To Disclose or Not to Disclose: The Dilemma of Homeowners and Real Estate Brokers Under Wisconsin's "Megan's Law"

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TO DISCLOSE OR NOT TO DISCLOSE: THE DILEMMA OF HOMEOWNERS AND REAL ESTATE BROKERS UNDER WISCONSIN'S "MEGAN'S LAW"

I. INTRODUCTION

Imagine that you and your family have just purchased the home of your dreams in a quiet suburban neighborhood. Now imagine that on a warm summer day, your seven-year-old daughter is walking home from school. As she is about to enter her yard, a neighbor from across the street, approaches her and invites her to come over and play with his new puppy. Your unsuspecting child excitedly agrees, hoping to meet a new four-legged friend. After following the neighbor inside, the neighbor grabs your daughter and forces her to the floor. Before your daughter can scream for help, the neighbor strangles her with a belt, and then proceeds to rape her while she lays unconscious. After stealing the last breath of innocence from your daughter's seven-year-old body, the neighbor discards her body in a nearby dumpster.

Soon after learning of your daughter's horrible death, you, for the first time, are informed that the murderer of your child is a repeat sex offender who has twice been incarcerated for the sexual assault of other young children. Furthermore, you discover that both the seller and the real estate broker who sold you your home knew of this information, but failed to disclose it to you; if only you would have known this information, your daughter still may be alive.

Unfortunately, insufferable incidents such as this are not confined to our imagination. Recent studies indicate that an estimated 61% of rape victims are younger than eighteen-years old, while 29% are less than the age of eleven. Furthermore, an alarming number of these crimes are

2. Id.
3. Id.
4. Id.
5. For purposes of this Comment, "real estate broker" and "broker" will mean any person who is licensed to practice real estate, as defined in Wis. STAT. ANN. § 452.01(2) (1995-96).
6. Community Notification Laws: Hearing on HR 2137 Before the Subcomm. on Crime
being committed by previous sex offenders within a few years of being released from prison. 7

In response to the strong public outcry over the release of convicted sex offenders into our communities, on May 17, 1996 President Clinton signed federal legislation into law that requires state law enforcement agencies to notify and provide certain information to communities when convicted sex offenders move into local communities. 8 This legislation, referred to as "Megan’s Law," was named in memory of seven-year-old Megan Kanka, who was brutally raped and murdered by a convicted sex offender living in her neighborhood unbeknownst to Megan’s parents and other neighborhood residents. 9 Since Megan’s death, thirty-eight states, including Wisconsin, 10 have enacted community notification re-

7. ALLEN J. BECK & BERNARD E. SHIPLEY, U.S. DEP’T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1983, at 6, tbl. 9 (1989) (indicating that 7.7% of convicted rapists were re-arrested within three years after being released from prison).


quirements despite ongoing legal challenges.\textsuperscript{11}

Although each state’s law differs to some degree, they share the common concern that released sex offenders pose a substantial danger to the public. In support of this premise, proponents cite statistics showing the high rate of recidivism among sex offenders\textsuperscript{12} and the lack of success that our criminal justice system has had in rehabilitating them.\textsuperscript{13}

As a result of this perceived safety risk, the presence of a known sex offender living in a community will likely have a significant impact on the residential real estate market within the surrounding area. If informed that a sex offender lives within a particular area, prospective homebuyers will presumably look elsewhere, causing area real estate values to decline. Knowing this, sellers and real estate brokers may have a natural tendency to keep this information confidential. However, both sellers and real estate brokers are required to disclose all material adverse facts to prospective purchasers.\textsuperscript{14} Such facts include all conditions which significantly reduce the property’s value or structural integrity, or pose a health risk to the occupants of the property.\textsuperscript{15} Because Wisconsin’s sex offender registration and community notification requirements (hereinafter Wisconsin’s Law) do not speak to the disclosure duties of sellers and real estate brokers, the real estate industry has been left with unanswered questions about whether sellers and real estate brokers have a duty to disclose the presence of known sex offenders to prospective homebuyers.

To analyze this question, Part II examines the expansion of disclosure duties owed by both sellers and brokers to prospective buyers in residential real estate transactions. Specifically, this Part surveys the transformation from the common law doctrine of 	extit{caveat emptor} to the current trend of consumer protectionism. In addition, Part II discusses

\textsuperscript{11} See W.P. v. Poritz, 931 F. Supp. 1199 (D.N.J. 1996) (holding that community notification requirements did not impose “punishment” within the meaning of due process or ex post facto clauses); Doe v. Poritz, 662 A.2d 367 (N.J. 1995) (holding that registration and community notification requirements were rationally related to legitimate state interest of protecting public from risk from recidivist offenders and, thus, did not violate offender’s equal protection rights). \textit{But see} Doe v. Pataki, 919 F. Supp. 691 (S.D.N.Y. 1996) (holding that community notification provisions constituted ex post facto punishment).


\textsuperscript{13} See 139 CONG. REC. S15295, S15310 (daily ed. Nov. 8, 1993) (congressional hearings relating to the Jacob Wetterling Act).

\textsuperscript{14} See WIS. STAT. §§ 452.133(1)(c), 709.03 (1995-96).

\textsuperscript{15} See id. §§ 452.01(1e), (5g), 709.03.
the nature of material adverse facts and how they have been defined by our courts and state legislature. Part III analyzes the registration and community notification requirements of Wisconsin’s Law. Part IV outlines what a homebuyer would have to prove in order to bring a cause of action against a seller or real estate broker for failing to disclose the presence of a known sex offender. Part V addresses the public policy reasons both for and against requiring a seller and a real estate broker to disclose the existence of known sex offenders. Finally, Part VI recommends a practical solution that balances the interests of both prospective homebuyers and sellers and real estate brokers.

II. A SURVEY OF THE EXPANDING DUTY TO DISCLOSE IN RESIDENTIAL REAL ESTATE TRANSACTIONS

Due to the advent of consumer protectionism, many state courts and statutes have expanded the disclosure duties owed to a prospective homebuyer in a residential real estate transaction. Although the purchase of a home is often the biggest financial and emotional investment in a person’s life, most homebuyers generally are inexperienced in procedural matters relating to financing and transferring real estate. As a result of this inexperience, the homebuyer often relies on the experience and representations made by sellers and their real estate agents. Because sellers and their agents generally are in a better position to know the conditions which affect their property, courts increasingly have attempted to protect prospective homebuyers by requiring sellers and their agents to disclose information that may materially affect a homebuyer’s decision to purchase the property.16

A. A Seller’s Common Law Duty to Disclose

1. Judicial Treatment

Historically, a seller of real estate generally had no duty to disclose defective conditions to potential buyers.17 In large part, this rule was based on the old tort notion that people generally had no duty to act.18

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16. See Ollerman v. O’Rourke Co., 94 Wis. 2d 17, 42, 288 N.W.2d 95, 107 (1980).
17. See Robert M. Washburn, Residential Real Estate Disclosure Legislation, 44 DePaul L. Rev. 381, 385 (1995) (noting that a seller, however, could be held liable in situations where the seller expressly warranted the condition of the property, where the buyer was not given an opportunity to inspect the property, or where the seller was guilty of fraud).
Thus, because there was no duty to act, a mere nondisclosure of a material fact, no matter how unjust, was not actionable. As stated by the Wisconsin Supreme Court, in Ollerman v. O’Rourke Co., Inc., "[a] seller of real estate, dealing at arm’s length with the buyer, has no duty to disclose information to the buyer and therefore has no liability . . . for failure to disclose." Under this common law doctrine of caveat emptor, or buyer beware, buyers of real estate were required to conduct their own investigations to determine if a property suffered from any material defects. Most defects, however, were not easily detectable through a buyer’s inspection, especially if that buyer was not trained to know what to look for. If buyers wanted to protect themselves from any latent defects, they were required to negotiate an express warranty with the seller. Without an express warranty, buyers were solely responsible for any defective conditions discovered relating to the property. Despite these harsh results, courts consistently placed the burden of investigating and discovering a property’s condition solely on the buyer.

Although the general rule provided that sellers were not required to disclose any information, the common law, however, recognized certain exceptions. For example, if a seller chose to provide information to a prospective buyer, the seller was required to provide enough information to prevent the buyer from being mislead or tricked into purchasing the real estate. In applying this rule, buyers, who had been given specific information from the seller, had a right to rely upon the truth of that information without conducting an investigation. Additionally, if a seller made a statement and subsequently acquired additional information which made the statement untrue or misleading, the seller had a
duty to disclose the new information to anyone who was still relying on the original statement. While courts also recognized a duty to disclose where parties had a confidential or fiduciary relationship, they rarely considered the relationship between buyers and sellers in most residential real estate transactions to be of this nature. Due to their relatively limited application, these exceptions had very little effect on sellers of real estate.

During the last forty years, however, most jurisdictions, including Wisconsin, have slowly abolished the rule of *caveat emptor*, recognizing that it is more equitable to provide buyers with some remedy in the event of fraudulent misrepresentations or nondisclosures by sellers. While the rule of *caveat emptor* generally embraced the concepts of rugged individualism and the free market, society no longer considered buyers and sellers to be on equal terms or to possess comparable knowledge and experience in the transaction. In response to this deficiency, for example, Wisconsin courts began to impose a duty to disclose in situations involving dangerous conditions. Such a duty arose in situations which posed health and safety risks to the buyer and where known legal encroachments were not present on legal records such as building code and zoning ordinance violations, and unrecorded ease-
ments that are not open and notorious.\textsuperscript{38}

Realizing that sellers are in a better position to know about their own property and those conditions which affect its value, Wisconsin courts have recently adopted the philosophy that sellers must disclose "whenever justice, equity and fair dealing demand it."\textsuperscript{39} Under this standard, sellers must disclose all known material facts relating to the property which a prospective purchaser would not be able to readily discover.\textsuperscript{40} As the Wisconsin Court of Appeals declared, in \textit{Green Springs Farms v. Spring Green Farms Assoc.},\textsuperscript{41} "[t]he doctrine of \textit{caveat emptor} no longer excuses real estate sellers from fully disclosing to potential purchasers the existence of conditions which may be material to the decision to purchase and which the purchaser is in a poor position to discover."\textsuperscript{42}

2. Statutory Requirements

In 1991, the Wisconsin legislature essentially codified the common law requirement that sellers disclose all information material to the physical condition of the property by enacting Chapter 709 of the Wisconsin Statutes.\textsuperscript{43} This statute requires sellers\textsuperscript{44} to furnish prospective

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38. See Bump v. Dahl, 26 Wis. 2d 607, 612, 133 N.W.2d 295, 298 (1965).
39. \textit{Ollerman}, 94 Wis. 2d at 34, 288 N.W.2d at 103 (citing Note, \textit{Silence as Fraudulent Concealment—Vendor & Purchaser—Duty to Disclose}, 36 WASH. L. REV. 202, 204 (1961)). However, a seller's duty to disclose is not unlimited. For example, a seller is not required to disclose the legal effect of a conveyance. See Ritchie v. Clappier, 109 Wis. 2d 399, 403-04, 326 N.W.2d 133-34 (Ct. App. 1982).
40. \textit{Ollerman}, 94 Wis. 2d at 42, 288 N.W.2d at 106. In determining whether to impose a duty on a seller of real estate to disclose known facts, the Wisconsin Supreme Court has listed the following elements as significant:

\[\text{T}he\ \text{condition\ is\ 'latent'\ and\ not\ readily\ observable\ by\ the\ purchaser;\ the\ purchaser\ acts\ upon\ the\ reasonable\ assumption\ that\ the\ condition\ does\ (or\ does\ not)\ exist;\ the\ [seller]\ has\ special\ knowledge\ or\ means\ of\ knowledge\ not\ available\ to\ the\ purchaser;\ and\ the\ existence\ of\ the\ condition\ is\ material\ to\ the\ transaction,\ that\ is,\ it\ influences\ whether\ the\ transaction\ is\ concluded\ at\ all\ or\ at\ the\ same\ price.}\]

\textit{Id.} at 39-40; 288 N.W.2d at 106; \textit{Kanack v. Kremski}, 96 Wis. 2d 426, 433, 291 N.W.2d 864, 867 (1980).
41. 172 Wis. 2d 28, 492 N.W.2d 392 (Ct. App. 1992).
42. \textit{Id.} at 39, 492 N.W.2d at 397.
43. See \textbf{Wis. STAT.} \textsection 709.03 (1995-96).
44. Wisconsin Statute Chapter 709 applies to all persons transferring one to four dwelling units except: personal representatives, trustees, conservators, and fiduciaries appointed by or subject to supervision by a court. See \textit{id.} \textsection 709.01. However, if any of the listed excep-
homebuyers with a copy of a completed Real Estate Condition Report (RECR) within 10 days after a binding sales contract has been formed.45 Because many defects are only evident during particular seasons46 or under specific conditions,47 a seller's knowledge and experience is often the most valuable source of information relating to the property's condition.48 To help prospective homebuyers make informed decisions as to the property's condition, the RECR requires sellers to indicate whether they have notice or knowledge of twenty-seven49 enumerated defects relating to such things as the roof, electrical system, plumbing system, hazardous or toxic substances, special assessments, proposed construction, and other defects50 which affect the property.51 However, if a seller fails to disclose a known defect, the only buyer remedy specifically created by this statutory enactment is the right to rescind.52

B. A Broker's Duty to Disclose to Prospective Homebuyers

Like sellers, real estate brokers traditionally owed no duties to prospective homebuyers.53 This rule was based on the theory that since the

45. WIS. STAT. §§ 709.02 - .03 (1995-96). Real estate condition reports are not required for: (1) transfers from "personal representatives, trustees and conservators; and fiduciaries appointed or subject to supervision by a court; but only if those persons have never occupied the property"; (2) "real estate that has not been inhabited, such as new construction or property converted from a commercial to residential use"; and (3) "transfers exempt from the real estate transfer fee, such as gifts between husband and wife or between parent and child, tax sales, foreclosure sales, condemnations, and transfers by will, descent or survivorship." See Debra Peterson Conrad, Truth or Consequences? Residential Seller Disclosure Law, 65 WIS. LAW. 9, 10 (Aug. 1992), citing WIS. STAT. §§ 77.25 & 709.01 (1992).

46. For example, a defective air conditioner may not be detected during the winter months. See Conrad, supra note 45, at 10.

47. For example, a basement may leak only after a heavy rainstorm. Id.

48. Id.

49. In addition to the 27 stated defects directly relating to the condition of the property, the RECR also requires the seller to disclose whether the property is an historic building or is located in an historical district. WIS. STAT. ANN. § 709.03 (D)(1) (1995-96).

50. A "defect" is defined as a condition that would (1) have a significant adverse effect on the property's value, (2) significantly impair the health or safety of future occupants of the property, or (3) significantly shorten or adversely affect the expected normal life of the premises if not repaired, removed, or replaced. See id. § 709.03(B)(1).

51. See id. § 709.03.

52. Id. § 709.05.

53. Due to the principal-agent relationship between the seller and the broker, the broker has a duty to act in good faith and for the sole benefit of the seller. See Sheldon Winicour, Clearing the Air on Radon Testing: The Duty of Real Estate Brokers to Protect Prospective Homebuyers, 15 FORDHAM URB. L.J. 767, 777 (1987); see also HAROLD G. REUSCHLEIN & WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP § 68 (2d ed. 1990).
broker was an agent of the seller, and the seller owed no duty to buyers under the doctrine of *caveat emptor*, the broker, who stood in the place of the seller, maintained a similar relationship to the buyer.\(^{54}\)

In recent years, however, Wisconsin courts have recognized the important role which brokers play in modern residential real estate transactions. As a result, courts have expanded the disclosure duties owed by brokers to prospective purchasers under three doctrines: public interest theory, tort liability, and statutory and administrative requirements.\(^{55}\)

1. Agency Law v. Duty to the Public

In most residential real estate transactions, a seller and a broker create an agency relationship\(^{56}\) by entering into a listing agreement.\(^{57}\) The listing agreement is a contract between the buyer and seller which sets forth, among other things, the property to be sold, the terms and conditions of the listing, and the duties of both the seller and the broker.\(^{58}\) As an agent of the seller, the broker owes the seller a duty of undivided loyalty, good faith, and full disclosure of all material information relating to the transaction.\(^{59}\) Furthermore, since the broker generally receives a commission based upon a percentage of the sales price, both the broker and the seller have a mutual interest in obtaining the highest sales price possible in the shortest amount of time.\(^{60}\)

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55. See Paula C. Murray, *The Real Estate Broker and the Buyer: Negligence and the Duty to Investigate*, 32 VILL. L. REV. 939, 957-84 (1987); see generally Joseph M. Groham, *A Reassessment of the Selling Real Estate Broker's Agency Relationship with the Purchaser*, 61 ST. JOHN'S L. REV. 560 (1987) (arguing that a subagency relationship between the seller and the selling broker created solely on the basis of a broker's membership in the multiple listing services is contrary to both the laws of agency and the expectations of the buyer).

56. “The essential and basic feature underlying the relation of a broker to his employer is that of agency, and the principles of the law of agency apply throughout.” Hercules v. Robedaux, Inc., 110 Wis. 2d 369, 373, 329 N.W.2d 240 (1982) (citing Ford v. Wisconsin Real Estate Examining Bd., 48 Wis. 2d 91, 102, 179 N.W.2d 786, 792 (1970)).


58. See generally WALTER B. RAUSHENBUSH & SCOTT C. MINTER, WISCONSIN REAL ESTATE LAW §§ 3.02 & 3.03 (1994) (providing a detailed discussion of the requirements for a listing contract under Wisconsin law).


Due to the agency relationship between the seller and broker, courts traditionally maintained that the broker owed no fiduciary duties to the prospective homebuyer.\footnote{Norville v. Palant, 545 P.2d 454 (Ariz. Ct. App. 1976); Allen v. Lindstrom, 379 S.E.2d 450 (Va. 1989). A broker, however, may owe fiduciary duties to a buyer if the broker is serving as the buyer's agent.} Courts based this rationale on the belief that a broker who was legally responsible to both parties would be faced with a natural conflict of interest: the seller wants to receive the highest possible price while buyers want to pay the lowest possible price.\footnote{See Romero, supra note 57, at 770-71.} In resolving this conflict, courts applied the general principle that an agent cannot serve two masters\footnote{See Reuschlein, supra note 53, at § 68, at 127.} and refused to extend broker liability to buyers based on nondisclosure.\footnote{See Zichlin v. Dill, 25 So.2d 4, 4 (Fla. 1946) (noting that an agent is generally responsible only to his or her principal).}

Recently, however, courts have recognized the significant role in which real estate brokers play in residential real estate transactions and, thus, have held brokers liable to buyers for breach of a fiduciary duty despite the lack of a traditional agency relationship.\footnote{See Waldstein, supra note 32, at 554.} For most people, the purchase of a home is often the largest emotional and financial investment in their lifetime. Brokers and buyers, therefore, are often engaged in a close working relationship,\footnote{During the course of a transaction, a broker will often spend a considerable amount of time with the prospective homebuyer, offering advice and discussing the buyer's personal financial information and personal preferences while searching for the perfect house. See Romero, supra note 57, at 772 n.32; see also Waldstein, supra note 32, at 554.} causing the buyer to place a great deal of trust in the broker.\footnote{To ensure that buyers are made fully aware of the agency relationship that exists between the broker and the seller, Wisconsin has enacted mandatory disclosure requirements which require the brokers to disclose to both parties the duties owed to each party. See Wis. Stat. § 452.135 (1995-96).} Additionally, many prospective buyers are inexperienced with the contractual and financial procedures required in the purchase of real estate. If they are not represented by an attorney, buyers often rely solely on the advice of real estate brokers due to the broker's superior knowledge and experience in such transactions.\footnote{Waldstein, supra note 32, at 554.} As a result of this relationship, courts have required brokers to deal fairly and competently with prospective buyers.\footnote{Id. at 555.}

Courts also have imposed a fiduciary duty on brokers based on the
state licensing laws. Because most residential real estate transactions involve brokers, the public has a general interest in requiring brokers to have a minimum level of competency and, thus, require brokers to satisfy various educational requirements before becoming licensed to practice. By requiring all brokers to become licensed by the state, Wisconsin has given brokers a special status among the public with whom they work. Due to the benefits gained by such status, Wisconsin courts have imposed a duty upon brokers to deal with prospective buyers in an honest, fair, and ethical manner. As recognized by the Wisconsin Supreme Court:

The purpose and method of licensing real estate brokers to do business and limiting this field to those so duly licensed creates a relation between the broker and the public dealing with him which places on him an obligation commensurate with the advantage he has in the general knowledge that he is designated as one having special understanding and information concerning the things affecting his particular vocation.

2. Liability in Tort

To prevent fraudulent misrepresentations and nondisclosures by real estate brokers, Wisconsin courts have held that brokers may be liable to buyers for three types of tortious misrepresentations: intentional, negligent, and strict responsibility.

A broker who actively misstates information to conceal material defects in a property may be held liable for intentional misrepresenta-

70. NATIONAL ASS'N OF REALTORS, TARGETING PROSPECTIVE HOME BUYERS AND SELLERS 43 (figure 5.1) (1995 Ed.) (indicating that 81% of all homeowners employed the services of real estate brokers to assist them in selling their homes).

71. See generally WIS. ADMIN. CODE §§ RL 25.02, .03 (1996) (discussing the general education requirements for obtaining a broker's license).

72. WIS. STAT. § 452.03 (1995-96).

73. See id.; see also WIS. ADMIN. CODE §§ RL 25.02, .03 (1996).


76. See Whipp v. Iverson, 43 Wis. 2d 166, 168 N.W.2d 201 (1969). In Whipp, a buyer and seller entered into an agreement for the sale of an automobile dealership. Id. at 167, 168 N.W.2d at 202. After the sale, the Oldsmobile division of General Motors refused to transfer the franchise to the buyer. Id. at 168, 168 N.W.2d at 202. Because the seller, as owner of the franchise, knew or should of known that the franchise could not be sold as part of the business, the supreme court held that the seller was liable for misrepresentation on the theory of strict liability. Id. at 172, 168 N.W.2d at 204. As demonstrated in Whipp, courts may generally find sellers liable under the same theories as brokers for misrepresentation.

77. To maintain a successful claim of misrepresentation against a broker, a buyer must
Such a liability may be created if the broker knows the representation is untrue or if it was made recklessly without first determining its truth. In *Grube v. Daun*, the Wisconsin Court of Appeals held that "once [a broker] has made an affirmative representation about some aspect of the property, the buyer is entitled to rely upon that statement and expect full and fair disclosure of all material facts relating to that aspect of the property."

Wisconsin, unlike some jurisdictions, also holds a broker liable for making negligent misrepresentations. By imposing liability on brokers for negligent misrepresentations, buyers are relieved of the difficult evidentiary burden of showing that the broker made the statement with an intent to deceive or that the broker knew the disclosed information was false. Although a broker may believe that the representation is true, the broker likely will be held negligent if the broker failed to use "reasonable care in ascertaining the facts, or in the manner of expression, or [if the broker fails to use] the skill and competence required by . . . [the] profession."

In addition to imposing liability under the theories of intentional and negligent misrepresentation, a court may hold a broker strictly responsible for a misrepresentation. Under the theory of strict responsibility, a broker who makes an incorrect statement of fact, even though his belief as to its truth was reasonable, may be held liable if he made the statement based on (1) his own personal knowledge or (2) under circumstances which indicate that he ought to have known the truth of the statement. Because a license to sell real estate connotes a degree show that: (1) the broker made a representation of fact; (2) such representation of fact was untrue; (3) the broker made the representation knowing that the fact was untrue or made it recklessly without caring whether it was true or false; (4) the broker made the representation with an intent to defraud and to induce the buyer to act upon it; and (5) the buyer believed such representation to be true and relied on it to the buyer's detriment. *Grube v. Daun*, 173 Wis. 2d 30, 496 N.W.2d 106, 114-15 (Ct. App. 1992).

78. *Restatement (Second) of Torts* § 525 (1977).
79. *Whipp*, 43 Wis. 2d at 169-70, 168 N.W.2d at 203.
80. 173 Wis. 2d 30, 496 N.W.2d 106 (Ct. App. 1992).
81. *Id.* at 61, 496 N.W.2d at 117.
82. In a claim for negligent misrepresentation, a buyer must show that: (1) the broker made a factual representation; (2) the representation was untrue; (3) the broker was negligent in making the representation; and (4) the buyer believed the representation to be true and relied on it to the buyer's detriment. *Id.* at 53-55, 496 N.W.2d at 114-15.
83. See Keeton et al., *supra* note 18, § 107, at 740-41.
84. *Id.* at 745.
85. See Whipp v. Iverson, 43 Wis. 2d 166, 169-70, 168 N.W.2d 201, 203 (1969). In addition, the broker must also have a pecuniary interest in the transaction. *Id.* at 170, 168
of competence to the general public, the doctrine of strict responsibility is based on a public policy which favors placing liability upon the innocent broker rather than the innocent buyer who has been misled. Based on this rationale, Wisconsin courts frequently have imposed liability upon brokers who have unintentionally misrepresented such things as the allowable uses under the present zoning classification, amount of water frontage, and the size of the lot.

In addition, a broker may be liable under all three doctrines for failing to disclose a fact. If a broker has a duty to disclose a particular fact, the broker's "failure to disclose that fact is treated... as the equivalent to a representation [that the fact does not exist]."

3. Statutory and Regulatory Requirements

In recent years, Wisconsin has enacted various statutory and regulatory requirements which have expanded and further defined the duties owed by a real estate broker to prospective homebuyers. To help eliminate the apparent conflicts in the duties owed to both the seller and the public with whom the broker deals, the Wisconsin legislature, in 1993, set forth seven duties a broker owes to all parties in a transaction. Among these duties is the requirement that brokers disclose all material adverse facts that are both (1) known to the broker and (2) unknown to or unable to be discovered through a reasonable vigilant observation by the buyer.

Under the vigilant observation doctrine, a broker, absent an agency relationship between the broker and buyer, is required to disclose only

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N.W.2d at 203. Wisconsin courts also have a long history of applying the doctrine of strict responsibility to representations made by sellers. See, e.g., Harweger v. Wilcox, 16 Wis. 2d 526, 114 N.W.2d 818 (1962); Lee v. Bielefeld, 176 Wis. 225, 186 N.W. 587 (1922); Davis v. Nuzum, 72 Wis. 439, 40 N.W. 497 (1888).


89. Reda v. Sincaban, 145 Wis. 2d 266, 426 N.W.2d 100 (1988).


91. Id. (citing Ollerman v. O'Rourke Co., 94 Wis. 2d 17, 26, 288 N.W.2d 95, 99-100 (1980)).


94. Id. § 452.133(1)(c).

95. If a broker is acting as a buyer's agent, the broker, among other things, has a duty to disclose all known information, as opposed to only adverse information, that is material to
those material adverse facts that the buyer does not know or cannot easily discover. In *Kanack v. Kremski*, a buyer brought suit against a seller for failing to disclose "a serious water problem in the basement." In denying the buyer's claim, the Wisconsin Supreme Court stated that buyers of real estate have a duty to exercise proper vigilance by either personally inspecting the property or inquiring about its condition. Buyers, therefore, must "not close their eyes to means of information accessible to them."

In Wisconsin, a broker's disclosure duties are not limited to only those material adverse facts which affect the condition of the property. Rather, a broker generally must disclose any information that suggests the possibility of adverse facts which are material to the transaction. Such facts are likely to include any on-site or off-site conditions which materially affect the habitability, use, enjoyment, or value of the property. To determine if there are any material adverse facts, a broker is required to conduct "a reasonably competent and diligent inspection" of the house and areas immediately surrounding the property. If such facts are discovered, the broker must disclose these facts, in writing, to each party in the transaction. A broker, however, is not required to retain third-party inspectors to further investigate possible material ad-

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97. 96 Wis. 2d 426, 291 N.W.2d 864 (1980).
98. *Id.* at 428, 294 N.W.2d at 865.
99. *See id.* at 435, 294 N.W.2d at 868.
100. *Id.* at 432, 294 N.W.2d at 867 (quoting *Farr v. Peterson*, 91 Wis. at 187-88, 64 N.W.2d at 865).
101. WIS. ADMIN. CODE §§ RL 24.07 (3) (1995). If a broker discovers information that could have a possible material adverse affect on the transaction, the broker must: (1) disclose this information, in writing and in a timely manner, to all parties in the transaction; (2) recommend to the parties that they hire an expert to "inspect or investigate for possible material adverse fact to the transaction;" and (3) "draft appropriate inspection or investigation contingencies" if directed to do so by the parties. *Id.* However, a broker is not required to disclose information related to the condition of the property if a "qualified third party" has conducted an inspection of the property. See WIS. STAT. § 452.23(2)(b) 1995-96; see also *Conell v. Coldwell Banker Premier Real Estate, Inc.*, 181 Wis. 2d 894, 900, 512 N.W.2d 239, 242 (Ct. App. 1994).
103. WIS. ADMIN. CODE § RL 24.07(1) (1996). A broker, however, is not required to inspect the property if the broker or a party in the transaction employs a "qualified third party" to inspect the property. See *id.* § RL 24.07(5). The broker must obtain a written copy of the inspection report and deliver a copy of the report, in a timely manner, to all interested parties. *Id.*
104. *Id.* § RL 24.07(2).
verse conditions.\textsuperscript{105}

Although Wisconsin courts have yet to interpret the extent of a broker's liability for failing to conduct a diligent investigation, some jurisdictions have imposed liability for failing to disclose information that the broker should have known through such an investigation.\textsuperscript{106} In the leading case of \textit{Easton v. Strassburger},\textsuperscript{107} a California court held that a real estate broker's failure to investigate potential soil problems after observing certain warning signs was a breach of the broker's duty to the buyer.\textsuperscript{108} In \textit{Easton}, a buyer purchased a home located on a one-acre parcel of land which suffered massive earth movements shortly after the buyer took possession.\textsuperscript{109} Due to the severe nature of the earth movements, a portion of the property began to slide away causing significant damage to the residential structure.\textsuperscript{110} Although the sellers never informed the real estate brokers of any prior earth movements or of their attempts to correct the problem, the court determined that the real estate brokers had sufficient notice of potential soil problems and were negligent for not conducting a more thorough investigation.\textsuperscript{111}

As indicated by the \textit{Easton} case, the law has moved in a direction that presently requires brokers to make a "full disclosure of all material facts . . . whenever elementary fair conduct demands."\textsuperscript{112}

\section*{C. Material Adverse Facts}

Wisconsin, like most states, requires sellers\textsuperscript{113} and real estate brokers

\begin{quote}
\textsuperscript{105} \textit{Id.} § RL 24.07(3).
\textsuperscript{107} 199 Cal. Rptr. at 383.
\textsuperscript{108} \textit{Id.} at 391-92.
\textsuperscript{109} \textit{Id.} at 385.
\textsuperscript{110} \textit{Id.} at 391-92.
\textsuperscript{111} \textit{Id.} Due to the "red flags" which indicated potential soil problems, the court indicated that the real estate brokers should have requested a soils report, or taken investigatory measures to determine if there had been prior erosion or soil problems. \textit{Id.} at 391.
\textsuperscript{112} \textit{See RAUSHENBUSH \\& MINTER, supra} note 58, at § 4.06 (quoting WILLIAM L. PROSSER, PROSSER ON TORTS 535 (2d ed. 1955)).
\textsuperscript{113} In Wisconsin, sellers of property containing one to four dwelling units must complete a real estate condition report (RECR). WIS. STAT. § 709.01 (1995-96). Under the RECR, a seller must disclose any known defect that affects the property. See \textit{id.} § 709.03. For purposes of the RECR, a "defect" is defined as "a condition that would have a significant adverse effect on the value of the property; that would significantly impair the health or safety of future occupants . . . ; or that if not repaired, removed or replaced would significantly shorten or adversely affect the expected normal life of the premises." \textit{Id.} at § 709.03(B)(1).
\end{quote}
to disclose all material adverse facts concerning a property to prospective homebuyers. The question of materiality, however, generally depends upon the particular facts of each case. Many courts, therefore, have struggled to determine what information is considered material to the transaction. In Ollerman v. O'Rourke, the Wisconsin Supreme Court defined a material fact as one that:

[A] reasonable purchaser would attach importance to its existence or nonexistence in determining the choice of action in the transaction in question; or if [a broker] knows or has reason to know that [a] 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.

A material fact includes any condition or occurrence that has a significant adverse effect on the value of the property or the structural integrity of the improvements, or presents a significant health risk to the occupants of the property.

Furthermore, some jurisdictions have interpreted “material adverse facts” to include information which has no relation to the physical condition of the property. In Stambovsky v. Ackley, the New York Supreme Court, Appellate Division, held that a seller had a duty to disclose to a potential buyer that he believed the house to be haunted by ghosts. Similarly, a California court, in Reed v. King, extended a broker’s disclosure duties by holding that a broker could be liable for failing to disclose that a murder had occurred in the residence ten years before the sale of the property, if the buyer could prove that the murder

115. 94 Wis. 2d 17, 288 N.W.2d 95 (1980).
116. Id. at 42, 88 N.W.2d at 107 (quoting 3 RESTATEMENT (SECOND) OF TORTS, § 538 (1977)). The Wisconsin legislature essentially has codified this definition in Wisconsin Statute § 452.01(5g), which defines a “material adverse fact” as: an adverse fact that a party indicates is of such significance, or that is generally recognized by a competent licensee as being of such significance to a reasonable party, that it affects or would affect the party’s decision to enter into a contract or agreement concerning a transaction or affects or would affect a party’s decision about the terms of such a contract or agreement.
117. WIS. STAT. ANN. § 452.01(1e)(a) (1995-96).
119. Id. at 677. Because the seller had publicized the existence of the spirits in Reader's Digest and a local newspaper, the court found that the seller was "estopped to deny [the existence of the spirits] and, as a matter of law, the house [was] haunted." Id. at 674. In addition, the court found that the broker had no duty to disclose "the phantasmal reputation of the premises." Id. at 674-75.
120. Reed v. King, 193 Cal. Rptr. 130 (Ct. App. 1983).
had a material affect on the property’s value.\textsuperscript{121}

In Wisconsin, a broker is not required to disclose that “the property was the site of a specific act or occurrence” unless that act or occurrence had an effect on the physical condition or structural integrity of the property.\textsuperscript{122} As a result, a broker would likely not have to disclose that a property had been the site of a murder, suicide, haunting, or other notorious event unless the event resulted in physical damage to the property. Because this law applies only to brokers, a seller arguably would have a duty to disclose the notorious event if the event could have a significant adverse affect on the property’s value.\textsuperscript{123}

In other jurisdictions, sellers and brokers not only have a duty to disclose conditions attributable to the subject property, but also any off-site conditions that might reasonably affect the value or enjoyment of the property for sale.\textsuperscript{124} For example, in \textit{Strawn v. Canuso},\textsuperscript{125} the New Jersey Supreme Court held that a seller and broker could be held liable for failing to disclose the existence of a nearby landfill which posed significant health and safety risks to area residents due to possible hazardous waste contamination.\textsuperscript{126} In making this determination, the \textit{Strawn} court reasoned that when an off-site physical condition is known by the seller or broker and both unknown and material to the buyer, the seller or broker has a duty to disclose.\textsuperscript{127} However, the \textit{Strawn} court noted the sellers and real estate brokers do not “have a duty to investigate or disclose transient social conditions in the community that arguably affect the value of property.”\textsuperscript{128}

In keeping with the trend of consumer protectionism, Wisconsin courts could extend the definition of “material adverse fact” to include

\textsuperscript{121} See \textit{id.} at 133.
\textsuperscript{122} See \textit{WIS. STAT. ANN.} § 452.23(2)(a) (1995-96).
\textsuperscript{123} See \textit{id.} at § 709.03.
\textsuperscript{124} See \textit{e.g.}, \textit{Strawn v. Canuso}, 638 A.2d 141 (N.J. Super. Ct. App. Div. 1994), aff'd 657 A.2d 420 (1995); Alexander v. McKnight, 9 Cal. Rptr. 2d 453 (Ct. App. 1992) (holding that sellers would be required to disclose neighborhood noise problems and nuisances caused by neighbors to prospective homebuyers); O'Leary v. Industrial Park Corp., 542 A.2d 333 (Conn. App. Ct. 1988) (finding a seller liable for failing to disclose to the buyer that the property was located too close to a town well to obtain a permit to use the property for the buyer's intended purpose); Saslow v. Novick, 191 N.Y.S.2d 645 (Super. Ct. 1959) (finding that a seller of a cigar store had a duty to disclose to the buyer that the New York City Transit Authority was attempting to eliminate a nearby subway station that served as the primary source of transportation for many of the store’s customers).
\textsuperscript{125} \textit{Strawn v. Canuso}, 657 A.2d 420 (N.J. 1995).
\textsuperscript{126} \textit{Id.} at 431.
\textsuperscript{127} \textit{Id.}
\textsuperscript{128} \textit{Id.}
off-site conditions which might reasonably affect the value of the property or the health and safety of the occupants. Because the broker’s disclosure duty extends to any conditions that are materially adverse to the transaction, the broker’s duty to disclose off-site material adverse facts arguably would not be limited to only those conditions which would affect the value of the property or the health and safety of the occupants.

III. WISCONSIN’S "MEGAN" LAW

On June 24, 1996, Governor Tommy Thompson signed into law Wisconsin’s Law which upgraded and expanded Wisconsin’s existing sex offender registration requirements. Due to the public outrage surrounding the proliferation of violent sex crimes, especially those against children, Wisconsin’s Law is designed to better protect society by providing local communities with information about known sex offenders living in their neighborhoods. The most important provisions of Wisconsin’s Law include requiring convicted sex offenders to register with the Department of Corrections (DOC) and requiring the DOC to disseminate this information to local law enforcement officials and the general public.

A. Registration Requirements for Sex Offenders

The system of registering sex offenders is intended to serve two primary functions. First, by requiring sex offenders to provide personal information and the location of their residence, local law enforcement officials have immediate access to a list of possible suspects whenever a person is sexually assaulted or reported missing. Because this information is kept in a central registry, allowing communities to share information, law enforcement agencies can solve crimes more expeditiously. Second, because law enforcement agencies possess this information, sexual offenders will likely be deterred from committing

131. Id.
132. Prior to the enactment of Wisconsin’s Law, the DOC, formerly the Department of Justice, kept all registration information confidential, except as needed for law enforcement purposes. WIS. STAT. ANN. § 301.45(7)(a) (West Supp. 1997).
134. WIS. STAT. ANN. § 301.45(2)(a) (West Supp. 1997).
future sexual offenses. By requiring sex offenders to register, they will be on notice that when subsequent sex crimes are committed in their neighborhood, they may be subject to investigation.

Under Wisconsin's Law, any person convicted of a sexual assault of an adult or a sex crime involving a child is required to register with the DOC. All registrants must provide, among other things, a DNA sample, their name, a physical description, the address at which they will be residing, and a description, including the license plate number, of any motor vehicle they own. This information, along with the offender's history of sex-related crimes, must be maintained on the state registry.

After being released from prison, registrants must contact the DOC and provide it with updated information at least once each calendar year and whenever the information changes. All offenders are required to continue this process for a period of 15 years following their release. However, if the person is a repeat sex offender or is considered to be a sexually violent person, the offender must continue to comply with the registration requirements for the remainder of the person's life. If offenders fail to comply with these requirements, they may be fined up to $10,000, imprisoned up to nine months, or both.

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135. See Earl-Hubbard, supra note 133, at 796.
136. Id.
137. For purposes of this Comment, a person who has been convicted, adjudicated delinquent, or found in need of protection or services on or after December 25, 1993 will be considered “convicted.” See Wis. Stat. Ann. § 301.45(1) (West Supp. 1997).
139. See Wis. Stat. Ann. §§ 940.22(2), 944.06, 948.02(1), 948.02(2), 948.025, 948.05, 948.055, 948.06, 948.07, 948.11, or 948.30, or of §§ 940.30 or 940.31, if the victim was a minor and the person was not the victim's parent.
143. See id. § 301.45(2)(a)(2).
144. See id. § 301.45(2)(a)(5).
145. See id. § 301.45(2)(a)(7).
146. See id. § 301.45(2)(a)(3).
147. See id. § 301.45(2)(a).
149. Id. at § 301.45(4).
150. Id. § 301.45(5)(a)(2).
151. See id. § 980.01 (7) (1995-96); see also id. §§ 940.225(1), 940.225(2), 948.02 (1), 948.025(2), and 948.025 (1995-96).
153. Id. § 301.45(6)(a).
B. Community Notification Requirements

While registration requirements allow law enforcement agencies to keep track of sex offenders, community notification is intended to provide residents with information necessary to protect themselves from sex offenders who live in their proximity.\textsuperscript{154}

Wisconsin's Law creates a two-tiered system for the classification and notification of released sex offenders.\textsuperscript{155} The levels of community notification vary based on the perceived risk of danger to the public. If the sex offender has been convicted or found not guilty on only one occasion, the perceived risk of a repeat offense is low, and the DOC has the discretion to provide the registration information through a written bulletin\textsuperscript{156} to local law enforcement officials\textsuperscript{157} in the community where the person is residing, employed, or attending school.\textsuperscript{158} If the sex offender has been convicted or found not guilty on two or more occasions or is considered to be a sexually violent person,\textsuperscript{159} the perceived risk is high, and the DOC is required, rather than having the option, to send a bulletin to local law enforcement officials.\textsuperscript{160}

Upon request, the DOC also must provide various community groups, such as public or private elementary and secondary schools, daycare providers, neighborhood watch programs, and organized units of the Boy and Girl Scouts of America, with information\textsuperscript{161} concerning a


\textsuperscript{155} See WIS. STAT. ANN. § 301.46(2m) (West Supp. 1997). If the sex offender has been convicted or found not guilty on only one occasion, the DOC may notify local law enforcement officials of the sex offender's release into their community if the DOC determines that such notification is necessary to protect the public. Id. at § 301.46(2m)(a). However, such notification is mandatory if the sex offender has been convicted or found not guilty on two or more occasions. Id. § 301.46(2m)(am).

\textsuperscript{156} See id. § 301.46(2m)(b).

\textsuperscript{157} WIS. STAT. ANN. § 301.46(2) (West Supp. 1997). If the DOC determines that notification is necessary to protect the public, the agency may provide local law enforcement officials with a written bulletin. Id. § 301.46(2m). For purposes of this Comment, "local law enforcement officials" will mean the police chief of the community and the sheriff of the county in which the person will be residing, employed, or attending school. Id. at § 301.46(2)(a).

\textsuperscript{158} See id. § 301.46(2)(b)(5), (8), (9).

\textsuperscript{159} See WIS. STAT. § 980.01(7) (1995-96).

\textsuperscript{160} WIS. STAT. ANN. § 301.46(2m)(am) (West Supp. 1997).

\textsuperscript{161} The DOC must provide the following information: (1) the name of the sex offender, including any aliases; (2) the date of the sex offender's conviction, and the county or state, if not Wisconsin, in which the sex offender was convicted; and (3) the make, model, and license plate number of any motor vehicle owned by the sex offender or registered in the sex offender's name. WIS. STAT. ANN. § 301.46 (4)(ar)(b) (West Supp. 1997). Noticeably
specific registered sex offender or all registered sex offenders\textsuperscript{162} within a community.\textsuperscript{163} After receiving the information from the DOC, local law enforcement officials are permitted to disseminate the registration information to members of the general public.\textsuperscript{164} However, the local law enforcement officials may provide this information only if law enforcement officials determine that the information is necessary to protect the public.\textsuperscript{165} Additionally, local law enforcement officials may provide a sex offender’s registration information to members of the public upon request, but again, only if the local law enforcement officials determine that it is necessary to protect the public.\textsuperscript{166} To be valid, the request must: (1) be in the proper form and manner, as determined by the local law enforcement officials;\textsuperscript{167} (2) state the name of the specific individual about whom the person is seeking information,\textsuperscript{168} and (3) contain any other information the local law enforcement officials consider necessary to accurately determine whether the person is a registered sex offender.\textsuperscript{169} If the person requesting the registration information satisfies all the requirements set forth by the local law enforcement officials, the local law enforcement officials must present that person with the sex offender’s date of conviction,\textsuperscript{170} information about any motor vehicle the sex offender owns,\textsuperscript{171} and the most recent date the registration information was updated.\textsuperscript{172} Unlike the community notification requirements in

\textsuperscript{162} Unlike the two-tiered classification system created for notifying law enforcement officials, the DOC is authorized to provide information to community groups and citizens on any registered sex offender, regardless of whether the sex offender is perceived as high risk. WIS. STAT. ANN. § 301.46(4) (West Supp. 1997).

\textsuperscript{163} Id. § 301.46(4)(a) - (ar).

\textsuperscript{164} Id. § 301.46(2)(e), (2m)(c), (5)(a).

\textsuperscript{165} Id. § 301.46(2)(e). In determining whether the release of registration information is necessary to protect the general public, the police chief or sheriff in possession of such information is given discretionary authority. Id. § 301.46(2m)(c).

\textsuperscript{166} Id. § 301.46(5)(a).

\textsuperscript{167} WIS. STAT. § 301.46(5)(a)(1) (West Supp. 1997).

\textsuperscript{168} Id. § 301.46(5)(a)(2).

\textsuperscript{169} Id. § 301.46(5)(a)(3). The local law enforcement officials also may require the written request to contain a statement indicating why the person is requesting the information. Id. § 301.46(5)(a).

\textsuperscript{170} Id. § 301.46(5)(b)(1).

\textsuperscript{171} Id. § 301.46(5)(b)(2).

\textsuperscript{172} WIS. STAT. § 301.46(5)(b)(3) (West Supp. 1997). However, the local law enforce-
other states. Wisconsin's Law does not require the DOC to release information relating to the sex offender's place of residence.

Wisconsin's Law also provides law enforcement officials with civil immunity for a good faith act or omission regarding the release of information. This immunity, however, does not protect a law enforcement official "whose act or omission constitutes gross negligence or involves reckless, wanton or intentional misconduct."

IV. ANALYSIS

Wisconsin's Law does not create an affirmative duty for sellers or real estate brokers to disclose the presence of a known sex offender living in a neighborhood. However, in view of the fact that the disclosure duties of both sellers and brokers have expanded significantly since the days of caveat emptor, some commentators have suggested that both sellers and brokers have a legal duty, rather than a mere "moral obligation," to disclose the presence of known sex offenders living in a neighborhood to prospective homebuyers. Because neither Wisconsin courts nor courts in other jurisdictions have had the opportunity to decide whether such a disclosure duty exists, the answer, as illustrated by the divergent viewpoints of legal experts, is not yet evident.

As indicated by recent incidents in other states, it is, however, only a matter of time before a homebuyer in Wisconsin discovers a sex of-

175. Id. § 301.46(7).
176. Id.
178. See, e.g., id. at 706.
179. See Komuves, supra note 177, at 697 (citing Robert Schwaneberg, Megan's Law May Force Sellers to Notify Buyers About Sex Offenders, Star Ledger (Newark, NJ), July 22, 1996, at 1, 1996 WL 7950435) presenting the opinion of one real estate attorney, who believes that the law will soon develop to require sellers, and presumably real estate brokers, to disclose the existence of known sex offenders. Compare with Schwaneberg, at 1, (expressing the view of a former judge and lawyer who believes that courts may limit disclosure duties to "permanent, physical features such as abandoned dumps," and not extend the duty to known sex offenders).
180. See Karen Hucks, Realtor Wants Sex Offenders To Notify Sellers/Law Sought After Home In Lacey Unwittingly Sold To Family With Molester, 19, MORNING NEWS TRIB. (Tacoma, Wash.), at A1, 1998 WL 4077594.
fender living in the neighborhood after purchasing a home and subsequently sues a seller or real estate broker for failing to disclose this information. In anticipation of such a day, this Comment will now examine what a homebuyer would likely have to demonstrate under current Wisconsin law to bring a cause of action against a seller or real estate broker who failed to disclose the presence of a known sex offender living in the neighborhood.

A. A Duty To Disclose

First, a homebuyer would likely have to demonstrate that a seller or real estate broker has a duty to disclose information. As previously discussed in this Comment, sellers of residential real estate in Wisconsin must disclose to prospective buyers the existence of any known defects that would, among other things, (1) “have a significant adverse effect on the value of the property,” or (2) “significantly impair the health or safety of future occupants of the property.” Similarly, real estate brokers in Wisconsin have a duty to disclose to each party in the transaction any known material adverse facts related to the transaction that “the party does not know or cannot discover through a reasonably vigilant observation,” unless such disclosure is prohibited by law. Although the scope of these duties are defined using different terminology (i.e., “material adverse fact” versus “defect that would have a significant adverse effect”), a court would likely determine that both the seller and broker have an independent duty to disclose to prospective homebuyers any known on-site or off-site defect that will materially affect the value of the property or the health and safety of prospective homebuyers.

Therefore, even if a seller specifically instructs the broker not to inform prospective homebuyers of a known material defect, the broker has an independent duty, which overrides the duties of loyalty and confidentiality owed to the seller, to disclose this information to prospective homebuyers.

181. See supra note 43 and accompanying text.
183. Wis. Admin. Code § RL 24.07(2) (1996). The broker must make this disclosure in writing and in a timely manner. Id.
184. Although a broker is not required to disclose a material adverse fact that the buyer is already aware of or could discover through a “reasonably vigilant observation,” a broker arguably should disclose this information under these circumstances nonetheless to ensure that the broker is acting competently. See Wis. Admin. Code § RL 24.07(2), (3) (1996).
185. See Wis. Stat. § 452.133(1)(d), (2)(a) (1995-96). Under this statute, the broker’s duty of confidentiality owed to all parties is subordinate to the broker’s duty to disclose all material adverse facts to all parties. Id. § 452.133(1)(d). Similarly, a broker is required to place the client’s interests ahead of the interests of any other party unless it would violate the...
In addition to having the duty to disclose known material adverse facts, a broker also must disclose, in writing and in a timely manner, any information that suggests "the possibility of material adverse facts to the transaction." Therefore, if a broker learned that some condition was possibly forthcoming and may have a material adverse affect at some point in the future (i.e., a proposed rock quarry in the immediate vicinity), the broker is required to disclose this information.

**B. Material Adverse Fact**

Next, a buyer would likely have to show that the presence of a known sex offender is a material adverse fact. In order for an adverse fact to be material it must be "of such significance . . . to a reasonable party that it affects or would affect the party's decision to enter into a contract . . . concerning a transaction or . . . a party's decision about the terms of such a contract." In other words, the condition must be so essential to the transaction that had the prospective homebuyer known the truth, the homebuyer would not have purchased the property or would not have accepted the terms of the purchase contract. To demonstrate that the presence of a known sex offender living in the area would constitute a material adverse fact, a prospective homebuyer would likely have to prove that such information would have a significant negative impact on either the value of the property or on the health or safety of future occupants of the property.

1. Affect on a Property's Value

Although the exact dollar value is almost impossible to calculate, the perceived health and safety risk resulting from a known sex offender living in a neighborhood will likely have a significant negative affect on the value of any property located in that neighborhood. If informed that a sex offender is living in the area, most homebuyers, espe-
cially those with children, would likely decide not to purchase a home in the nearby vicinity, no matter what the price. Some homebuyers, however, may still be interested in purchasing a home after learning that a sex offender is living in the neighborhood, but the price they are willing to pay would likely be discounted significantly due to the reduced number of buyers who would be willing to purchase the home upon resale if the sex offender was still living in the area.

2. Impact on the Health or Safety of Future Occupants

In addition to significantly affecting a property's value, the presence of a sex offender living in an area also may have a significant impact on the health or safety of future occupants of the property. Studies have shown that child sex offenders, on average, molest 117 children during their lifetime, while other studies indicate that rates of recidivism are as high as eighty percent. Due to the high rate of recidivism among sex offenders, most homebuyers would likely consider a sex offender living in a neighborhood to be a significant health or safety risk to area residents.

Whether considering the affect on value or the potential health or safety risks, a court would likely find the presence of a sex offender living in a neighborhood to be a material adverse fact.

C. Misrepresentation As A Matter Of Law

Next, a buyer would likely have to prove that the seller's or real estate broker's failure to disclose constituted a misrepresentation as a matter of law. Wisconsin courts generally recognize three types of legal misrepresentation: intentional, negligent, and strict responsibility.

191. For a discussion on the effect of disclosures on market value, see Komuves, supra note 177, at 700 n.211.

192. See Earl-Hubbard, supra note 133, at 795 (citing results from a National Institute study finding that each child molester abuses an average of 117 children); see also Lawrence A. Greenfield, U.S. Dept of Justice, Child Victimizers: Violent Offenders and Their Victims 9 (1996) (reporting that 20% - 30% of prisoners in state correctional facilities have sexually abused more than one child).


194. See supra note 191 and accompanying text.


196. See supra notes 76-91 and accompanying text. See also Whipp v. Iverson, 43 Wis. 2d 166, 169-70, 168 N.W.2d 201, 203-04 (1969); Wis. J I—Civil 2400-03.
Each type of misrepresentation has three common elements: (1) the defendant made a factual representation; (2) the factual representation was untrue; and (3) the plaintiff believed the factual representation to be true and relied on it to his or her detriment. In addition, if a party has a duty to disclose a fact but fails to do so, the party's "failure to disclose that fact is treated in the law as equivalent to a representation of the nonexistence of the fact." Because the presence of a known sex offender living in a neighborhood would likely constitute a material adverse fact which both sellers and real estate brokers have a duty to disclose, a failure to disclose this information would be treated as representation that the fact did not exist. The first two elements of misrepresentation would be satisfied, leaving a court to consider whether the homebuyer believed the factual representation to be true and relied on it to his or her detriment. Similarly, the determination that information constitutes a material adverse fact necessarily presumes that the homebuyer believed the factual representation to be true and relied on it to his or her detriment. As a result, a court also would likely find the third element to be satisfied.

1. Intentional Misrepresentation

In addition to the three common elements of misrepresentation, a buyer making an intentional misrepresentation claim must demonstrate that the seller or real estate broker: (1) "either made the representation knowing it was untrue or made it recklessly without caring whether it was true or untrue;" and (2) made the representation to intentionally deceive and induce the buyer to act upon it. Because a seller or real estate broker who fails to inform a prospective homebuyer of a known sex offender living in the neighborhood presumably does so in order to induce the prospective homebuyer into purchasing the house, a buyer would likely succeed in an intentional misrepresentation claim.

2. Strict Responsibility

A prospective homebuyer also may file a strict responsibility claim

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197. See Whipp, 43 Wis. 2d at 169, 168 N.W.2d at 203.
198. Ollerman v. O'Rourke Co., 94 Wis. 2d 17, 26, 288 N.W.2d 95, 100 (1980). This rule applies to all three forms of misrepresentation. See also Wis. J I—Civil 2402-03.
199. See supra note 189 and accompanying text.
200. See supra note 197 and accompanying text.
201. Grube v. Daun, 173 Wis. 2d 30, 54, 496 N.W.2d 107, 114 (Ct. App. 1992) (citing Lundin v. Shimanksi, 124 Wis. 2d 175, 184, 368 N.W.2d 676, 680 (1985)).
202. See Lundin, 124 Wis. 2d at 184, 368 N.W.2d at 680. See also, Wis. J I—Civil 2401.
for misrepresentation. In making a strict responsibility claim for misrepresentation, the buyer must demonstrate, in addition to the three common elements, that the seller or real estate broker: (1) made the representation based on his or her own personal knowledge, or could have ascertained the pertinent facts, his or her "position made possible complete knowledge and his or her statements fairly implied that he or she had [the knowledge];" and (2) had an economic interest in the transaction. Because the seller or real estate broker, under this hypothetical scenario, knew that a sex offender was living in the area and both have an economic interest in the transaction, a buyer would likely have a successful strict liability claim for misrepresentation.

3. Negligent Misrepresentation

If the buyer makes a claim of negligent misrepresentation, the buyer must prove one element in addition to the three common elements of misrepresentation: that the seller or real estate broker "was negligent in making the representation." A seller or real estate broker is negligent if he or she "makes a representation under circumstances in which a person of ordinary intelligence and prudence ought reasonably to foresee that such representation will subject the interest of another to an unreasonable risk of damage." Accordingly, if the seller or real estate broker demonstrated "a lack of reasonable care" in obtaining information related to the sex offender or made the disclosure "without the skill or competence required" in the real estate industry, the buyer will likely have a successful negligent misrepresentation claim.

D. Award of Damages

If a buyer is able to show that the presence of a known sex offender is a material adverse fact and that the seller and/or real estate broker


204. See Wis. J I—Civil 2402.

205. A seller has an economic interest in selling the house and the real estate broker has an economic interest in receiving a commission upon procuring a ready willing and able purchaser. See generally RAUSHENBUSH & MINTER, supra note 58, § 3.03(F) (discussing how a broker earns a commission).


207. See Wis. J I—Civil 2403.

208. Id.
had a duty to disclose this information, but failed to do so, a court would likely rescind the contract,\(^2\)\(^9\) award compensatory damages in an amount equal to the difference between the purchase price and the home's fair market value,\(^2\)\(^\text{10}\) and/or award punitive damages\(^2\)\(^\text{11}\) to punish the seller or real estate broker for the nondisclosure.

**E. Other Considerations**

1. The Means by which the Seller or Broker Learned of the Information

In addition, a court may also consider how the seller or real estate broker learned of the information relating to the location of the known sex offender (i.e., the reliability of the information). If the seller or real estate broker learned of the information through the notification process specifically provided for under Wisconsin's Law, a seller or broker could be relatively certain that the information was reliable, at least at the time the local law enforcement officials disseminated the information. Accordingly, a court may be more likely to require disclosure under these circumstances. On the other hand, if the seller learned of the information through word of mouth without any confirmation from law enforcement officials, the information would not be as reliable and, therefore, may not necessitate disclosure. Because a broker, unlike a seller, has a duty to disclose any information suggesting the possibility of a material adverse fact,\(^2\)\(^\text{12}\) a broker arguably would still be required to make a disclosure even though the broker did not learn of the information through the notification process under Wisconsin's Law.

2. Interpretation by the Department of Regulation and Licensing

Because the Wisconsin legislature has given the Wisconsin Department of Regulation and Licensing ("DRL") the authority to promulgate rules relating to the ethical conduct of brokers,\(^2\)\(^\text{13}\) including disclosure duties, a court may also consider an interpretation made by the

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209. See First Nat'l Bank & Trust Co. v. Notte, 97 Wis. 2d 207, 219, 221, 293 N.W.2d 530, 536-37 (1980). See also Whipp v. Iverson, 43 Wis. 2d 166, 171, 168 N.W.2d 201, 204 (1969) (noting that claims for rescission are discernable from claims seeking damages for misrepresentation).

210. See Wis. J I—Civil 2405, 2405.5, and 2406.


DRL. In an opinion letter from the DRL, attorney Donald R. Rittel maintained that a real estate broker does not have a duty to disclose the presence of a known sex offender unless: (1) the broker learned of the information through the community notification process created by Wisconsin's Law, and (2) the prospective buyer specifically asked the broker about such information.214

When reviewing an administrative agency's conclusions of law, a court will apply one of three standards of deference: great weight deference, due weight deference, or de novo review.215 The level of deference "depends on the comparative institutional capabilities and qualification of the court and the administrative agency."216 An agency's conclusion of law is entitled to great weight deference only when all of the following requirements have been met:

1. the agency was charged by the legislature with the duty of administering the statute;
2. that the interpretation of the agency is one of longstanding;
3. that the agency employed its expertise or specialized knowledge in forming the interpretation;
4. that the agency's interpretation will provide uniformity and consistency in the application of the statute.217

Depending upon when a court is presented with this issue, the DRL's interpretation may or may not be a longstanding interpretation. However, the dispositive issue would likely be whether the DRL has sufficient "expertise or specialized knowledge" to make this determination. Although the DRL has the "expertise or specialized knowledge" to determine what constitutes a material adverse fact for purposes of determining a real estate broker's disclosure duties,218 it has not been given the authority, nor does it have the expertise, to interpret Wisconsin's Law. Rather, the Wisconsin legislature arguably has given the DOC the specific authority to interpret and administer Wisconsin's Law.219 As a result, a court likely would not give great weight deference

217. UFE Inc. v. Labor & Indus. Review Comm'n, 201 Wis. 2d at 284, 548 N.W.2d at 61 (quoting Harnischfeger Corp. v. LIRC, 196 Wis. 2d 650, 660, 539 N.W.2d 98, 102 (1995)).
218. In his letter, Rittel recognizes that the presence of known sex offender living in a neighborhood would likely constitute a material adverse fact to prospective homebuyers. See supra note 214.
219. See WIS. STAT. §§ 301.01(1), 301.45(8) (1995-96).
to the DRL's legal conclusion.

A court will give an agency's legal conclusion due weight deference "when the agency has some experience in an area, but has not developed the expertise which necessarily places it in a better position to make judgments regarding the interpretation of the statute than a court."220 Again, because the DRL has little, if any, expertise in interpreting Wisconsin's Law, a court likely would not give due weight deference to the DRL's legal conclusion.

The third level of deference is no deference, or de novo review. A court will make a de novo review of an agency's conclusion of law if any of the following are true: "(1) the issue before the agency is clearly one of first impression; (2) a legal question is presented and there is no evidence of any special agency expertise or experience; or (3) the agency's position on an issue has been so inconsistent that it provides no real guidance."221 Because the DRL presumably does not have any special expertise or experience in interpreting Wisconsin's Law, a court would not defer to the DRL's conclusion of law. As a result, a court would likely make a de novo review of such a case.

3. Continuing Education Requirements

Although a court may not pay deference to the DRL's interpretation, Wisconsin real estate brokers who have relied upon this interpretation would likely have an affirmative defense to a misrepresentation claim by a homebuyer. As stated previously, in Wisconsin a "material adverse fact" is defined as "an adverse fact that a party indicates is of such significance, or that is generally recognized by a competent licensee as being of such significance to a reasonable party, that it affects or would affect the party's decision to enter into a contract... or... the party's decision about the terms of such a contract... ."222 To help ensure that real estate brokers remain competent and informed of current laws, public policies, and market conditions,223 all real estate brokers licensed in Wisconsin must satisfy specified continuing education requirements each licensing biennium in order to renew their licenses.224

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220. UFE Inc. v. Labor & Indus. Review Comm'n, 201 Wis. 2d at 286, 548 N.W.2d at 62.
223. Id. § RL. 24.03(2)(c).
224. Id. § RL 25.065.
As part of this mandatory continuing education program, the DRL, in 1996, specifically approved continuing education curricula based upon its interpretation of Wisconsin's Law (i.e., that real estate brokers do not have a duty to disclose the presence of known sex offenders living in a neighborhood unless specifically asked).

Because real estate brokers are required to satisfy the continuing education requirements created by the DRL, a real estate broker who relies upon and acts in accordance with DRL-approved curricula would presumably be acting competently. In light of this continuing education requirement, a court may find that such a broker is not liable for misrepresentation.

4. Fair Housing Laws

In determining whether to impose a duty to disclose, a court may also consider whether a sex offender could be classified as a person with a disability. In Wisconsin, a real estate broker is prohibited from disclosing information that would constitute an unlawful discrimination to any person involved in a transaction. Under Wisconsin's fair housing laws, a person is prohibited from discriminating against another person on the basis of that person's disability. A "disability" is defined as "a physical or mental impairment that substantially limits one or more major life activities, a record of having such an impairment or being regarded as having such an impairment." Although the rehabilitation of criminals is generally one of the underlying premises of our criminal justice system, Wisconsin's Law, like other community notification laws, rejects this premise on the belief that most sex offenders are not rehabilitated when released from prison. Due to the high rate of recidivism among sex offenders, some experts believe that various sex offenders have a "pathological need" to repeatedly commit sex crimes.

225. As one of its many duties and responsibilities, the Department of Regulation and Licensing is in charge of approving continuing education programs and courses required for license renewal. See WIS. STAT. § 452.05 (1)(d), (g) (1995-96).

226. However, if a broker has never attended this course and, therefore, has not relied upon this information, the broker may not be entitled to this defense.

227. See WIS. STAT. § 452.23(1) (1995-96). Although no statute specifically speaks to the seller's duty not disclose, such a disclosure, if made by the seller, would arguably violate the fair housing laws.

228. Id. § 101.22(1).

229. Id. § 101.22(1m)(g).

230. See Bedarf, supra note 154, at 910.

231. Id.
and, thus, may be mentally disabled. This theory of mental disability is further evidenced by the fact that law enforcement officials often place released sex offenders in mental health facilities after they have completed their prison sentences. Accordingly, if a court determines that a particular sex offender has a mental disability, a broker would likely be prohibited from disclosing the presence of a known sex offender to a prospective homebuyer.

V. PUBLIC POLICY CONSIDERATIONS

Although the presence of a known sex offender living in a neighborhood would likely constitute a material adverse fact which generally must be disclosed by both sellers and real estate brokers, the public policy arguments both in favor and against such a disclosure should be examined before an affirmative disclosure duty is imposed.

A. Public Policy Considerations In Favor of a Duty to Disclose

1. Sellers and Brokers are in the Best Position to Know of Information

As with other disclosure duties relating to material adverse facts, the primary justification for imposing a disclosure duty on sellers and real estate brokers under Wisconsin's Law is that they are in a better position than prospective homebuyers to know of information that may affect the property. Wisconsin's Law authorizes local law enforcement officials to make limited disclosures of registration information only if they determine that it is necessary to protect the public. Although this information will likely spread throughout a community once provided to one of its residents, many prospective homebuyers, especially those prospective homebuyers who currently live in different geo-
graphic areas, generally will not have access to this information. In addition, even if these prospective homebuyers requested information on known sex offenders living in a particular neighborhood from local law enforcement officials, the prospective homebuyers may not receive such information unless they inquired about a specific individual. Moreover, even if a prospective homebuyer requests information from local law enforcement officials about a specific sex offender, local law enforcement officials ultimately decide whether to disseminate the information. Therefore, unless the seller or broker discloses information relating to known sex offenders living in a neighborhood, a prospective homebuyer would likely never become aware of this information.

The argument in favor of disclosure becomes even more persuasive when considering the ability of prospective homebuyers to protect themselves from other latent defects which the real estate broker and seller must disclose. In most cases, a prospective homebuyer can hire an independent home inspector or purchase a home warranty to reduce the risk of possible undisclosed on-site defects. In addition, a prospective homebuyer can generally drive around the neighborhood or call local government officials to discover most adverse conditions located off-site. Although a prospective homebuyer can discover these adverse conditions through his or her independent efforts, both a seller and a real estate broker are required to disclose this information if known by the seller or real estate broker and is material to the transaction. Because a prospective homebuyer is generally unable to identify a sex offender by driving around the neighborhood, and because home warranties do not cover the presence of sex offenders in a neighborhood, a prospective homebuyer who wants to learn of known sex offenders living in a neighborhood is even more dependent upon disclosures by sellers and real estate brokers than he or she is for other material adverse facts.

2. Wisconsin's Law is Intended to Provide Protection for Area Residents

One of the primary purposes of Wisconsin's Law is to provide community residents with information so that they are better able to protect
themselves from sex offenders. If community residents are aware of a sex offender living in their neighborhood, they will have the opportunity to take proactive measures to help reduce the risk of victimization by known sex offenders. As one commentator stated, "[community notification empowers] individuals [to] police their own communities to prevent sex crimes, rather than simply react to crimes after they have been committed." Therefore, it seems consistent with this rationale to provide prospective homebuyers with this information to ensure that prospective homebuyers are given the same opportunity as current residents to protect themselves.

B. Public Policy Considerations Against A Duty to Disclose

In spite of the sound policy arguments in favor of requiring disclosure by sellers and real estate brokers, there exists equally strong policy arguments against such disclosure requirements.

1. The Disclosure Duties Under Wisconsin’s Law are Very Limited in Scope

Under Wisconsin’s Law, the duty to disseminate a sex offender’s registration information to the general public is specifically limited to local law enforcement officials. To strike a balance between increased public protection and the need to successfully integrate the sex offender within the community, the Wisconsin legislature created a series of procedural safeguards to limit the free flow of registration information to the general public. One of the primary safeguards is the requirement that prior to the dissemination of registration information to the public local law enforcement officials must determine that the dis-

238. See supra note 154 and accompanying text. See also G. Scott Rafshoon, Comment, Community Notification of Sex Offenders: Issues of Punishment, Privacy, and Due Process, 44 EMORY L.J. 1633, 1666-67 (1995) (citing “better law enforcement” and “deterrence” as additional purposes of Megan’s Law).

239. Bedarf, supra note 154, at 903.

240. In some areas of the country, local residents have begun to take a proactive approach to notifying prospective homebuyers of known sex offenders in the neighborhood by waiting outside a home and informing the prospective homebuyers when they come to tour a property. See Maryann Haggerty, Selling the Dark Sites of Executioners’ Songs; Long After the Blood of Grisly Crime Scenes Has Turned Cold, Agents Find Buyer Resistance, Reduced Prices for Stigmatized Homes, WASH. POST, at E01, April 12, 1997, available in 1997 WL 10012111.

241. See supra note 165 and accompanying text.


243. See supra notes 168-69 and accompanying text.
semination of this information is necessary to protect the public.\textsuperscript{244} One can reasonably presume that this duty was assigned to law enforcement agencies and not, for example, the Department of Transportation, because law enforcement officials are more experienced in utilizing information for criminal investigation purposes without infringing upon the constitutional rights afforded to criminals.\textsuperscript{245} Therefore, any duty that would specifically require sellers and real estate brokers to disclose information regarding known sex offenders to members of the public would appear to be in direct conflict with the procedural safeguards specifically created by the legislature to control the dissemination of information to the public.\textsuperscript{246}

2. Determining the "Zone of Danger"

If required to disclose the existence of known sex offenders to prospective homebuyers, sellers, and real estate brokers would have extreme difficulty in determining the geographical limitations on such a duty—"the zone of danger." Unlike most other material adverse facts, a sex offender is mobile and, therefore, not permanently fixed in any one location. Because of this mobility, a sex offender who lives in one neighborhood could effectively drive to another neighborhood where his or her identity is unknown, and commit sex crimes. As a result, it would be seemingly impossible for a seller or a real estate broker to determine, without some specified guidelines, the distance away a home must be before a sex offender no longer poses a threat to future occupants. For example, if a sex offender was known to live in a particular neighborhood, how far away would a property have to be before the released sex offender no longer posed a reasonable threat to the occupants? Across the street? One block? One mile? Ten miles? Because any specified distance would be arbitrary and likely unprotective, sellers and real estate brokers who knew of a sex offender living in any neighborhood arguably would have to make disclosures to all prospective homebuyers, without considering the distance between the house and the known sex offender.

\textsuperscript{244} Wis. Stat. § 301.46(5)(a) (1995-96).
\textsuperscript{246} See supra note 242 at ii (recommending that only limited information be provided to the public upon written request).
3. No Procedure for Updating or Verifying Registration Information.

Although cases such as *Strawn v. Canuso*\(^\text{247}\) establish an affirmative duty to disclose off-site conditions such as a nearby landfill, the presence of sex offender is not of the same category. Unlike a landfill, the presence of a sex offender is not a permanent adverse condition. Sex offenders are able to relocate on a recurrent basis. Because a sex offender is mobile, a seller or real estate broker would be required to constantly confirm the sex offender's neighborhood presence to ensure that any disclosures relating to the sex offender were accurate. To make accurate disclosures to potential buyers, a seller or broker, therefore, would need to have access to up-to-date information relating to a sex offender's whereabouts. However, under Wisconsin's Law, any dissemination of registration information is subject to the discretion of local law enforcement officials.\(^\text{248}\) Furthermore, because local law enforcement officials are not required to disclose the address of the sex offender's residence,\(^\text{249}\) any information provided by local law enforcement officials would likely be ineffective in helping the seller or broker to determine if the sex offender was presently living in the same neighborhood.

Another problem facing sellers and real estate brokers is the inability to verify the accuracy of the information. Because Wisconsin's Law provides only limited access to registration information,\(^\text{250}\) a seller or broker who learns that a sex offender is living in the neighborhood through a source other than local law enforcement officials may be unable to verify that the information is correct. Even the accuracy of information disseminated under Wisconsin's Law is questionable in view of the fact that after a sex offender registers with the DOC\(^\text{251}\) there is no verification procedure currently in place to determine if the address given by the released sex offender is accurate. Because the immunity from civil liability provided for under Wisconsin's Law arguably does

\(^{247}\) See supra notes 125-28 and accompanying text.

\(^{248}\) See supra note 166 and accompanying text.

\(^{249}\) See supra note 174 and accompanying text. See Paul Norton, *Residents Told of Molester Safety Vowed; Many Fearful*, THE CAP. TIMES, Feb. 26, 1998, at 2A, available in 1998 WL 5863004 (indicating that area residents are often upset when law enforcement officials refuse to reveal the address of the released sex offender); *Law May Spur Vigilantes*, CHI. TRIB., July 22, 1996, available in 1996 WL 2691930 (citing the threat of vigilantism as the reason a sex offender's address is not revealed to the general public).

\(^{250}\) See supra note 170-72 and accompanying text.

\(^{251}\) See supra note 140.
not extend to sellers and real estate brokers, a seller or real estate broker who discloses inaccurate information may be liable for misrepresentation.


Furthermore, by requiring real estate brokers to disclose the presence of known sex offenders living in an area to all prospective homebuyers, local housing markets may be severely impacted. Prospective homebuyers, who are informed of a prior sex offender living within a neighborhood, likely will lose interest in purchasing property within that neighborhood due to the perceived safety risks. If there is a lack of buyer demand, area real estate values will sharply decline. As a result, local residents, unwilling to allow sex offenders to live in their neighborhoods, may result to vigilantism to ostracize sex offenders from their communities.
VI. RECOMMENDATION: A "BALANCED AND PRACTICAL" SOLUTION

Many states have already addressed this issue by passing legislation which clearly defines the disclosure duties owed by a seller and broker under the state's version of Megan's Law. However, a survey of this legislation indicates that each state has a different approach. In New Jersey, for example, sellers and real estate brokers are required to disclose this information to prospective homebuyers, but only after the sale closes and only if the sex offender is considered "high risk." Some states, like Minnesota, create a blanket exception for real estate brokers by specifically exempting them from any disclose duties arising under Megan's Law. Other states, like Washington, are considering legislation that would require real estate brokers to inform sellers if their buyer-clients are registered sex offenders.

Rather than creating a blanket exception for sellers and real estate brokers or an impractical duty to disclose any known information, Wisconsin should adopt a 'balanced and practical' solution to the disclosure issues that arise under Wisconsin's Law. One such solution, which is currently being considered in Virginia and California, would be to require sellers and real estate brokers to provide prospective homebuyers with notice on how to obtain information on sex offenders. To provide buyers with this notice, a disclosure statement which informs prospective buyers of their right to contact local law enforcement officials and inquire whether any sex offenders live in the area could be inserted into all residential offers to purchase. In exchange for providing prospective homebuyers with this notice, sellers and real estate brokers would not be required to make any additional disclosures regarding rationalize vigilantism as regrettably necessary, something the offender brought on himself.

256. See MINN. STAT. ANN. § 244.052(Subd. 8) (1996-97). See also Betsy Z. Russell, Measure May Haunt Homeowners For Years To Come Senate Oks Bill That Shields Sellers From Revealing Whether Home Is 'Psychologically Impacted,' The Spokesman Rev. (Spokane, Wash.), March 5, 1998, at A1, available in 1998 WL 7522919 (indicating that Idaho has recently introduced legislation (S.B. 1393) that exempts both sellers and real estate brokers from being required to disclose to prospective homebuyers information relating to released sex offenders); Virginia Churn Times, Liability of Bill Concerns Realtors 1998 Assembly Expected To Debate Virginia Version of Megan's Law, Richmond Times-Dispatch, Jan. 11, 1998, at K1, available in 1998 WL 2023444.
257. See Hucks, supra note 180.
259. Id.
By directing prospective homebuyers to local law enforcement officials, prospective homebuyers would be able to receive "uniform and consistent access" to the most accurate and current information available on the whereabouts of a released sex offender. In addition, sellers and real estate brokers would be provided with a relieved of the impossible task of determining whether the sex offender poses a sufficient threat to warrant disclosure. Furthermore, this approach would be consistent with Wisconsin's Law which specifically authorizes the DOC and local law enforcement officials, rather than sellers and real estate brokers, to be the disseminators of this information.

However, until either a Wisconsin court or the Wisconsin legislature specifically addresses the disclosure duties of sellers and real estate brokers under Wisconsin's Law, sellers and real estate brokers will continue to ponder whether they have a duty to disclose information relating to known sex offenders to prospective homebuyers.

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260. See S.B. 1989, supra note 258. California's law would also grant sellers and real estate brokers immunity from any civil suit brought by a registered sex offender relating to the disclosure. Id.

261. See id.

* This Comment is dedicated to my loving wife, Shannon, for her unwavering support and patience and to my children, Payton and Lake, for serving as constant reminders as to what is truly important in life.