* notes 174–190 and accompanying text.

198. *Zanaty Realty, Inc.*, 935 So. 2d at 1169.

199. *Id.* at 1168.

between the role of an appraiser and the role of a home inspector.²⁰⁰ And although the plaintiff did not receive a copy of the appraisal report because she was not the intended user, she did testify that before closing on the house “she received a form from HUD entitled, ‘For Your Protection Get a Home Inspection.’”²⁰¹ The court noted that “[t]his form stated: ‘As part of our job insuring the loan, we require that the lender conduct an FHA appraisal. An appraisal is different from a home inspection. Appraisals are for lenders; home inspections are for buyers.’”²⁰²

This is an interesting case because it deals with several issues and themes that regularly surface in cases involving defects in homes. First, it highlights the difference between the role of an appraiser and a home inspector. Unless homeowners read the disclosures or their real estate agents point out the difference, a homeowner may wrongly conclude that an appraisal suffices as an inspection. Second, the case is important and relevant to liability for home inspectors because it offers some good disclosure language that limits the use of the work product to the party who hired the appraiser for one purpose and warns away others from relying on the appraisal or the report. Both the limited purpose of the appraisal and the prohibition against use by parties other than the client (a financial institution, in this case) are expressly stated.²⁰³ This language is important for home inspectors as they try to establish and report the limitations of a home inspection in their contracts in addition to limiting their liability to the contracting, paying client, rather than parties not in privity of contract.

Regarding the liability of a home inspector who was not in privity of contract with the homeowners, the Alabama Supreme Court has stated that buyers “could be found to be third-party beneficiaries of the contract between the real-estate agent and the sellers, on the one hand, and [a home inspection company whose inspector was a licensed contractor], on the other.”²⁰⁴ In *Hill v. Metrospec, Inc.*,²⁰⁵ at the real estate closing, a pest in-

200. See *id.* The appraisal form “identifie[d] Wells Fargo as the ‘Lender or Client.’” *Id.* at 1165. Moreover, the form also contained the following disclosure:

I am not a licensed building contractor or professional building inspector. I am not qualified to survey or analyze physical items that are not readily visible. If any parties in this transaction have any questions or concerns regarding any mechanical or structural physical problems, condition, infestation, contamination, or other issues regarding the subject property, an expert in that field of specialty should be consulted.

Moreover, with respect to the intended use of the appraisal, the appraisal contains the following disclaimer:

PURPOSE, INTENDED USE, AND INTENDED USER OF THE APPRAISAL:

The purpose of the appraisal is to estimate the market value of the subject property, as defined in this report, on behalf of the above referenced client [Wells Fargo] as the intended user of this report. The intended use of the appraisal is to assist the client, as intended user of this report, in evaluating the subject property for lending purposes. The use of this appraisal by anyone other than the stated intended user, or for any other use than the stated intended use, is prohibited.

Id. at 1165 (alteration in original).

201. *Id.*

202. *Id.* at 1165–66.

203. *Id.* at 1165.

204. *Hill v. Metrospec, Inc.*, 730 So. 2d 214, 217 (Ala. 1998).

spection report obtained by the sellers indicated that there was “a severe infestation of wood-boring beetles” in the house.²⁰⁶ When the buyers learned of the report, “they demanded that a licensed contractor inspect the house to determine whether the wood-boring beetles had caused structural damage to the house. The real-estate agent then produced a letter from [the home inspector,] Metrospec, signed by Ben Hill, who was a licensed contractor and a friend of the real-estate agent.”²⁰⁷ The letter indicated that Metrospec “found no structural damage that would indicate a compromise in the integrity [of] the floor system or any of its components.”²⁰⁸ Although there were a number of other issues addressed by the trial court and the Court of Civil Appeals, the Alabama Supreme Court cited previous cases involving pest control inspectors and applied classic third-party beneficiary contract law.²⁰⁹

The idea that a buyer would be considered a third-party beneficiary of a contract between a seller and a home inspector is not at all a surprise if the contract is clearly made for the benefit and intended use of a specific buyer. But these specific facts would probably not carry over to most other cases involving home inspectors as defendants. In most cases the home inspectors are hired directly by the buyer,²¹⁰ so there is no need to search for standing through use of a third-party beneficiary analysis. In *Hill*,²¹¹ the buyers did not learn of the infestation until they attended the closing.²¹² The real estate agent guessed right, anticipating that the buyers would not proceed when they were provided with a pest inspection report indicating insect infestation.²¹³ The second letter, authorized by a licensed contractor, was enough to overcome the buyer’s resistance, but it also set the stage for the buyers to position themselves as beneficiaries of the contract with the second inspector.²¹⁴

In a case where the buyer’s agent was evidently the contracting party with the home inspector, rather than the buyers themselves, an Indiana Court of Appeals not only found it easy to use third-party beneficiary analysis to hold that the buyers were legally entitled to sue the home inspector under a contract theory, but it also upheld the trial court’s finding that the

205. *Id.*

206. *Id.* at 216.

207. *Id.*

208. *Id.* (alteration in original).

209. *Id.* at 217–18. The court described the possibility of liability based on the buyer being a third-party beneficiary, noting that “[a] home buyer may prove that a pest inspector hired by the seller, or by the seller’s real-estate agent, has a duty to the buyer to use reasonable care in the inspection, where the buyer shows that the inspector knew the purpose of the inspection and knew that his ‘letter of clearance’ would be presented to, and was for the benefit of, the buyer.” *Id.* at 217.

210. Stephanie Stern, *Temporal Dynamics of Disclosure: The Example of Residential Real Estate Conveyancing*, 2005 UTAH L. REV. 57, 72 (2005).

211. *Hill v. Metrospec, Inc.*, 730 So. 2d 214, 217 (Ala. 1998), *see* discussion *supra* notes 204–209 and accompanying text.

212. *Hill*, 730 So. 2d at 216.

213. *Id.*

214. *Id.*

home inspector was careless, grossly negligent, and that the home inspector's conduct manifested a reckless disregard of the buyers' rights.²¹⁵ An interesting sidebar to this case is that the buyers had seen the defendant's advertisements "in a widely distributed real estate circular."²¹⁶ The advertisement "implied that [the defendant] was licensed to perform home inspections."²¹⁷ As it turns out, neither the business entity nor the owner was licensed to perform home inspections and no license was required to perform the service.²¹⁸ Holding yourself out as licensed, when you are not or when no license can be obtained because none is required, is one of the oldest tricks around in another industry—the home improvement industry has always been plagued by itinerant operators who make false "licensed and bonded claims."²¹⁹ Separate from the deception involved when you falsely claim you are licensed is the problem that "licensed" should never be equated with "qualified," unless you know more about the state licensing requirements.

There is an interesting trial court opinion from Virginia where the inspector was saved by the court's analysis of the privity defense, based on the fact that the plaintiff's claim focused solely on economic loss.²²⁰ The real estate sales contract "required [the seller] to furnish a report from a termite control company."²²¹ After the buyers took possession they discovered termites and sought damages for the cost to repair the home.²²² The trial court agreed that the inspection report, which was addressed only to the seller, did not make the buyer a party to the agreement.²²³ The trial court noted that the buyers' claim against the inspector was one for economic loss, characterizing it as "an economic theory of recovery based upon a contractual relationship."²²⁴ The trial court then noted that Virginia's statutory abolishment of the defense of lack of privity only applies:

where the product is manufactured or designed in a way which constitutes a danger to the safety of persons or property from the defec-

215. A.B.C. Home & Real Estate Inspection, Inc. v. Plummer, 500 N.E.2d 1257, 1261, 1263 (Ind. Ct. App. 1986). A few months after moving into the home:

the Plummers were awakened by the bedroom ceiling collapsing. Investigation revealed that there were numerous leaks in the roof. There was a large sheet of plastic hung to catch water A roofing contractor . . . testified that the roof had been repeatedly patched and that the attic rafters were rotted from constant exposure to moisture. He further testified that the damage could not have occurred in the short time the Plummers had owned the house.

Id. at 1259. The home inspection report submitted by the defendants noted only "slow drains and inadequate water flow" in some places. *Id.* The report also noted that the "[r]oof is good no sign of leaks," and that, "[c]ondition of chimney good." *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. See *supra* note 41 and accompanying text.

220. *Huffman v. Brown*, 25 Va. Cir. 180, 182–83 (Va. Cir. Ct. 1991).

221. *Id.* at 180.

222. See *id.* at 181–82.

223. *Id.*

224. *Id.* at 182.

tive product. Thus an economic loss to property cannot survive the privity rule where the product itself does not constitute a danger or safety hazard to persons or property.²²⁵

B. Consumer Reliance on Inspections, Misunderstandings Regarding Scope, and Substandard Home Inspections

From a buyer's perspective, a qualified home inspector should be used, the home inspection should be done in a timely fashion, and the sales contract should contain a condition, another "way out," or clearly spell out the respective rights and duties of each party should the inspection uncover significant problems.²²⁶ A possible approach that maximizes the leverage for the buyer but leaves the seller exposed to disappointment, is to include a home inspection clause linked to a buyer's satisfaction clause in the sales contract. One such case involving both elements is *Hill v. Perrone*.²²⁷ In *Perrone*, "[a] clause in the contract provided that performance was contingent upon the completion of all inspections to the [buyers'] satisfaction within 21 days of closing."²²⁸ A termite inspection was conducted on September 11, 2000, followed by a complete home inspection on September 13, 2000 conducted by a home inspector hired by the prospective buyers.²²⁹ After the buyers discovered that a previous termite infestation may have been treated with chlordane and were informed that several other items needed to be repaired, they did not go forward with the purchase and were sued by the sellers for breach of contract.²³⁰ The trial court granted summary judgment for the buyers, finding that they merely "exercised their contractual right to rescind under the buyer satisfaction clause," based on the results of the inspection.²³¹

The Court of Appeals of Kansas affirmed the trial court and provided an analysis of the satisfaction clause in a contract.²³² The court noted that it was undisputed that the contract included a buyer satisfaction clause and that the buyers' "reasons for terminating the contract were based on their dissatisfaction with the results of the inspections."²³³ The sellers argued that the buyers "should have been satisfied as a matter of law because the items needing repair were completed before closing."²³⁴ However, the court noted that a buyers' "dissatisfaction is not measured objectively, but subjectively," the reasons for being dissatisfied were immaterial, and that the sellers "may

225. *Id.*

226. *See supra* Part III.

227. 42 P.3d 210 (Kan. Ct. App 2002).

228. *Id.* at 211.

229. *Id.*

230. *Id.* at 211–12.

231. *Id.* at 212.

232. *See id.* at 213–14.

233. *Id.*

234. *Id.* at 214.

only challenge the [buyers'] motives for terminating the agreement according to the good faith standard."²³⁵ The Court of Appeals noted that the trial court had found that the buyers' concerns following the inspection were genuine and in good faith, and that in "[v]iewing the evidence in the light most favorable to the [sellers], reasonable minds cannot differ as to the defendants' true motive for terminating this contract."²³⁶

Depending on the nature of the defect and the law of the jurisdiction where a dispute occurs, sellers who agree to a satisfaction clause for use by a buyer should understand they are a long way from having money in the bank should a problem surface in the home inspection. It may be that, in a slow market, sellers may be willing to take a chance in order to move houses, but they should also know that in some cases, the test of "dissatisfaction" by the buyer will be subjective, as it is in Kansas.²³⁷ Short of being able to prove bad faith on the part of the buyers, having a contract on a house with a naked "satisfaction" clause linked to a home inspection may be only slightly better than having no contract at all.

In cases where the property is purchased "as is" and imposes a duty on the purchaser to thoroughly inspect the property, a failure by the purchaser to conduct an adequate inspection will generally be fatal to a subsequent claim for fraud, fraudulent suppression, or negligence. In *Nesbitt v. Frederick*,²³⁸ the contract stated that the property was purchased "as is" but also imposed "a duty on Buyer to thoroughly inspect [the] property, for defects or otherwise"²³⁹ The Alabama Supreme Court affirmed summary judgment for the sellers, noting that the buyers "could have discovered any defects . . . through ordinary diligence."²⁴⁰ The court noted that a home inspection report submitted by the buyers *after* the litigation commenced included a detailed report of the problems that were now the subject of the lawsuit.²⁴¹ Thus, it was a weak position for the buyer to have submitted a home inspection report in support of their claim as a plaintiff in litigation but to have failed to use a home inspector to spot what were evidently obvious problems before moving into the house. The Alabama Supreme Court noted that "[t]he [buyers] decided not to hire a professional home inspector to inspect the house before closing."²⁴²

235. *Id.*

236. *Id.*

237. *Id.* at 213. Although a review of whether a subjective or objective test should be applied in contract cases involving satisfaction clauses will not be undertaken here, Kansas applies the subjective test; as the Court of Appeals of Kansas noted:

Satisfaction clauses in contracts are given legal effect by Kansas courts. A contract conditioned on the satisfaction of one party is binding and precludes recovery by the other party when the satisfaction clause is exercised in good faith. . . . Dissatisfaction is not measured objectively, but subjectively.

Id. at 213 (citations omitted).

238. 941 So. 2d 950 (Ala. 2006).

239. *Id.* at 953.

240. *Id.* at 959.

241. *Id.*

242. *Id.* at 954.

The buyer's problems were compounded by the fact that the contract was not only clearly labeled "AS IS," but included a provision that made it clear that professional inspection services were available and that the real estate agency and sales associates "strongly recommended" the use of a home inspector.²⁴³ Furthermore, a buyer should not expect to hold a home inspector liable where the inspector's recommendations for further investigation are ignored.²⁴⁴

If a buyer chooses to hire a home inspector, they should understand that they may not only need to choose among inspectors, but also among several types of home inspections offered in the marketplace. Alternatives may include an inspection resulting in a written report or a less expensive inspection, in which the home inspector walks the clients through the house and orally advises them of observed defects in the home. Another matter to be resolved is whether the sellers or real estate salespersons will be present during the inspection. If the seller is present and responds to questions raised by the home inspector or buyer, the reliance element may be lost in any action against the home inspector, if the seller provides an explanation or a history on an observed defect. And for a real estate salesperson, it may be awkward (and dangerous) to be around if questions are being raised regarding the home. One real estate professional told the author that the general view among his colleagues is that when an inspection is occurring, "it's best to go out for a cigarette, and if you don't smoke, it's a good time to take it up."²⁴⁵ So, some buyers may see their real estate salesperson become scarce when the inspection is taking place.

In *Connor v. Merrill Lynch Realty, Inc.*,²⁴⁶ the plaintiffs sued the sellers, real estate broker, and home inspector for damage caused by persistent flooding of the basement.²⁴⁷ The home inspector offered two types of home inspections from which to choose.²⁴⁸ One option was a written inspection.²⁴⁹

243. *Id.* at 953. A buyer who gets a clear explanation of the ramifications of "AS IS" language, who is made aware of the availability of professional home inspection services, and who is encouraged by the real estate professionals to use such a service will likely suffer a similar fate in any jurisdiction, if they pass on the opportunity. *See, e.g.,* *Ingram v. Cendant Mobility Fin. Corp.*, 215 S.W.3d 367, 376 (Tenn. Ct. App. 2006). The relevant portion of the sales contract in this case read as follows:

10. *NECESSITY OF INSPECTION*: Buyer acknowledges and agrees that Alabama law imposes a duty on Buyer to thoroughly inspect a property, for defects or otherwise, in accordance with the terms of this contract and prior to closing the sale. Buyer further acknowledges and agrees that he/she is aware that professional inspection services and/or contractors may be engaged for this purpose and that *RealtySouth* and its sales associates strongly recommend the use of such professionals *After closing of this sale, all conditions of the property are the responsibility of the purchaser.*

Id.

244. *See, e.g.,* *Niermeyer v. Cook's Termite & Pest Control, Inc.*, No. 05AP-21, 2006 WL 330099, at *1, *9 (Ohio Ct. App. Feb. 14, 2006) (upholding trial court's grant of summary judgment in favor of defendants, including inspector, agent, and exterminator, where home inspector noted previous termite damage and recommended a "destructive" investigation to determine the extent of the damage).

245. The home inspector in this case wished not to be identified.

246. 581 N.E.2d 196 (Ill. App. Ct. 1991).

247. *Id.* at 199.

248. *Id.*

The plaintiffs “opted for the less expensive inspection in which the [inspector] walks the clients through the house and orally advises them of observed defects in the home.”²⁵⁰ When questions were raised regarding water marks and obvious water damage in the basement, the sellers provided an explanation and the plaintiffs chose to believe the seller.²⁵¹

The trial court granted summary judgement for the home inspector,²⁵² and the appellate court affirmed, noting that the “plaintiffs had actual notice that the Home had once taken a significant amount of water in the basement” and therefore they could not “rely on [the inspector’s] representations when they had actual notice that the Home flooded previously.”²⁵³ Thus, the buyer’s reliance on the explanation provided by the seller and their knowledge of previous flooding saved the day for the home inspector who walked the buyer through the house.²⁵⁴

Even when the buyer receives a written report, it is important they understand the limited nature of many inspections. Inspections are often described by such terms as “visual,” “not technically exhaustive,” and home inspectors will sometimes recommend that people get a more detailed expert opinion should major structural problems (such as with the foundation) be detected.²⁵⁵ Although a written report will likely include observed problems in need of correction, home inspectors are not serving as engineers or guarantors that the house is or will be structurally sound.²⁵⁶ Home inspectors also generally shy away from identifying the cause of a problem that may be noted in the report.²⁵⁷

249. *Id.*

250. *Id.*

251. *Id.* at 199–200.

252. *Id.* at 200.

253. *Id.* at 203.

254. The buyer asserted a cause of action for negligent misrepresentation and a separate cause of action for breach of contract against the home inspector. *Id.* In dispatching the first cause of action, the Illinois Court of Appeals noted that the reliance element was lacking in the negligent misrepresentation claim against the home inspector, given the reliance the buyers placed on the explanation provided by the seller. *Id.* Regarding the breach of contract claim, the court noted that the inspector “fulfilled its obligations under the contract.” *Id.* Moreover, the “Home Inspector did point out that the basement did have water marks,” and went no further. *Id.* It was the seller “who presumably had knowledge of the incident(s) of flooding” and it was her explanation the buyers chose to believe. *Id.* The court also upheld the grant of summary judgment against the brokers on the negligent misrepresentation claim, using a similar analysis. *Id.* at 202. The court noted: “There is no factual basis that Brokers made any false statements of material fact. Nothing in the record suggests that Brokers knew the Home had flooding problems, other than the representations made by Seller in the presence of plaintiffs.” *Id.* at 201.

255. *See, e.g., Mathews v. Blixt*, No. C5-95-1150, 1995 WL 687638, at *1 (Minn. Ct. App. Nov. 21, 1995). The inspection agreement that the buyer signed stated: “The inspection is essentially visual, is not technically exhaustive, and does not imply that every defect will be discovered.” *Id.* In upholding a summary judgement granted the home inspector on claims of breach of contract and negligence, the court was fairly tough on the buyer, noting: “We conclude that Mathews got exactly what she bargained for: a purely visual nonexhaustive survey with no implication that every defect would be discovered. She was alerted to cracks in the foundation. Inspecta-Homes fulfilled its duty and honored its contract.” *Id.* at *3.

256. *See supra* text accompanying note 179.

257. *See* ASHI STANDARDS OF PRACTICE AND CODE OF ETHICS, *supra* note 56, at 8.

A home inspection and related report may also be limited in scope if it is obtained by a relocation service rather than arranged by a buyer who has contracted to buy the home. Some employers provide employees with a home relocation service in order to assist them in moving to a new job site.²⁵⁸ The home relocation service may contract for a limited inspection in order to get a quick general idea of the condition of the home before assisting in the sale.²⁵⁹ In such cases, the inspection and the report may be limited and clearly disclose that it should not be used by a buyer when considering the purchase of the home.²⁶⁰ However, it seems likely that should the report be provided to the buyer, the inspection report will likely cause confusion, because most buyers will seize on the concept of “inspection,” rather than focus on the exclusions and limitations embedded in the report.²⁶¹

A review of home inspection reports described in litigation suggests that home inspectors often recommend that a prospective buyer seek further review or consultation with a specialist or engineer when a potential major problem is discovered in the inspection. Just as a buyer who ignores the suggestion to hire a home inspector receives little sympathy from the courts,²⁶² a buyer who retains a home inspector but ignores advice on the need to consult with a specialist after the initial inspection is completed will likely face a dismissal of the action against a home inspector.²⁶³ The wishful thinking, impatience and full-speed-ahead attitude of a number of buyers is evident in many of the cases involving home inspectors. Whether it is an urgent need to move into a home due to job relocation or some related matter, or simply being starry-eyed after finding what is considered to be a dream home, it is clear that many buyers run right past some fairly prominent signs as they rush to close on the house. In pursuit of “God’s Little Acre” and “Home Sweet Home,”²⁶⁴ many buyers (or at least the ones who show up in cases) throw caution to the wind.²⁶⁵

258. *See, e.g.*, Moore v. Prudential Residential Servs. Ltd. P’ship, 849 So. 2d 914, 916 (Ala. 2002) (describing that sellers’ employer had agreement with real estate company to help employees who were relocated to sell their houses).

259. *E.g., id.* at 919 (Inspection report provided to buyers “stated: ‘[t]his report and form is much more limited than a typical whole house inspection which is normally obtained by a buyer when purchasing a home.’”).

260. *E.g., id.* at 919–20 (“The report concluded by urging prospective buyers to obtain their own home inspection before purchasing the house . . .”).

261. *See, e.g., id.* at 920 (describing that plaintiff thought it would be wasteful to have an additional home inspection performed).

262. *See* discussion *supra* notes 238–243 and accompanying text.

263. *E.g.,* McNeil v. Vanscoy, No. 28261-5-II, 2003 WL 21007606, at *1 (Wash. Ct. App. May 6, 2003) (upholding dismissal of an action against a home inspector where the inspector’s “report recommended ‘further review’ by, or ‘consult[ation] with,’ a specialist” after noting problems with “loose masonry in the chimney, open electrical junction boxes, improper wiring and non-water proof exterior outlets, inadequate attic ventilation, questionable water pipes and fittings, and bulging in the wall or floor near the bathtub and faucet”; nevertheless, the buyers “decided against obtaining ‘further review’ of these obvious and potentially extensive defects and, instead, determined that they could make the necessary repairs themselves.”).

264. *See supra* note 4 and accompanying text.

265. *See, e.g.,* Fann v. Mills, 546 S.E.2d 853, 855–56 (Ga. Ct. App. 2001) (finding that the buyer could have learned about flooding problems by simply reading the seller’s disclosure statement and

Further underscoring that home inspections are non-intrusive and visual, ASHI's *The Standards of Practice and Code of Ethics* notes that inspectors are "NOT required to disturb insulation"²⁶⁶ or "move personal property, furniture, equipment, plants, soil, snow, ice, or debris."²⁶⁷ Thus, if a buyer moves into a home and discovers defects only after furniture and rugs have been removed, ceiling tiles have been lifted, or load bearing walls have been removed during the course of renovations, home inspectors have generally avoided liability.²⁶⁸ Similarly, the failure to detect drill holes through concrete slab, indicating past treatment for termite infestation, may be excused where there is no evidence of active termite infestation and the drill holes may have been hidden by a rug and other of the seller's personal belongings placed around the perimeter of the garage.²⁶⁹

Some home inspection contracts limit the inspection to "accessible places," and in some cases inspectors make it clear that they will not enter small crawl spaces or attics that provide very little clearance. Such was the case in *Lee v. C.D.E. Home Inspection Co.*,²⁷⁰ where, after occupying the house, the buyers discovered rotted floor joists and other problems that were evident after entering the crawl space.²⁷¹ However, the home inspector had not entered the crawl space and the problems were not readily viewable from the vantage point of the crawl space entrance.²⁷² The home inspection agreement contained a disclaimer limiting the inspection to "accessible spaces."²⁷³ The buyers alleged "that the failure to enter and inspect the crawl space before preparing the report constituted an unconscionable sales prac-

although buyer hired home inspector whose report noted water damage, buyer never spoke with the inspector to discuss either the cause or extent of the damage).

266. ASHI STANDARDS OF PRACTICE AND CODE OF ETHICS, *supra* note 56, § 11.2, at 5.

267. *Id.* § 13.2(F)(3), at 6.

268. *See, e.g., Nye v. Sound Home Inspection*, No. 556206, 2001 WL 811763, at *1-2 (Conn. Super. Ct. June 18, 2001) (inspection company did not violate its standard of care in failing to discover fire damage that was not discovered until a load-bearing wall was removed after the purchase since the damage could not be detected without removing the ceiling tiles in a suspended ceiling).

269. *See Galvin v. DeLaurentis*, No. CV 960387977S, 1998 WL 289079, at *1 (Conn. Super. Ct. May 18, 1998) (refusing to impose liability on an inspector who missed evidence of previous termites in the form of "patched drill holes around the interior perimeter of the garage"). As such, a cautious buyer should inspect for drill holes (or hire a professional who will do the same) in all concrete slabs, concrete patios, garage floors, sidewalks close to the house and even in the mortar in brick walls, especially close to the ground. Drill holes indicate treatment for a termite infestation at some point in the history of the house. *See id.* The holes are usually patched, but they should be easy to spot because they will have a different color than the original concrete or mortar, and the holes are often evenly spaced. *See id.* In slabs, garage floors and patios, the holes are typically close to the walls of the house, so they may be concealed by rugs, furniture, plants or the usual collection of odds and ends stacked around the wall of a garage. The presence of drill holes does not mean that there is current, active infestation. *See id.*

270. No. 00AP-516, 2002 WL 1938248 (Ohio Ct. App. Aug. 22, 2000).

271. *Id.* at *2.

272. *Id.* at *1, *3.

273. *Id.* at *2. The provision in the contract read as follows:

Wherever possible, all rooms, areas and accessible spaces will be entered to evaluate existing conditions. This applies particularly to attics and crawl spaces. Attics with less than 4 feet and crawl spaces with less than 3 feet of clearance will not be entered but will be examined visually from a point of entry.

Id. (emphasis removed).

tice.”²⁷⁴ The jury returned a verdict in favor of the home inspector and the Ohio Court of Appeals affirmed.²⁷⁵ The court noted that the jury heard evidence regarding the crawl space, the nature of the inspection, the inspection report and the contract terms, and whether the contract provision was unconscionable “was a question of fact for the jury to be determined according to the jurors’ assessment of the relative positions of the parties, the circumstances of the transaction, and the jurors’ own application of fundamental concepts of fairness.”²⁷⁶

People who have any familiarity with common problems in used homes (i.e., termites, mold, moisture, leaking roofs, sagging) understand the “story” an attic and crawl space can tell. Evidence of leaks, insect damage, sagging and evidence of repairs are often found in attics and crawl spaces.²⁷⁷ So many buyers could get a bad surprise if they pay for a home inspection and find out the inspector stood at an opening and waived a flashlight around in the dark, rather than possibly low-crawling through attics, insulation, spiders and dirt. And a buyer who is not present when the home inspection occurs might well wonder what he or she paid for if the home inspector stays out of the attic or crawl space. However, having the home inspector enter the crawl space is no guarantee that the home inspector will report obvious problems if he or she does not understand the significance of what is in plain view, and in such a case, the buyer may have a remedy.²⁷⁸ In at least a few cases, the court put on the home inspector hat and visited the home site, by agreement of the parties.²⁷⁹

Prospective buyers should also understand that at least from the industry perspective, home inspectors are not required to report on noncompliance or compliance with applicable regulatory requirements, such as building code requirements. ASHI’s *The Standard of Practice and Code of Ethics*, provides, “*Inspectors* are NOT required to determine: . . . compliance with

274. *Id.*

275. *Id.* at *3, *7.

276. *Id.* at *3, *5–*6.

277. See GLENDA M. HERMAN & SANDRA A. ZASLOW, N.C. COOP. EXTENSION SERV., INSPECTING A HOUSE, <http://www.ces.ncsu.edu/depts/fcs/pdfs/fcs436.pdf> (last visited Oct. 6, 2007); Superior Home Inspections, Home Maintenance Guide, <http://asuperiorhomeinspection.com/HomeMaintenanceList.pdf> (last visited Oct. 6, 2007).

278. See *Freeman v. Duhamel*, No. 96A-01-001-JOH, 1997 WL 524119, at *1–*2, *6 (Del. Super. Ct. May 29, 1997) (upholding trial court’s finding of negligence where the home inspector entered the crawl space beneath the kitchen floor but failed to report the presence of “makeshift supports which consisted of four columns made of concrete blocks piled together without mortar, with 2” x 4” framing lumber wedged on top of the columns” and the buyers noticed sagging in the kitchen floor six months after moving in).

279. *Zitzkat v. Talotta*, No. CV 970569373S, 1999 WL 1273715, at *3 (Conn. Super. Ct. Dec. 8, 1999) (“At the request of the parties and with [the parties] and their attorneys present, the court inspected the house and allowed [the plaintiff] to point out defects in the structure.”); *Palumbo v. Jack A. Halprin Assocs., Inc.*, No. CV 93-0353094-S, 1994 WL 692739, at *1 (Conn. Super. Ct. Nov. 30, 1994) (court visited the premises “two and a half years after the defendant’s inspection.”). In *Palumbo*, the court also noted on the matter of the cost to repair: “Despite obvious personal animosity between these experts, and a tendency on the part of the plaintiff’s expert to volunteer information and to ramble in his explanation, the Court finds the latter’s estimate to be reasonable under all the circumstances.” *Id.* at *2.

regulatory requirements (codes, regulations, laws, ordinances, etc.).²⁸⁰ This may be stated clearly in the home inspection contract and, at least in one case, the court rejected the plaintiff's argument that the home inspector assumed a common-law duty to advise the plaintiff regarding code violations where the contract specifically declared that the inspector did not inspect for code violations.²⁸¹

The most common claim against home inspectors is one based on negligence rather than fraud. Plaintiffs who allege fraud but fail to allege negligence do not fare well.²⁸² However, buyers have had some success using negligence, where courts focus heavily on the specific limiting language in the home inspection contracts and the language of the inspection report. Among the reported cases, the damages awarded for negligence are often fairly modest.²⁸³

Because the purchase and ownership of a home is such a special experience in the lives of most people, a home inspector who performs poorly, and especially beyond mere negligence, may be liable for damages for mental anguish. In *Guilbeau v. Anderson*,²⁸⁴ the Texas Court of Appeals affirmed a judgment in favor of the plaintiff, "awarding damages for negligence, gross negligence, mental anguish and violations of the Deceptive Trade Practices Act."²⁸⁵ The home inspector's report "indicated that the foundation had good structural integrity," but a structural engineer who had inspected the home for another prospective buyer before the inspection conducted by the defendant in this case noted "significant settling of the foundation."²⁸⁶ The structural engineer testified at trial that the problems should have been spotted and agreed that an inspection that did not note the problems "would be caused by the failure to meet the standard of care that is applicable to people in your profession."²⁸⁷ The home inspector argued that he could not be held

280. ASHI STANDARDS OF PRACTICE AND CODE OF ETHICS, *supra* note 56, § 13.2(A)(8), at 6.

281. *Ribeiro v. Black Paw Home Inspection, Inc.*, No. 985905, 2000 WL 33159242, at *1 (Mass. Dist. Ct. Feb. 28, 2000) (home inspector did not inform the buyer "that the absence of a second means of egress from the third floor meant that the building was in violation of the building code for a three-family residence.").

282. *See, e.g., Johnson v. Beverly-Hanks & Assocs., Inc.*, 388 S.E.2d 584, 590 (N.C. Ct. App. 1990), *aff'd in part on other grounds, rev'd in part on other grounds*, 400 S.E.2d 38 (N.C. 1991) (plaintiff failed to prove representations made in a home inspection report were false and did not allege negligent inspection). However, language in a home inspection report could rise to the level of being described as possibly false, misleading, or deceptive. *See Spicer v. Great Serv., Inc.*, 580 S.W.2d 14, 15-17 (Tex. App. 1979) (reversing the instructed verdict against the case for a new trial where the inspector's report described the central heating system as "in good working order," despite excessive rust and silver paint sprayed on the furnace).

283. *See Pagliuca v. Jack A. Halprin Assocs.*, No. CV92-338161, 1996 WL 409367, at *2 (Conn. Super. Ct. June 24, 1996) (awarding \$1,458.00 plus taxable costs to home buyer where home inspector was negligent in failing to discover termite damage in the joists of the basement); *Descano v. Walters*, No. 88C-NO-18, 1992 WL 9078, at *2-*4 (Del. Super. Ct. Jan. 15, 1992) (parties stipulated to damages in the amount of \$27,000 where inspector was negligent in failing to detect problems that resulted in rotten wood below the grade of the home).

284. 841 S.W.2d 517 (Tex. App. 1992).

285. *Id.* at 518.

286. *Id.* at 518-19.

287. *Id.* at 521.

personally liable for the judgment “because he was acting within the course and scope of his employment” where he was the president and major stockholder of the contracting entity.²⁸⁸ The home inspector argued that the plaintiff “had to plead and pierce the corporate veil in order to hold him personally liable.”²⁸⁹ The Texas Court of Appeals disagreed, noting that the inspector was “being sued individually for his own negligence and his own misrepresentations.”²⁹⁰ And in addressing the award of damages for mental anguish, the court of appeals noted that “[t]he trial judge specifically found that ‘the negligence on the part of the defendants constituted such an entire want of care as to constitute gross negligence.’”²⁹¹

The most interesting and informative opinion among all these found dealing with liability of home inspectors is *Herner v. HouseMaster of America, Inc.*,²⁹² wherein a New Jersey appellate court provides a caustic analysis (justified by the facts) of the failings of a home inspector, the sometimes unhealthy relationship between realtors and home inspectors, the inclination of some home inspectors to give “rosy reports,” and the weakness of the “rosy report” provided to the homeowners in this case which the court described as “so ‘balanced’ as to render it pabulum and worthless.”²⁹³ The home inspector in the case was a Mr. Tangradi, whose brochure for home inspection services was provided by a realtor.²⁹⁴ The president of HouseMaster of America, Inc., the franchise the inspector was affiliated with, admitted that he had no construction or inspection background,²⁹⁵ that HouseMaster’s franchisees got eighty percent of their referrals from realtors, and that HouseMaster provided training and educational seminars for realtors.²⁹⁶

The court’s blunt assessment of the “value” of the home inspection report is worth noting here:

288. *Id.* at 518–19.

289. *Id.* at 519.

290. *Id.* The Texas Court of Appeals noted:

It is the general rule in Texas that corporate agents are individually liable for fraudulent or tortious acts committed while in the service of their corporation. Further, an agent is liable under the DTPA for affirmative misrepresentations, notwithstanding the agent’s lack of knowledge or notice of the falsity thereof.

Mr. Guilbeau testified that he has been a registered structural engineer for sixteen years. He stated that he performed the inspection on the house located at 12414 Brandywyne. He testified that he considered the settling of the foundation to be normal and that “I specifically stated on my report that this is a statement of condition” as of May 1988. The record is full of other indications of Mr. Guilbeau’s individual participation, and the basis of the lawsuit is the tort committed by Guilbeau individually. The record also shows that Guilbeau is the president and major stockholder of the corporate-defendant. Further, a corporation can be held liable for the torts committed by its agents or employees while acting in the course and scope of their employment.

Id. (citations omitted).

291. *Id.* at 520.

292. 793 A.2d 55 (N.J. Super. Ct. App. Div. 2002).

293. *See id.* at 67–68.

294. *Id.* at 56.

295. *Id.* at 58–59.

296. *Id.* at 58.

In this case, HouseMaster's system of home inspection resulted in a report to the HERNERS which was so "balanced" as to render it pabulum and worthless. Tangradi personified HouseMaster's marketing philosophy. His report told the HERNERS nothing important about the condition of the house they had agreed to buy but undoubtedly pleased the realtor. In that respect it was affirmatively misleading. Of fifty-four items inspected, fifty-one were marked "Satisfactory", HouseMaster's highest rating, some with comments. None were marked "Poor." And yet within months of closing, the HERNERS were confronted by thousands of dollars of ascertainable loss in the form of repairs including the replacement of a roof near the end of its useful life.²⁹⁷

The court is also particularly critical of the relationship between the realtor and home inspectors where home inspectors rely so heavily on referrals from realtors,²⁹⁸ and the opinion includes citations to testimony wherein the home inspector admits that a home inspector who writes critical reports would be called a "deal killer" and, if all inspectors were "deal killers," "[a]ll the home inspection business would die."²⁹⁹

Regarding the disinclination of the home inspector in this case to be the bearer of bad news, and the extent to which the home inspector is more interested in maintaining the relationship with the realtor, rather than safeguarding the interests of the buyer, the court admonished:

HouseMaster's reports strum the chord of high hopes on the part of those consumers who, having already committed themselves, yearn for confirmation that they have made a wise decision. But its carefully couched and deliberately softened language fails to raise troubling issues which might challenge that decision. We reject [the president of HouseMaster's] characterization of this approach as "impartial." At the expense of the consumer, it favors sellers and the realtors who represent them in the market place. In contrast, for the professional buyers of homes for the relocation market, the "big boys," a HouseMaster inspection picks out and reports every "nail pop" that could affect the judgment to buy. Such a stark difference in the approach to an "impartial" inspection is further evidence of unconscionable commercial practice.³⁰⁰

A significant portion of the opinion includes excerpts from testimony wherein the HouseMaster Inspector Guidelines Manual, which is distributed to franchisees, was put before the president of HouseMaster to elicit his

297. *Id.* at 67-68.

298. *Id.* at 66-67.

299. *Id.* at 63.

300. *Id.* at 67.

testimony.³⁰¹ Long passages in the opinion, focusing on excerpts from the manual, establish that the home inspector largely adopted a smiley-face philosophy in their inspections and reports, trying to avoid a common real estate agent complaint that inspectors nit-pick and can become “deal killers.”³⁰² More than any other reported opinion under the general heading of home inspector liability, this opinion captures the sometimes conflicting interests of buyers, seller, realtors and inspectors, drawing particular attention to the negligence of home inspectors when they become more concerned with keeping realtors happy (thereby keeping the referrals coming), rather than protecting the interests of their paying client – the buyer.³⁰³

The most startling passage from the HouseMaster manual noted that in a relocation inspection, “unlike a normal home inspection, a relo[cation] company need [sic] us to nitpick.”³⁰⁴ A fair reading of all that is described in the case shows a home inspection company more interested in marketing than inspecting, a home inspection manual filled with advice on how to avoid being a “deal killer,” and a process that is more geared to watching out for the best interests of sellers and realtors than the interest of the paying client. And all of this occurs in the face of advice on how to create and further the appearance of independence from the referring realtor.³⁰⁵

The issues highlighted by counsel for the plaintiff in *Herner* provide a blueprint for attorneys who represent a buyer in a home inspection case. The employment history, qualifications, and training of the owner of the business and individual home inspectors should be explored. The seller and any real estate agent or broker who was involved with previous prospective buyers should be asked to produce the names (and reports, if available) of inspectors whose reports preceded the report in the instant litigation. Previous reports and inspectors may be important to use in the litigation.

Marketing material, training manuals, and operations manuals should be acquired. The relationship and history between the home inspector and involved real estate companies and individuals should be thoroughly examined. Whether the home inspector relies heavily on referrals from one or several real estate companies should be established and any suggestion in any written material or correspondence that the inspector avoid being a “deal killer” should be examined and used. Any information relevant to the

301. *See id.* at 60–63.

302. *See id.* at 60–64.

303. *See id.* at 67.

304. *Id.* at 62.

305. *Id.* at 63, 67. The following testimony is instructive on the fraud committed through the creation of the appearance of independence, and other critical information that is kept from the buyer:

[The president of HouseMaster of America, Inc.] conceded the manual also recommended to its inspectors that they not advise the buyers: (1) that they are part time inspectors; (2) that they are new inspectors; and (3) to appear as if they do not know the realtor even where they have done prior inspections for that realtor. It was pointed out that the brochure did not advise the [buyers] that the inspector is to be mindful of everyone’s interest including the buyers, the sellers and the realtors. It does not reveal HouseMaster indemnifies the realtor and other referral sources from liability in the case of a faulty inspection.

Id. at 63.

inspector's independence and objectivity should be examined and highlighted.

The extent to which the subject inspection report and reports on other properties conducted by the same inspector (perhaps redacted) are consistently bland and rosy should be examined. If the house inspector is a "Will Rogers" of the industry, never seeing a home he did not like, he or she should be challenged.

Probably not many home inspection companies or home inspection franchise companies have as much ill-advised written material as HouseMaster, but if anyone follows HouseMaster's lead, the attorney for the plaintiff should draw a bead on it. If there are recommendations made to avoid letting homeowners know that the inspector is in the business part-time or to avoid letting the homeowner know that the inspector knows the real estate agent, that material should be highlighted in depositions and at trial. And if the operations and training material spend more time dwelling on the marketing aspects of the business rather than the technical aspects and duties owed to the client, the attorney for the plaintiff should bring that point home.

Unlike so many areas of the law, most judges, arbitrators, and jurors will have experience in the purchase and sale of homes. None will expect that any house is perfect, but few will fail to appreciate the buyer's problem when major problems surface shortly after occupancy, where the inspector gave a "rosy report." There is little doubt that some sellers mask the problems in the home with wood putty, caulking, paint, and the strategic location of rugs and furniture. However, the whole point of hiring a home inspector is to find someone who has the training and a good eye for spotting defects that may not be obvious to the untrained eye.

C. Attempts By Home Inspectors To Limit Liability and Impose Arbitration

Home inspectors have had mixed success in limiting their liability through contract provisions and in imposing arbitration provisions on buyers. A common limited liability clause is one where the damages are limited to the lesser of the cost of the inspection or the cost of repairs.³⁰⁶ This offers a puny result for the plaintiff, particularly given the likely cost of repairing a major defect in a home. Other clauses attempt to limit the scope of the inspection, excluding certain structural features or possible problems with the home, such as termites and wood-boring insects.³⁰⁷ Some inspection contracts purport to reduce the statute of limitations from what would otherwise be available under state law for a negligence or breach of contract claim.³⁰⁸

306. See, e.g., *Rector v. Calamus Group, Inc.*, 794 N.Y.S.2d 470, 470-71 (N.Y. App. Div. 2005).

307. See, e.g., *Berger v. Am. Bldg. Inspection, Inc.*, No. 96-L-114, 1997 WL 269318, at *1-*2 (Ohio Ct. App. May 2, 1997).

308. See, e.g., *Dean v. Haman*, No. 259120, 2006 WL 1330325, at *1-*2 (Mich. Ct. App. May 16, 2006) (upholding contract for home inspection which limited statute of limitations to six months where statute provides six years).

As arbitration provisions have swept the country, some home inspectors have incorporated arbitration provisions in their contracts. There are not many reported cases where the enforceability of the arbitration provision is at issue, but there are a few and they generally have not gone well for home inspectors.

Regarding clauses limiting liability to the cost of the inspection or a lesser amount, the courts generally have applied the same analysis used in analyzing exculpatory and limiting provisions in other businesses and professions.³⁰⁹ Where the exculpatory provision is conspicuous and presented at a time when the buyer has a meaningful choice, courts have honored the provision, *in the absence of gross negligence*.³¹⁰ Plaintiffs, whose facts support a claim of gross negligence or worse, willful behavior, will probably be able to maneuver past the limited liability clause.³¹¹

If a home inspector hopes to enforce a limitation of liability provision, it would be wise to present it early and in a conspicuous fashion. In *Head v. U.S. Inspect DFW, Inc.*,³¹² the home inspector did it right. The “limitation of liability clause was set apart” in the written agreement, “enclosed in a box, and separately initialed by” the plaintiff.³¹³ It is important to present the limitation of liability clause in the home inspection agreement, rather than presenting it for the first time in the written report detailing the results of the home inspection.³¹⁴ Where the presentation of the limited liability clause is conspicuous and timely, the home inspector who misses a problem with the house will have a chance in the courts, particularly where the inspection is a relatively quick, visual walk-through.³¹⁵

309. See, e.g., *Rector*, 794 N.Y.S.2d at 471.

310. *Baker v. Roy H. Haas Assocs., Inc.*, 629 A.2d 1317, 1319–21 (Md. Ct. Spec. App. 1993) (noting that if the home inspector’s conduct had amounted to gross negligence—a wanton and reckless disregard for the buyer’s rights—he could be liable for more than the \$250 home inspection fee); *Ricciardi v. Frank*, 655 N.Y.S.2d 242, 243 (N.Y. App. Div. 1996) (noting that because the inspector was not grossly negligent, his liability was limited to the \$375 cost of the inspection); *Rector*, 794 N.Y.S.2d at 470–72 (finding that provision in the contract with the home inspector limiting the inspector’s liability to the amount of the inspection fee (\$205) was enforceable, absent allegation of gross negligence).

311. See, e.g., *Carleton v. Winter*, 901 A.2d 174, 181 (D.C. 2006) (noting that “an examination of leading authorities in the contract area and of cases in other jurisdictions reveals that courts have not generally enforced exculpatory clauses to the extent that they limited a party’s liability for gross negligence, recklessness or intentional torts.”).

312. 159 S.W.3d 731 (Tex. App. 2005).

313. *Id.* at 735.

314. See *id.* at 748 (noting that if the buyer “was unsatisfied with the limitation of liability provision, she was free to choose another inspection service”).

315. See *id.* at 735, 748. The court in *Head* noted:

Head paid a small fee for a visual inspection of her home, and prohibiting [the inspection company] from limiting liability could subject it to a significant risk of liability. Furthermore, without the ability to limit liability, the costs of home inspection services would likely increase, which might make this service unaffordable for some. See *Racal-Chubb*, 997 S.W.2d at 811 (listing the potential for increased cost of alarm services as one policy reason for limiting liability). Therefore, the policy reasons in favor of limiting liability in the alarm context apply equally as well in this situation. Thus, we hold that the limitation of liability clause in the Inspection Agreement is not unconscionable.

Id. at 749.

In at least one case, the contract provision limiting the liability of the home inspector was labeled as a liquidated damage clause.³¹⁶ Liquidated damage clauses in contracts involving consumers are not an everyday occurrence, and probably for good reason. It is fairly easy to understand language that clearly signals that the inspector is proposing a limitation of liability, but many consumers would not understand or be able to describe a “liquidated” damage concept. But in the one case where it appeared, the court held the clause was enforceable because “damages at the time of the agreement were difficult to determine with exactness and the amount can not be construed as a penalty.”³¹⁷ The court simply used the standard analysis of the enforceability of liquidated damage provisions employed in other commercial settings.³¹⁸

Where courts refuse to enforce limited liability clauses, they go about it in different ways. In another case involving HouseMaster,³¹⁹ the Appellate Court of Connecticut addressed the possibility that a clause labeled “COMPANY LIABILITY” was either “a liquidated damages clause or a disclaimer of liability clause.”³²⁰ The court ultimately determined the clause was not enforceable.³²¹ In the analysis as liquidated damages, the court concluded the inspection company did not show “why damages would be uncertain in amount or difficult to prove” and a refund of “[t]he inspection fee of \$225 falls far short of the damages claimed by the plaintiffs and of the trial court’s award of reasonably foreseeable damages that the unreasonableness of the ‘stipulated’ amount is apparent.”³²² And under the analysis of the provision as a limitation of liability clause, the court concluded that “[t]here was no assent here to limit the service provider’s liability” on the facts of the case.³²³

Some courts focus less on the clarity and timing of the presentation of the language and merely find such provisions to be contrary to public policy.³²⁴ In those cases the courts simply apply what is typically well-developed case law from attempts to enforce similar provisions in other

316. See *Williams v. Neff*, 43 Va. Cir. 464, 466 (Va. Cir. Ct. 1997).

317. *Id.* at 466.

318. *Id.*

319. See *supra* notes 292–305 and accompanying text.

320. *Mattegat v. Klopfenstein*, 717 A.2d 276, 280 (Conn. App. Ct. 1998).

321. *Id.*

322. *Id.*

323. *Id.* In cases where the home inspector is judged to have culpability and the extent of the problem requiring repair by the homeowner results in thousands of dollars of expense, a mere refund of the home inspection fee has all the makings of a lousy bargain, no matter what legal arguments are being parsed. Lousy bargains in consumer settings lead many courts to “find a way” around contract language. See *infra* notes 324–327 and accompanying text.

324. See, e.g., *Lucier v. Williams*, 841 A.2d 907, 913 (N.J. Super. Ct. App. Div. 2004) (holding that the limitation of liability clause was against public policy, allowing “the home inspector to circumvent the state’s public policy of holding professional service providers to certain industry standards” and “contravene[ing] the stated public policy of New Jersey regarding home inspectors”); *Russell v. Bray*, 116 S.W.3d 1, 5–8 (Tenn. Ct. App. 2003) (holding the exculpatory clause unenforceable because four of the six criteria established by the Supreme Court in previous case law of whether the clause affects public policy had been met).

industries and professions.³²⁵ But other courts stop short of the public policy analysis and strike down the provisions based on both ambiguity, construing language against the drafter,³²⁶ and objections to the timing of the disclaimer where the limiting language is included in the inspection report.³²⁷ Waiting to disclose “Terms and Conditions of the Inspection” only at the time the report is handed to the buyer has and should make a limitation of liability provision unenforceable.³²⁸

Some of the “scope of inspection” provisions contained in contracts reviewed by the author³²⁹ disclose the general level of detail of the inspection³³⁰ while others include specific provisions wherein the home inspector tries to except or carve out particular structural elements or systems in the house.³³¹ Other provisions put the buyer on notice that the inspection and report do not create a warranty.³³² The perception that many buyers may have regarding whether the inspection report contains some form of continuing promise (like a warranty) requires clear and conspicuous language to overcome the likely confusion. Buyers should be warned (unless they are purchasing a warranty) that an inspection report is largely based on the concept of “what is” wrong with a house, as opposed to “what will be.” The language in the inspection report should make it clear that the job of the inspector is in the present and involves no predictions or obligations regarding the future. But it is likely that the gut reaction of most buyers who have a major problem shortly after occupancy, such as a heat pump or furnace going out, will be that the inspector missed something. And anyone who has

325. See, e.g., *Lucier*, 841 A.2d at 911–13; *Russell*, 116 S.W.3d at 5–8.

326. E.g., *Rubin v. AMC Home Inspection & Warranty Serv.*, 418 A.2d 306, 309–11 (N.J. Super. Ct. Law Div. 1980) (stating that strictly construing an exculpatory provision included in the Inspection Order Form “is not a clear and plain indication that the stated limitation of liability is applicable to negligent conduct by defendant”); *Hoskins v. Inspector, LLC*, 961 P.2d 261, 262–64 (Or. Ct. App. 1998) (finding that “substantial evidence that the liability limitation clause was not intended to immunize Inspector from its own negligence” and ambiguities in the clause were to be construed against the inspector because the inspector drafted the contract).

327. See, e.g., *Redding v. Tanner*, 498 S.E.2d 156, 157 (Ga. Ct. App. 1998) (holding a waiver of liability provision void where the inspection “report contained three pages of ‘Terms and Conditions of the Inspection,’ which declared that “[n]either [the inspection company] nor the inspector shall be liable for mistakes, omissions, or errors in judgment”).

328. *Id.*

329. See *supra* notes 67–68 and accompanying text.

330. See, e.g., *Moreno v. Sanchez*, 131 Cal. Rptr. 2d 684, 686 (Cal. Ct. App. 2003) (defining inspection as a visual inspection and explicitly excluding matters not visible as outside the scope of the inspection).

331. E.g., *Rose v. Affiliated Bldg. Inspectors, Inc.*, No. 90-0691 (HHG), 1991 U.S. Dist. LEXIS 4617, at *1, *3–*5 (D.D.C. Apr. 8, 1991) (finding no evidence that inspection for toxins was a purpose of the home inspection where contract disclaimed liability for potential findings discoverable only by removing insulation or other additional testing); *Berger v. Am. Bldg. Inspection, Inc.*, No. 96-L-114, 1997 WL 269318, at *1–*2, *5 (Ohio Ct. App. May 2, 1997) (homeowners who discovered house had been damaged by termites could not recover against home inspector where the signed contract for the home inspection clearly disclaimed inspection for termites and other boring insects).

332. See, e.g., *Badzinski v. Patnode*, No. 02-0416, 2002 WL 1904380, at *1 (Wis. Ct. App. Aug. 20, 2002) (holding that trial court erred in finding that home inspector created a warranty in his inspection report where the inspection agreement included conspicuous language that the inspector made no warranty).

owned a home for any length of time would agree that sometimes you can go long stretches of time without any problems, but there are other times when unrelated problems occur in such a short stretch of time (i.e., dishwasher, dryer, and heat pump go out) that you start to believe evil spirits are at work. If a lot goes bad shortly after the buyer takes possession, it is likely that the effectiveness and clarity of the disclosures made by the inspector will be tested.³³³

There are not many reported cases involving attempts by inspectors to enforce arbitration provisions, but the few that have appeared are interesting. In *Kramer v. Eagle Eye Home Inspections, Inc.*,³³⁴ the inspector evidently failed to have an eagle eye, both in the home inspection and for compliance with the state law regarding required disclosures to enforce arbitration.³³⁵ One interesting twist in the case is that the buyer submitted an affidavit wherein he alleged that “the inspector admitted that he had “missed” the termite damage, stated that “it was his “fault,” and encouraged [the buyer] to sue (to recover from Eagle Eye’s insurance)”³³⁶ Since the notice of the arbitration requirement was not in the words and style mandated by state law and the consumer gave up his common law right to sue, the court followed precedent in strictly construing the statutorily required notice provision for arbitration and held the arbitration clause to be unenforceable.³³⁷ A home inspector attempting to impose arbitration should not include some passage pulled out of a form book provided by a trade association without further exploring requirements under the specific state statute and any case law that has developed in the state regarding all the issues that arise when arbitration provisions are challenged.

The interplay between a clause limiting liability and a clause imposing significant costs for arbitration is highlighted in *O’Donoghue v. Smythe, Cramer Company*,³³⁸ where the court held that “the interaction between the clauses render[ed] the contract unenforceable because the [buyers] would

333. See, e.g., *Pitts v. Watkins*, 905 So. 2d 553, 554–55, 558 (Miss. 2005).

334. 716 N.W.2d 749 (Neb. Ct. App. 2006).

335. See *id.* at 764.

336. *Id.* at 757.

337. See *id.* at 763–64. The following passage from the case is instructive:

(ii) Violation of Nebraska Statutory Law

Section 25-2602.02 states, “The following statement shall appear in capitalized, underlined type adjoining the signature block of any standardized agreement in which binding arbitration is the sole remedy for dispute resolution: THIS CONTRACT CONTAINS AN ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES.” Nonetheless, the inspection agreement at issue reads:

In the event a dispute or claim should arise from the inspection or inspection report, it is agreed that this dispute or claim shall be resolved informally between the parties or by binding Arbitration under the “Construction Industry Arbitration Rules” of the American Arbitration Association, and use as a gauge of performance the “Standards-of-Practice” of the American Society of Home Inspectors (ASHI®).

Id. at 763.

338. No. 80453, 2002 WL 1454074 (Ohio Ct. App. July 3, 2002).

[have] effectively [been] denied any redress.”³³⁹ The testimony given “was uncontested that the fee for arbitration would be at least \$500,” but the limitation of liability clause purported to limit recovery to \$265.³⁴⁰ If the buyers in the case used a lawyer before finalizing this agreement, they missed a chance at a malpractice claim if it was not pursued. Offering a consumer the opportunity to spend \$500 (at least) to get \$265 is a bad deal in Ohio and everywhere else.

In *Pitts v. Watkins*,³⁴¹ the home inspector went 0-3 in the attempt to impose arbitration, limit liability, and shrink the statute of limitations.³⁴² The Mississippi Supreme Court struck down the arbitration provision as unconscionable because the arbitration clause “provide[d] an avenue for [the home inspector] to pursue his claims in a court of law, while requiring the [consumer] to arbitrate.”³⁴³ The limitation of liability clause was held to be substantively unconscionable where the limited liability clause operated to limit the inspector’s liability to \$265, while the homeowner alleged that the inspector’s “negligence caused them to incur \$30,000 to \$40,000 in damages.”³⁴⁴ The Mississippi Supreme Court cited a case from the Superior Court of New Jersey,³⁴⁵ noting that

a limitation of liability provision in a home inspection contract was found unconscionable for the following reasons: “(1) the contract, prepared by the home inspector, is one of adhesion; (2) the parties, one a consumer and the other a professional expert, have grossly unequal bargaining status; and (3) the substance of the provision eviscerates the contract and its fundamental purpose because the potential damage level is so nominal that it has the practical effect of avoiding almost all responsibility for the professional’s negligence.”³⁴⁶

Finally, the Mississippi Supreme Court struck down the clause wherein the home inspector tried to shrink the statute of limitations from three years to one year from the date of the inspection.³⁴⁷ The court noted: “[t]he attempt to create a private statute of limitations is further evidence of overreaching by [the inspector], is oppressive, violates statutory law and is likewise unconscionable.”³⁴⁸ One gets the sense that the magnitude of the problems faced by the homeowner in *Pitts*,³⁴⁹ standing against the attempt by the

339. *Id.* at *5.

340. *Id.*

341. 905 So. 2d 553 (Miss. 2005).

342. *Id.* at 558.

343. *Id.* at 555.

344. *Id.* at 556.

345. *Lucier v. Williams*, 841 A.2d 907 (N.J. Super. Ct. App. Div. 2004).

346. *Pitts*, 905 So. 2d at 557 (quoting *Lucier*, 841 A.2d at 912).

347. *Id.* at 558.

348. *Id.*

349. *See id.* at 554–55.

inspector to limit liability three different ways, led to the application of the rule that “pigs get fed and hogs get slaughtered.”

In the other cases involving attempts to shrink the statute of limitations, the courts have dealt with whether the accrual of a cause of action occurs with the inspection, or when the homeowner discovers or should have discovered the breach. In *Moreno v. Sanchez*,³⁵⁰ the inspector agreed to strike the liquidated damage clause in the proposed contract but would not agree to remove the statute of limitation clause which “provided [that] any lawsuit, sounding in either contract or tort, had to be filed within a year from the date of the inspection.”³⁵¹ The contract provided: “[t]his time period is shorter than otherwise provided by law.”³⁵² The court concluded that “one year from the date of the inspection can be an unreasonably short period of time to discover” the breach and that the “cause of action . . . accrues when the buyer discovers, or through the exercise of reasonable diligence should have discovered, the breach.”³⁵³ Citing *Moreno* favorably, the Indiana Court of Appeals held that the discovery rule can apply to breach of contract actions in a case where the contract contained a one-year period of limitations for bringing an action for breach of contract.³⁵⁴

D. Other Issues in Home Inspector Litigation

Does home inspection constitute a “profession” for purposes of applying a beneficial statute of limitations for professional malpractice? In *Gebhardt v. Allspect, Inc.*,³⁵⁵ the plaintiffs named the corporate entity as defendant, rather than suing a licensed engineer acting individually.³⁵⁶ An engineer would have been entitled to the three-year statute of limitations available for professionals.³⁵⁷ The federal court, relying on New York case law, held that the six-year statute of limitations applied, rather than the three-year statute.³⁵⁸ In New York, an engineer when acting individually

350. 131 Cal. Rptr. 2d 684 (Cal. Ct. App. 2003).

351. *Id.* at 686.

352. *Id.*

353. *Id.* at 685. The lower court had held that “the one-year statute of limitations was reasonable . . . and thus presented a bar” to the buyer’s claims “for breach of contract, negligence and negligent misrepresentation.” *Id.* at 687–88. The lower court also “granted the inspector’s request for contractual attorney fees and costs as the prevailing party in the action.” *Id.* at 688. The buyers filed suit fourteen months after the inspection. *Id.* at 700 (Perluss, P.J., dissenting).

354. *New Welton Homes v. Eckman*, 786 N.E.2d 1172, 1177 (Ind. Ct. App. 2003), *transfer granted* by 804 N.E. 2d 749 (Ind. 2003), *vacated* by 830 N.E. 2d 32 (Ind. 2005), *rev’d on other grounds*, 786 N.E. 2d 1172 (Ind. App. 2003). The Court concluded:

We hold that the discovery rule can apply to breach of contract actions in which the contract contains a limitation of actions provision. The rule tolls the running of the time period in which to bring an action until such time as a party discovers or could have discovered by the exercise of ordinary diligence the alleged breach, where the alleged breach is not fixed or clearly ascertainable.

Id. at 1178.

355. 96 F. Supp. 2d 331 (S.D.N.Y. 2000).

356. *See id.* at 335.

357. *Id.*

358. *Id.*

would get the benefit of the shorter statute.³⁵⁹ But the defendant, a home inspection company in this case, was “an unlicensed corporation that perform[ed] home inspections, not engineering services.”³⁶⁰ The opinion includes analysis of case law in New York where the courts have considered a number of factors in determining whether a given activity constitutes the practice of a profession.³⁶¹

In another case, the buyers sued the home inspector *eight years* after “they discovered that a hairline crack, present at the time of the purchase, had opened significantly.”³⁶² Application of a state statute of repose would have imposed an absolute bar to bringing suit.³⁶³ The sole issue in the case on appeal (the homeowners received a judgment in their favor at trial) was whether the statute of repose applied to “an inspector [who] negligently conducted a ‘pre-buy’ inspection”³⁶⁴

After analyzing the statute and concluding that the language was ambiguous, the court held that the General Assembly “intended [the statute] to apply only to the actual process of construction” and not to a “pre-buy” inspection conducted by a home inspector.³⁶⁵ The court noted that in discussions of the proposed legislation in the Colorado House and Senate, “legislators specifically referred to the impact on the construction industry and on architects and engineers. No mention was made of inspectors and no testimony was received from professionals who were not connected with the building industry.”³⁶⁶

It is not a surprise that home inspectors were not mentioned or testimony heard from them in a legislative session which took place in 1986, but the court was not inclined to give the home inspector a break in light of the jury verdict for the homeowners.³⁶⁷ Unfortunately, the reported opinion does not include any discussion of what might cause a jury to conclude that an inspector was negligent in an inspection which took place so far back in time.³⁶⁸ In the inspection report, the inspector “concluded there were ‘no

359. *Id.*

360. *Id.*

361. *Id.* at 333–34. In *Port Authority of New York & New Jersey v. Evergreen International Aviation, Inc.*, a New York court described four factors of what constitutes a profession:

(1) a long-term educational background generally associated with a degree in an advanced field of science or learning; (2) the requirement of a license which indicates sufficient qualifications have been met prior to engaging in the occupation; (3) the control of the occupation by standards of conduct, ethics and malpractice liability; and (4) the barrier to carrying on the occupation as a corporation.

686 N.Y.S.2d 269, 272 (N.Y. Sup. Ct. 1999). Were these four factors to be applied to the home inspector credentialing, licensing, and regulatory schemes across the states, the result would likely be mixed. *See supra* notes 86–105 and accompanying text.

362. *Gleason v. Becker-Johnson Assocs., Inc.*, 916 P.2d 662, 663 (Colo. Ct. App. 1996).

363. *Id.* at 663–63.

364. *Id.* at 663.

365. *Id.* at 664–65.

366. *Id.* at 665. The house was purchased in 1984. *Id.* at 663. In 1992 the homeowners discovered the hairline crack that was present at the time of purchase “had opened significantly.” *Id.* In 1994 they filed a complaint based on “negligence and negligent misrepresentation.” *Id.*

367. *See id.* at 664.

368. *See id.*

problems with the subsurface masonry garage wall or the foundation in general.”³⁶⁹ However, a whole lot of settling and changes in drainage and landscaping can occur over an eight year period, leading to problems that did not exist when the home was purchased, and many houses have hairline cracks that become more prominent over time.³⁷⁰

Among all the reported cases involving home inspectors, the eight years in *Gleason* (from inspection to the time the homeowners identified a foundation crack as a major problem) was the longest in time from the inspection to the “upset” of the buyer. It is hard to imagine too many other sets of facts like *Gleason* surviving a statute of repose, statute of limitations, or just a rule of common sense. Too many things can go wrong with a house over the course of years to reach too far in the future and assume the problem is one that could have been avoided but for the negligence of the home inspector. As a house ages, systems fail. Furnaces, shingles, heat pumps, built-in appliances and other systems come with a five or ten year warranty (some longer), for a reason. Water is the universal solvent and will find its way in a house at every chance. Termites attack, foundations settle, landscaping and water direction is changed (often at the direction of the homeowner), causing problems. For the most part a home inspection is a snapshot, not a warranty, and it is certainly not a continuing promise lingering years into the future. If that is what people expect home inspection to be, they better be ready to pay a far dearer price for an inspection than they are now, or they had better shop for some sort of warranty or service contract on the house. They should probably check to see what warranties may remain on indoor appliances, heat pumps and shingles if the house is relatively new. Unless you are going to buy or inherit a warranty, the best you can do is identify the problems before you buy so you do not get a bad surprise after you move in.

VI. CONCLUSION

The purchase of a home is one of the most important steps in the life of a consumer, and, for many people, it represents their largest asset. We want our home to be an attractive and comfortable place we can enjoy. However, the joy of home ownership will be shattered if the buyer discovers major structural defects after moving in. Increasingly, buyers and others involved in the transaction employ home inspectors to identify structural defects in the home at some point in the transaction, before closing takes place.

The timely use of a qualified home inspector who expresses independent judgment on the condition of a home is critical, especially since *caveat emptor* remains a dominant theme in many parts of the country in the sale of

369. *Id.* at 663.

370. *See generally* Tim Carter, Settlement Cracks – Causes and Preventions, http://www.askthebuilder.com/288_Settlement_Cracks_-_Causes_and_Prevention.shtml (last visited Oct. 7, 2007).

used homes. The importance of the timing of the home inspection and ramifications to the buyer and seller should be made clear. The real estate agents involved in the transaction can be a great help here because they bring to the table the experience that an infrequent buyer and seller will not have.

Many buyers wrongly equate a home inspection report with something akin to a warranty. Buyers should be warned (unless they are purchasing a warranty) that an inspection report is based largely on the concept of “what is” wrong with the house as opposed to “what will be” in the future. If people expect home inspection to provide more than a snapshot, they should expect to pay far more for the service or purchase some sort of warranty or service contract.

Prior to 1985 there was no state regulation of home inspection or home inspectors. State regulation remains uneven. Most of the cases involving home inspectors as defendants have appeared since 1996. In some cases home inspectors have been held liable to parties not in privity of contract, where courts have imported third-party liability concepts from the restatement, and case law that developed in accountants' liability. Home inspectors have had mixed success in their attempts to limit their liability, shrink statutes of limitations and impose arbitration. Courts largely have used existing law that has developed in other areas of commerce to test the enforceability of these provisions. For the benefit of the home inspector, buyer, and all parties who have a stake in the transaction, the scope and limitations of the inspection, as well as any attempt to limit or reduce liability should be clearly disclosed in writing at the start of the contractual relationship. It is at that point that consumers have a meaningful choice and the ability to understand what the inspector will and will not do when examining the house. Attempts by some home inspectors to present these important terms only after the inspection is completed, incorporated in the written inspection report, should be rejected.