Marquette Law Review

Volume 64
Issue 3 *Spring 1981*

Article 4

1981

Property - Caveat Emptor - Duty to Disclose Limited to Commercial Vendors. Ollerman v. O'Rourke Co., 94 Wis. 2d 17, 288 N.W.2d 95 (1980) and Kanack v. Kremski, 96 Wis. 2d 426, 291 N.W.2d 864 (1980)

Frederick C. Wamhoff

Many states will not have such an impressive history of granting free speech rights broader than those provided by the Federal Constitution. However, such a history is obviously not necessary to the passage of a state statute protecting free speech on private property, a course which might have substantial advantages over a judicially created right of access in any case.[202] Furthermore, even if a state's constitutional provision regarding free speech is worded identically to that in the Federal Constitution, the state is still free to interpret it as providing broader protection.[203]

A number of paths are open to the states to create a right of access to privately owned property for free speech purposes. The *PruneYard* case indicates that these paths are largely free of federal constitutional obstacles, at least under similar facts. The ultimate effect of the *PruneYard* decision will depend on the extent to which individual states choose to take advantage of this opportunity, and on how far their efforts are allowed to proceed before the Supreme Court imposes further limitations.

CORDELIA S. MUNROE

PROPERTY—Caveat Emptor—Duty to Disclose Limited to Commercial Vendors. *Ollerman v. O'Rourke Co.*, 94 Wis. 2d 17, 288 N.W.2d 95 (1980) and *Kanack v. Kremski*, 96 Wis. 2d 426, 291 N.W.2d 864 (1980).

I. INTRODUCTION

Note, that by the civil law every man is bound to warrant

---

endum, and recall. (Cal. Const., art. II, §§ 8, 9, and 13.)"

Because of this special importance of the right to petition, it has been carefully guarded by the California courts. *See generally Federalism, supra* note 21, at 838-40.

202. Provision of a right of access via a legislative enactment would allow review of data concerning, for instance, the prevalence of shopping centers in the state in question. Such review, coupled with legislative hearings, would permit a better estimate to be made of the need for special protection of free speech rights than is possible if the right of access is judicially created. Also, a statutory measure could deal with such questions as control of the forum, the owner's rights, and so on, with a detail not possible in judicial decisions.

203. *See* note 88 *supra*.

> the thing that he selleth or conveyeth, albeit there be no expresse warranty; but the common law bindeth him not, unlesse there be a warranty, either in deed or in law; for caveat emptor . . . .[1]

The more lengthy expression is *caveat emptor, qui ignorare non debuit quod jus alienum emit* which means let a purchaser, who ought not be ignorant of the amount and nature of the interest which he is about to buy, exercise proper caution.[2] The rule of caveat emptor in realty transactions has enjoyed a long, although increasingly tenuous, position in Wisconsin and in this country generally.[3] Its continued existence is in doubt because of the harsh and inequitable results often reached through its application. The harshness of the doctrine of caveat emptor is most striking when compared to the continued development of consumer protection in the sale of personal goods. One writer has observed that the law offers greater protection to the purchaser of a seventy-nine cent dog leash than to the purchaser of a $40,000 home.[4] If the dog leash is defective the purchaser can easily obtain a refund or a new leash, or even sue to recover damages if the defective leash resulted in the loss of his pet. The purchaser of the home, on the other hand, is often without recourse when the spring rains filter through his basement walls.

In two recent decisions,[5] the Wisconsin Supreme Court discussed the concept of caveat emptor in the sale of realty. The first of these decisions constituted a step toward abolition of caveat emptor in the sale of realty, while the second found caveat emptor alive and well in the setting of noncommercial

---

1. Sir Edward Coke as quoted in Note, *Caveat Emptor in the Sale of Real Property — Epitaph to an Inequitable Maxim*, 4 MEM. ST. U.L. REV. 54 (1973) [hereinafter cited as Note, *Caveat Emptor*].

2. H. BROOM, LEGAL MAXIMS 769 (7th ed. 1874).

3. In Wisconsin, Ollerman v. O'Rourke Co., 94 Wis. 2d 17, 288 N.W.2d 95 (1980) marks the end of caveat emptor with respect to dealings between a noncommercial purchaser and a commercial vendor. *See also* Clauser v. Taylor, 44 Cal. App. 2d 453, 112 P.2d 661 (1941); Cohen v. Vivian, 141 Colo. 443, 349 P.2d 366 (1960); Kaze v. Compton, 283 S.W.2d 204 (Ky. 1955); Weikel v. Sterns, 142 Ky. 513, 135 S.W. 980 (1911) discussed *infra*, for examples of substantial inroads into the doctrine of caveat emptor.

4. Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633 (1964-65) [hereinafter cited as Haskell].

5. Ollerman v. O'Rourke Co., 94 Wis. 2d 17, 288 N.W.2d 95 (1980) and Kanack v. Kremski, 96 Wis. 2d 426, 291 N.W.2d 864 (1980).

realty vendors. The purpose of this article is to analyze the factual context and holding of these two decisions, to evaluate the reasoning employed in them, particularly the distinction made between commercial and noncommercial vendors, and, finally, to examine their likely effect on realty transactions in Wisconsin.

II. Recent Wisconsin Decisions

A. *Ollerman v. O'Rourke Co.*

In the first of these decisions, *Ollerman v. O'Rourke Co.*[6] the court was presented with a purchaser of a lot for residential construction who alleged that the commercial-subdivider-vendor had fraudulently failed to disclose the existence of a well beneath the surface of the lot. The nondisclosure led the purchaser to believe that the lot was suitable for the immediate construction of his home. Shortly after the excavation began, the well was uncapped, releasing water which resulted in large expenditures for cleanup and changes in construction plans by the purchaser. The purchaser brought suit against the vendor on the theory of intentional misrepresentation and, in the alternative, negligent misrepresentation for failure to exercise ordinary care in disclosing the defective condition of the lot.

The case reached the supreme court on an appeal from an order overruling the vendor's motion to dismiss the purchaser's amended complaint for failing to state a claim upon which relief could be granted. Justice Connor Hansen's concurring opinion[7] was entirely correct in pointing out that the sole issue on such an appeal is whether or not the pleadings set forth any facts upon which relief could be granted. The majority, however, after having determined that the complaint stated a claim for intentional misrepresentation, went beyond that threshold issue and briefly discussed the merits of a cause of action for negligent misrepresentation. Regardless of the propriety of the court's discussion of negligent misrepresentation in this particular case, its holding, with respect to intentional misrepresentation through nondisclosure in realty sales, was progressive but narrow. The court held that:

---

6. 94 Wis. 2d 17, 288 N.W.2d 95 (1980).
7. *Id.* at 54, 288 N.W.2d at 113.

> [A] subdivider-vendor of a residential lot has a duty to a "non-commercial" purchaser to disclose facts which are known to the vendor, which are material to the transaction, and which are not readily discernible to the purchaser. A fact is known to the vendor if the vendor has actual knowledge of the fact or if the vendor acted in reckless disregard as to the existence of the fact.
>
> A fact is material if a reasonable purchaser would attach importance to its existence or nonexistence in determining the choice of action in the transaction in question; or if the vendor knows or has reason to know that the purchaser regards or is likely to regard the matter as important in determining the choice of action, although a reasonable purchaser would not so regard it. *See* 3 Restatement (Second) of Torts, sec. 538 (1977). Whether the fact is or is not readily discernible will depend on the nature of the fact, the relation of the vendor and purchaser and the nature of the transaction.[8]

In sum, the court held that a commercial realty seller has a duty to disclose to a noncommercial purchaser any material fact which the vendor knows or should know about the realty. A material fact is defined as one that a reasonable purchaser would regard as important to the transaction *and* any other fact the vendor knows or has reason to know is important to this particular purchaser.

While recognizing that the traditional rule in Wisconsin had been that there was no duty to disclose information to a buyer of real estate in arm's length transactions,[9] the court noted that times had changed[10] and that the "rugged individualism" of the 19th century has been displaced by a need for formulating business judgments without being misled by others. With that liberal preamble and the general progressiveness of the authorities cited throughout the opinion, it seemed likely that the court's narrow holding protecting noncommercial purchasers from commercial vendors only, was the cautious beginning of a complete abolition of the rule of caveat emptor in sales of realty. Such notions were quickly dis-

8. *Id.* at 42, 288 N.W.2d at 107.
9. *Id.* at 29, 288 N.W.2d at 101.
10. *Id.*

dispelled, however, with the court's decision in *Kanack v. Kremski.*[11]

B. Kanack v. Kremski

The *Kanack* case was brought before the court on an appeal from an order which granted the defendant-seller's motion for summary judgment. In that case the purchasers inspected the home for sale and bought it from the owner-occupants. Some time subsequent to the purchase and closing of the transaction, the purchasers discovered what was alleged to be a "serious water leakage problem" which the seller had failed to disclose. As in *Ollerman,* the purchasers brought suit against the sellers on the basis of intentional misrepresentation for failure to disclose a material latent defect in the realty. The court affirmed the lower court's order granting summary judgment and in so doing noted that in *Ollerman,* "this court specifically referred to the holding as 'narrow' and limited it to a 'subdivider-vendor of a residential lot.' "[12]

Justice Abrahamson delivered a concurring opinion[13] in an effort to more fully explain the majority's rationale for affirming the summary judgment and dismissing the amended complaint on the merits. The justice cited *Wilson v. Continental Insurance Co.*[14] for the proposition that when certain public policy questions are involved, the complaint must set forth the facts in detail in order to withstand a motion to dismiss. Justice Abrahamson reasoned that the majority had obviously decided that the complaints failed to state a claim and, due to the lapse of time since the action was commenced and the number of pleadings already submitted, the ends of justice would not be served by granting the plaintiffs leave to amend the complaint. While Justice Abrahamson agreed that the complaint in this case did not state a cause of action, she did state that "[t]he majority opinion recognizes that there may be instances where non-disclosure of a defect by a non-commercial seller engaged in a real estate transaction may constitute intentional misrepresentation."[15] This statement is contradicted by the majority's emphasis on the special knowl-

11. 96 Wis. 2d 426, 291 N.W.2d 864 (1980).
12. *Id.* at 433, 291 N.W.2d at 867.
13. *Id.* at 435, 291 N.W.2d at 868 (Abrahamson, J., concurring).
14. 87 Wis. 2d 310, 274 N.W.2d 679 (1979).
15. 96 Wis.2d at 436, 291 N.W.2d at 868 (Abrahamson, J., concurring).

edge of commercial vendors[16] and the majority's statement that "the parties appear to be noncommercial persons engaged in a typical real estate transaction. Under these circumstances, the sellers were under no duty to disclose . . . ."[17] Before discussing how these two decisions may affect Wisconsin law, a brief discussion of the changing law of misrepresentation and realty sales may be helpful.

III. Realty Law: Where It's Been—Where It's Going

A. *Caveat Emptor—Doctrine From an Earlier Day*

It is generally agreed that the maxim of caveat emptor was fashioned in and for an earlier day—a day when trade was simple and face-to-face between neighbors. The rule developed in a time when goods and land were there to be seen and everybody knew everybody else's land. One writer observed that during that time caveat emptor was more than a rule of nonliability; rather, it was a philosophy that placed a premium on individual skill and minimal public imposition on standards of fair play.[18] *Peek v. Gurney*,[19] an English case, was one of the earlier decisions to set forth the rule that there is no duty to disclose facts however morally censurable their nondisclosure. One of the basic questions facing the courts today, in the field of real property conveyancing, is whether this rule, conceived in and for another era, should be replaced by the creation of implied warranties against latent defects or by a broad duty to disclose material defects.[20] Despite many authors'[21] questions of the propriety of continued application of caveat emptor, it is still the touchstone in most jurisdictions today. There have been inroads made on the doctrine in Wis-

16. *Id.* at 433, 291 N.W.2d at 867.

17. *Id.* at 434-35, 291 N.W.2d at 868.

18. *See* Dunham, *Vendor's Obligations as to Fitness of Land for a Particular Purpose*, 37 Minn. L. Rev. 108 (1952-53) [hereinafter cited as Dunham].

19. L.R. 6 H.L. 377 (1873).

20. Goldfarb, *Fraud and Nondisclosure in the Vendor-Purchaser Relation*, 8 W. Res. L. Rev. 5, 9 (1956-57) [hereinafter cited as Goldfarb].

21. *See* Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 Vand. L. Rev. 541 (1960-61) [hereinafter cited as Bearman]; Dunham, *supra* note 18; Haskell, note 4 *supra;* Note, *Caveat Emptor*, *supra* note 1; Note, *The Doctrine of Caveat Emptor as Applied to Both the Leasing and Sale of Real Property; The Need for Reappraisal and Reform*, 1-2 Rutgers-Cam. L.J. 120 (1969-70).

consin as evidenced by cases like *Pines v. Perssion*,[22] cited in the *Ollerman* opinion, and *Ollerman* and *Kanack* themselves. More often than not, however, the exceptions or inroads made on the doctrine of caveat emptor are the result of some peculiar fact pattern which leaves the general rule intact.[23]

B. Caveat Emptor—Attacked Through Misrepresentation

Prominent among the avenues through which caveat emptor has been attacked are the three forms of misrepresentation defined by the court in *Ollerman* and first dealt with in *Whipp v. Iverson*.[24] The *Whipp* court noted that the three bases for responsibility for representations—intentional, negligence and strict responsibility—are alike in that each requires (1) a representation of a fact; (2) the representation of fact must be untrue; and (3) the plaintiff must believe the representation and rely upon it to his damage.[25] Also noted were the respects in which the three classes of responsibility for representations differed. In addition to the elements mentioned, a cause of action for intentional deceit requires evidence that the defendant knew his representation was false, or that he made it without knowing its truth, with intent to deceive and induce the plaintiff to act upon it to his damage. In negligence, the plaintiff need only show that the defendant failed to exercise ordinary care in making a misrepresentation and that the defendant had a legally enforceable duty to exercise care in making the particular statement. Finally, in strict responsibility, in addition to the first three factors, the misrepresentation must be made on the defendant's personal knowledge or under circumstances in which he ought to have known the truth or untruth of the statement and the defendant must have an economic interest in the transactions.[26]

Having outlined the elements of a cause of action in mis-

---

22. 14 Wis. 2d 590, 594-95, 111 N.W.2d 409, 412 (1961). The court held that a residential lease contains an implied warranty of habitability.

23. Goldfarb, *supra* note 20, at 17.

24. 43 Wis. 2d 166, 168 N.W.2d 201 (1969).

25. *Id.* at 169, 168 N.W.2d at 203.

26. *Id.* at 169-70, 168 N.W.2d at 203-04. *See* Harper and McNeely, *A Synthesis of the Law of Misrepresentation*, 22 MINN. L. REV. 939, 988 n.12 (1938); Also on negligent misrepresentation *see* Note, *Deceit and Negligent Misrepresentation in Maryland*, 35 MD. L. REV. 651, 661-62 (1976); 3 RESTATEMENT (SECOND) OF TORTS §§ 526, 552 & 552C (1977).

representation, it is important to note that many of the cases where caveat emptor has been called into question, including *Ollerman* and *Kanack*, were cases of nondisclosure and, therefore, as a practical matter, there has been no representation, much less a misrepresentation. Nevertheless, most courts have recognized, as the Wisconsin court did,[27] that where there is a duty to disclose a fact, failure to do so is treated in the law as the equivalent of a representation that the fact does not exist.[28] As in the law of positive misrepresentations of fact, caveat emptor has governed the majority of decisions rendered concerning the duty to disclose latent material defects in realty. That is not to say there has been no change. In nondisclosure cases, like other areas where caveat emptor is applied, there have been many exceptions carved out of the general rule of no duty to disclose.

As early as 1926 the Connecticut Supreme Court[29] held that the surrounding circumstances of a vendor's silence may operate to produce a false impression in the mind of the vendee and thereby lead the vendee to believe that a certain fact exists and amount to an affirmation of it. Other exceptions to the no duty to disclose rule can be found where vendor and vendee stand in some type of trust relationship,[30] or where the seller actively conceals the defect or tells half-truths, or where there are facts peculiarly within the seller's knowledge.[31]

For a graphic example of the situations that prompt courts to create these exceptions to avoid application of caveat emptor, consider the case of *Swinnton v. Whitinsville Savings Bank*[32] cited in many texts and law reviews.[33] The case involved the sale of a house, which was infested with termites, by the defendant-vendor to the unsuspecting plaintiff-vendee. The court placed much emphasis on the fact that the parties

27. 94 Wis. 2d 17, 288 N.W.2d 95 (1980).

28. *Id.* at 26, 288 N.W.2d at 99-100.

29. Gayne v. Smith, 104 Conn. 650, 652, 134 A. 62, 63 (1926).

30. Goldfarb, *supra* note 20, at 17.

31. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 696-97 (4th ed. 1971) [hereinafter cited as Prosser]; Keeton, *Fraud-Concealment and Non-Disclosure*, 15 TEX. L. REV. 1, 2 n.1 (1936).

32. 311 Mass. 677, 42 N.E.2d 808 (1942).

33. Goldfarb, *supra* note 20, at 14; Prosser, *supra* note 31, at 696; Haskell, *supra* note 4, at 643; Keeton, *Rights of Disappointed Purchasers*, 32 TEX. L. REV. 1, 4 (1953-54).

were not in any fiduciary relationship or any other recognized exception to the general rule of nondisclosure, and, therefore, held that caveat emptor applied. Dean Prosser has commented that this case means that "the owner of a dwelling which he knows to be riddled with termites can unload it with impunity upon a buyer unaware, and go on his way rejoicing. These are surely singularly unappetizing cases."[34]

C. *The Trend Toward Consumer Protection*

Blind application of the maxim caveat emptor once characterized the law. However, an increasing tendency by the court to find exceptions to the rule has prompted the expression that caveat emptor in the sale of realty is dying but not dead. It is no coincidence that the increasing willingness by the courts to find exceptions to the rule has paralleled the development of consumer protection in the field of personal property sales law. Prosser notes that the law of real property has progressed more slowly than in other fields but there have been notable stirrings even there.[35] Courts and commentators[36] are in substantial agreement that in areas of the sale of new homes,[37] homes built on filled land,[38] and in landlord-tenant law[39] the trend is undoubtedly toward greater protection of the unwary, unsuspecting buyer-lessee. The legislatures have also been concerned with protection of the buyer[40] and have enacted the Securities Act,[41] Truth in Lending Act,[42] the Interstate Land Sales Full Disclosures Act[43] and the Truth in Negotiation Act[44] as the fruits of their concern.

---

34. Prosser, *supra* note 31.

35. *Id.*

36. Haskell, *supra* note 4, at 645-47; Keeton, *supra* note 33, at 1; Note, *Caveat Emptor*, *supra* note 1, at 60; Bearman, *supra* note 21, at 570-72.

37. *See* Comment, *Liability of the Builder Vendor Under the Implied Warranty of Habitability—Where Does It End?*, 13 CREIGHTON L. REV. 593 (1979).

38. *See* Clauser v. Taylor, 44 Cal. App. 2d 453, 112 P.2d 661 (1941) and Cohen v. Vivian, 141 Colo. 443, 349 P.2d 366 (1960).

39. *See* Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

40. J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 9-20 at 288 (2d ed. 1977).

41. 15 U.S.C. §§ 77a-77bbbb (1976).

42. 15 U.S.C. §§ 1601-1691f (1976).

43. 15 U.S.C. §§ 1701-1720 (1976).

44. 10 U.S.C. § 2304 (1976), discussed in 1-2 PUB. CONTRACT L.J. 88 (1963) relating to armed forces procurement contracts.

D. Summary of the State of Realty Law

In summary, the rule of caveat emptor in realty transactions developed in a much simpler day when the land was often bought and sold between neighbors. With increasing mobility and sophistication our society has reached the stage where its laws must protect the unwary buyer from the unscrupulous seller. More and more frustrated buyers and lessees are turning to the theory of misrepresentation to attack continued application of caveat emptor. The courts and legislatures have responded to the importance of protecting the consumer through greater flexibility in the application of the law of misrepresentations, adoption of implied warranties, and expanded duties of disclosure. It is against this background that the *Ollerman* and *Kanack* decisions were written. As a result of these decisions a duty of disclosure is placed on commercial vendors, but no such duty is applicable to noncommercial vendors in the sale of realty. From this juncture one can consider the propriety or impropriety of the court's holding in these two cases. Why, for instance, was the duty to disclose latent material defects thrust upon the commercial vendor only? Is the court's policy which distinguishes between commercial and noncommercial vendors a well-reasoned one?

IV. A Critical Evaluation of the Wisconsin Decisions

A. The Court's Limited Development of a Duty of Disclosure

When a court resolves a question of legal duty it is making a policy determination.[45] Prosser has observed that "[t]here is a duty if the court says there is a duty; the law, like the Constitution, is what we make it. Duty is only a word with which we state our conclusion that there is or is not to be liability; it necessarily begs the essential question."[46] The question is, why did the Wisconsin court not impose a duty to disclose latent material defects in sales of realty by noncommercial vendors? The court cites with approval the way the Second Restatement of Torts handles the duty to disclose.[47] In partic-

45. Fisher v. Simon, 15 Wis. 2d 207, 211-12, 112 N.W.2d 705, 708 (1961).
46. Prosser, *Palsgraf Revisited*, 52 Mich. L. Rev. 1, 15 (1953).
47. 94 Wis. 2d 17, 36, 288 N.W.2d 95, 104 (1980).

ular, the court notes comment 1 of section 551[48] which states that:

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

The court also observed that draftsmen of the Restatement had recognized the gradual expansion of the duty to disclose and did not intend to impede that development by their treatment of it. One cannot help but question why the court's holdings in *Ollerman* and *Kanack* were so narrow when neither the Restatement sections, nor the commentators cited by the court in *Ollerman,* nor even the case law cited by the court as evidence of the trend toward legally requiring disclosure in realty sales, made any distinction between commercial and noncommercial vendors.

In *Weikel v. Sterns,*[49] one of the cases cited by the *Ollerman* court, the Kentucky court found a duty on the part of the noncommercial vendor to disclose to the vendees that the house for sale had been constructed on top of a sewage pit. The pit had been covered with clay and was still collecting sewage from the vendor's building next door creating an odor in the house which made it virtually untenantable. The Kentucky court made no distinctions between commercial and noncommercial vendors or vendees. The court held that "[t]o sell such a house without disclosing the situation, when the purchaser would have no means of knowing the facts from the pit being covered up as it was, was to practice a fraud upon him."[50]

Another case cited by the court evidencing the trend to-

48. *Id.* at 37, 288 N.W.2d at 105.
49. 142 Ky. 513, 134 S.W. 908 (1911).
50. *Id.* at _, 134 S.W. at 909.

ward requiring disclosure is *Kaze v. Compton.*[51] This was a Kentucky case in which the court held that the existence of a twelve inch drain tile running beneath the house and causing water to accumulate there was a condition substantial or vital enough to place a duty upon the vendors to disclose it. This case, like *Weikel,* involved only noncommercial parties. Nevertheless, the duty to disclose a material defect was found.

A California court has held that when a vendor sells real property which he knows has been filled, and the value of which is materially affected by such filling, he is bound to disclose these facts to the vendee.[52] Upon failure to disclose the defects and discovery of the same by the vendee, the contract may be rescinded at the vendee's option. A similar policy has been adopted in Colorado.[53]

Though these cases certainly are evidence of the trend toward imposing a duty of disclosure, they, like the other authorities cited by the *Ollerman* court, failed to mention any distinction between commercial and noncommercial vendors. Could it be that the distinction the Wisconsin court makes is based on the court's desire to retain the rule of caveat emptor?

B. Caveat Emptor—Evaluation of a Policy

Among the most oft cited reasons for continued applications of caveat emptor is that uncertainty would pervade the entire real estate field if the rule were abolished. The fear is expressed that real estate transactions would become chaotic if vendors were subjected to liability long after they had parted company with the property.[54] Naturally, a major change in the law, like the abolition of caveat emptor, would create some confusion and uncertainty at first but the sale of personal property and manufactured items is no longer governed by caveat emptor and that field has not been plagued by chaos as a result.[55]

Another justification offered on behalf of caveat emptor is

---

51. 283 S.W.2d 204 (Ky. 1955).

52. Clauser v. Taylor, 44 Cal. App. 2d 453, 112 P.2d 661 (1941).

53. Cohen v. Vivian, 141 Colo. 443, 349 P.2d 366 (1960).

54. These fears are expressed in Levy v. C. Young Constr. Co., 46 N.J. Super. 293, 297-98, 134 A.2d 717, 719 (App. Div. 1957).

55. *See* Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).

that the parties in realty transactions can inspect the property for themselves to determine its suitability.[56] This reasoning, however, ignores the fact that the defects that have brought about the cry for warranties and disclosure are latent defects which are, by definition, defects that are beyond the reach of a diligent inspection by the ordinary vendee. Inspection is simply an inadequate substitute for full and frank disclosure.

Still another reason to maintain the doctrine is that the lessee or vendee has the option of obtaining express warranties if he desires further protection.[57] Asking for warranties, however, is often times beyond the sophistication of the average lessee or vendee. And in many places the housing market is a seller's market and the prudent seller may just as easily refuse one offer to accept another simply on the basis that he is not asked to make any promises in the second.

A fourth argument in favor of caveat emptor has been that most landlords and vendors will take it upon themselves to repair defects in the property, that were latent at the time of the transaction, out of a sense of pride and the need to maintain goodwill with customers.[58] The volume of litigation that has arisen in this area is ample evidence that pride and goodwill are less than adequate protection for vendee.

One of the most common arguments against expansion of any legal duty is that a rash of litigation will ensue.[59] The obvious response to this assertion is that the court's function is to solve disputes as long as the claims are just. Certainly there would be less litigation if the court were to abolish liability for striking another against his will, but no one would advocate such a thing. There are values of greater importance than limiting litigation.

Perhaps the strongest factor which supports the existence of caveat emptor is the apparent difficulty of administering the alternatives. The most frequently suggested alternatives are the imposition of implied warranties and/or an expanded duty of disclosure. For instance, one observer has noted the difficulty in defining the limits of any warranty for land or

---

56. Note, *Implied Warranty of Fitness for Habitation in Sales of Residential Dwellings*, 43 DEN. L.J. 379 (1966).

57. Haskell, *supra* note 4, at 642.

58. Bearman, *supra* note 36, at 573.

59, *Id.*

housing due to the many and varied purposes to which land is put and the vastly different standards of living conditions to which people are accustomed.[60] Although several writers have argued persuasively for the adoption of implied warranties in realty transactions,[61] a less radical and more tenable position for the near future is to urge the other alternative to caveat emptor—a duty of disclosure. Rather than impose a blanket warranty on realty sales, the law could encourage vendors and lessors to simply tell the prospective buyers and lessees up front any material or basic problem with the property. Of course, a substantial amount of litigation would revolve around what was or was not material and a standard may prove difficult to establish. As early as 1936 Dean Keeton had suggested the use of the "reasonable" or "standard" man to determine the existence of a duty to disclose.[62] Admittedly, such a standard is difficult to define and apply, but it has existed as a standard for determining the existence of a duty in negligence actions for many years. The application of the reasonable man in this new context should be at least as practical.

In sum, many of the reasons traditionally advanced for the continued application of caveat emptor are not very persuasive. Additionally, there is good reason to believe that the alternatives to caveat emptor are viable and not as difficult to apply as might be expected. Again, the question is, why did the *Ollerman* court retain caveat emptor for noncommercial vendors?

C. Commercial/Noncommercial Vendor Distinction Not Persuasive: A Call for Honesty in the Market Place

Each of the justifications for caveat emptor presented in the last section were urged by the defendant-vendor in *Ollerman.*[63] The court found that the seller's arguments were "not persuasive in light of the facts alleged in complaint and

60. Dunham, *supra* note 18, at 119. For a discusson of other questions to be answered in the application of warranties *see* Comment, *Liability of the Builder-Vendor Under the Implied Warranty of Habitability—Where does It End?* 13 CREIGHTON L. REV. 593 (1979).

61. Haskell, *supra* note 4; Dunham, *supra* note 18.

62. Keeton, *supra* note 31, at 5 n.13.

63. 94 Wis. 2d at 40-41, 288 N.W.2d at 106-07.

our narrow holding in this case."[64] The court went on to explain:

> Where the vendor is in the real estate business and is skilled and knowledgeable and the purchaser is not, the purchaser is in a poor position to discover a condition which is not readily discernible, and the purchaser may justifiably rely on the knowledge and skill of the vendor. Thus, in this instant case a strong argument for imposing a duty on the seller to disclose material facts is this "reliance factor." The buyer portrayed in this complaint had a reasonable expectation of honesty in the market place, that is, that the vendor would disclose material facts which it knew and which were not readily discernible. Under these circumstances the law should impose a duty of honesty on the seller.[65]

At first glance the court's distinction between commercial and noncommercial vendors appears to be entirely reasonable. It does not seem unreasonable to require a higher standard of care from a vendor who is in the real estate business and is "skilled and knowledgeable" in such affairs. Upon deeper reflection however, the court's holding seems quite arbitrary.

The implication to be derived from the holding in *Ollerman* and *Kanack* is that somehow the purchaser is in a poorer position to discover a latent defect when he is dealing with a skilled commercial vendor than when he is dealing with a noncommercial vendor. Such a proposition is specious since a latent defect is equally latent whether the realty for sale is held by a commercial or noncommercial vendor. Nor can the different treatment be based on the differing sophistication of the two types of vendors because it requires no sophistication to tell the truth. Adhering to the new duty to disclose material facts does not require a skilled and knowledgeable seller—just an honest one. Imposing the duty to disclose on all vendors would not prevent the shrewd business person, with an eye for market fluctuations and good buys, from making a profit. It is the chiseler, the vendor who sells "lemons" in the real estate market that such a rule would censure.

Whether a particular vendor is a corporation or an individual, the result of buying realty laden with hidden defects is

64. *Id.* at 41, 288 N.W.2d at 107.
65. *Id.* at 41-42, 288 N.W.2d at 107.

equally burdensome on the vendee. Imagine the frustration of a first time home purchaser who finds that, though he and his neighbor purchased materially defective homes at the same time, his neighbor had the good fortune of having purchased his home through a commercial vendor and, thus, was afforded a remedy under Wisconsin law. He, on the other hand, could only hope that some other unsuspecting soul would some day buy from him, or go remedyless. If, by chance, he was lucky enough to unload the house the cycle could continue, all in the name of freedom of contract and stability in the market place.

In contrast to this sad scenario, consider the stability in the market that could be achieved if every vendee was confident that each vendor was bound by the law to disclose those latent defects in the realty for sale or rent that a reasonable man would consider material. Suppose the two of them, vendor and vendee, could amicably agree that the vendor would fix certain of the defects or that a reasonable abatement in the asking price be made. There may even be some very advantageous side effects from such a rule. The quality of housing in general may improve due to the inability to sell a house without disclosing its material defects. Landlords would have another source of incentive to maintain their buildings.

V. CONCLUSIONS

The Wisconsin court has taken a step in the right direction with its *Ollerman* decision. With the continued expansion of the use of warranties and other forms of consumer protection in the field of personal property, it is quite likely that the court will eventually expand its narrow holding to include a duty to disclose latent material defects in realty to all vendors. The Wisconsin court might benefit from some advice given by the New Jersey court:

> The law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping its common law principles abreast of the times. Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected.[66]

66. Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).

It is right and just to disclose to vendees those hidden defects which materially lessen the value of the realty they are purchasing or renting. The Wisconsin court is apparently aware of the outmoded and no longer useful application of the maxim caveat emptor and has begun the process of eliminating it. It is hoped that the court will recognize the inequity of imposing the duty of disclosure on a certain class of vendors while retaining the rule of caveat emptor for others and will make the duty of disclosure espoused in *Ollerman* applicable to all vendors. Until then, caveat emptor in Wisconsin realty transactions is dying but not dead.

FREDERICK C. WAMHOFF

PROPERTY—Landlord-Tenant—Landlord No Longer Immune from Tort Liability for Failure to Exercise Reasonable Care in Maintaining Premises. *Pagelsdorf v. Safeco Insurance Co. of America*, 91 Wis. 2d 734, 284 N.W.2d 55 (1979). At common law, the lease of land was treated as equivalent to a sale of land for the term of the lease. The lessee acquired an estate in land and was, for the time he occupied the land, subject to virtually all the liabilities of the owner of a fee simple.[1] For this reason, the doctrine of caveat emptor applied to a lessee as well as to a vendee. The lessee, like a vendee, was required to inspect the land for himself and take it as he found it. The general rule was that there was no tort liability on the part of the landlord to the lessee or to others entering on the land for injuries resulting from conditions on the premises.[2]

In the recent decision of *Pagelsdorf v. Safeco Insurance Co. of America*,[3] the Wisconsin Supreme Court changed the scope of a landlord's duty toward his tenants (whether under a lease or not) and their visitors for injuries resulting from

1. *See, e.g.*, Fowler v. Bott, 6 Mass. 62 (1809); Becar v. Flues, 64 N.Y. 518 (1876).

2. W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 63 (4th ed. 1971) [hereinafter cited as Prosser]; 1 H. TIFFANY, THE LAW OF REAL PROPERTY, § 104 (3d ed. B. Jones 1939). For a thorough discussion of the historical development of the common law rules of landlord-tenant relationships, *see generally* Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?* 1975 WIS. L. REV. 19 [hereinafter cited as Love].

3. 91 Wis. 2d 734, 284 N.W.2d 55 (1979).