

## THE CURRENT STATE OF CAVEAT EMPTOR IN ALABAMA REAL ESTATE SALES

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### INTRODUCTION

“Caveat emptor.” Perhaps no other phrase conjures up such divergent reactions among buyers and sellers. The phrase, while invoking feelings of anxiety for a buyer, can be a seller’s saving grace. In real estate transactions, the caveat emptor doctrine holds that a seller has no duty to disclose to potential buyers defects in the property being offered for sale.<sup>1</sup>

Although many jurisdictions have moved away from the caveat emptor doctrine through the enactment of mandatory seller disclosure laws,<sup>2</sup> the doctrine remains remarkably robust in Alabama in the sale of homes<sup>3</sup> and unimproved land.<sup>4</sup> Consequently, familiarity with the doctrine remains of critical importance for those involved in real estate transactions within the state. This Note examines the current state of caveat emptor in residential

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1. Cato v. Lowder Realty Co., 630 So. 2d 378, 382 (Ala. 1993).

2. As of mid-2008, forty-five jurisdictions and the District of Columbia have enacted mandatory seller disclosure laws. See Realtor.org, Talking Points: Property Disclosure, [http://www.realtor.org/press\\_room/public\\_affairs/tpsellerdisclosure](http://www.realtor.org/press_room/public_affairs/tpsellerdisclosure) (last visited Jan. 8, 2009).

3. See Whatley v. Reese, 875 So. 2d 274, 275 (Ala. 2003).

4. Clay Kilgore Constr., Inc. v. Buchalter/Grant, L.L.C., 949 So. 2d 893, 896-97 (Ala. 2006).

home sales in Alabama and places Alabama's continued adherence to the doctrine in the state's policy of encouraging self-reliance by Alabamians.

## II. SALE OF NEW HOMES

### *A. Implied Warranty of Habitability*

Alabama courts historically applied the caveat emptor doctrine with equal force to the sale of new and used homes.<sup>5</sup> Some decades ago, the Alabama Supreme Court in *Cochran v. Keeton* abrogated the rule of caveat emptor in new home sales and recognized an implied warranty of habitability in the sale of a new home by its builder-vendor.<sup>6</sup> Since the court's decision in *Cochran*, the contours of the implied warranty have been further defined. The buyer must show six things: (1) the buyer purchased a new home from the seller; (2) the seller built the home; (3) the home was "not . . . inhabited by any other person or persons" before the buyer's purchase; (4) the home was built by the seller for purposes of sale and was sold to the buyer in a defective condition impairing the home's intended use; (5) the buyer was not aware of the defective condition and did not have any knowledge or notice by which the buyer "could have reasonably discovered it"; and (6) the defective condition decreased the fair market value of the home, resulting in damage to the buyer.<sup>7</sup> The six elements significantly restrict the scope of the implied warranty. Several of the requirements deserve additional discussion, particularly the limitation of the implied warranty to "new homes" and the requirement that the seller be the builder.

#### *1. Limited to "New" Homes*

Significantly, the implied warranty only arises in the sale of a "new" home by its builder-vendor.<sup>8</sup> Because the implied warranty only applies in "new" home sales, litigation arises, albeit infrequently, as to what constitutes a "new" home.<sup>9</sup> The paucity of litigation on this point likely results

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5. See *Druid Homes, Inc. v. Cooper*, 131 So. 2d 884, 885-86 (Ala. 1961) (holding that new homes have no implied warranty of good and workmanlike construction).

6. 252 So. 2d 313, 314 (Ala. 1971). In *Cochran*, the buyers of a new home brought suit against the builder-vendor after the home was substantially damaged by fire only five months after purchase. *Cochran v. Keeton*, 252 So. 2d 307, 308-09 (Ala. Civ. App. 1970), *aff'd*, 252 So. 2d 313 (Ala. 1971). See also *Turner v. Westhampton Court, L.L.C.*, 903 So. 2d 82, 93 (Ala. 2004) (detailing *Cochran's* role in establishing a "court-created" implied warranty).

7. See *Sims v. Lewis*, 374 So. 2d 298, 303 (Ala. 1979).

8. *Id.*

9. Although a Westlaw search for "implied warranty" /20 new" in the AL-CS database returns fifty-two cases, only two directly address this issue: *Waites v. Toran*, 411 So. 2d 127 (Ala. 1982), and *O'Connor v. Scott*, 533 So. 2d 241 (Ala. 1988).

from the fact that the distinction between a “new” and “used” home is somewhat self-evident.

In *Waites v. Toran*,<sup>10</sup> the Alabama Supreme Court, citing *Sims*, sensibly defined a “new” home as a home that has “not . . . been inhabited by others prior to purchase.”<sup>11</sup> In *Waites*, the plaintiffs rented one side of a previously unoccupied duplex. Within two weeks of moving in, the plaintiffs began negotiating with the defendant to purchase the half of the duplex they occupied, eventually closing on the property. When their basement wall collapsed less than two years after they purchased the property, the plaintiffs sued the defendant for breach of implied warranty. The defendant argued that the plaintiffs’ breach of implied warranty claim was barred because the duplex was not “new” when they bought it since the plaintiffs lived in it for approximately two weeks before initiating negotiations to buy it.<sup>12</sup> The Alabama Supreme Court rejected the defendant’s argument, determining that the duplex was “new” because “no *others* had inhabited [it].”<sup>13</sup>

*Waites* suggests that if the *buyer* lives in the home prior to purchase it is still considered “new.” In contrast, if the *seller* lives in the home prior to the buyer’s purchase, the home is *not* considered “new” even if the seller also built the home. *O’Connor v. Scott* illustrates this second principle.<sup>14</sup> In *O’Connor*, the seller, an experienced builder, lived in the home purchased by the plaintiffs for approximately two years before selling it to the plaintiffs. The Alabama Supreme Court determined that the seller-builder constituted “other persons” within the meaning of *Sims* and *Waites*, and thus, the home was not “new” when purchased by the plaintiffs. Although the plaintiffs were the first purchasers of the home, the builder in *O’Connor* effectively negated the implied warranty by living temporarily in the home.<sup>15</sup>

## 2. Seller Must be the Builder

In addition to the requirement that the home be “new,” an implied warranty only arises when the buyer purchases the home from its “builder.”<sup>16</sup> To be considered a builder, the seller is not required to be “in the business of building and selling houses. . . . Instead the critical question is whether the [seller’s] construction and sale [of the home] [is] commercial

10. 411 So. 2d 127 (Ala. 1982).

11. *Id.* at 129.

12. *Id.*

13. *Id.* (emphasis added).

14. See *O’Connor v. Scott*, 533 So. 2d 241, 243 (Ala. 1988).

15. See *id.* at 243; see also *Stoner v. Anderson*, 701 So. 2d 1140, 1144 n.1 (Ala. Civ. App. 1997) (no implied warranty of habitability where builder lived in the home for two and one-half years).

16. See *Sims v. Lewis*, 374 So. 2d 298, 303 (Ala. 1979).

rather than casual or personal in nature.”<sup>17</sup> *Capra v. Smith* is illustrative. In *Capra*, the plaintiffs purchased a new home from the defendant, a real estate broker, who took an active role in the home’s construction. Although a contractor was used on the project, the defendant supervised the project. The defendant argued that since she was a real estate broker rather than a contractor, no implied warranty attached to the sale. The Alabama Supreme Court disagreed. Rejecting the defendant’s argument, the court concluded that a seller’s profession is not dispositive in determining whether he or she constitutes a “builder” and that the defendant’s activities were sufficient to classify her as a builder as a matter of law.<sup>18</sup>

The test employed by the court in *Capra*, “whether the construction and sale [of the home] was commercial rather than casual or personal in nature,” appears to have been taken from *Klos v. Gockel*, a Washington Supreme Court case.<sup>19</sup> In *Klos*, the court stated: “The essence of the implied warranty of . . . habitability requires that the vendor–builder be a person regularly engaged in building, so that the sale is commercial rather than casual or personal in nature.”<sup>20</sup> Interestingly, in *Capra*, the Alabama Supreme Court rejected the argument that an implied warranty *only* attaches if the seller is “in the business of building and selling houses.”<sup>21</sup> Instead, the court suggested that an implied warranty of habitability could be imposed on a broader class of persons: those *not* engaged in the “business of building and selling houses” but who nevertheless make “commercial” sales.<sup>22</sup> In contrast, *Klos* seems to require that, in order for a sale to be “commercial,” the seller must be in the business of building and selling houses. At least one member of the Washington Supreme Court has interpreted “commercial” in this fashion.<sup>23</sup> Because the Alabama Supreme Court suggested in *Capra* that a person does not have to be in the business of building and selling houses for an implied warranty to be imposed, what constitutes a “commercial” rather than a “casual or personal” sale is less clear. Nevertheless, once a seller is deemed to be a “builder,” an implied warranty of habitability attaches to the sale.<sup>24</sup> The seller’s level of experience is irrelevant. The warranty applies with equal force regardless

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17. *Capra v. Smith*, 372 So. 2d 321, 323 (Ala. 1979) (emphasis omitted).

18. *Id.*

19. *See Klos v. Gockel*, 554 P.2d 1349, 1352 (Wash. 1976) (en banc).

20. *Id.* at 1352.

21. *Capra*, 372 So. 2d at 323 (emphasis omitted).

22. *Id.* (emphasis omitted).

23. *See Frickel v. Sunnyside Enters., Inc.*, 725 P.2d 422, 431 (Wash. 1986) (Pearson, C.J., dissenting) (“This court will imply the warranty of habitability only to ‘commercial rather than casual or personal’ sales. In my opinion, this means the builder must be in the business of building residential structures. The reason for the requirement flows from the justifiable belief that a nonprofessional builder should not be deemed to warrant the same quality of construction demanded of his professional counterpart.” (citation omitted) (quoting *Klos*, 554 P.2d at 1352)).

24. *See Sims v. Lewis*, 374 So. 2d 298, 303 (Ala. 1979).

of whether the seller is selling “his first house [or] . . . his one hundredth.”<sup>25</sup> In *Capra*, for example, the defendant was held liable for breaching the implied warranty although it was her first project, and she primarily worked as a real estate broker.

### 3. Implications

Restricting the implied warranty to instances in which the home is both “new” and purchased from the “builder” severely limits its applicability. Together, the requirements bar application of the implied warranty in many instances in which a buyer would likely reasonably expect it to apply. For example, if a builder sells a home to a buyer, who never occupies it, and the buyer subsequently sells it to a third party, the second buyer cannot maintain a cause of action against the builder for breach of an implied warranty even though the home was never occupied by the first buyer.<sup>26</sup> Although the home is considered “new” because it was not “inhabited by any other person or persons” prior to the second buyer, the second buyer cannot recover from the builder because the second buyer did not purchase the home directly from the builder.<sup>27</sup> The difference between the first and second buyer is that the first buyer is in privity with the builder and the second is not.<sup>28</sup> The lack of privity between the second buyer and the builder bars the buyer’s recovery.

This result prohibits suits even when the harm comes within the stated purpose of recognizing an implied warranty of habitability. In *Capra*, the Alabama Supreme Court noted that “the avowed purpose of the implied warranty of habitability, [is] to inhibit the unscrupulous, fly-by-night, or unskilled builder and ‘to discourage . . . sloppy work and jerry building . . . .’”<sup>29</sup> Other courts have articulated the warranty’s purpose as follows: “The purpose of a[n] [implied] warranty is to protect innocent purchasers and hold builders accountable for their work.”<sup>30</sup> In the previously owned but unoccupied home example, the implied warranty serves neither as a deterrent nor as an accountability mechanism. The builder is shielded from liability by virtue of transfer of the property from the first to second buyer.

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25. *Capra*, 372 So. 2d at 323. Alabama imposes the same obligations on all sellers. *See id.* (“[A] part-time builder stands on equal footing with the corporate developer of tract housing.”).

26. *See Sims*, 374 So. 2d at 303.

27. *See id.*

28. *See Wooldridge v. Rowe*, 477 So. 2d 296, 298 (Ala. 1985) (holding that buyer not in privity with builder could not recover under implied warranty theory).

29. *Capra*, 372 So. 2d at 323 (quoting *Cochran v. Keeton*, 252 So. 2d 307, 310 (Ala. Civ. App. 1970)).

30. *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733, 736 (Wyo. 1979).

#### 4. Refusal to Expand to Subsequent Purchasers

Unlike Alabama, at least sixteen jurisdictions have abolished the privity requirement and allow subsequent purchasers of a home to maintain a cause of action against the home's builder for breach of an implied warranty of habitability.<sup>31</sup> Interestingly, Indiana was the first jurisdiction to extend the warranty to subsequent purchasers in 1976,<sup>32</sup> only four years after first recognizing an implied warranty in *Theis v. Heuer*.<sup>33</sup> The fact that Indiana was the first jurisdiction to extend the warranty to subsequent purchasers is notable because the Alabama Supreme Court adopted the elements of an implied warranty claim, as articulated in *Theis*, in *Sims v. Lewis*.<sup>34</sup> By the time of the Alabama Supreme Court's decision in *Sims*, Indiana had already abandoned the privity requirement.

Jurisdictions like Indiana, that extend the implied warranty of habitability to subsequent purchasers, limit the builder's risk exposure by placing restrictions on the type of defects that can give rise to liability and by placing limitations on the length of time that a suit can be brought.<sup>35</sup> To prevent the builder from serving as an insurer to later buyers, the warranty is limited to "latent defects which become manifest after the subsequent [buyer's] purchase and which were not discoverable had a reasonable inspection of the structure been made prior to purchase."<sup>36</sup> In addition to requiring that the defect be latent, jurisdictions also require that the suit be brought within a "reasonable length of time."<sup>37</sup> Jurisdictions differ as to what constitutes a reasonable length of time. For example, in Mississippi, a builder's potential liability extends for six years.<sup>38</sup> In Arkansas, the

31. See, e.g., *Richards v. Powercraft Homes, Inc.*, 678 P.2d 427, 430 (Ariz. 1984) (Arizona); *Blagg v. Fred Hunt Co.*, 612 S.W.2d 321, 322 (Ark. 1981) (Arkansas); *Tusch Enters. v. Coffin*, 740 P.2d 1022, 1034-35 (Idaho 1987) (Idaho); *Briarcliffe W. Townhouse Owners Ass'n v. Wiseman Constr. Co.*, 454 N.E.2d 363, 365 (Ill. App. Ct. 1983) (Illinois); *Barnes v. Mac Brown & Co.*, 342 N.E.2d 619, 620 (Ind. 1976) (Indiana); *Degeneres v. Burgess*, 486 So. 2d 769, 774 (La. Ct. App. 1986) (Louisiana); *Keyes v. Guy Bailey Homes, Inc.*, 439 So. 2d 670, 673 (Miss. 1983) (Mississippi); *Moglia v. McNeil Co.*, 700 N.W.2d 608, 615-16 (Neb. 2005) (Nebraska); *Lempke v. Dagenais*, 547 A.2d 290, 294 (N.H. 1988) (New Hampshire); *Hermes v. Staiano*, 437 A.2d 925, 929 (N.J. Super. Ct. Law Div. 1981) (New Jersey); *Elden v. Simmons*, 631 P.2d 739, 741 (Okla. 1981) (Oklahoma); *Nichols v. R.R. Beaufort & Assocs., Inc.*, 727 A.2d 174, 179 (R.I. 1999) (Rhode Island); *Terlinde v. Neely*, 271 S.E.2d 768, 769 (S.C. 1980) (South Carolina); *Gupta v. Ritter Homes, Inc.*, 646 S.W.2d 168, 169 (Tex. 1983), *overruled on other grounds by* 919 S.W.2d 644 (Tex. 1996) (Texas); *Sewell v. Gregory*, 371 S.E.2d 82, 84-85 (W. Va. 1988) (West Virginia); *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733, 735-36 (Wyo. 1979) (Wyoming).

32. *Barnes*, 342 N.E.2d at 620 (Ind. 1976); see also Sean M. O'Brien, Note, *Caveat Venditor: A Case for Granting Subsequent Purchasers a Cause of Action Against Builder-Vendors for Latent Defects in the Home*, 20 J. CORP. L. 525, 534 (1995).

33. 280 N.E.2d 300, 303 (Ind. 1972) (recognizing implied warranty of habitability in new home sales).

34. See *Sims v. Lewis*, 374 So. 2d 298, 303 (Ala. 1979) (citing *Theis*, 280 N.E.2d at 303).

35. See, e.g., *id.* at 621.

36. *Richards*, 678 P.2d at 430 (emphasis added).

37. See *Sewell v. Gregory*, 371 S.E.2d 82, 86 (W. Va. 1988).

38. MISS. CODE ANN. § 15-1-41 (1999 & Supp. 2008).

claim must be brought within five years of substantial completion of the home.<sup>39</sup> In both jurisdictions, the time limit is determined by the statute of limitations on an implied warranty claim.<sup>40</sup> Jurisdictions taking this approach have not increased a builder's risk exposure by extending the implied warranty to subsequent purchasers. Transfer of the property simply has no impact on the statute of limitations.<sup>41</sup>

Notably, jurisdictions extending the implied warranty to subsequent purchasers allow recovery *even if* the home was previously occupied.<sup>42</sup> For example, in *Barnes v. Mac Brown & Co.*, the landmark Indiana case that first extended the warranty to subsequent buyers, the original purchasers lived in the home approximately three years before selling it to the plaintiffs.<sup>43</sup> The plaintiffs filed suit against the builder after moving in and discovering large cracks in the basement walls. The Indiana court allowed recovery. If the implied warranty only extended to subsequent purchasers of homes that had never been occupied, the extension would provide little additional protection to buyers. Builders could still negate the warranty by living temporarily in the home.<sup>44</sup>

Jurisdictions extending the warranty to subsequent purchasers have done so largely on public policy grounds. In *Lempke v. Dagenais*, the New Hampshire Supreme Court summarized the prevailing arguments in favor of extension.<sup>45</sup> There are five major public policy arguments advanced by courts. First, latent defects typically do not manifest themselves for a considerable length of time. By the time the defects become apparent, the original purchaser has often sold the home to a subsequent buyer.<sup>46</sup> The subsequent buyer is thought to be as equally innocent as the first purchaser because the defect is latent and thus "by definition, . . . not discoverable by reasonable inspection."<sup>47</sup> Second, courts have taken judicial notice that "[w]e are an increasingly mobile people."<sup>48</sup> As a result, courts conclude that builders should have a reasonable expectation that the homes they build will be resold within a short period of time and should

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39. See *Rogers v. Mallory*, 941 S.W.2d 421, 423 (Ark. 1997).

40. See *id.*; *Keyes v. Guy Bailey Homes, Inc.*, 439 So. 2d 670, 673 (Miss. 1983).

41. *Keyes*, 439 So. 2d at 673 ("Nothing in today's ruling enlarges the time within which an action for faulty construction may be brought. . . . Prior to today, that statute of limitations was gratuitously shortened if the first purchaser sold the home to a third party. Under today's ruling, the homebuilder's exposure continues for [the same period], without regard to how many subsequent purchasers there may have been.")

42. See, e.g., *Moglia v. McNeil Co.*, 700 N.W.2d 608, 615-16 (Neb. 2005) (first buyers lived in the house approximately four years). This differs from the example raised earlier. See *supra* note 26 and accompanying text.

43. *Barnes v. Mac Brown & Co.*, 342 N.E.2d 619, 620 (Ind. 1976).

44. See *O'Connor v. Scott*, 533 So. 2d 241, 243 (Ala. 1988).

45. *Lempke v. Dagenais*, 547 A.2d 290, 294-96 (N.H. 1988).

46. *Id.* at 295 (citing *Terlinde v. Neely*, 271 S.E.2d 768, 769 (S.C. 1980)).

47. See *O'Brien*, *supra* note 32, at 532.

48. *Lempke*, 547 A.2d at 295 (quoting *Redarowicz v. Ohlendorf*, 441 N.E.2d 324, 331 (Ill. 1982)).

not reasonably expect the implied warranty to be limited to the first buyer.<sup>49</sup> Third, “technology is increasingly complex.”<sup>50</sup> Consequently, purchasers have become increasingly reliant on a builder’s skill because the “ordinary buyer” is thought “not [to be] in a position to discover hidden defects in a structure . . . .”<sup>51</sup> Fourth, no additional obligations are imposed on the builder by extending the warranty to subsequent purchasers.<sup>52</sup> “The builder already owes a duty to construct [a] home in a workmanlike manner and to construct a home which is suitable for habitation.”<sup>53</sup> Extending the warranty to subsequent purchasers still only burdens the builder “with the [initial] duty to construct the home in a workmanlike manner . . . .”<sup>54</sup> Lastly, extending the warranty discourages builders from making “sham first sales to insulate [themselves] from liability.”<sup>55</sup>

Economic considerations have also motivated the expansion. Builders are thought to be in a better position to bear the financial losses that result from latent defects.<sup>56</sup> One court noted that “by virtue of superior knowledge, skill, and experience in the construction of houses, a builder-vendor is generally better positioned than the purchaser to . . . evaluate and guard against the financial risk posed by a [latent defect] . . . .”<sup>57</sup> In other words, some courts have concluded that the costs of latent defects should fall on the builder because the builder can avoid the loss at a lower cost than the purchaser, making it economically efficient for the builder to bear the loss.<sup>58</sup>

Although other jurisdictions have extended the warranty on various grounds, in *Lee v. Clark & Associates Real Estate, Inc.*, the Alabama Supreme Court expressly refused to extend the warranty to subsequent purchasers.<sup>59</sup> The court gave little explanation for its refusal other than that it did not want to depart from “the longstanding rule that the doctrine of *caveat emptor* applies to subsequent purchasers of a house.”<sup>60</sup> While not expressly stated in *Lee*, Alabama’s reluctance to extend the warranty may stem from a fear that abrogating the privity requirement “would impose

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49. *Id.*

50. *Barnes v. Mac Brown & Co.*, 342 N.E.2d 619, 620 (Ind. 1976).

51. *Terlinde v. Neely*, 271 S.E.2d 768, 769 (S.C. 1980). *See also Lempke*, 547 A.2d at 295 (citing *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733, 735 (Wyo. 1979)).

52. *See Lempke*, 547 A.2d at 295 (citing *Keyes v. Guy Bailey Homes, Inc.*, 439 So. 2d 670, 673 (Miss. 1983)).

53. *Keyes*, 439 So. 2d at 673.

54. *Id.*

55. *Lempke*, 547 A.2d at 295 (quoting *Richards v. Powercraft Homes, Inc.*, 678 P.2d 427, 430 (Ariz. 1984)).

56. *See id.*

57. *Id.* (alterations in original) (quoting *George v. Veach*, 313 S.E.2d 920, 923 (N.C. Ct. App. 1984)).

58. *See id.*

59. *Lee v. Clark & Assocs. Real Estate, Inc.*, 512 So. 2d 42, 45 (Ala. 1987).

60. *Id.*

unlimited liability on builders . . . .”<sup>61</sup> Other courts have expressed this concern.<sup>62</sup> As noted earlier, some jurisdictions expanding the warranty to subsequent purchasers have addressed this concern by limiting the builder’s risk exposure to the statute of limitations that would normally apply to an implied warranty claim.<sup>63</sup> The only difference is that the statute of limitations is not “gratuitously shortened if the first purchaser [sells] the home to a third party.”<sup>64</sup>

##### 5. Disclaimer, Statute of Limitations, and Damages

Recently, in *Turner v. Westhampton Court, L.L.C.*, the Alabama Supreme Court held that the first purchaser of a home can disclaim the implied warranty of habitability.<sup>65</sup> In reaching this conclusion, the court noted that an implied warranty of habitability was first recognized in *Cochran*, in part, because of the existence of an implied warranty in the sale of personal property.<sup>66</sup> Implied warranties in personal property sales can be disclaimed.<sup>67</sup> Therefore, the court thought it reasonable to allow a party to similarly disclaim the implied warranty of habitability in new home sales.<sup>68</sup>

Assuming the warranty is not disclaimed, the statute of limitations on a breach of implied warranty of habitability claim is “limited to a reasonable time, [but] can extend as long as six years.”<sup>69</sup> If the first purchaser does not discover the defect within a “reasonable” period of time, as adjudged by a jury, the purchaser’s claim is time barred, even if six years has not elapsed.<sup>70</sup>

If the purchaser successfully brings an implied warranty of habitability claim against the builder, Alabama uses two methods to determine the purchaser’s damages. Unless repairing the defect would constitute waste, the purchaser is awarded the reasonable cost of repair.<sup>71</sup> If the cost of repair exceeds the value of the house, the second method of determining

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61. See *Lempke*, 547 A.2d at 291 (recognizing argument).

62. See, e.g., *Ellis v. Robert C. Morris, Inc.*, 513 A.2d 951, 953 (N.H. 1986), *overruled by* *Lempke v. Dagenais*, 547 A.2d 290 (N.H. 1988). In *Lempke*, the court stated that denial of relief in *Ellis* was based on “fear that to allow recovery without privity would impose unlimited liability on builders and contractors”. *Lempke*, 547 A.2d at 291.

63. See, e.g., *Rogers v. Mallory*, 941 S.W.2d 421, 423 (Ark. 1997); *Keyes v. Guy Bailey Homes, Inc.*, 439 So. 2d 670, 673 (Miss. 1983).

64. *Keyes*, 439 So. 2d at 673.

65. *Turner v. Westhampton Court, L.L.C.*, 903 So. 2d 82, 93 (Ala. 2004).

66. *Id.* at 92–93.

67. See ALA. CODE § 7-2-316(3) (2006).

68. See *Turner*, 903 So. 2d at 92–93.

69. *Id.* at 91 (citing ALA. CODE § 6-2-34 (2005)).

70. See *Sims v. Lewis*, 374 So. 2d 298, 304–05 (Ala. 1979).

71. *Norman Props. v. Bozeman*, 557 So. 2d 1265, 1271 (Ala. 1990).

damages is used.<sup>72</sup> In that instance: “The measure of damages . . . is the difference in the reasonable market value of the house in its condition at the time it was purchased and the reasonable market value of the house as it would have been had the house been constructed substantially according to the . . . warranty.”<sup>73</sup>

### III. SALE OF USED HOMES

Although Alabama does not recognize an implied warranty of habitability in the sale of used homes,<sup>74</sup> Alabama recognizes three exceptions to the rule of caveat emptor. The first is statutory: “Under § 6-5-102, Ala. Code, 1975, the seller has a duty to disclose [known] defects to a buyer if a fiduciary relationship exists between the parties.”<sup>75</sup> Second, if no fiduciary relationship exists between the parties, the seller must nevertheless disclose known defects “if the buyer specifically inquires about a material condition concerning the property . . . .”<sup>76</sup> Lastly, if the seller, or an agent for the buyer or seller, is aware of “a material defect or condition that affects health or safety and the defect is not known to or readily observable by the buyer” the seller or the agent must disclose the defect and is liable for any damages caused by nondisclosure.<sup>77</sup>

#### A. Exceptions to Caveat Emptor

Of the three exceptions to caveat emptor, only two, the fiduciary relationship and health or safety exceptions, require the seller to disclose defects without an inquiry by the buyer. If either exception applies, the buyer does not have to ask about the defect in order for the seller to be obligated to disclose it.<sup>78</sup> While both exceptions create an affirmative duty on the part of the seller to disclose defects without an inquiry by the buyer, the fiduciary relationship exception requires broader disclosure than the health or safety exception. If a fiduciary relationship exists between the parties, the seller must disclose *all* known material defects.<sup>79</sup> However, in the absence of a fiduciary relationship, the seller is only obligated to disclose known defects affecting health or safety that are not known or readily observable by the buyer.<sup>80</sup> In other words, the seller’s duty of disclosure

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72. *Id.*

73. *Crocker v. Reed*, 420 So. 2d 285, 286 (Ala. Civ. App. 1982).

74. *Boackle v. Bedwell Constr. Co.*, 770 So. 2d 1076, 1079 (Ala. 2000).

75. *Moore v. Prudential Residential Servs. Ltd. P’ship*, 849 So. 2d 914, 923 (Ala. 2002) (quoting *Commercial Credit Corp. v. Lisenby*, 579 So. 2d 1291, 1294 (Ala. 1991)).

76. *Id.* (quoting *Commercial Credit Corp.*, 579 So. 2d at 1294).

77. *Id.* (quoting *Fennell Realty Co. v. Martin*, 529 So. 2d 1003, 1005 (Ala. 1988)).

78. *See id.*

79. *Nesbitt v. Frederick*, 941 So. 2d 950, 956 (Ala. 2006).

80. *Id.*

is limited to known latent material defects affecting health or safety. The specific inquiry exception, in contrast, merely requires the seller to respond truthfully if asked about defects in the property. Each of the three exceptions is discussed in turn.

### *1. Fiduciary Relationship Exception*

As previously noted, § 6-5-102 of the Alabama Code requires a seller to disclose known defects to the buyer if a fiduciary relationship exists between the parties.<sup>81</sup> Section 6-5-102 does not specifically use the term “fiduciary relationship.” Instead, it refers to a “confidential relations[hip]” between the parties.<sup>82</sup> In *Bank of Red Bay v. King*,<sup>83</sup> the Alabama Supreme Court defined a confidential relationship as follows:

A confidential relationship is one in which

“one person occupies toward another such a position of adviser or counselor as reasonably to inspire confidence that he will act in good faith for the other’s interests, or when one person has gained the confidence of another and purports to act or advise with the other’s interest in mind; where trust and confidence are reposed by one person in another who, as a result, gains an influence or superiority over the other; and it appears when the circumstances make it certain the parties do not deal on equal terms, but, on the one side, there is an overmastering influence, or, on the other, weakness, dependence, or trust, justifiably reposed; in both an unfair advantage is possible. It arises in cases in which confidence is reposed and accepted [sic], or influence acquired, and in all the variety of relations in which dominion may be exercised by one person over another.”<sup>84</sup>

It is important to note that a fiduciary relationship is not created between a buyer and seller merely by virtue of their mutual involvement in the sales transaction.<sup>85</sup> If that were the case, the exception would swallow

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81. See *Moore v. Prudential Residential Servs. Ltd. P’ship*, 849 So. 2d 914, 923 (Ala. 2002); *Cato v. Lowder Realty Co.*, 630 So. 2d 378, 382–83 (Ala. 1993).

82. See ALA. CODE § 6-5-102 (2005). The statute specifically provides: “Suppression of a material fact which the party is under an obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case.”

83. 482 So. 2d 274 (Ala. 1985).

84. *Id.* at 284 (internal quotation marks omitted) (quoting *Holdbrooks v. Cent. Bank of Ala.*, 435 So. 2d 1250, 1252 (Ala. 1983)); see also *Brushwitz v. Ezell*, 757 So. 2d 423, 431 (Ala. 2000) (“A fiduciary relationship is a confidential relationship in which one person is obligated to act in another person’s best interests.”).

85. See *Serena Kafker, Sell and Tell: The Fall and Revival of the Role on Nondisclosure in Sales*

the rule. For a fiduciary relationship to exist, there must be some sort of special relationship between the buyer and seller that obligates the seller to act in the buyer's "best interests."<sup>86</sup>

While the fiduciary relationship exception to the caveat emptor rule is often stated, it is inapplicable in the overwhelming majority of cases.<sup>87</sup> The Alabama Supreme Court generally cites to *Moore v. Prudential Residential Services Ltd. Partnership* and *Commercial Credit Corp. v. Lisenby* when discussing the exception.<sup>88</sup> In *Moore*, however, the plaintiffs did not allege that they were in a fiduciary relationship with the defendants. Instead, they relied on the specific-inquiry exception to support their claim.<sup>89</sup> In *Commercial Credit Corp.*, it is not clear from the court's opinion that the plaintiffs specifically alleged that the defendants owed them a fiduciary duty. The opinion merely states that "plaintiffs based their claim of liability upon the theory that the defendants had owed the plaintiffs a duty to disclose defects that they had, or should have had, knowledge of."<sup>90</sup> It is not clear on which of the exceptions the plaintiffs relied in making that assertion. In addressing the applicability of the fiduciary relationship exception, the court stated, without further explanation, that "[t]here was no fiduciary duty between the parties."<sup>91</sup> Neither case, therefore, is particularly helpful in determining when the exception applies.

However, assuming a fiduciary relationship *does* exist between the parties, the seller has an affirmative duty to disclose known material defects to the buyer.<sup>92</sup> The buyer does not have to request the information. In this limited circumstance, a seller's mere silence can give rise to liability.<sup>93</sup> The fiduciary relationship itself creates the duty of disclosure. The seller's failure to disclose known defects permits the buyer to assert a fraudulent suppression claim against the seller.<sup>94</sup> The elements of a fraudu-

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*of Used Real Property*, 12 U. DAYTON L. REV. 57, 59 (1986) ("Almost every court considering this issue has found that in the ordinary sale there is no confidential or fiduciary relationship between vendor and purchaser on which to base a duty to disclose."); see also *Blaylock v. Cary*, 709 So. 2d 1128, 1131 n.4 (Ala. 1997) (observing that relationship of arm's-length buyers and sellers acting through qualified agents did not give rise to fiduciary relationship).

86. See *Brushwitz*, 757 So. 2d at 431.

87. A Westlaw search for "fiduciary /20 disclose" in the AL-CS database returns sixty-seven cases; however, not all involve used home sales. Of those involving the sale of used homes, in none of them was a buyer's recovery predicated on the fiduciary relationship exception.

88. See, e.g., *Nesbitt v. Frederick*, 941 So. 2d 950, 956 (Ala. 2006).

89. See *Moore v. Prudential Residential Servs. Ltd. P'ship*, 849 So. 2d 914, 923 (Ala. 2002).

90. *Commercial Credit Corp. v. Lisenby*, 579 So. 2d 1291, 1294 (Ala. 1991).

91. *Id.*

92. See *Nesbitt*, 941 So. 2d at 956.

93. See *Keeler v. Chastang*, 472 So. 2d 1031, 1032 (Ala. 1985). A buyer also has an affirmative duty to disclose known material defects affecting health or safety. See *Fennell Realty Co. v. Martin*, 529 So. 2d 1003, 1005 (Ala. 1988). The "health or safety" exception is discussed *infra* Part III.A.3.

94. See ALA. CODE § 6-5-102 (2005). Note that a fraudulent suppression claim is distinct from a fraudulent concealment claim, which is also frequently asserted by buyers. In the latter instance, a seller can be held liable for failing to disclose a known material defect if the seller "knowingly takes action to conceal [the] material fact with the intent to deceive or mislead [the buyer]." *Soniat v. John-*

lent suppression claim 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.”<sup>95</sup>

Even if a fiduciary relationship exists between the parties, it is overly broad to say that a seller can be held liable for fraudulent suppression for failing to disclose *any* known defect in the home. Rather, the seller’s liability is limited to nondisclosure of known *material* defects.<sup>96</sup> In jurisdictions with broader disclosure requirements, the issue of materiality is often critical.<sup>97</sup> In Alabama, the materiality concept has diminished importance because the dispositive issue is usually whether the seller had a duty to disclose at all, not whether the seller’s nondisclosure was material.<sup>98</sup>

## 2. *Specific Inquiry Exception*

The rule of caveat emptor is also inapplicable when the buyer asks directly about material conditions concerning the property.<sup>99</sup> In *Commercial Credit Corp. v. Lisenby*, the court articulated the exception as follows: “[I]f the buyer specifically inquires about a material condition concerning the property, the seller has an obligation to disclose known defects.”<sup>100</sup> The exception is slightly broader than this statement of the rule makes it appear. The exception is not limited solely to inquiries made to the seller. It also applies to inquiries made to the seller’s agent.<sup>101</sup>

Although whether the buyer’s inquiry is made to the seller or the seller’s agent is of no consequence, the timing of the inquiry *is* important. It must occur before closing.<sup>102</sup> Inquiries made *after* the closing do not fall within the confines of the exception. In *Blazier v. Cassady*,<sup>103</sup> the buyer asked the seller about the condition of the home’s furnace *after* the closing but before transfer of possession of the property. Noting that at the time the inquiry was made the buyer already owned the home, the court determined that the conversation could not support the buyer’s fraud claim.<sup>104</sup>

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son-Rast & Hays, 626 So. 2d 1256, 1259 (Ala. 1993). No fiduciary relationship between the parties need exist. *Id.*

95. Brushwitz v. Ezell, 757 So. 2d 423, 431 (Ala. 2000).

96. See Nesbitt v. Frederick, 941 So. 2d 950, 956 (Ala. 2006).

97. See Robert M. Washburn, *Residential Real Estate Condition Disclosure Legislation*, 44 DEPAUL L. REV. 381, 388–89 (1995).

98. See, e.g., Nesbitt, 941 So. 2d at 956.

99. See *Commercial Credit Corp. v. Lisenby*, 579 So. 2d 1291, 1294 (Ala. 1991).

100. *Id.*

101. See *Fennell Realty Co. v. Martin*, 529 So. 2d 1003, 1005 (Ala. 1988).

102. *Id.*

103. 541 So. 2d 472 (Ala. 1989).

104. *Id.* at 474. The closing document in *Blazier* included an “as is” clause, making the plaintiff’s recovery doubtful even if the conversation had taken place prior to closing. See *infra* Part III.A.2.a.

In addition to the timing of the inquiry, the specificity of the inquiry is also critical. Vague inquiries are generally insufficient to trigger the exception.<sup>105</sup> For example, in *Bennett v. Cell-Pest Control, Inc.*, the buyers asked the seller whether “there was anything else [the seller] knew about the house that they should know.”<sup>106</sup> The court held the buyers’ inquiry to be “far too vague to bring this case within the ‘direct inquiry of a specific defect’ exception to the general rule of ‘caveat emptor.’”<sup>107</sup> In contrast, asking a question like, “Any type of water problem in this basement?” is sufficiently precise.<sup>108</sup>

The timing and specificity requirements notwithstanding, in the vast majority of cases, the specific inquiry exception is inapplicable because the buyer fails to make an inquiry *at all*.<sup>109</sup> It is axiomatic that for the specific inquiry exception to apply, the buyer must make an inquiry.<sup>110</sup>

Assuming the buyer makes a timely and sufficiently precise inquiry, the seller’s duty of disclosure only extends to defects of which the seller is aware. The seller does not have a duty to disclose unknown, latent defects.<sup>111</sup> Moreover, a seller’s knowledge of prior problems that were repaired “does not impute or constitute knowledge of present problems.”<sup>112</sup>

#### *a. Impact of “As Is” Clause*

Like many other general rules, it is important to note there is an exception to the specific inquiry exception. Even if the buyer’s inquiry “would otherwise impose a duty of truthful disclosure, th[e] [Alabama Supreme] Court has held that a purchaser’s fraud claim is precluded by language in a sales contract stating that the purchase is ‘as is.’”<sup>113</sup> The “as is” clause negates the element of reliance, which is essential to any fraud claim.<sup>114</sup> For example, in *Massey v. Weeks Realty Co.*,<sup>115</sup> the buyer noted

105. See *Bennett v. Cell-Pest Control, Inc.*, 701 So. 2d 1122, 1124 (Ala. Civ. App. 1997).

106. *Id.* at 1122.

107. *Id.* at 1124; see also *Ivey v. Frankle*, 619 So. 2d 1277, 1279 (Ala. 1993) (“[C]asual inquiry about loose dirt does not constitute a specific inquiry.”).

108. Just such a question was asked by the buyer in *Moore v. Prudential Residential Services Ltd.*, 849 So. 2d 914, 917 (Ala. 2002); see also *id.* at 923–24 (suggesting buyer’s inquiry was sufficiently precise). Recovery was precluded, however, because the plaintiff’s purchase contract contained an “as is” clause. See also *infra* Part III.A.2.a.

109. See, e.g., *Blaylock v. Cary*, 709 So. 2d 1128, 1131 n.4 (Ala. 1997) (buyer failed to make inquiry about water damage, the defect at issue); *Hays v. Olzinger*, 669 So. 2d 107, 108 (Ala. 1995) (buyer did not ask about odor).

110. See *Hays*, 669 So. 2d at 108.

111. See *Nesbitt v. Frederick*, 941 So. 2d 950, 956 (Ala. 2006).

112. *Commercial Credit Corp. v. Lisenby*, 579 So. 2d 1291, 1294 (Ala. 1991) (citing *Speigner v. Howard*, 502 So. 2d 367, 371 (Ala. 1987)).

113. *Moore v. Prudential Residential Servs. Ltd. P’ship*, 849 So. 2d 914, 924 (Ala. 2002).

114. *ERA Class.Com, Inc. v. Stoddard*, 987 So. 2d 1130, 1136 (Ala. Civ. App. 2007) (citing *Clay Kilgore Constr., Inc. v. Buchalter/Grant, L.L.C.*, 949 So. 2d 893, 897–98 (Ala. 2006)).

115. 511 So. 2d 171 (Ala. 1987).

damage to one of the home's exterior columns. The real estate agent told the buyer that the damage was dry rot and that it could be fixed inexpensively. Without having the home inspected for termites, the buyer signed a form including an "as is" clause and a purchase agreement that specified that "[t]he agents do not warrant or guarantee the condition of this property or any of the equipment therein."<sup>116</sup> A few months after moving in, the buyer learned that much of the front of the home was infested with termites. He sued the real estate agent and her employer for fraudulent misrepresentation. The court rejected the buyer's fraud claim, holding that the buyer "did not have the right to rely on oral representations of [the agent] made prior to the execution by [the buyer] of the form containing the 'as is' provision and the purchase agreement that provided that the realtor did not warrant or guarantee the condition of the property."<sup>117</sup>

Similarly, in *Haygood v. Burl Pounders Realty, Inc.*,<sup>118</sup> the buyers asked the sellers, who were themselves real estate agents, whether the home's basement had ever leaked. The sellers allegedly told them that they had never had any leakage problems. In actuality, the sellers had hired someone to do repair work on several leaks a few years earlier. The buyers signed a form including an "as is" clause and a sales contract including the following provision: "Neither the Seller nor the Broker have made or make any other representations about the condition of the property and the Purchaser agrees that he has not relied on any other representation . . . ."<sup>119</sup> Shortly after purchasing the home, the basement collapsed; the buyers sued the sellers for fraudulent misrepresentation. Like in *Massey*, the court rejected the buyers' fraud claim.<sup>120</sup> The court concluded that the buyers failed to prove that they had relied on the sellers' representations. However, the court also noted that even if they had, the signing of the two documents would still preclude recovery.<sup>121</sup>

In *Leatherwood, Inc. v. Baker*,<sup>122</sup> the buyers asked one of the listing agents whether the home had any structural problems. The buyers were told that the seller was only aware of one crack around the air conditioning unit. Without hiring someone to inspect the property, the buyers signed a sales contract including an "as is" clause. After moving in, the buyers discovered that the home had severe structural problems and sued the seller's realty company for, among other claims, fraudulent misrepresentation. Unlike in *Haygood*, the buyers did allege that they relied on the representations made by the seller's agents. However, like in *Massey* and

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116. *Id.* at 172.

117. *Id.* at 173.

118. 571 So. 2d 1086 (Ala. 1990).

119. *Id.* at 1089.

120. *Id.*

121. *Id.*

122. 619 So. 2d 1273 (Ala. 1992).

*Haygood*, the court concluded that the buyers' signing of the "as is" clause prevented them from recovering on their fraud claim.<sup>123</sup>

Alabama's position that the signing of an "as is" clause bars a buyer's recovery is not without criticism. In *Leatherwood*, Chief Justice Hornsby dissented. Citing cases from a host of jurisdictions, he concluded that "[v]irtually every other state that has addressed the effect of an 'as is' provision in a contract for the purchase of used residential real estate has held that the 'as is' provision does not insulate a vendor from liability for fraud."<sup>124</sup> However, at present, Alabama still takes the contrary position. Recently, in *Clay Kilgore Construction, Inc., v. Buchalter/Grant L.L.C.*, the Alabama Supreme Court made this point clear: "Under a growing body of Alabama case-law involving circumstances in which the rule of caveat emptor is applicable, a fraud or fraudulent-suppression claim is foreclosed by a clause in a purchase contract providing that the purchaser of real property accepts the property 'as is.'"<sup>125</sup> However, the court left open at least the *possibility* that it would be willing to revisit that position.<sup>126</sup> In *Clay Kilgore Construction*, the purchaser did not ask the court to overrule current Alabama law. After noting that fact, the court stated that "[e]ven if [it] would be amenable to such a request, [it was] not inclined to abandon precedent without a specific invitation to do so."<sup>127</sup>

### 3. Knowledge of Material Defect Affecting Health and Safety

Alabama courts have also carved out a "health or safety" exception to the caveat emptor doctrine in the sale of used homes. In *Fennell Realty Co. v. Martin*,<sup>128</sup> the Alabama Supreme Court articulated the rule as follows:

[I]f the agent (whether of the buyer or of the seller) has knowledge of a material defect or condition that affects health or safety and the defect is not known to or readily observable by the buyer, the agent is under a duty to disclose the defect and is liable for damages caused by nondisclosure. This duty is also placed on the seller.<sup>129</sup>

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123. See *id.* at 1275.

124. *Id.* at 1276 (Hornsby, C.J., dissenting).

125. *Clay Kilgore Constr., Inc. v. Buchalter/Grant, L.L.C.*, 949 So. 2d 893, 897 (Ala. 2006).

126. See *id.* at 898.

127. *Id.*

128. 529 So. 2d 1003 (Ala. 1988).

129. *Id.* at 1005 (citing *Cashion v. Ahmadi*, 345 So. 2d 268, 270 (Ala. 1977), *superseded by statute on other grounds*, ALA. CODE §§ 34-27-80 to -88 (2002)).

The health or safety exception is a narrow one.<sup>130</sup> First, the seller must have *knowledge* of the material defect affecting the health or safety of the buyer.<sup>131</sup> Second, the material defect must not be “known to *or* readily observable by the buyer.”<sup>132</sup> If the buyer has knowledge of the material defect, the exception does not apply even if the defect affects the health or safety of the buyer. For example, in *Blaylock v. Cary*, the health or safety exception was held to be inapplicable where the homebuyers admitted they knew that the home had some water damage prior to purchase and an inspection report specifically stated the same.<sup>133</sup> Even if the buyer does not have actual knowledge of the defect, the exception is also inapplicable if the defect is “readily observable by the buyer.”<sup>134</sup> In other words, the exception only applies to latent defects.<sup>135</sup> Further limiting the exception, a defect that is a matter of public record is not latent. For example, in *Morris v. Strickling*, the purchasers of an unimproved lot could not recover for fraudulent suppression when the fact that the lot was formally used as a dump site was a matter of public record.<sup>136</sup>

In addition to the knowledge requirements, the defect must also affect the buyer’s “health or safety.”<sup>137</sup> Buyers have successfully relied on the health or safety exception when the defect involved the home’s heating or air conditioning system.<sup>138</sup> In *Fennell*, the plaintiffs purchased a home through a realty company. The sales contract required the sellers to ensure that the home’s heating system was in “operable condition” at the time of closing. The sellers’ agent hired a technician, instructing him to “get the system running.”<sup>139</sup> When the technician informed the agent that the heating system was unsafe and needed to be replaced, the agent responded that the sellers were only obligated to get the system running. The sale was closed and the buyers moved into the house without being informed of the heating system’s problems. The buyers subsequently discovered that if the problem went uncorrected, carbon monoxide could be released into the house, causing serious injury or death. The Alabama Supreme Court held

130. See *Blaylock v. Cary*, 709 So. 2d 1128, 1131 n.4 (Ala. 1997) (noting that the “health or safety” exception is a narrow exception to the general rule of caveat emptor).

131. See *Fennell Realty Co.*, 529 So. 2d at 1005.

132. *Id.* (emphasis added).

133. See *Blaylock*, 709 So. 2d at 1131. The court also noted that the exception was inapplicable because the plaintiffs failed to prove that the home’s water damage posed a direct threat to their health or safety. *Id.* at 1131 n.4.

134. *Fennell Realty Co.*, 529 So. 2d at 1005; see also *Compass Point Condo. Owners Ass’n v. First Fed. Sav. & Loan Ass’n of Florence*, 641 So. 2d 253, 257 (Ala. 1994) (Hornsby, C.J., concurring) (water saturation and damage affected health and safety but “doctrine of *caveat emptor* applies only because . . . defect was readily observable”).

135. See *Fennell Realty Co.*, 529 So. 2d at 1005.

136. See *Morris v. Strickling*, 579 So. 2d 609, 610 n.1, 611 (Ala. 1991).

137. *Fennell Realty Co.*, 529 So. 2d at 1005.

138. *Id.* at 1006; see also *Alfa Realty, Inc. v. Ball*, 733 So. 2d 423, 426 (Ala. Civ. App. 1998) (heating and air conditioning unit was a fire hazard).

139. *Fennell Realty Co.*, 529 So. 2d at 1004.

that the agent had a duty to disclose the heating system's defect because it was a "defective and dangerous condition, which was known to the agent and not the buyer and which affected the unit's safe and efficient operation."<sup>140</sup> Similarly, in *Alfa Realty, Inc. v. Ball*, the court held that a buyer could maintain a fraudulent suppression claim against the seller and the seller's real estate agency where the home's heating and air conditioning unit posed a fire hazard at the time of closing.<sup>141</sup>

Termite damage and mold can also fall within the health or safety exception.<sup>142</sup> In *Rumford v. Valley Pest Control, Inc.*, the plaintiffs purchased a home that had been treated for termite damage two years earlier. Two years after the purchase, the plaintiffs discovered that it was infested with termites and that fungus and mildew were growing on the floor joists under the house. They filed suit against, among others, the sellers alleging, in part, fraud. The sellers argued that the plaintiffs' fraud claim was barred by the caveat emptor doctrine since the plaintiffs never specifically asked them about prior termite damage or the presence of fungus or mildew. The sellers argued, in effect, that absent a specific inquiry by the buyers, they had no affirmative duty to disclose either fact. Citing expert testimony offered by the plaintiffs that the termite damage and moisture defects could affect the buyers' health and safety, the court concluded that a question for the jury existed as to whether the sellers had a duty to disclose the prior termite damage and moisture problems.<sup>143</sup>

#### CONCLUSION

The caveat emptor doctrine remains alive and well in Alabama while many other states have eroded the doctrine by statute and case law. Forty-five states and the District of Columbia have enacted mandatory seller disclosure laws.<sup>144</sup> Mississippi, for example, requires sellers to complete a disclosure form drafted by the Mississippi Real Estate Commission.<sup>145</sup> Mississippi's form requires a seller to disclose a variety of information about the home including defects in the foundation, the age of the roof, and any history of infestation.<sup>146</sup> State courts have also begun to move

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140. *Id.* at 1006.

141. *Alfa Realty, Inc.*, 733 So. 2d at 426.

142. *See Rumford v. Valley Pest Control, Inc.*, 629 So. 2d 623, 629 (Ala. 1993). *But see* Cashion v. Ahmadi, 345 So. 2d 268, 271 (Ala. 1977) (standing water in basement does not affect health and safety).

143. *Rumford*, 629 So. 2d at 629.

144. In addition to Alabama, Kansas, Vermont, West Virginia, and Wyoming do not have mandatory seller disclosure laws. Realtor.org, *supra* note 2. For a thorough discussion of Oklahoma's seller disclosure statute, see Leroy Gatlin II, Note, *Reforming Residential Real Estate Transactions: An Analysis of Oklahoma's Disclosure Statute*, 22 OKLA. CITY U. L. REV. 735 (1997).

145. MISS. CODE ANN. § 89-1-509 (1999 & Supp. 2008); *see also* §§ 89-1-507 to -525.

146. Mississippi Real Estate Commission, Property Condition Disclosure Statement (July 1, 2008), available at [http://www.mrec.state.ms.us/docs/mrec\\_forms\\_property\\_condition\\_disclosure\\_](http://www.mrec.state.ms.us/docs/mrec_forms_property_condition_disclosure_)

away from the caveat emptor doctrine. At least sixteen jurisdictions have extended the implied warranty of habitability to subsequent purchasers.<sup>147</sup>

Although the national trend appears to be a shift away from caveat emptor in favor of increased seller disclosure, the doctrine remains remarkably robust in Alabama. The state legislature has not enacted mandatory disclosure laws, and the Alabama Supreme Court has repeatedly refused to carve out additional exceptions to the doctrine.<sup>148</sup> The rationale for the refusal appears to be two-fold: promoting certainty in the law and encouraging Alabamians to be self-reliant. The Alabama Supreme Court has stated:

Although we have abrogated the *caveat emptor* rule in sales of new residential real estate by a builder/vendor, we have not extended the *Cochran* rule to the sale of used homes, and we are not inclined in this case to depart from a long-standing rule which provides certainty in this area of the law. A purchaser may protect himself by express agreement in the deed or contract for sale.<sup>149</sup>

Buyers in Alabama are expected to safeguard their own interests when purchasing used homes. Existing case law suggests that as a matter of state public policy, it is simply unreasonable for a buyer to rely on the seller when purchasing a home. “The purchase of a . . . home is usually the largest single purchase of a lifetime, and a lifetime is required to pay for it.”<sup>150</sup> Given the magnitude of the purchase, the buyer is expected to be an active, rather than passive, participant in the sale. In Alabama, unlike states with mandatory seller disclosure laws, if a buyer wants to know something about the home, the buyer must generally ask. A seller does not have to disclose that the roof is five years old or that the kitchen faucet leaks. The burden is placed on the buyer to diligently inspect the home and make specific inquiries of the seller. In short, the buyer is expected, and in many instances required, to be self-reliant.

Even Alabama’s existing exceptions to the doctrine encourage Alabamians to be self-reliant. Although two of the three exceptions require the seller to affirmatively disclose known material defects, both infrequently apply.<sup>151</sup> In the typical arm’s-length transaction, there is no fiduciary rela-

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statement.pdf.

147. See *supra* note 31 and accompanying text.

148. See, e.g., *Lee v. Clark & Assocs. Real Estate, Inc.*, 512 So. 2d 42, 45 (Ala. 1987) (refusing to extend implied warranty of habitability to subsequent purchasers).

149. *Ray v. Montgomery*, 399 So. 2d 230, 233 (Ala. 1980)(citations omitted). This passage was quoted with approval by the Court in *Lee*, 512 So. 2d at 45.

150. *Cochran v. Keeton*, 252 So. 2d 307, 312 (Ala. Civ. App. 1970).

151. See discussion *supra* Parts III.A.1, A.3.

tionship between the buyer and seller and hence the seller has no duty of disclosure.<sup>152</sup> Therefore, the exception, while frequently stated, provides little actual protection to the typical buyer. The health or safety exception is similarly narrow.<sup>153</sup> The seller's duty of disclosure only extends to known material defects "that affect[] health or safety and . . . [are] not known to or readily observable by the buyer,"<sup>154</sup> resulting in the exception only being applicable in a narrow class of cases. The latency requirement encourages self-reliance because if the buyer could have discovered the defect upon reasonable inspection, but did not, no recovery is permitted. The remaining exception, the specific inquiry exception, requires the buyer to actively question the seller about potential defects in the home. Absent a specific inquiry, the seller has no duty of disclosure.

Encouraging Alabamians to be self-reliant has long been a part of the state's public policy. As early as 1849, in *Munroe v. Pritchett*, the Alabama Supreme Court stated: "If the purchaser blindly trusts where he should not, and closes his eyes where ordinary diligence requires him to see, he is willingly deceived, and the maxim applies, '*voluntis non fit injuria*'"<sup>155</sup>—to a willing person, no injury is done.<sup>156</sup> Alabama seemingly has reached the conclusion that a buyer of a used home who does not safeguard his own interests is willingly deceived.

*Elizabeth Murphy\**

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152. See *Blaylock v. Cary*, 709 So. 2d 1128, 1131 n.4 (Ala. 1997).

153. See *Fennell Realty Co. v. Martin*, 529 So. 2d 1003, 1005 (Ala. 1988).

154. *Nesbitt*, 941 So. 2d at 956 (quoting *Moore v. Prudential Residential Servs. Ltd. P'ship*, 849 So. 2d 914, 923 (Ala. 2002)).

155. *Munroe v. Pritchett*, 16 Ala. 785, 789 (1849).

156. See BLACK'S LAW DICTIONARY 1764 (8th ed. 2004).

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