Condition of the Premises

- Traditional view: *caveat emptor*
  - “As is,” no implied warranty of premises
  - No seller liability for defects, unless
    - Express warranty (contract), or
    - Affirmative misrepresentation (tort)

Problem 1

- Buyer signs K to buy “Anderson Rd., Dearborn County, 81.1 acres” from Seller for price of $252,500
  - Parties “walked the 4 corners” of the land
- Pre-closing survey shows parcel is actually 96.3 acres
- Can Seller cancel K?

Seller may argue “I priced it on a per acre basis, not ‘in gross’ (lump-sum)”
- General rule: price is “in gross” absent evidence that price was negotiated on a per acre basis
- No mutual mistake (parties “walked the 4 corners” of the land); *McAndrew v. Perfect* (Ind. App. 2003) (seller could not rescind)

If land is sold “in gross” (for a lump sum), statement of acreage or square footage is a “mere matter of description,” is not “of the essence of the agreement”
- “15.6 ac., more or less” suggests “in gross” sale
- By contrast, if evidence demonstrates that land is sold “per acre” or “per square foot” and there is deficiency/overage in acreage, price will be adjusted
“In Gross” Sales

- Courts won’t give relief for disparity between assumed and actual size, unless the disparity is extreme
  - *E.g., Turner v. Ferrin* (Montana 1988) (sale was in gross; “material deficiency has been said to exist only where the discrepancy closely approached, or exceeded, 50 percent”)

• Suppose the facts in Problem 1 were reversed
  - *K:* land was “96.3 acres, more or less”
  - Pre-closing survey shows that parcel is actually only 81.1 acres
  - Can Buyer cancel?

Modern Duty of Disclosure

- If statement of acreage rises to actual representation or warranty by Seller, Buyer can cancel based upon material misrepresentation
  - However, if qualified by “more or less,” not likely a representation/warranty of size
- What if Seller *knows* that the parcel is in fact smaller? Would Buyer have nondisclosure claim?

- Home seller must disclose known defect if
  - Material to a reasonable buyer
  - Unknown to the buyer, and
  - Unlikely to be discovered by reasonable inspection of the land (*i.e.*, “latent”)

- Rationale?
  - Buyer takes silence as signal that condition is OK (nondisclosure = misrepresentation)
  - Balancing information asymmetry leads to better deals (and avoids disputes)
Duty of Disclosure

• Most decisions have involved the sales of homes, not the sale of commercial property or raw land
  - Thus, it isn’t well-established that Seller would have a duty of disclosure in this situation
• Also, Seller may not know that the parcel was smaller than stated size!

Disclosure Statements

• Brokers, concerned about potential nondisclosure liability, customarily compel sellers to provide standard form disclosure statements [listing form, p. 4, ¶ 9]
  - Sellers in some states must provide such disclosure based upon state statutory requirement [note 8, p. 176]

Latent vs. Patent Defects

• Duty of disclosure only extends to “latent” defects (ones known by seller but unlikely to be discovered by buyer via reasonable inspection)
• If a defect is something that would’ve been discovered by a reasonably competent home inspector, is it really “latent”?

“Latency”

• How should the law resolve what is a “latent” (discoverable) defect?
  - Should the law adopt a “Bob Vila” standard (would Bob have discovered the problem?), or a “Homer Simpson” standard (would Homer have discovered it?)?
• The higher the standard to which law holds buyers, the less disclosure there will be
  – Buyers would be forced to do more stringent and intrusive inspections, which will increase the cost of acquiring land
• By contrast, lower standard would produce more disclosure (sellers/brokers more likely to disclose in marginal cases)
  – This may lower cost of acquiring land (and protect naïve buyers)

Disclosure v. Inspections
• Some courts are less inclined to allow nondisclosure action if buyer contracted for, but did not exercise, inspection rights
  – E.g., Alires v. McGehee (Kan. 2004); sellers failed to disclose leaky basement; buyers contracted for but waived inspection right; buyers could not recover damages

• Seller, Buyer sign home sale
  – Seller knows home once had termite damage, which had been previously treated
• After closing, Buyer discovers termite damage had recurred. Can Buyer recover damages based on nondisclosure?

Termites: Problem 5

Must Seller Disclose Problems that Were “Fixed”?
• Weight of authority: Seller does not have to disclose prior damage that has been fixed, if Seller relied on assurance from contractor that condition has been fixed, and doesn’t know/ have reason to know of new problems
• Should disclosure duty extend to “psychic” defects (e.g., house was scene of murder)?
• Should disclosure duty extend to “off-site” defects? (e.g., nearby sex offender)

Disclosure

• Some decisions have required Sellers to disclose latent “psychic” defects that materially affect land’s value
  – E.g., Reed v. King (Cal. 1983) (home was location of multiple homicide)
  – E.g., Stambovsky v. Ackley (N.Y. 1991) (home reputed to be haunted)

• Other courts have been reluctant to extend duty to disclose beyond the premises, or to “nonphysical” defects
  – May render Seller’s land effectively unsellable
  – Parameters unclear (how far does duty extend)?
  – Buyer’s subjective preferences might be rational (“reasonable”) and yet hard for a seller to be able to predict or anticipate
  – Buyers should signal to Sellers what information is important to Buyers, by asking specific Qs

Missouri Disclosure Statute

• Fact that land is “psychologically impacted real property,” or in close proximity to such land, “shall not be a material or substantial fact that is required to be disclosed” [RSMo. § 442.600(1)]
  – “Psychologically impacted” includes land that was site of homicide or other felony, suicide, or that was occupied by someone with HIV/AIDS
Implied Warranty of Quality

- Builder-seller of a **new home** impliedly warrants home’s structural soundness and its fitness for use as a residence
- Coverage varies by state:
  - In some states, warranty covers only major structural defects [note 1, p. 186]
  - In others, it covers any part of home that “has a functional purpose that directly benefits the home” or “plays an integral role in the enjoyment of the home” (e.g., defective landscape retaining wall violated warranty, *Hershewe v. Perkins*, 102 S.W.3d 73 (Mo. App. 2003))

Implied Warranty: Rationales

- Buyers can’t realistically inspect new home under construction
- Buyers rely upon expertise of builder re: quality of materials and construction
- New homes more analogous to goods (which have long been subject to Article 2 warranties)

Problem 7

- MO case law limits implied warranty to original buyer (doesn’t run w/land) [p. 180, fn. 10]
- In this sensible?
  - Risk allocation is essentially the same for the builder, whether or not the warranty “runs”
  - Trend in other states is in the other direction [fn. 11, p. 181], builder held liable to remote buyer for IWQ violation, despite lack of privity

Problem 8

- Suppose contract in *Speight* had stated “Builder expressly warrants the home, as to materials and workmanship, for a period of 2 years, in lieu of any other warranty, express or implied.”
- Is this a valid waiver of IWQ?
Waiver/Replacement of IWQ?

- Agreement would/could substantially shorten Builder’s time exposure (e.g., 2 year express warranty vs. 6 year IWQ)
- Would/could narrow scope of covered risks
  - Case law is mixed, but OK in MO (Crawford)

Express Warranties and Merger

- Even if K made an express warranty of quality, the “merger” rule sometimes prevented buyer from enforcing that warranty after closing
  - Merger doctrine: at closing, all covenants in the contract are “merged” into the deed
  - Thereafter, buyer can only enforce covenants expressed in the deed (and most deed covenants only address title quality)

Commercial Transactions

- No implied warranty of fitness
  - Courts continue to apply caveat emptor
  - Commercial buyers perceived capable of evaluating risk, contracting for protection
- Duty of disclosure has not been extended to commercial transactions
- Thus, in Problem 2, L&M, LP likely cannot recover from Seller either in contract or in tort, absent (a) express warranty or (b) affirmative misrepresentation
Problem 3

- Same as Problem 2, but assume Buyer discovers asbestos before closing
- Buyer purports to rescind, demands return of deposit
- Can Seller enforce the contract? Is the problem different when it arises before closing?

- Express inspection contingency may permit Buyer to withdraw due to presence of asbestos
- Representations/warranties
  - Representations: statements of fact material to Buyer (basis of the bargain)
  - If K represented no asbestos was present, Buyer could rescind (but an unqualified representation is unlikely; Buyer likely to limit such a representation to “Buyer’s knowledge”)