NOTES

The State of Caveat Emptor in Alaska as it Applies to Real Property

This Note looks at the impact that statutes and cases have had on the doctrine of caveat emptor in Alaska as it has been applied to sales of real property over the past twenty years. After examining the history of the doctrine, the Note discusses several Alaska Supreme Court cases involving disclosure requirements, Alaska's mandatory disclosure law, the Uniform Land Sales Practices Act and the use of implied warranties, all of which weaken the doctrine's impact on sales of real property. The Note then looks at two cases recently decided by the Alaska Supreme Court, State v. Carpenter and Stormont v. Astoria Ltd. These cases could signal a change in the supreme court's treatment of the doctrine of caveat emptor, especially when compared to the earlier decisions involving disclosure requirements. Finally, the Note concludes that although the doctrine of caveat emptor no longer applies to sales of residential real estate, it is still applicable to sales of commercial real estate. The Note recommends that the doctrine of caveat emptor only be applied when the purchaser of commercial real estate is an experienced and knowledgeable business person who has the ability to protect his or her interests.

I. INTRODUCTION

"Caveat emptor, qui ignorantia non debuit quod jus alienum emit." This Latin phrase, translated as "let the buyer beware, who ought not be ignorant of the amount and nature of the interest which he is about to buy, exercise caution," first appeared on signs in ancient Roman markets. As recently as 1960, hornbook law considered the doctrine of caveat emptor applicable to the sale of real estate. However, statutes and cases have weakened the doctrine's impact over the past twenty years. The Note examines the history of the doctrine and discusses several Alaska Supreme Court cases involving disclosure requirements, Alaska's mandatory disclosure law, the Uniform Land Sales Practices Act, and the use of implied warranties. These cases weaken the doctrine's impact on sales of real property.

The Note then looks at two cases recently decided by the Alaska Supreme Court, State v. Carpenter and Stormont v. Astoria Ltd. These cases could signal a change in the supreme court's treatment of the doctrine of caveat emptor, especially when compared to the earlier decisions involving disclosure requirements. Finally, the Note concludes that the doctrine of caveat emptor only be applied when the purchaser of commercial real estate is an experienced and knowledgeable business person who has the ability to protect his or her interests.

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of real estate. However, in more recent years, the doctrine has begun to erode in many states, including Alaska.

After briefly examining the history of caveat emptor in Part II, this Note will discuss the state of caveat emptor in Alaska today. Sub-part A of Part III will examine the seller's duty of disclosure. While a vendor originally had no duty of disclosure, this view has been abandoned in recent years. This sub-part of the Note will review several Alaska Supreme Court cases that dealt with the issue of disclosure and helped lead to the passage of a mandatory disclosure law in Alaska. Sub-part B of Part III will discuss Alaska's mandatory disclosure law, looking at why the law was enacted, to whom it applies and the effect it has had on the doctrine of caveat emptor. Sub-part C of Part III will examine the Uniform Land Sales Practices Act, which Alaska enacted in 1977. This Sub-part will discuss the various elements of the Act and an interesting side effect of the law. Sub-part D will cover implied warranties. Although the Alaska Supreme Court has accepted the use of implied warranties, two issues still remain: whether these warranties also apply to sales of commercial real estate and whether they can be disclaimed.

Finally, Part IV of this Note will look at two cases recently decided by the Alaska Supreme Court and the possible impact they will have on the doctrine of caveat emptor in Alaska. These cases could signal a change in the court's treatment of the doctrine as it applies to real property. The section recommends that while caveat emptor should not be abandoned entirely in Alaska, it should apply only to purchasers of commercial real estate who, through their knowledge and experience, have the ability to detect and protect themselves from defects.

II. A BRIEF HISTORY OF CAVEAT EMPTOR

The doctrine of caveat emptor as it applies to real estate originated in England during the Middle Ages, a time when agriculture was the sole purpose of land. The doctrine was premised on the purchaser's ability to discover and protect himself from defects in the property through prior inspection, since the quality of the land took precedence over the quality of the

4. ALASKA STAT. §§ 34.70.010-.70.200 (Michie Supp. 1995).
5. Id. §§ 34.55.004-.55.046 (1977).
6. Scheid, supra note 2, at 158.
structures on the land. Furthermore, it was assumed that the vendor and purchaser were of equal bargaining positions and engaged in arm's-length transactions, and that the buyer therefore did not need special protection.

The doctrine of caveat emptor was incorporated into the American common law in the nineteenth century during the industrial revolution. At that time, courts generally refused to interfere with business ventures, often holding that a purchaser must take care of his own interests. While real estate needs had shifted from agrarian to urban, courts still assumed that the vendor and purchaser were operating from equal bargaining positions.

Under the doctrine of caveat emptor, the seller is not required to disclose to the purchaser any facts that might affect the value of the property. In the 1800's, Lord Cairns wrote that "mere nondisclosure of material facts, however morally censurable . . . would in my opinion form no ground for an action in . . . misrepresentation." In addition to following this view, the English and American courts consistently held that no implied warranties existed in the sale of new or used dwellings. Thus, if the purchaser did not obtain an express warranty or show proof of fraud, "the doctrine of caveat emptor precluded the plaintiff's recovery for defects in his home purchased from the defendant builder-vendor."

However, as society grew more complex, courts slowly abandoned the doctrine of caveat emptor, at least in the area of residential real estate. They increasingly imposed stricter disclosure requirements as well as implied warranties in the sale of housing. One reason for this shift is the dramatic change in home-buying

9. Id.
10. Scheid, supra note 2, at 159.
11. Comment, Caveat Vendor — A Trend in the Law of Real Property, 5 DEPAUL L. REV. 263, 264 n.7 (1956); see Barnard v. Kellog, 77 U.S. 383 (1870) (holding that business needs are best served through the use of the doctrine of caveat emptor).
12. Lawrence, supra note 3, at 52.
13. Scheid, supra note 2, at 158.
15. Lawrence, supra note 3, at 50.
practices that occurred after World War II.\textsuperscript{17} As the demand for residential real estate increased, builders began producing houses in mass quantities.\textsuperscript{18} This frequently left buyers unable to closely inspect the real estate for defects prior to purchase.\textsuperscript{19} In addition, the increasing complexity of houses made it more difficult for the buyer to detect hidden defects.\textsuperscript{20} As a result of these changes, the courts were increasingly pressured to abandon the doctrine of caveat emptor.\textsuperscript{21}

The first time an English court refused to apply the doctrine of caveat emptor was in 1931 in the case of \textit{Miller v. Cannon Hill Estates, Ltd.}\textsuperscript{22} The court, by way of dictum, stated that the law presumes an implied warranty of habitability (1) when a home is purchased while still under construction and (2) when the home is so defective as to render it uninhabitable.\textsuperscript{23} Although only dictum, this exception to caveat emptor ultimately became the law in England.\textsuperscript{24}

The rules set out in \textit{Miller} were first adopted by an American court in 1957, in \textit{Vanderschrier v. Aaron}.\textsuperscript{25} The court retained the rule that the house must be unfinished at the time of purchase in order for the warranty of habitability to apply.\textsuperscript{26} The continued distinction between sales of houses still under construction and completed houses was premised on a presumption that the purchaser of a finished home could either inspect the property or bargain for express warranties.\textsuperscript{27}

Colorado became the first state to abandon the distinction between completed and unfinished houses and imply a warranty of habitability in a new home.\textsuperscript{28} The court reasoned

\begin{quote}
[t]hat a different rule should apply to the purchaser of a house which is near completion than would apply to one who purchases a new house seems incongruous. To say that the former may
\end{quote}

\begin{itemize}
\item \textsuperscript{17} Lawrence, \textit{supra} note 3, at 53.
\item \textsuperscript{18} \textit{Id.}
\item \textsuperscript{19} \textit{Id.}
\item \textsuperscript{20} Powell & Mallor, \textit{supra} note 7, at 310.
\item \textsuperscript{21} Fredericks, \textit{supra} note 16, at 512.
\item \textsuperscript{22} 2 K.B. 113 (1931).
\item \textsuperscript{23} \textit{Id.} at 120-21.
\item \textsuperscript{24} Lawrence, \textit{supra} note 3, at 52 (citing Bruce Farms, Inc. v. Coupe, 247 S.E.2d 400 (Va. 1978)).
\item \textsuperscript{25} 140 N.E.2d 819 (Ohio App. 1957).
\item \textsuperscript{26} \textit{Id.} at 821.
\item \textsuperscript{27} Powell & Mallor, \textit{supra} note 7, at 308.
\item \textsuperscript{28} Carpenter v. Donohoe, 388 P.2d 399 (Colo. 1964).
\end{itemize}
rely on an implied warranty and the latter cannot is recognizing a distinction without a reasonable basis for it.29

Over the next decade, most states' courts, including Alaska's,30 followed Colorado and rejected the doctrine of caveat emptor in the sale of homes, replacing it with an implied warranty of habitability or an implied warranty of workmanlike construction.31

In addition to imposing implied warranties in the sale of housing, courts have also adopted stricter disclosure requirements.32 Traditionally, vendors of real estate could not communicate any falsehoods or actively conceal any defects in the property.33 Nevertheless, the law imposed no affirmative duty on sellers to disclose material facts.34 There have always been exceptions to this general rule, however. For example, if the seller chooses to speak about a material fact, he must disclose enough information so as not to mislead the buyer.35 Another exception provides that if a seller makes an assertion that he later learns is incorrect, he has a duty to inform the purchaser of his mistake.36 Where the parties are in a confidential or fiduciary relationship, courts have also made an exception to the traditional rule and required disclosure of all material facts.37

In recent years, many courts have recognized that buyers and sellers of residential property are no longer of equal bargaining positions. This change in the relationship between buyers and sellers frequently leaves buyers unable to protect themselves by inspecting the property or demanding express warranties.38 As a result, the majority of state courts have imposed a duty of disclosure where the seller has knowledge of concealed or latent defects in the property that cannot be discovered with reasonable diligence by the purchaser.39 Like several other states, the Alaska legislature has gone even further by passing a mandatory disclosure law.40

29. Id. at 402.
31. Powell & Mallor, supra note 7, at 309.
32. Scheid, supra note 2, at 161.
34. Id. at 387.
35. Id.
37. Id.
38. Id. at 254.
39. Id. at 255.
40. ALASKA STAT. §§ 34.70.010-.70.200 (Michie Supp. 1995); see infra text
Although the doctrine of caveat emptor as it applies to residential real estate has been greatly eroded in most states, many states still apply the doctrine to sales of commercial real estate. The continued application of the doctrine is based on a presumption that purchasers of commercial property have greater experience and do not need the same protection as residential real estate purchasers. As a result of this presumption, courts often hold a commercial purchaser to a higher standard of diligence in discovering defects than that which is required for residential purchasers. In addition, courts are divided over whether the protection of implied warranties extends to purchasers of commercial property.

III. The State of Caveat Emptor in Alaska: Statutes and Warranties

A. Disclosure Requirement

In 1992, the Alaska Legislature passed a law entitled "Disclosures in Residential Real Property Transfers," which requires the transferor of residential real property to make a written disclosure to the transferee about the condition of the property. This law was passed, in part, as a result of the lobbying effort conducted by the National Association of Realtors ("NAR") in response to various judicial decisions that had held in favor of the buyer of real property on grounds of nondisclosure. Traditionally in Alaska, to recover for defects in the property that were not discovered prior to purchase, a buyer would have to prove intentional misrepresentation or fraud against either the seller or real estate broker. This required a buyer to establish five elements: (1) that the seller (or broker) made a representation to the buyer or failed to disclose a material fact; (2) that the seller/broker must have known the representation to be false; (3) that the seller/broker intended that the buyer rely on the representation;
(4) that the buyer acted in reliance on the representation; and (5) that damages resulted from such reliance.47

The test's requirement that the seller/broker have knowledge of the falsity of the representation was frequently difficult for buyers to prove. As a result, during the 1980s the Alaska Supreme Court retreated from this test and allowed the buyer to recover when the seller/broker made a negligent misrepresentation.48 In addition, Alaska became one of only a few jurisdictions to allow a buyer to have a cause of action against a broker for an innocent misrepresentation.49

In Cousineau v. Walker,50 the Alaska Supreme Court allowed the purchaser of land to rescind the land sale contract as a result of an innocent misrepresentation made by the seller.51 The defendant, Walker, placed a multiple listing for 9.1 acres of land with a realtor.52 The listing stated that the property had 580 feet of highway frontage and a minimum of 80,000 cubic yards of gravel.53 The purchaser, a contractor in the gravel extraction business, became aware of the property when he saw the multiple listing.54 He visited the property in an attempt to determine the lot's road frontage, but was unable to do so because the property was covered with snow.55 Shortly after purchasing the property, the plaintiff learned that there was only 415 feet of highway frontage, not 580 feet.56 Furthermore, the plaintiff discovered that the property contained only 6000 cubic yards of gravel.57 Having already paid $99,000, the plaintiff ceased making payments and the defendant reacquired the property.58 The trial court denied the purchaser rescission and restitution, holding that "the information which allegedly formed the basis of the misrepresentation was not material in the instant transaction, the agreement reached by the parties was valid and does not suffer any taint or defect of misrepresentation."59

49. Wisconsin, Ohio and Minnesota have also allowed recovery for an innocent misrepresentation. Washburn, supra note 33, at 400 n.144.
50. 613 P.2d 608 (Alaska 1980).
51. Id. at 616.
52. Id. at 609.
53. Id.
54. Id. at 610.
55. Id.
56. Id.
57. Id. at 611.
58. Id.
59. Id.
The Alaska Supreme Court reversed the trial court, ruling that three questions must be resolved to determine whether the purchaser is entitled to rescission and restitution on the basis of the seller's misrepresentations: (1) whether the purchaser relied on the statements; (2) whether the statements were material to the transaction; and (3) if so, whether the purchaser's reliance was justified.60

After affirmatively answering questions one and two, the court looked to whether the purchaser was entitled to rely on the seller's misrepresentation. The defendant argued that the plaintiff was an experienced businessman and that therefore the doctrine of caveat emptor precluded recovery.63 The court rejected this, however, noting that

in the area of commercial and consumer goods, the doctrine of caveat emptor has been nearly abolished by the Uniform Commercial Code and imposition of strict products liability. In real property transactions, the doctrine is also rapidly receding . . . .

There is a split of authority regarding a buyer's duty to investigate a vendor's fraudulent statements, but the prevailing trend is toward placing a minimal duty on a buyer.64 The court concluded by holding that "[a] buyer of land, relying on an innocent misrepresentation, is barred from recovery only if the buyer's acts in failing to discover defects were wholly irrational, preposterous, or in bad faith."65

This case is important in several respects. The court could not have been any clearer in signaling its retreat from the doctrine of caveat emptor as it applies to real property. In addition to noting various ways both Alaska and other states have receded from the doctrine, such as through applying implied warranties of merchantability to new home sales,65 and enacting the Uniform Land Sales Practices Act67 and the Uniform Residential Landlord and Tenant Act,68 the court placed only a minimal duty on the buyer to investigate and discover the true facts about the property. Since the original purpose of the doctrine of caveat emptor was to require the buyer to investigate and detect defects in the property

60. Id. at 611-13.
61. Id. at 612.
62. Id. at 613.
63. Id. at 614.
64. Id.
65. Id. at 616.
66. Id. at 614.
67. ALASKA STAT. §§ 34.55.004-.55.046 (Michie 1977).
68. Id. §§ 34.03.010-.03.380 (Michie 1990).
prior to purchasing it,\textsuperscript{69} this was indeed a dramatic abandonment of the doctrine. Perhaps most surprising is that \textit{Cousineau} did not involve residential property or a naive purchaser. Although many courts had been willing to protect residential purchasers, courts had been less willing to afford relief to purchasers of commercial property since they are presumed to be better able to protect themselves.\textsuperscript{70} Nevertheless, the purchaser in \textit{Cousineau} was an "experienced businessm[a]n who frequently bought and sold real estate."\textsuperscript{71} Furthermore, the purchaser's actions "may well have exhibited poor judgment . . . ."\textsuperscript{72} Thus, this case suggests that "in cases of active misrepresentation courts today are more likely to blame the maker of a misrepresentation than the negligent victim."\textsuperscript{73} As a result of \textit{Cousineau}, it appeared that Alaska was moving from caveat emptor to caveat venditor.

In \textit{Bevins v. Ballard},\textsuperscript{74} the Alaska Supreme Court extended \textit{Cousineau} and held not a seller of real estate, but a real estate broker liable for making an innocent misrepresentation.\textsuperscript{75} The sellers of a lot with an unfinished dwelling on it told their real estate broker that the property contained a well capable of supporting the reasonable water needs of the residents of the house.\textsuperscript{76} The broker passed this information on to the purchasers of the lot, who then discovered that the well could not provide sufficient water.\textsuperscript{77} The purchasers sued both the sellers and the real estate broker for misrepresentation, claiming that the broker had a duty to check the well's condition.\textsuperscript{78} The trial court found for the purchasers, and only the real estate broker appealed.\textsuperscript{79}

The Alaska Supreme Court found the real estate broker liable for the innocent misrepresentation.\textsuperscript{80} The court noted that parties to real estate transactions frequently do not deal on equal terms and reasoned that since real estate brokers are licensed professionals, prospective purchasers tend to rely on a broker's representations.\textsuperscript{81} Since a purchaser can rely on an owner's representations,
as in *Cousineau*, they also should be able to rely on the broker’s representations. Otherwise, brokers could “use misleading statements in selling the property, yet remain immune from liability by simply remaining ignorant of the property’s true characteristics.” The court concluded that “a purchaser who relies on a material misrepresentation, even though innocently made, has a cause of action against the broker originating or communicating the misrepresentation.”

*Bevins* not only reaffirmed *Cousineau*, it also shifted the burden to inspect the property further away from the purchaser and onto the real estate broker. The court stated that brokers can protect themselves from liability by investigating the sellers’ statements or by requiring the sellers to sign a statement that the representations made are true and providing for indemnification if they are not. Of course, under the doctrine of caveat emptor, the burden was on the purchaser to determine whether there were any defects in the property and whether the sellers’ statements were correct.

The dissent in *Bevins* recognized the large burden the majority decision placed on real estate brokers: “Allowing an innocent misrepresentation action against the broker in such circumstances is quite close to imposing strict liability. There is no reason to make the broker the ‘insurer’ of the seller’s representation.” This trend of holding real estate brokers liable for sellers’ misrepresentation would eventually lead to the NAR’s endorsement of mandatory disclosure laws.

Despite the apparent willingness of the Alaska Supreme Court to retreat from the doctrine of caveat emptor, it did not abandon the doctrine entirely. While the seller of real property was placed under increased pressure either to disclose material facts about the property or risk liability, this duty was limited to the disclosure of latent defects only. The seller was not required to disclose patent or obvious defects because the purchaser should be able to discover these defects through ordinary inspection and inquiry. Whether a defect is obvious is a question of fact and depends on

82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. See supra notes 6-16 and accompanying text.
88. Scheid, supra note 2, at 155.
89. Powell, supra note 36, at 257.
90. *Id.* at 267.
the particular circumstances of each case. The case *Matthews v. Kincaid* presents a good example.

Matthews listed his apartment building for sale with a real estate agency where he was a broker. The property had no off-street parking, but on the listing agreement, Matthews left the space next to “parking units” blank. Kincaid purchased the building after dealing only with Matthew’s real estate broker. Prior to the purchase, the broker told Kincaid that there was parking at the building next door. The broker then contacted Matthews to clarify the parking situation and Matthews informed her that parking was available on the street for twenty-two out of twenty-four hours a day. There was a dispute over whether the broker told Kincaid this information. After Kincaid purchased the property, she was told not to have tenants park in the lot next door. About a year later, the city closed the street on which the property was located and towed away several of the tenants’ cars. The property was subsequently foreclosed by the holder of the first deed of trust Kincaid had assumed. Kincaid brought suit against Matthews and his broker, seeking damages for fraudulent or negligent misrepresentation that the property contained off-street parking. The jury found for Kincaid, and Matthews appealed, arguing that there was insufficient evidence of fraud or misrepresentation to sustain the jury verdict.

The Alaska Supreme Court set aside the jury verdict and found for Matthews. Since Matthews had made no affirmative misrepresentations, the court stated that in order to prevail in an action for misrepresentation, Kincaid had to prove that Matthews had a duty to disclose certain information and that he failed to disclose that information. The court held that the lack of off-street parking was an obvious fact that an ordinary purchaser would be expected to discover by ordinary inspection and inquiry.

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91. *Id.* at 266.
93. *Id.* at 470.
94. *Id.*
95. *Id.* at 472.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 471.
Therefore, Matthews was not required to disclose this information, and he could not be held liable for his nondisclosure.105

The decision in Matthews indicates the supreme court's unwillingness to abandon caveat emptor entirely. Although the court noted that a seller has a duty to disclose material facts that are concealed or unlikely to be discovered, it refused to require a seller to disclose material facts that are obvious.106

Nevertheless, the decisions in Cousineau, Bevins and Matthews demonstrate the court's dramatic retreat from the application of the doctrine of caveat emptor to real estate sales. The retreat has most clearly affected sellers and brokers. Although sellers and brokers previously had no duty to disclose and would not be held liable for innocent misrepresentations, they now must disclose material facts that would not be obvious to a buyer and will be held liable so long as the buyer's actions in failing to discover the defects were not wholly irrational, preposterous or in bad faith.107

The willingness of the Alaska Supreme Court, as well as other states' courts, to impose liability on real estate brokers for even innocent misrepresentations alarmed members of the NAR.108 Ultimately, a California appellate court decision led the NAR to push for mandatory disclosure legislation.109 In Easton v. Straussburger,110 the California Court of Appeals held that a real estate broker not only has a duty to disclose known material facts, but also has an affirmative duty to inspect the property diligently and disclose to the buyer all facts revealed by the inspection that materially affect the value or desirability of the property.111 Echoing the court's dramatic expansion of real estate brokers' duties, in 1985 California passed the first mandatory disclosure statute.112 Although the California statute is the most comprehensive, sixteen other states, including Alaska, also have adopted disclosure legislation.113

105. Id. at 472.
106. Id. at 471-72.
107. Cousineau, 613 P.2d at 616; Bevins, 655 P.2d at 763.
108. Scheid, supra note 2, at 168-69.
109. Id.
111. Id. at 390.
113. Washburn, supra note 33, at 410.
B. Alaska's Mandatory Disclosure Law

Alaska enacted its mandatory disclosure law on July 14, 1992. As with the other states' disclosure statutes, the Alaska act requires the seller of residential real property to complete and deliver a written disclosure statement in the form established by the state's real estate commission. However, unlike the acts of most other states, the Alaska act does not provide any guidance concerning the categories of information to be disclosed. Also, Alaska is the only state to restrict the statute to single-family dwellings or to two single-family dwellings in one building. In addition, the statute does not apply to the first transfer of property that has never been occupied.

According to the statute, if the purchaser receives the disclosure statement or a material amendment to the statement after the purchaser has made a written offer, the purchaser can terminate the offer by delivering a written notice of termination within three days after the disclosure statement or amendment is delivered in person, or within six days after the disclosure statement or amendment is delivered by mail. However, once the seller discloses the existence of a defect or other condition in the property being sold, the seller is shielded from any liability arising from that defect or condition.

Beyond the right of the buyer to rescind his or her purchase offer, the Alaska statute provides an express remedy for failure to comply with the statute. A person who negligently violates the statute or fails to perform a duty imposed by the statute is liable to the buyer for the amount of actual damages suffered by the buyer as a result of the violation or failure. If the violation or failure was willful, the purchaser may recover up to three times the actual damages suffered. In either case, the court may also award the buyer costs and attorney fees to the extent allowed under the rules of the court. Finally, the statute allows the buyer and seller to

114. ALASKA STAT. §§ 34.70.010-.70.200 (Michie Supp. 1995).
115. Id. § 34.70.010.
116. Id. § 34.70.050; see Washburn, supra note 33, at 425 (Delaware also leaves the content of the disclosure form entirely within the discretion of the appropriate regulatory body).
117. ALASKA STAT. § 34.70.200 (3).
118. Id. § 34.70.120.
119. Id. § 34.70.020.
120. Id. § 34.70.030.
121. Id. § 34.70.090(b).
122. Id. § 34.70.090(c).
123. Id. § 34.70.090(d).
waive the applicability of the statute to the property sale by agreeing to do so in writing.\textsuperscript{124}

In effect, the Alaska disclosure statute codifies the common law approach to disclosure requirements. For example, the statute follows the holding in Cousineau requiring the seller to disclose to the buyer all material facts about the property.\textsuperscript{125} However, in a departure from the common law, the statute eliminates the distinction between latent and patent defects that was at issue in Matthews.\textsuperscript{126} Instead, the statute requires all material facts to be disclosed, not just the ones that the buyer could not discover by inspection. Furthermore, the statute relieves real estate brokers from the responsibility of inspecting the property themselves, so agents are shielded from the liability that the court imposed in Bevins.\textsuperscript{127}

It must be noted, however, that the disclosure statute applies only to residential property, not to commercial transactions. Thus, commercial purchasers must still inspect the property for obvious defects before they can recover damages. While caveat emptor has for the most part been extinguished for residential purchasers, it still remains, in part, a viable doctrine for commercial real property.

C. Uniform Land Sales Practices Act

Although most commercial real property is still subject to the doctrine of caveat emptor in Alaska, the passage of the Uniform Land Sales Practices Act\textsuperscript{128} in Alaska in 1977 nullified the use of the doctrine as it applied to certain forms of subdivided property.

The real estate boom of the last three decades caused property development to flourish all over the United States.\textsuperscript{129} Unfortunately, this period also saw the rise of fraudulent developers who sold worthless property, as well as well-intentioned developers who lacked sufficient capital or managerial skills to complete development projects and deliver the developed land as promised.\textsuperscript{130} As a result, innocent purchasers were spending large sums of money to purchase real estate that was either worthless or that would never be developed as planned.\textsuperscript{131}

\begin{thebibliography}{99}
\bibitem{124} Id. § 34.70.110.
\bibitem{125} Cousineau v. Walker, 613 P.2d 608, 616 (Alaska 1980).
\bibitem{128} ALASKA STAT. §§ 34.55.004-.55.046 (Michie 1977).
\bibitem{130} Id.
\bibitem{131} Id.
\end{thebibliography}
In response to these abuses, federal and state regulation was enacted to regulate the land sales industry. Congress passed the Interstate Land Sales Full Disclosure Act, as Title XIV of the Housing and Urban Development Act of 1968. At the same time, the National Conference of Commissioners on Uniform State Laws met to draft a Uniform Land Sales Practices Act, which was approved in 1967. Alaska adopted this Uniform Act in 1977. The purpose of both acts is to protect purchasers by placing them in an equal bargaining position with developers through registration, disclosure and antifraud requirements.

The Alaska Land Sales Act applies to any subdivided land that is located in the state. The Act also applies if the subdivider's principle office is located in Alaska, or if an offer or disposition of subdivided land is made in the state. Thus, the Act may apply even if the subdivided land is located in another state. If, for example, a developer with subdivided land in New York contacts a purchaser in Alaska about buying a lot, the Act will apply.

For the purposes of the Act, a "subdivision" or "subdivided land" is land that is divided or is proposed to be divided for the purpose of disposition into two or more lots, parcels, units or interests. It also includes any land that is offered as a part of a common promotional plan of advertising and sale, regardless of the number of lots. Disposition is defined as including the sale, lease, assignment, award by lottery, or any other transaction concerning a subdivision, if undertaken for sale or profit. Thus, the Act's jurisdiction is relatively broad, especially when compared to the jurisdictions established by some of the other states that have adopted variations of the Land Sales Act. For example, the Kansas Land Sales Act applies only to land that is divided into fifty or more lots.

There are several exceptions to the Act, however. For example, the registration provisions of the Act do not apply if fewer than ten separate lots located outside the state are offered by a subdivider during a year, or if fewer than fifty separate lots

135. ALASKA STAT. §§ 34.55.004-.55.046 (Michie 1977).
137. ALASKA STAT. § 34.55.032(3).
138. Id. § 34.55.032 (1), (2).
139. Id. § 34.55.044 (7).
140. Id.
141. Id. § 34.55.044 (2).
142. KAN. STAT. ANN. § 58-3301(6) (West 1994).
located in the state are offered during a year. The registration provisions also do not apply if the land contains a residential, commercial or industrial building, or where the builder is legally obligated to construct such a building within one year from the date of disposition. In addition, the land is exempt if it would be exempt under the federal Interstate Land Sales Full Disclosure Act.

The Alaska Land Sales Act has registration and disclosure requirements as well as antifraud provisions. The Act prohibits persons from employing a device, scheme or artifice to defraud, from making an untrue statement of material fact, or from omitting a statement of material fact that would be necessary to make statements not misleading. The Act also requires the registration of subdivided land before it can be sold and the delivery of a "public offering" statement to the purchaser before the disposition. The public offering statement "must disclose fully and accurately the physical characteristics of the subdivided land offered and must make known to prospective purchasers all unusual and material circumstances or features affecting the subdivided land." Thus, the Act is similar to the mandatory disclosure law but applies to subdivided land rather than residential real property transfers.

Under the Land Sales Act, if a person were willfully to violate the statute, he or she would be subject to a fine of not more than $50,000, imprisonment for not less than one year nor more than five years, or both a fine and imprisonment. The Act also provides for a civil remedy. A person who disposes of subdivided land in violation of the Act is liable to the purchaser unless, in the case of an untruth or omission, one of the following can be proved: (1) that the purchaser knew of the untruth or omission or (2) that the seller did not know, and in the exercise of reasonable care could not have known, of the untruth or omission. If the Act

143. ALASKA STAT. § 34.55.042(a)(2) (Michie 1977).
144. Id. § 34.55.042(a)(3).
145. Id. § 34.55.042(a)(8).
146. Id. § 34.55.006 (1), (2).
147. Id. § 34.55.008 (1), (2). The registration requirements are listed in § 34.55.010 (1)-(15). The contents of the public offering statement are listed in § 34.55.012 (1)-(6).
148. Id. § 34.55.012(a).
149. Id. § 34.70.010 (Michie Supp. 1995).
150. Id. § 34.55.028.
151. Id. § 34.55.030(a).
is violated, the purchaser may recover the consideration paid for
the lot together with interest and reasonable attorney fees. 152

As discussed, the purpose of the Land Sales Act is to protect
the purchaser of subdivided land. 153 However, the Act can also
serve to protect the seller of subdivided land. This is what
occurred in the Alaska Supreme Court case Stepanov v. Gavril-
ovich. 154

The defendants, the Gavrilovichs, purchased forty-four acres
of unimproved land in Anchorage in 1967. 155 They subdivided
the land into one hundred and fifty residential building lots and
conducted soil tests to ensure that the land was suitable to
construct housing. 156 The presence of permafrost was not expect-
ed, nor was it revealed by any of the tests performed. 157 In 1970,
various contractors purchased the lots and constructed single family
homes on them. 158 In 1971, the houses began to subside and
additional soil testing revealed scattered areas of permafrost. 159
The contractors sued the defendants, alleging breach of an implied
warranty of fitness and strict liability. 160 The trial court found for
the defendants, and the contractors appealed. 161 The Alaska
Supreme Court held that under the Alaska Land Sales Practices
Act, the defendants could not be held liable. 162

The court reasoned that permafrost is an important physical
characteristic and one of the material features affecting the
subdivided land. 163 Thus, the failure to disclose the presence of
permafrost in the public offering statement can result in civil
liability under the Act. 164 However, under the Act, such liability
does not attach if the seller of the land did not know, and in the
exercise of reasonable care could not have known, of the omissions
165 Since the defendants conducted soil tests, the court held
that they "did not know and in the exercise of reasonable care

152. Id. § 34.55.030(b).
153. See supra note 132-36 and accompanying text.
155. Id. at 32.
156. Id.
157. Id.
158. Id.
159. Id.
160. Id.
161. Id. at 33.
162. Id.
163. Id.
164. Id.
165. Id.
could not have known of the presence of permafrost." Therefore, under the Act, the defendants were exempt from liability.

While the legislature's purpose in enacting the Land Sales Act was to impose a system of controls on the activities of large scale subdividers, the Act also shields subdividers from liability for defects that cannot be detected with reasonable care. The Act is therefore similar to the Residential Disclosure Act, which was enacted to protect residential purchasers but also has the effect of protecting real estate brokers.

The mandatory disclosure law and the Land Sales Practices Act have significantly reduced the application of caveat emptor to the sale of real property. Both Acts mandate clear disclosure requirements and provide remedies for purchasers if the seller is aware, or should be aware, of defects in the land. No longer is the purchaser required to conduct in-depth inspections of property or risk bearing the burden of any defects in the property. However, these Acts are limited to specific forms of real estate and do contain several exceptions. As a result, caveat emptor may still apply to certain forms of real estate.

D. Implied Warranties

Aside from the two statutes enacted by the legislature, the application of caveat emptor in Alaska has also declined as a result of the supreme court's imposition of implied warranties to the sale of real property. An implied warranty of habitability is an extracontractual duty placed on those in the business of building or selling real property. The warranty requires that the property sold comply with community standards of workmanlike construction and be fit for human habitation. As previously discussed, while courts in the United States initially refused to impose implied warranties to the sale of real property, today almost all states' courts, including Alaska, will impose an implied warranty, at least to the sale of residential property.

The Alaska Supreme Court noted in a 1975 decision that

166. Id. at 35.
167. Id.
168. Id.
169. ALASKA STAT. §§ 34.70.010-70.200 (Michie Supp. 1995).
170. Powell & Mallor, supra note 7, at 312.
171. Id.
172. See supra notes 17-31 and accompanying text.
it is well settled that, in building or construction contracts whenever someone holds himself out to be specifically qualified to do a particular type of work, there is an implied warranty that the work will be done in a workmanlike manner, and that the resulting building, product, etc. will be reasonably fit for its intended use.\textsuperscript{174}

Thus, home purchasers can recover for unreasonable defects under a breach of implied warranty in Alaska.

However, two issues remain in Alaska with regard to implied warranties. First, whether implied warranties apply to commercial real estate, and, second, whether implied warranties can be disclaimed by the builder-vendor. Two recent cases decided by the Alaska Supreme Court suggest that implied warranties are less likely to be enforced in connection with commercial property, and that the court will uphold such disclaimers.\textsuperscript{175} These cases and their impact will be discussed in Part IV.

1. Commercial Property The Alaska courts have not specifically dealt with the issue of whether implied warranties should extend to the sale of commercial real property, and commentators and other states' courts remain divided. Since implied warranties are an exception to caveat emptor created to accommodate home purchasers who cannot deal at arm's length with builder-vendors, some commentators argue that it would not make sense to extend this exception to commercial purchasers who generally deal at arm's length.\textsuperscript{176} The argument in favor of imposing implied warranties to sales of commercial property is that while buyers of commercial property might have more experience than residential home purchasers, the builder-vendor still has superior knowledge about the construction, and is in a better position to avoid and detect defects in the structure.\textsuperscript{177} According to this view, there is little reason to place the burden on a purchaser, even if experienced, for defects caused by an equally sophisticated builder-vendor.\textsuperscript{178}

State courts, like commentators, are also divided over whether implied warranties should extend to commercial real property.

\begin{enumerate}
\item \textsuperscript{174} J.R. Lewis v. Anchorage Asphalt Paving Co., 535 P.2d 1188, 1196 (Alaska 1975); see also Alaska Pac. Assurance Co. v. Collins, 794 P.2d 936, 941 (Alaska 1990) (holding that a purchaser of a home that was damaged as a result of permafrost could recover for a breach of an implied warranty of habitability).
\item \textsuperscript{176} Brown, \textit{supra} note 173, at 751.
\item \textsuperscript{177} Powell & Mallor, \textit{supra} note 7, at 331-32.
\item \textsuperscript{178} Id.
Several courts have refused to impose warranties on the basis that implied warranties are designed to protect only the relatively inexperienced residential purchaser, not those purchasing for investment purposes. People purchasing property for investment purposes are presumed to "[have] ample opportunity to investigate, study, appraise and assess the relative merits and demerits of the subject matter and then to make a calculated judgment about how profitable it will be." 

In contrast, other courts have held that implied warranties should be extended to commercial purchasers. For example, the California Supreme Court, in Pollard v. Saxe & Yolles Development Co., made no distinction between residential and commercial property when stating that builder-vendors should be held to their implied representation "that the completed structure was designed and constructed in a reasonably workmanlike manner." Similarly, the New Jersey appellate court, in Hodgson v. Chin, held that the application of implied warranties to the sale of a commercial building was a logical extension of the precedents creating the warranty in sales of residential structures.

Thus, whether courts are willing to extend implied warranties to the sale of commercial real property depends upon their view of the commercial purchaser. If the commercial purchaser is seen as a sophisticated investor easily able to protect himself, the warranty will not be extended. However, if the court views a commercial purchaser's ability to protect himself as not much greater than that of a residential purchaser, the warranty will be extended.

2. Disclaimers Since most states' courts recognize an implied warranty of habitability, at least as applied to the sale of residential real property, a question arises over whether these warranties can be disclaimed by the builder-vendor. Although courts do not look favorably upon disclaimers, courts seem to agree that disclaimers of implied warranties are not contrary to public policy. Courts

180. Hopkins, 427 N.E.2d at 1339.
182. Id. at 91.
184. Id. at 945.
185. Powell & Mallor, supra note 7, at 327.
do not agree, however, on what constitutes an adequate disclaimer. Few courts have enforced "boiler plate" disclaimers or generally worded disclaimers containing the phrases "as is" or "in its present condition." Most courts have required that disclaimers be specific and conspicuous and have required a showing that the buyer knew and understood the meaning of the disclaimer. Just as they do when evaluating the validity of an implied warranty, courts will consider the experience of the purchaser and whether the property involved is commercial in nature.

IV. THE STATE OF CAVEAT EMPTOR IN ALASKA: THE RECENT CASES AND THEIR IMPACT

Two cases recently decided by the Alaska Supreme Court could signal a change in the application of the doctrine of caveat emptor to sales of real property. These cases suggest that the court will continue to distinguish between commercial property and residential property and that the court will not only enforce disclaimers, but will also enforce "as is" disclaimers.

A. The Cases

The first of these cases, State v. Carpenter, was decided in 1994. In 1978, and again in 1981, Carpenter purchased agricultural land from the Division of Lands of the Department of Natural Resources (the "DNR"). Both of the land sale contracts contained a disclaimer of any guarantee of profitability as well as the following disclaimer:

The seller makes no warranty, express or implied, nor assumes any liability whatsoever, regarding the social, economic, or environmental aspects of the [p]arcel, to include, without limitation, the soil conditions, water drainage, or natural or artificial hazards.

In addition, the contracts required Carpenter to improve and develop the land as a working farm. In 1980 and 1983, Carpenter borrowed money from the Agricultural Revolving Loan Fund (the "ARLF"), a state agency within the DNR that lent money to

187. Powell & Mallor, supra note 7, at 315.
188. Id.
189. Id.; Lytle, supra note 186, at 682.
190. Powell & Mallor, supra note 7, at 316.
192. Carpenter, 869 P.2d at 1182.
193. Id.
194. Id.
farmers to help them develop their land. After repeated unsuccessful attempts to plant, Carpenter abandoned the land in 1987 and it was reclassified as unsuitable for agriculture. At this point, Carpenter ceased making payments toward his ARLF loans. The ARLF filed suit, and Carpenter claimed he was excused from performing under the contracts. The jury found that Carpenter was excused from his duty to repay the loans because of mutual mistake, commercial impracticability and misrepresentation. The state appealed.

The Alaska Supreme Court reversed, holding that there was no mutual mistake of fact because the disclaimer in the land sale contract demonstrated that Carpenter was consciously uncertain about the character of the land and, as a result of the disclaimer, bore the risk of the condition of the land. The court also held that there was no commercial impracticability as a result of the disclaimers in the contract. According to the court, the disclaimers made it clear that the problems with the soil were not unanticipated by Carpenter. Since Carpenter bore the risk of the condition of the land, he could not recover on the grounds of commercial impracticability. Finally, the court held that the state did not make a misrepresentation about the suitability of the land. The court stated that “[Carpenter’s] contention that he was justified in believing that the [s]tate would not sell land and make agricultural loans if the land was not suitable for agricultural development is without merit, considering the specific disclaimers in the land sales contracts.”

The decision in Carpenter shows the court’s willingness to enforce disclaimers in land sales contracts. Despite the fact that Carpenter purchased the land and took out loans from the state for the express purpose of farming the land, Carpenter bore all the risk solely as a result of the disclaimers. The court did not discuss whether Carpenter was an experienced businessman or whether he was made aware of the likely effect of the disclaimers. The court also did not discuss the fact that the disclaimers were “boilerplate.”

195. Id.
196. Id.
197. Id.
198. Id.
199. Id.
200. Id. at 1183.
201. Id.
202. Id. at 1184.
203. Id.
204. Id. at 1185.
205. Id.
Compared to the decisions of other states' courts, the Alaska court appears to be taking a more hardline approach to the enforcement of disclaimers.\textsuperscript{206} 

\textit{Stormont v. Astoria Ltd.},\textsuperscript{207} decided in 1995, is the second decision recently handed down by the Alaska Supreme Court involving the doctrine of caveat emptor. Stormont signed a lease with an option to purchase real property, including an eleven-unit apartment complex, from Astoria Ltd. in April 1992.\textsuperscript{208} Both the lease and option contained "as is" disclaimers.\textsuperscript{209} The option also contained a section stating that the purchaser assumed the risk that all or part of the real property may be inadequate, inappropriate or unusable for the purposes intended by the purchaser.\textsuperscript{210} The section further noted that the purchaser must make a thorough and careful inspection of the property.\textsuperscript{211} It was obvious upon inspection that the apartment building was badly deteriorated and required extensive repair to be habitable.\textsuperscript{212} After Stormont had begun repairing the building, the City of Fairbanks notified Stormont that the apartment complex would be demolished.\textsuperscript{213} The city's condemnation came as a surprise to both Stormont and Astoria.\textsuperscript{214} Stormont then filed suit against Astoria, asking damages for, \textit{inter alia}, mutual mistake of fact and frustration of purpose.\textsuperscript{215} 

The supreme court found in favor of Astoria Ltd., ruling that there was no mutual mistake of fact because Stormont bore the risk of a mistake as to the condition of the building.\textsuperscript{216} The court's finding that Stormont bore the risk was based on three factors: (1) the contract contained an "as is" disclaimer; (2) Stormont had opportunities to inspect the property; and (3) Stormont was an experienced contractor.\textsuperscript{217} These factors also caused the court to find that there was no frustration of purpose.\textsuperscript{218}

\begin{itemize}
\item \textsuperscript{206} See supra notes 186-90 and accompanying text.
\item \textsuperscript{207} 889 P.2d 1059 (Alaska 1995).
\item \textsuperscript{208} Id. at 1060.
\item \textsuperscript{209} Id.
\item \textsuperscript{210} Id.
\item \textsuperscript{211} Id.
\item \textsuperscript{212} Id.
\item \textsuperscript{213} Id.
\item \textsuperscript{214} Id.
\item \textsuperscript{215} Id. at 1061.
\item \textsuperscript{216} Id. at 1062.
\item \textsuperscript{217} Id. at 1062-63.
\item \textsuperscript{218} Id. at 1063.
\end{itemize}
B. Impact and Analysis of the Recent Cases

The decisions handed down in State v. Carpenter and Stormont v. Astoria Ltd. could signal a change in the Alaska Supreme Court's treatment of caveat emptor as it applies to real property. As noted above, in the early 1980s, the court began to retreat from the doctrine of caveat emptor. With Cousineau v. Walker and Bevins v. Ballard, the court shifted the burden of discovering defects in real property from the purchaser to the seller. The court also was one of the first to hold a seller liable for making innocent misrepresentations about the condition of the property, even if the purchaser was an experienced businessperson. However, the court was not willing to abandon the doctrine of caveat emptor entirely, instead choosing to distinguish between latent and patent defects in Matthews v. Kincaid.

Despite this steady retreat, Carpenter and Stormont now suggest that the court is unwilling to erode the doctrine of caveat emptor any further. In fact, it may seem unclear whether the court is beginning to back away from the earlier decisions. However, when viewed in light of the recent statutes enacted by the Alaska legislature, it does not appear that the court is retreating.

The deciding factor in both Carpenter and Stormont was the presence of disclaimers. The contracts signed by the purchasers in both cases contained "boiler plate" or "as is" disclaimers. The court's decisions were based on the purchaser's assumption of the risk in signing the disclaimers. Thus, these decisions do not represent a retreat from the earlier decisions. None of the earlier cases involved disclaimers; they all dealt with disclosure issues.

It is true that the court is taking a more hard-line approach to the presence of disclaimers than other state courts. As discussed previously, few courts have enforced "boiler plate" or "as is" disclaimers, instead requiring a showing that the purchaser knew and understood the meaning of the disclaimer. After Carpenter and Stormont, however, it appears that in Alaska, if the purchaser

221. 613 P.2d 608 (Alaska 1980).
223. Cousineau, 613 P.2d at 608; see supra notes 64-65 and accompanying text.
225. Carpenter, 869 P.2d at 1182; Stormont, 889 P.2d at 1060.
226. Carpenter, 869 P.2d at 1183; Stormont, 889 P.2d at 1062-63.
227. See supra notes 187-90 and accompanying text.
228. Powell & Mallor, supra note 7, at 315.
signs a contract containing a disclaimer, even if "boiler plate," the purchaser will bear the risk that there is a defect in the property.

Of course, Carpenter and Stormont did not involve residential purchasers. Carpenter involved the purchase of farm land, while Stormont dealt with a commercial purchaser. It is not clear how the court would rule in a case involving disclaimers associated with the sale of residential real estate. Commercial buyers are often viewed as needing less protection than residential buyers, since commercial buyers are considered to be more sophisticated and knowledgeable. The Alaska legislature has also distinguished between commercial and residential purchasers, exempting sales of commercial real estate from Alaska's mandatory disclosure statute. Since residential purchasers have traditionally been given greater protection, both by the court and the legislature, it is unlikely that the court would uphold a "boiler plate" disclaimer in a sale of residential property.

However, the distinction drawn between commercial and residential purchasers does represent a change from the earlier cases. Cousineau implied that the court would not make the residential-commercial distinction, since the test created by the court to determine liability for misrepresentation simply referred to "buyers of land," not just "residential purchasers." In contrast, Stormont indicates that such a distinction must be made, so that buyers of commercial property will be held to stricter standards than purchasers of residential property. The Stormont court notes that the purchaser was an experienced contractor and that this weighed against him. In Cousineau, the purchaser was also an experienced businessman, but the court found his reliance reasonable nonetheless.

Making a distinction between residential and commercial purchasers might appear to be a significant retreat by the court. However, the court may simply be following the path of the Alaska legislature, which chose to exclude commercial purchasers from the mandatory disclosure law. The disclosure law was enacted after the court's decision in Cousineau, so it is not surprising that the court has now changed its opinion. In future cases, the court probably will take the purchaser's experience and knowledge into consideration.

229. See supra notes 176-85 and accompanying text.
230. ALASKA STAT. §§ 34.70.010-.70.200 (Michie Supp. 1995).
231. Cousineau, 613 P.2d at 616.
232. Stormont, 889 P.2d at 1062.
233. Cousineau, 613 P.2d at 613.
Taking the purchaser's experience into consideration is sensible in light of the historical purpose of caveat emptor. The doctrine of caveat emptor was premised on the theory that buyer and seller were of equal bargaining positions and that the purchaser had the ability to discover and protect himself from defects. If the purchaser had the knowledge and ability to discover defects, it was unfair to place all the risk with the seller. As housing practices changed and became more complex, residential purchasers no longer had the sophistication and experience needed to discover defects, and strict application of the doctrine began to make less sense. Both the Alaska Supreme Court and the legislature recognized the unfairness of caveat emptor and responded: the court in its decisions in Cousineau and Bevins, and the legislature through its passage of the mandatory disclosure law and similar statutes. This protection of residential purchasers eliminated the unfairness inherent in the doctrine of caveat emptor. However, since many commercial purchasers maintain the knowledge and ability to discover defects, the doctrine still has some value with regard to the sale of commercial property. Following the lead of the legislature, which chose to exclude commercial purchasers from the protection of the mandatory disclosure law, the Alaska Supreme Court has declined to abandon caveat emptor and instead chose to maintain it as a viable doctrine as it applies to sales of commercial real estate.

This extension makes sense only if it is limited to commercial purchasers who have the experience needed to protect themselves. If the court extends the doctrine to all commercial purchasers, regardless of their sophistication or knowledge, the doctrine once again becomes too harsh. The best approach is a case-by-case determination of whether the buyers have sufficient experience to warrant the imposition of the doctrine. Yet it is unclear whether the court is making case-by-case determinations. Although the buyer's experience was considered in Stormont, no mention of the level of experience of the buyer was made in Carpenter. According to the court, the fact that a disclaimer was present in the contract was sufficient to place the risk of a defect with the buyer.

Apart from examining the impact Stormont has had on the doctrine of caveat emptor, there is another interesting aspect of the decision that should be examined. A footnote in the Stormont

234. See supra notes 7-9 and accompanying text.
235. 889 P.2d at 1063.
237. Id. at 1183.
opinion seems to contradict a statement made in Cousineau. In footnote five of Stormont, the court states that "[u]nlike . . . the sale of goods, however, real property law has largely remained sympathetic to caveat emptor."²³⁸ This statement is in marked contrast to the opinion in Cousineau, where the court wrote "[i]n real property transactions, the doctrine [of caveat emptor] is . . . rapidly receding."²³⁹ Thus, while in 1980 the court felt that caveat emptor was declining in importance as applied to real property transactions, in 1995 it was saying that caveat emptor is still an important doctrine. Does the conflicting opinion in Stormont signal a dramatic reversal for the court? The answer is no.

In analyzing the two statements, it is necessary to consider the years the two decisions were handed down, and the state of the doctrine of caveat emptor at those times. As discussed,²⁴⁰ caveat emptor was the guiding doctrine in sales of real property until after World War II. It was not until the 1960's that courts began to impose implied warranties and apply stricter disclosure requirements. Thus, between the 1960's and the 1980's, when Cousineau was decided, the doctrine of caveat emptor was rapidly receding in sales of real property. In that short time span, caveat emptor was severely restricted, especially for sales of residential property. By the time of Stormont, the state of the doctrine as applied to real property had largely been settled by the Alaska legislature. The passage of the mandatory disclosure law basically eliminated the doctrine from sales of residential property, and the Alaska Land Sales Act²⁴¹ extended protection to the purchasers of subdivided property.²⁴² However, the legislature chose not to extend protection to most other commercial purchasers. The decision by the legislature not to extend protection to commercial buyers is probably what the court had in mind when it stated that "real property law has largely remained sympathetic to caveat emptor."²⁴³

Thus, in this sense, the statements in Cousineau and Stormont are compatible. Caveat emptor had rapidly receded from its original application. Purchasers were protected by implied warranties, anti-fraud provisions and disclosure requirements. However, caveat emptor was not abandoned entirely, as it still applied to sales of certain commercial real estate. Perhaps the

²³⁸ Stormont, 889 P.2d at 1062 n.5.
²³⁹ 613 P.2d at 614.
²⁴⁰ See supra notes 10-21 and accompanying text.
²⁴¹ ALASKA STAT. §§ 34.55.004-.55.046 (Michie 1990).
²⁴² See supra notes 128-49 and accompanying text.
²⁴³ Stormont, 889 P.2d at 1962 n.5.
Stormont court overstated the sympathy for the doctrine; a great deal of the doctrine of caveat emptor has been eroded. However, the doctrine is still a force as applied to commercial purchasers and because of this, the law has remained "somewhat sympathetic" to the doctrine of caveat emptor.

V. CONCLUSION

The state of caveat emptor as it applies to real property in Alaska has thus largely been settled, notwithstanding the recent cases of State v. Carpenter244 and Stormont v. Astoria Ltd.245 For the most part, the doctrine no longer applies to sales of residential property. Residential purchasers are protected by Alaska's mandatory disclosure law as well by implied warranties. Although the court has not yet ruled on whether a builder can disclaim an implied warranty, it seems likely that the court would protect a residential purchaser from such disclaimers.

On the other hand, caveat emptor still largely applies to sales of commercial real estate. Sellers of commercial real estate still have the obligation to disclose material defects to the purchaser because the court has not overturned its decision in Cousineau v. Walker.246 However, the court's recent decisions imply that a seller of commercial property can disclaim implied warranties, even through "boiler plate" and "as is" disclaimers, and that the purchaser will bear the risk of any unknown defects.

The recent cases do not make it clear, though, whether these "boiler plate" disclaimers will be effective against all commercial purchasers or only knowledgeable and experienced purchasers. In keeping with the original purpose of the doctrine of caveat emptor, the court should uphold only disclaimers against experienced purchasers who have the ability to protect themselves. The doctrine was intended to force a purchaser to protect him or herself. If a purchaser is unable to do so, the application of caveat emptor ceases to make sense.

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244. 869 P.2d 1181 (Alaska 1994).
246. 613 P.2d 608 (Alaska 1980).