

STRIKING DOWN THE IMPERVIOUS SHIELDS: WHY *CAVEAT EMPTOR* MUST BE ABANDONED IN COMMERCIAL REAL PROPERTY SALES AND LEASES

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In Florida, *caveat emptor* no longer applies to residential real property leases or to new or used residential real property sales, yet the doctrine persists in commercial real property leases and sales.¹ The Florida Supreme Court's failure to abandon the *caveat emptor* doctrine and impose a duty to disclose on lessors and sellers in commercial real property leases and sales transactions is harmful to prospective purchasers and lessees. Holding property purchasers and lessees to a different standard depending on the land use categorization of the property harms these parties by affording them less protection, and doing so is not grounded in any legitimate justification. Accordingly, this Article both sets forth reasons for why the ancient *caveat emptor* doctrine must be eradicated from commercial real property transactions and provides an alternative solution that will afford more protection to purchasers in certain real property transactions.

I. INTRODUCTION

In an episode from the famous sitcom *Seinfeld*,² Jerry Seinfeld observes an agreement in his apartment between Kramer and Newman, both of whom have agreed that Kramer will trade his

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1. *Haskell Co. v. Lane Co.*, 612 So. 2d 669, 674 (Fla. 1st Dist. Ct. App. 1993).

2. The successful 1990s series received roughly 76 million viewers during its peak and is credited with revolutionizing networks' approach to sitcoms. Daniel Bettridge, *Why Seinfeld Is Still Master of Its Domain*, THE WEEK (July 2, 2014), <http://theweek.com/articles/445703/why-seinfeld-still-master-domain>.

radar detector for Newman's helmet.³ As soon as Newman leaves Jerry's apartment, Kramer admits to Jerry that the radar detector is defective.⁴ Scenes later, Newman comes scurrying back to Jerry's apartment, informing Jerry and Kramer with his all-too-familiar excitement and agitation that the police had pulled him over on the Palisades Parkway because the radar detector had failed to operate.⁵ Newman demands that Kramer return his helmet, but Kramer refuses to do so since they had a deal.⁶ Newman, knowing that Jerry observed the deal, appeals to him to invalidate the agreement, but Jerry throws up his hands and proclaims, "buyer beware!"⁷

Whether our neurotic New York friends realized it or not, Jerry's "buyer beware" statement references one of the most well-known legal doctrines: *caveat emptor*. This simple phrase, which is loosely translated to "let the buyer beware,"⁸ persists throughout American legal jurisprudence. The full Latin maxim reads: "*Caveat emptor, qui ignorare non debuit quod jus alienum emit.*"⁹ Under the *caveat emptor* doctrine, buyers in arm's length transactions must "fend for themselves," as their only protection is "their own skepticism as to the value and condition of the subject of the transaction."¹⁰ With respect to real property, buyers and lessees carry the burden of making diligent inspections and inquiries for defects in arm's length transactions.¹¹ Sellers and lessors are not liable for any harm that an existing defect causes to buyers and lessees respectively, unless there is active concealment of the defect, a material misrepresentation, or the parties agree otherwise.¹² Consequently, property purchasers can stand in unequal bargaining positions in such arm's length transactions.

3. *Seinfeld: The Pitch* (NBC television broadcast Sept. 16, 1992).

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. 67A AM. JUR. 2D *Sales* § 610 (2014).

9. Alan M. Weinberger, *Let the Buyer Be Well Informed?—Doubting the Demise of Caveat Emptor*, 55 MD. L. REV. 387, 388 n.5 (1996). This phrase translates to: "Let a purchaser, who ought not be ignorant of the amount and nature of the interest which he is about to buy, exercise proper caution." *Id.* (quoting HERBERT BROOME, A SELECTION OF LEGAL MAXIMS 528 (10th ed. 1939)).

10. Biff Craine, *Real Property—Sellers' Liability for Nondisclosure of Real Property Defects—Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985), 14 FLA. ST. U. L. REV. 359, 361 (1985).

11. *Id.* at 359.

12. *Haskell Co. v. Lane Co.*, 612 So. 2d 669, 671 (Fla. 1st Dist. Ct. App. 1993).

Today, more than three centuries after the doctrine first made its appearance in England,¹³ *caveat emptor* remains strong in American real estate law with respect to both commercial and undeveloped properties.¹⁴ Many jurisdictions have limited the doctrine, however, such as by recognizing implied warranties of habitability in certain residential property sales,¹⁵ or instituting mandatory seller disclosure laws.¹⁶ As Justice Blackmun explained in 1980, *caveat emptor* is a “harsh maxim,” and the law has trended away from strict compliance with the doctrine “towards a more flexible, less formalistic understanding of the duty to disclose.”¹⁷ In Florida, *caveat emptor* has been eliminated from residential real property sales and leases, yet the doctrine persists in sales and leases of commercial real property.¹⁸ Despite having the opportunity to correct this problem, the Florida Supreme Court has failed to invalidate the doctrine’s application to commercial property transactions.¹⁹ A duty to disclose should be imposed on the seller in commercial real estate leases and sales transactions because the current failure to provide such a duty is harmful to prospective purchasers and lessees. Commercial property purchasers and lessees do not receive the same protections as residential real property buyers and lessees since the law presumes these parties to have a level of sophistication that they often do not have. This violates the principles of fair dealing, equity, and justice that the Florida Supreme Court stressed in

13. See Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133, 1164 (1931) (explaining that the roots of the doctrine can be traced back to England in the sixteenth century). Hamilton notes that the phrase “*caveat emptor*” did not appear in print until the sixteenth century, and it was well-known throughout England by the beginning of the seventeenth century. *Id.*

14. RICHARD A. LORD, 17 WILLISTON ON CONTRACTS § 50:26, 349 (4th ed. 2017).

15. *E.g.*, *Cochran v. Keeton*, 252 So. 2d 313, 314–15 (Ala. 1971) (eradicating the *caveat emptor* doctrine in builder-vendors’ new home sales by recognizing an implied warranty of fitness and habitability); *Petersen v. Hubschman Constr. Co.*, 389 N.E.2d 1154, 1157–58 (Ill. 1979) (finding an implied warranty of habitability in the sale of new homes by builder-vendors, thereby avoiding the “unjust results of caveat emptor and the doctrine of merger”). The Ohio Supreme Court was the first American court to identify an implied warranty of habitability or fitness in the construction and sale of new homes. 50 AM. JUR. 3D *Proof of Facts* 543, 558 (1999) (citing *Vanderschrier v. Aaron*, 140 N.E.2d 819 (Ohio 8th Dist. Ct. App. 1957)).

16. See Elizabeth Murphy, Note, *The Current State of Caveat Emptor in Alabama Real Estate Sales*, 60 ALA. L. REV. 499, 516 (2009) (noting that, as of 2008, the District of Columbia and forty-five states had enacted such mandatory disclosure laws).

17. *Chiarella v. United States*, 445 U.S. 222, 247–48 (1980) (Blackmun, J., dissenting).

18. *Haskell Co. v. Lane Co.*, 612 So. 2d 669, 674 (Fla. 1st Dist. Ct. App. 1993).

19. See *Serv. Merch. Co. v. Lane Co.*, 620 So. 2d 762, 762 (Fla. 1993) (dismissing the Petition for Review on the First District Court of Appeal’s certified question to the Court).

Johnson v. Davis.²⁰ Furthermore, the justifications for eradicating the doctrine from commercial property transactions outweigh the arguments for maintaining it.²¹

This Article first traces the history of the *caveat emptor* doctrine in Florida and discusses the evolution and application of the doctrine up until *Johnson*.²² Next, the Article examines *Johnson*²³ and *Futura Realty v. Lone Star Building Centers (Eastern), Inc.*,²⁴ along with the accompanying split in treatment of residential properties and commercial properties. The Article subsequently views the unfortunate consequences of *Futura Realty* and how courts' refusal to establish a bright line between residential property and commercial property has further muddied the waters. In conclusion, the Article argues that the *Johnson* nondisclosure duty should be extended to commercial real property transactions, thereby eradicating *caveat emptor* from all real property transactions. The Article also posits an alternative solution, explaining that if *caveat emptor* is not eliminated from commercial property sales and leases, the Florida Legislature should at least establish a bright line for distinguishing between residential property and commercial property.

II. THE HISTORY OF CAVEAT EMPTOR IN FLORIDA

The original principle behind the *caveat emptor* doctrine was that a land's seller could not be liable to the purchaser or any other person for the land's condition at the time of the transfer, unless otherwise provided in an express agreement.²⁵ Professor Walton Hamilton, a Yale University professor who analyzed the history of *caveat emptor*, traced the doctrine back to the mid-1500s.²⁶ Although the doctrine originally emerged in connection with

20. 480 So. 2d 625, 627-28 (Fla. 1985). *Johnson* and its impact are discussed extensively in this Article. *Infra* Part III.

21. *Infra* Part V.

22. 480 So. 2d 625.

23. *Id.*

24. 578 So. 2d 363 (Fla. 3d Dist. Ct. App. 1991).

25. RESTATEMENT (SECOND) OF TORTS § 352 cmt. a (1965).

26. Hamilton, *supra* note 13, at 1164.

certain chattel purchases, such as horses,²⁷ it subsequently developed in real property purchases and sales.²⁸

Once the doctrine made its way over to the United States through the common law, an emerging industrial society and the lack of traditional monarchical authority contributed to the doctrine's "real triumph."²⁹ This is hardly surprising because individualism, rather than paternalism, served as a pillar of the American Frontier.³⁰ Indeed, *caveat emptor* was widely used throughout the young republic, and the doctrine was utilized to define duties of both sellers and buyers in transactions, including the seller's duty to disclose material facts pertaining to the property's condition.³¹ As United States Supreme Court Justice David Davis explained in 1870, "[o]f such universal acceptance is the doctrine of *caveat emptor* in this country, that the courts of all the States in the Union where the common law prevails [except South Carolina], sanction it."³² Florida courts were thus among the courts in the nation that utilized the doctrine.

Caveat emptor has an extensive history in Florida. It is for this exact reason that the Florida Supreme Court's ruling in *Johnson v. Davis* sent shockwaves through the Florida legal community³³ when the Court drastically altered the application of *caveat emptor* in Florida in 1985.³⁴ An analysis of the development and application of the doctrine prior to *Johnson* is necessary to understand the significance of the Florida Supreme Court's decision.

27. *Id.* The first appearance of the doctrine in print specifically referenced horse-trading: "[I]f he be tame and have ben rydden upon, then *caveat emptor*." *Id.* (quoting ANDREW FITZHERBERT, *BOKE OF HUSBANDRIE* § 118 (1534); Nicola W. Palmieri, *Good Faith Disclosures Required During Precontractual Negotiations*, 24 SETON HALL L. REV. 70, 110 n.134 (1993). Prior to the doctrine's introduction, purchasers typically received broad deference in trading since few opportunities for trade existed and sellers were hesitant to offend those customers whom they were connected to in the societal hierarchy. *Id.* at 110.

28. *Haskell Co. v. Lane Co.*, 612 So. 2d 669, 671 (Fla. 1st Dist. Ct. App. 1993); Alex M. Johnson, Jr., *An Economic Analysis of the Duty to Disclose Information: Lessons Learned from the Caveat Emptor Doctrine*, 45 SAN DIEGO L. REV. 79, 101 (2008).

29. Hamilton, *supra* note 13, at 1178. Hamilton also explains that courts in the young country were reluctant to accept cases that dealt with business conflicts. *Id.*

30. *See id.* (remarking that the frontier reinforced intellectual individualism); WILL WRIGHT, *THE WILD WEST: THE MYTHICAL COWBOY AND SOCIAL THEORY* 191 (2001) (citing individualism as responsible for the "market idea of an open frontier").

31. Craine, *supra* note 10, at 360–61.

32. *Barnard v. Kellogg*, 77 U.S. 383, 388–89 (1870).

33. Parker, *infra* note 76, at 29.

34. 480 So. 2d 625 (Fla. 1985).

One of the first occasions when the Florida Supreme Court addressed *caveat emptor* was *Stephens v. Orman*.³⁵ The Court decided the case in 1862³⁶—a short seventeen years after Congress admitted Florida to the Union.³⁷ *Stephens* addressed the division of a firm’s assets between three partners: Orman, Young, and Sewall.³⁸ In reviewing Sewall’s argument for rescission of an agreement between the parties due to alleged misstatements of Orman and Young, the Court explained that a contracting party’s concealment of a material fact is grounds for relief if that party had a “better opportunity to know” than the other contracting party.³⁹ The Court held, however, that evidence of fraud does not exist even if the vendor knows facts and does not disclose these facts to the vendee if both parties have equal access and opportunity to examine the facts and the vendee examines the facts without relying on the vendor’s statements.⁴⁰ Although the Court did not explicitly cite *caveat emptor*, its holding nonetheless reflects the doctrine’s core principle—that the buyer has the burden of determining whether defects exist. The Court’s establishment of a cause of action against a party with a “better opportunity to know” reflects the Court’s attempt to ensure that the buyer is provided with a proper opportunity to make his investigation.⁴¹ Notably, this duty to investigate in the context of fraudulent misrepresentations persisted in Florida jurisprudence for decades⁴² before the Florida Supreme Court limited the duty in the fraud context.⁴³

35. 10 Fla. 9 (1862).

36. *Id.*

37. JAMES C. CLARK, A CONCISE HISTORY OF FLORIDA 46 (2014). Although the convention approved the constitution on January 11, 1839, Florida did not actually become a state until 1845. *Id.*

38. *Stephens*, 10 Fla. at 18. Sewall, as a silent partner in Alabama, argued that Orman and Young induced him into an offer that included inaccurate accounting information and misstatements. *Id.* at 85–86.

39. *Id.* at 86–87.

40. *Id.* at 87 (citing *Hall v. Thompson*, 9 Miss. 443 (1843)).

41. *See id.* at 86–87. This same rationale no doubt serves as the basis for some of the exceptions to *caveat emptor*. *See Besett v. Basnett*, 389 So. 2d 995, 997 (Fla. 1980) (discussing the seller’s misrepresentation of a property’s condition as an exception to *caveat emptor*); *Hayim Real Estate Holdings, LLC v. Action Watercraft Int’l, Inc.*, 15 So. 3d 724, 726 (Fla. 3d Dist. Ct. App. 2009) (discussing active concealment of a known defect in commercial real property transactions as an exception to *caveat emptor*).

42. *Potakar v. Hurtak*, 82 So. 2d 502 (Fla. 1955) (receded from by *Besett*, 389 So. 2d at 998).

43. *Besett*, 389 So. 2d at 998 (“We hold that a recipient may rely on the truth of a representation, even though its falsity could have been ascertained had he made an

By the twentieth century, *caveat emptor* influenced leases and sales of Florida real property. For example, in *Brooks v. Peters*,⁴⁴ the Florida Supreme Court established that *caveat emptor* applied to residential real property leases between landlord and tenant where the landlord surrendered the control of premises to the tenants, as long as no fraud or concealment existed.⁴⁵ The Court accordingly barred the tenants' recovery against the landlord, explaining that "caveat emptor applies, hence the landlord is not liable for any personal injuries or sickness of tenants, although attributable to the defects in the fixtures."⁴⁶ Similarly, the Second District Court of Appeal reaffirmed *caveat emptor* in real property sales, explaining that simple nondisclosure of material facts is not actionable unless acts or words constituting the active concealment of such material facts accompany the nondisclosure.⁴⁷ The Second District's holding served as the Florida courts' approach to fraudulent nondisclosure until the *Johnson* decision.⁴⁸

In the years leading up to *Johnson*, Florida courts approached *caveat emptor* with more skepticism and began to limit the doctrine and emphasize exceptions. In *Gable v. Silver*,⁴⁹ the Fourth District Court of Appeal extended the implied warranties of merchantability and fitness to new condominium and home

investigation, unless he knows the representation to be false or its falsity is obvious to him." The *Besett* court adopted Sections 540 and 541 of the Restatement (Second) of Torts in reaching its conclusion. *Id.* at 997. *Besett* is not limited to real estate transactions and also extends to sales of businesses. *Gold v. Perry*, 456 So. 2d 1197, 1201 (Fla. 4th Dist. Ct. App. 1984).

44. 25 So. 2d 205 (Fla. 1946), *overruled by* *Mansur v. Eubanks*, 401 So. 2d 1328 (Fla. 1981).

45. *Id.* at 207. After the defendant-landlord stopped providing hot water to plaintiff-tenants in May 1944, the plaintiff-tenants took it upon themselves, with the defendant-landlord's consent, to provide themselves with hot water. *Id.* at 205. After the gas from the apartment's heater exploded and injured one of the plaintiff-tenants, plaintiff-tenants brought suit arguing, inter alia, that the defendant-landlord owed the plaintiff-tenants a duty to warn of the apartment's defects and that he neglected to issue warnings regarding the heater's defective condition. *Id.* at 205-06.

46. *Id.* at 207. In support, the Court first cited the Supreme Court of Massachusetts' decision in *Mansell v. Hands*, 235 Mass. 253 (1920). *Id.* The Court also cited the Supreme Court of New Hampshire's decision in *Gobrecht v. Beckwith*, 82 N.H. 415 (1926). *Id.*

47. *Ramel v. Chasebrook Constr. Co.*, 135 So. 2d 876, 882 (Fla. 2d Dist. Ct. App. 1961). The First and Fourth District Courts of Appeal subsequently followed this rule. *Beagle v. Bagwell*, 169 So. 2d 43, 46-47 (Fla. 1st Dist. Ct. App. 1964); *Banks v. Salina*, 413 So. 2d 851, 852 (Fla. 4th Dist. Ct. App. 1982).

48. *Craine*, *supra* note 10, at 362.

49. 258 So. 2d 11 (Fla. 4th Dist. Ct. App. 1972), *cert. dismissed*, 264 So. 2d 418 (Fla. 1972). Several years later, the Florida Legislature codified the implied warranties for all new condominiums. FLA. STAT. § 718.203 (1976).

purchases, thereby eradicating *caveat emptor* from such purchases.⁵⁰ The Court emphasized that its holding was grounded in “present day trends, logic, and practical justice in realty dealings.”⁵¹ Despite its decision to deny the petition for rehearing, the Court certified its holding as a question for the Florida Supreme Court.⁵² The Florida Supreme Court subsequently adopted the Fourth District’s holding, solidifying the departure of *caveat emptor* from purchases of new condominiums and homes.⁵³

Two years before *Johnson*, the Florida Supreme Court had the opportunity to extend the implied warranties of habitability and fitness in *Gable* to property parcel purchases.⁵⁴ Surprisingly, the Court declined to extend *Gable*, explaining that the protection afforded to new home purchasers stemmed from the incapability of the prudent purchasers to detect construction defects in homes, and that policy would not be furthered by application to the defective seawall at issue in *Conklin*.⁵⁵ Justice Adkins, who notably would author the majority opinion in *Johnson*⁵⁶ two years later, dissented from the majority in *Conklin*, explaining that the “present day trends, logic, and practical justice in realty dealings”⁵⁷ language in *Gable* justified extending implied warranties to home improvements.⁵⁸ Justice Adkins characterized extending *Gable* as “both logical and just,”⁵⁹ which foreshadowed his emphasis on fair dealing and equity in the *Johnson* opinion.⁶⁰

50. 258 So. 2d at 18.

51. *Id.* The *Johnson* court likewise cited principles of modernism and justice in its holding. 480 So. 2d 625, 628 (Fla. 1985).

52. *Gable*, 258 So. 2d at 18.

53. *Gable v. Silver*, 264 So. 2d 418, 419 (Fla. 1972) (“[W]e hold that the District Court of Appeal has correctly decided the cause and its decision is adopted as the ruling of this Court.”). With the Court’s adoption of the implied warranties of habitability and fitness in this context, Florida joined fourteen other states that had recognized implied warranties, to one degree or another, for new homes. *Gable*, 258 So. 2d at 14. By 1983, thirty-three states had recognized such a warranty. *Conklin v. Hurley*, 428 So. 2d 654, 657 n.2 (Fla. 1983). The scope of the implied warranty of habitability in Florida has recently been debated, however. See FLA. STAT. § 553.835 (2012) (prohibiting homeowners and homeowners’ associations from pursuing causes of action founded in the implied warranties of either fitness and merchantability or habitability for offsite improvements); *Mardona Homes, Inc. v. Lakeview Reserve Homeowners Ass’n*, 127 So. 3d 1258, 1274 (Fla. 2013) (holding the retroactive application of Section 553.835 as unconstitutional).

54. *Conklin*, 428 So. 2d at 655.

55. *Id.* at 658.

56. 480 So. 2d 625.

57. *Gable*, 258 So. 2d at 18.

58. *Conklin*, 428 So. 2d at 660–61 (Adkins, J., dissenting).

59. *Id.* at 661.

60. *Johnson*, 480 So. 2d at 628.

The Florida Supreme Court also eradicated *caveat emptor* from leases of residential real property in 1981 by holding that a residential property owner who leases the property to a tenant bears a duty to “reasonably inspect” the property before leasing it and also to make necessary repairs to ensure that the tenant receives a “reasonably safe dwelling.”⁶¹ The Court accordingly overturned its previous decision in *Brooks v. Peters*, this time acknowledging that landlords frequently stood in better bargaining positions than tenants.⁶²

These limitations joined the already-extant exceptions to *caveat emptor*, some of which merit attention. The first specific exception is active concealment of a defect. As aforementioned, the *Ramel* court held that active concealment was an exception to *caveat emptor*, explaining that mere nondisclosure of material facts was not by itself actionable, although tricks that are used to prevent the purchaser-representee from conducting further inquiry were actionable.⁶³ In other words, a party that fraudulently takes active steps to conceal material facts from another party in a transaction does not receive the protection of *caveat emptor*. For this reason, part of the *Ramel* court’s holding highlighted that the buyers could not have observed the lack of necessary pilings, thus implicating a duty to disclose the improper construction because it

61. *Mansur v. Eubanks*, 401 So. 2d 1328, 1329–30 (Fla. 1981). “It is clear that the doctrine of *caveat emptor* no longer has any application to leases of residential real property [as demonstrated by] *Mansur v. Eubanks*” *Haskell Co. v. Lane Co.*, 612 So. 2d 669, 674 (Fla. 1st Dist. Ct. App. 1993). The New Jersey Supreme Court, on the other hand, eradicated *caveat emptor* from leasehold interests in property in 1958. Robert H. Shisler, Note, *Caveat Emptor Is Alive and Well and Living in New Jersey: A New Disclosure Statute Inadequately Protects Residential Buyers*, 8 *FORDHAM ENVTL. L.J.* 181, 188 (1996) (citing *Michaels v. Brookchester, Inc.*, 140 A.2d 199 (N.J. 1958)).

62. *Mansur*, 401 So. 2d at 1329–30. As the Florida Supreme Court discussed in *Mansur*:

We resolve the conflict by overruling *Brooks v. Peters*

. . . .

We do not believe there are sufficient reasons to continue to completely insulate the landlord from liability. We live in an age when the complexities of housing construction place the landlord in much better position than the tenant to guard against dangerous conditions.

Id. (internal citations omitted).

63. *Ramel v. Chasebrook Constr. Co.*, 135 So. 2d 876, 882 (Fla. 2d Dist. Ct. App. 1961). *Ramel* has been referred to as “[t]he most concise recitation of the Florida rule regarding fraudulent nondisclosure prior to *Johnson*.” Craine, *supra* note 10, at 362.

was a non-observable defect.⁶⁴ The *Johnson* court would overturn this ruling with respect to residential property sales and leases, equating misfeasance with nonfeasance.⁶⁵ Still, the exception remains alive and well in commercial real property transactions today.⁶⁶

The *Ramel* court's holding also touched upon another exception to *caveat emptor*—affirmative material misrepresentations.⁶⁷ The Florida Supreme Court solidified affirmative material misrepresentations as an exception to *caveat emptor* in *Besett v. Basnett*,⁶⁸ stating that a recipient of a representation may rely on that representation's truth, even if he could have determined its false nature from an investigation, unless he knows it is false or realizes it is obviously false.⁶⁹ The Court emphasized that although the law should not encourage a purchaser-representee's negligence; "negligence is less objectionable than fraud."⁷⁰ The Court explicitly disapproved of allowing a party guilty of fraudulent misrepresentation to use *caveat emptor* as a "shield" to liability.⁷¹

Finally, other exceptions to *caveat emptor* include the existence of a fiduciary or confidential relationship between the buyer and seller,⁷² and when the parties contract for a higher

64. 135 So. 2d at 879–82.

65. 480 So. 2d at 628.

66. *Thibault v. Transact Realty & Inv.*, 709 So. 2d 593, 595 (Fla. 5th Dist. Ct. App. 1998) ("In the [commercial real property] arena . . . caveat emptor bars only claims for intentional nondisclosure of material facts; the doctrine does not bar claims alleging fraudulent misrepresentations or active concealment."); *Hayim Real Estate Holdings, LLC v. Action Watercraft Int'l, Inc.*, 15 So. 3d 724, 727 (Fla. 3d Dist. Ct. App. 2009) ("Absent an express agreement, a material misrepresentation or active concealment of a material fact, the seller cannot be held liable for any harm sustained by the buyer or others as the result of a defect existing at the time of the sale.") (quoting *Haskell Co.*, 612 So. 2d at 671).

67. *Ramel*, 135 So. 2d at 881–82. The Court held that the defendant-builders' representation to the plaintiff-buyers that the house was "well constructed and well built" was fraudulent misrepresentation because the defendant-builders knew that the house was poorly constructed and their statement induced the plaintiff-sellers to purchase the home. *Id.* at 878.

68. 389 So. 2d 995 (Fla. 1980).

69. *Id.* at 998. In *Besett*, the sellers of a fishing lodge told the plaintiff-buyers that the property was five and one-half acres large, the roof was brand new, and the lodge's income was \$88,000. *Id.* at 996. In fact, the property was only one and one-half acres large, the roof was older and leaked, and the lodge's income was substantially less than \$88,000. *Id.*

70. *Id.* at 998.

71. *Id.* For another discussion of material misrepresentations, see *Wasser v. Sasoni*, 652 So. 2d 411 (Fla. 3d Dist. Ct. App. 1995) (reaffirming *Besett* and explaining that *caveat emptor* applies in commercial property transactions).

72. *Ramel*, 135 So. 2d at 882 ("In the absence of a fiduciary relationship, mere nondisclosure of all material facts . . . is ordinarily not actionable misrepresentation unless

disclosure obligation.⁷³ Moreover, a party who undertakes to disclose facts to another party must disclose the entire truth, even if that former party did not maintain a duty to disclose the facts.⁷⁴ Lastly, the Fifth District Court of Appeal has also held that a private cause of action for monetary damages associated with cleaning up an illegal discharge of pollutants exists under Chapter 376 of the Florida Statutes, otherwise known as the Pollutant Discharge Prevention and Control Act, thereby allowing a party to bypass *caveat emptor*.⁷⁵

III. JOHNSON AND FUTURA REALTY

This Part examines two principal cases that established the status quo for *caveat emptor* and the disclosure duty in real property transactions: (A) *Johnson v. Davis* and (B) *Futura Realty v. Lone Star Building Centers (Eastern), Inc.*

A. *Johnson v. Davis*

In 1985, the Florida Supreme Court issued a landmark ruling in *Johnson v. Davis*, which significantly altered the application of

some artifice or trick has been employed to prevent the representee from making further independent inquiry.”).

73. See *RNK Fam. Ltd. P’ship v. Alexander-Mitchell Assocs.*, 788 So. 2d 1035 (Fla. 2d Dist. Ct. App. 2001) (holding that the trial court erred in dismissing the complaint since, under the parties’ contract, the disclosure obligation pertained only to value).

74. *Stackpole v. Hancock*, 24 So. 914, 918 (Fla. 1898) As the Florida Supreme Court discussed in *Stackpole*:

The authorities sustain the view that while a purchaser, situated as Hancock was, is not bound to disclose facts in his knowledge, or to answer inquires as to such facts, yet, if he undertakes to do so, he must disclose the whole truth, without concealment of material facts, and without doing anything calculated to prevent an investigation on the part of the seller . . .

Id.

75. *Kaplan v. Peterson*, 674 So. 2d 201, 205 (Fla. 5th Dist. Ct. App. 1996). The Court nonetheless certified this question to the Florida Supreme Court, which subsequently dismissed review of the case. *Phelps v. Kaplan*, 687 So. 2d 1305 (Fla. 1997). Notably, the Second District Court of Appeal is at odds with *Kaplan*, holding that no private cause of action exists under Chapter 376. *Mostoufi v. Presto Food Stores, Inc.*, 618 So. 2d 1372, 1377 (Fla. 2d Dist. Ct. App. 1993) (reaffirming that *caveat emptor* still applies in commercial real property transactions and thus shields commercial real property sellers from liability).

the *caveat emptor* doctrine in Florida.⁷⁶ In *Johnson*, the Davises entered into a contract with the Johnsons to purchase the Johnsons' three year-old home for \$310,000.⁷⁷ Pursuant to the contract, the Davises were required to make a \$5,000 down payment and then subsequently pay the Johnsons a \$26,000 deposit within the next five days.⁷⁸ After the Davises paid the \$5,000 down payment, but before they made the \$26,000 deposit, Mrs. Davis noticed peeling plaster and buckling near a window frame in the house's family room, as well as stains on the ceilings in both the kitchen and the family room.⁷⁹ When Mrs. Davis inquired about these conditions, Mr. Johnson informed her of a prior problem with the window that had been corrected.⁸⁰ He also stated that the wallpaper glue and the moving of ceiling beams had caused the stains on the ceilings, and evidence at trial showed that the Johnsons "affirmatively repeated to the Davises that there were no problems with the roof."⁸¹ Days later, after the Davises paid the \$26,000 deposit, Mrs. Davis came home to water pouring into the house from the family room ceiling, the glass doors, the light fixtures, the stove, and around the window frame.⁸² The Davises subsequently hired three roofers, who deduced that the roof was inherently defective and "slipping."⁸³ The Davises filed a complaint against the Johnsons, alleging fraud and misrepresentation among other counts.⁸⁴

76. See Whilden S. Parker, *The Return of the Pink Panther or Johnson v. Davis, Redux*, 78 FLA. B.J. 29, 29 (June 2004) (describing the decision as "one of those decisions unarguably entitled to be included in the list of those anointed as 'landmark'").

77. *Johnson v. Davis*, 480 So. 2d 625, 626 (Fla. 1985). Adjusted for inflation, \$310,000 in 1982 is equivalent to roughly \$760,000 in 2015. U.S. Bureau of Labor Statistics, *CPI Inflation Calculator*, U.S. DEP'T OF LABOR, http://www.bls.gov/data/inflation_calculator.htm (last visited June 20, 2017).

78. *Johnson*, 480 So. 2d at 626. The contract also provided that the Davises had the right to obtain a licensed roofer's written report providing that the roof was "in a watertight condition," and that the Johnsons were to pay for any roofing repairs that were made by a licensed roofer. *Id.* The contract also stated that the "prevailing party" would receive payment of all reasonable fees and costs arising from any contract litigation. *Id.*

79. *Id.* at 626.

80. *Id.*

81. *Id.* at 627. At trial, the parties disagreed on whether Mr. Johnson had ever represented to Mrs. Davis that there had "never been any problems" with the ceilings or roof. *Id.* at 626 (emphasis added).

82. *Id.*

83. *Id.* The roofers also explained that the only way that the Davises would receive a "watertight" roof would be to purchase a new \$15,000 roof. *Id.* The Johnsons' roofers, on the other hand, believed that they could mend the leaks in the roof, and thus make the roof "watertight" for less than \$1,000. *Id.*

84. *Id.*

In its ruling, the Florida Supreme Court departed from the *caveat emptor* doctrine.⁸⁵ The Court first examined the distinction in tort law between misfeasance and nonfeasance, acknowledging that the difference is simple in theory, yet often difficult in practice.⁸⁶ To highlight this, the Court correctly pointed out that little distinction can be made between active concealment and affirmative misrepresentations, as both violate good faith and fair dealing principles and both have the same consequences.⁸⁷ The Court used this lack of distinction to criticize the decisions of lower Florida courts, including the *Ramel* court and the *Banks* court, which had held that nonfeasance cannot result in liability.⁸⁸

Justice Adkins, writing for the majority, emphasized the importance of equity, justice, and fair dealing, describing such cases as “unappetizing . . . not in tune with the times and . . . not [in] conform[ance] with current notions of justice, equity and fair dealing.”⁸⁹ The conclusion to draw from this language is that the Court sought to modernize the approach to *caveat emptor*, just as Justice Adkins had advocated for in *Gable*. In addition, the Court desired to follow the lead of other states that had restricted the doctrine’s application. In what is now a well-recognized quote from the opinion, Justice Adkins proclaimed: “One should not be able to stand behind the impervious shield of caveat emptor and take advantage of another’s ignorance.”⁹⁰

The Court looked to *Lingsch v. Savage*,⁹¹ a case from the California First District Court of Appeal that summarized the relevant California law as imposing a duty on the seller to disclose facts materially affecting a property’s value or desirability, if the facts are known or are only accessible to the seller and the seller additionally knows that the buyer does not know the facts or the

85. *Id.* at 629. By comparison, the Colorado Supreme Court had eradicated *caveat emptor* from new home sales more than twenty years before the Florida Supreme Court decided *Johnson. Carpenter v. Donohoe*, 388 P.2d 399, 402 (Colo. 1964) (codifying the dicta from a previous case that eradicated *caveat emptor*).

86. *Johnson*, 480 So. 2d at 628.

87. *Id.*

88. *Id.* (citing *Ramel v. Chasebrook Constr. Co., Inc.*, 135 So. 2d 876 (Fla. 2d Dist. Ct. App. 1961); *Banks v. Salina*, 413 So. 2d 851 (Fla. 4th Dist. Ct. App. 1982)).

89. *Johnson*, 480 So. 2d at 628. The New Jersey Supreme Court used similar language when it established a duty for used home sellers to disclose known, unobservable defects to buyers, citing “modern concepts of justice and fair dealing.” *Weintraub v. Krobatsch*, 317 A.2d 68, 75 (N.J. 1974).

90. *Johnson*, 480 So. 2d at 628.

91. 29 Cal. Rptr. 201 (Cal. 1st Dist. Ct. App. 1963).

facts are not “within the reach of [his] diligent attention and observation.”⁹² The Court also highlighted that other jurisdictions had adopted the same approach.⁹³

The Court accordingly fashioned its rule: “[W]here the seller of a home knows of facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer.”⁹⁴ The Second District Court of Appeal recently provided a helpful breakdown of this rule’s elements: (1) the residential property’s seller has knowledge of the property’s defect; (2) this defect materially affects the residential property’s value; (3) the purchaser of the property does not know of the defect, and the defect is not readily observable to him; and (4) the residential property’s purchaser demonstrates that the property’s seller failed to disclose this defect to the property’s purchaser.⁹⁵

The materiality of a fact affecting the property’s value is an objective analysis—not a subjective analysis—that centers on the relationship between the property’s value and the undisclosed fact.⁹⁶ Furthermore, the undisclosed fact in a *Johnson* nondisclosure action focuses on a fact that “materially affect[s] the actual value of property,”⁹⁷ rather than “material facts affecting the value of the property.”⁹⁸ Notably, *Johnson* simply requires the seller to have knowledge of the facts that allegedly materially affect the property’s value, not an intention to fail to disclose the

92. *Johnson*, 480 So. 2d at 628 (quoting *Lingsch*, 29 Cal. Rptr. at 204).

93. The Court examined a case from the First District of the Illinois Appellate Court, in which that court adopted the *Lingsch* rule. *Id.* at 628–29 (citing *Posner v. Davis*, 395 N.E.2d 133 (Ill. App. Ct. 1979)). The Court also examined cases from numerous other jurisdictions, including Nebraska, West Virginia, New Jersey, and Colorado. *Id.*

94. *Id.* at 629. Under this rule, the Court held that the Johnsons had fraudulently concealed facts materially related to the property’s value from the Davises, as the Johnsons knew that there had been problems with the roof, as Mr. Johnson’s testimony demonstrated, and they had failed to disclose the defects to the Davises. *Id.* Practitioners now refer to this cause of action as a “Johnson non-disclosure” action. Parker, *supra* note 76, at 30.

95. *Jensen v. Bailey*, 76 So. 3d 980, 983 (Fla. 2d Dist. Ct. App. 2011).

96. *Billian v. Mobil Corp.*, 710 So. 2d 984, 987 (Fla. 4th Dist. Ct. App. 1998) (citing *Johnson*, 480 So. 2d at 629) (noting that a subjective standard would depart from the *Johnson* holding).

97. *Id.* (citing *Johnson*, 480 So. 2d at 629) (emphasis added).

98. *Id.* (citing *Dorton v. Jensen*, 676 So. 2d 437 (Fla. 2d Dist. Ct. App. 1996)) (drawing the distinction between the two, but acknowledging that the *Dorton* court was not widening the scope of the *Johnson* rule). For a recent case discussing facts that allegedly affected a value’s property, see *Eiman v. Sullivan*, 173 So. 3d 994 (2015) (holding that the purchaser-appellees had failed to establish the existence of a fact materially affecting the property’s value).

facts,⁹⁹ but the buyer must prove that the seller had actual knowledge.¹⁰⁰ Recent holdings also establish that the inclusion of an “as is” clause in a contract between the parties in a residential property sales transaction does not waive this *Johnson* nondisclosure duty.¹⁰¹ Whether a buyer can waive the *Johnson* nondisclosure duty, however, appears to remain undecided.¹⁰²

Despite extensively criticizing *caveat emptor* and advocating for a more modern and fair approach, the *Johnson* court’s rule specifically mentioned residential property sellers, rather than sellers generally. However, the next sentence of the opinion reads: “This duty is equally applicable to *all forms of real property*, new and used.”¹⁰³ There are two ways to read these sentences and interpret the Court’s ruling. The first way is to interpret the *Johnson* nondisclosure duty as applying to both residential and commercial property, as evidenced by the Court’s underlying disgust for *caveat emptor* and its emphasis that the duty applies to all forms of real property, not all forms of residential real property.¹⁰⁴ The second interpretation—the interpretation adopted by lower courts after *Johnson*—is that the *Johnson* nondisclosure

99. *Billian*, 710 So. 2d at 988–89.

100. *Jensen*, 76 So. 3d at 983 (holding that the buyer must establish the seller’s actual—not constructive—knowledge, in order to prove liability under *Johnson*).

101. *Bowman v. Barker*, 172 So. 3d 1013, 1016 (Fla. 1st Dist. Ct. App. 2015); *Solorzano v. First Union Mortg. Corp.*, 896 So. 2d 847, 849–50 (Fla. 4th Dist. Ct. App. 2005); *Syvrud v. Today Real Estate, Inc.*, 858 So. 2d 1125, 1130 (Fla. 2d Dist. Ct. App. 2003). An “as is” clause provides that the buyer understands that the seller has not made any representations regarding the property’s environmental condition, and that the buyer relies on his own investigation in determining whether to buy the property. FLA. BAR CONTINUING LEGAL EDUC., FLORIDA REAL PROPERTY COMPLEX TRANSACTIONS § 12.33 (7th ed. 2013).

102. *Syvrud*, 858 So. 2d at 1131 n.2. In *Syvrud*, the buyers of a townhouse condominium brought a *Johnson* claim against the sellers of the unit and the listing broker. *Id.* at 1126. The listing broker argued that buyers had waived their right to pursue a *Johnson* claim against the sellers and the listing broker by signing an addendum to the sales contract, which relinquished the sellers and the listing broker from any duty to disclose defects materially affecting the property’s value. *Id.* The Court held that the contract did not allow the seller and listing broker to waive any disclosure duty and, therefore, the Court declined to decide whether a property purchaser can waive the *Johnson* nondisclosure duty. *Id.* at 1131. The Court noted, however, that its own “independent research has not disclosed[] a Florida case squarely deciding this issue.” *Id.* at 1131 n.2. It is also worth noting, by comparison, that if a person accepts a quitclaim deed, that person is presumed to have assented to the acceptance of that property’s title, “subject to all risks as to defects and encumbrances.” 19 FLA. JUR. 2D *Deeds* § 8 (WestLaw Next through May 2017) (citing *Morris v. Osteen*, 948 So. 2d 821 (Fla. 5th Dist. Ct. App. 2007)).

103. *Johnson v. Davis*, 480 So. 2d 625, 629 (Fla. 1985) (emphasis added).

104. *Id.* This is the approach that Futura Realty took six years later in *Futura Realty v. Lone Star Building Ctrs. (E.), Inc.*, 578 So. 2d 363, 364 (Fla. 3d Dist. Ct. App. 1991). The purchasers in *Green Acres, Inc. v. First Union Nat’l Bank of Fla.* made this argument, too. 637 So. 2d 363, 365 (Fla. 4th Dist. Ct. App. 1994).

duty applies only to residential real property, as the Court's express language demonstrated. This interpretation demands that "all forms of real property" be read as referring to "new and used" forms of real property, not to different land use categorizations.¹⁰⁵

B. *Futura Realty v. Lone Star Building Centers (Eastern), Inc.*

It was initially unclear how far the *Johnson* nondisclosure rule extended and whether *Johnson* applied to commercial real property transactions.¹⁰⁶ Six years after *Johnson*, though, the Third District Court of Appeal drew a line between residential property and commercial property transactions. In *Futura Realty v. Lone Star Building Centers (Eastern), Inc.*,¹⁰⁷ the Third District Court of Appeal addressed a party's assertion that *Johnson* applied to commercial real property transactions. Futura Realty was a corporate owner of a plot of property in Dade County that alleged that the previous owner, Stanley Davidson, defrauded Futura by failing to disclose that the property contained pollution until after the purchase.¹⁰⁸ Futura based its fraudulent concealment claim on the Florida Supreme Court's then-recent holding in *Johnson*, claiming that Davidson was liable because "[he] knew of the site's pollution prior to the site's sale to Futura and that because Davidson did not inform Futura as to the pollution and because the pollution was not readily observable."¹⁰⁹

The Third District Court of Appeal took a different view, however, disagreeing that *Johnson* controlled.¹¹⁰ The Court first distinguished *Johnson* by emphasizing that *Johnson* addressed residential property and dealt with false statements of home vendors.¹¹¹ The Court's synopsis of *Johnson* also implied that the case could be distinguished because the Johnsons' statements were

105. *Johnson*, 480 So. 2d at 629.

106. See Craine, *supra* note 10, at 367–68 (explaining that, in 1986, *Johnson* appeared to apply to commercial and residential real estate transactions, yet questioning the liability of real estate brokers and the requisite type of undisclosed defect).

107. 578 So. 2d 363 (Fla. 3d Dist. Ct. App. 1991).

108. *Id.* at 364. Futura also alleged that Davidson, CSX Transportation, and Lone Star Building Centers were all strictly liable for the pollution. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* ("[T]he purchasers of a *home* brought an action against the *home's vendors* relying on the vendor's false statement that there was no problem with the *home's roof*." (emphasis added)).

made to induce the Davises to purchase the home.¹¹² The Court then recognized the Florida Supreme Court's holding that the *Johnson* nondisclosure duty applied to all forms of real property, believing it to be the basis of Futura's claim, but held that "the statement[,] when read in context . . . clearly applies solely to the sale of homes."¹¹³ To support this apparent proclamation, the Court explained that the *Johnson* court never expressly ruled that the duty to disclose existed in commercial property sales and that the cases the *Johnson* court relied upon did not pertain to commercial real property.¹¹⁴ Therefore, according to the Court, *Johnson* did not "address or change the long line of case law establishing caveat emptor as the rule in the sale of commercial property"¹¹⁵ and thus, "*Johnson* simply does not impose a duty of disclosure in a commercial setting."¹¹⁶

The most glaring error in the Court's rationale was overlooking Justice Adkins's emphasis on fair dealing and equity. The consequences of *caveat emptor* had repulsed the Florida Supreme Court to the point of limiting the doctrine and adopting the approach of many other jurisdictions, so as to prevent sellers from using the "impervious shield of caveat emptor."¹¹⁷ Faced with the opportunity to underscore the *Johnson* court's call for fair dealing, equity, and justice, the Third District Court of Appeal instead maintained the very injustice that the *Johnson* court had criticized, by holding that purchasers of commercial real property did not receive the same protections as residential real property purchasers. Further, by focusing on the fact that the *Johnson* court never expressly stated that the disclosure duty was present in commercial real property sales, the Third District Court ignored the *Johnson* court's rationale entirely. The Court prevented the extension of equity and fair dealing to commercial property

112. The Court first stated its belief that *Johnson* did not control and then offered a summary of *Johnson* as a premise for this belief. *Id.* The Court then added "further" to introduce its next premise. *Id.* This use of "further" proves that the Court was adding a premise, thereby implying that at least one premise preceded it.

113. *Id.* (emphasis added).

114. *Id.*

115. *Id.* (citing *Conklin v. Hurley*, 428 So. 2d 654 (Fla. 1983)). The Court essentially relied on precedent, rather than justifying the precedent, in citing *Conklin* because, as discussed *infra*, the *Conklin* explanatory parenthetical failed to specifically mention how *Conklin* "establish[ed] caveat emptor as the rule in the sale of commercial property." *Id.*

116. *Id.* at 364–65.

117. *Johnson v. Davis*, 480 So. 2d 625, 628 (Fla. 1985).

transactions, thereby reinforcing the inferior bargaining position of commercial property purchasers and lessees.

Lastly, the Court noted the “long line of cases” supporting *caveat emptor* in commercial property sales, yet it only cited *Conklin* for support.¹¹⁸ This approach is problematic because *Conklin* did not establish *caveat emptor* in commercial property sales—rather, as aforementioned, the *Conklin* court merely rejected the extension of implied warranties to property parcel purchases.¹¹⁹ Unfortunately, both the Second and Fourth District Courts of Appeal have since declined to extend the *Johnson* duty to commercial real property transactions.¹²⁰ These cases have thus effectively allowed sellers of commercial real property to hold onto their impervious shields.

IV. THE RESULTING INCONSISTENT STANDARDS

Unsurprisingly, the Third District Court’s decision to depart from the *Johnson* court’s underlying policy, as well as its language rejecting the applicability of a duty to disclose to all forms of real property, demanded the courts to analyze whether the property is residential or commercial when evaluating whether *caveat emptor* applies. The Florida Supreme Court also shoulders some of the blame for failing to qualify the limits of its holding. Regardless, this results in an inconsistent standard, in which commercial property buyers and lessees now receive less protection than residential property purchasers and lessees. Consequently, the law is restrained in providing fair dealing to buyers and lessees of commercial real property. This Part (A) first examines a case from the First District Court of Appeal, which highlights the problems that the inconsistent standard poses. The next Part (B) analyzes a case that has further muddied the waters.

118. *Futura Realty*, 578 So. 2d at 364 (citing *Conklin*, 428 So. 2d at 654).

119. *Conklin*, 428 So. 2d at 658. In fact, since the *Conklin* court emphasized consumer protection as one of its reasons for declining to extend the implied warranty of *Gable*, the *Futura Realty* court’s citation to *Conklin* seems even more misguided. *Id.* at 659.

120. *Mostoufi v. Presto Food Stores, Inc.*, 618 So. 2d 1372, 1377 (Fla. 2d Dist. Ct. App. 1993) (acknowledging the criticism that *caveat emptor* has received, but stating that the “application has not yet been abrogated” and that there was not a duty to disclose “even if *caveat emptor* did not apply to commercial real estate transactions”), *overruled in part by* *Aramark Unif. & Career Apparel, Inc. v. Easton*, 894 So. 2d 20, 28 (Fla. 2004); *Green Acres, Inc. v. First Union Nat’l Bank of Fla.*, 637 So. 2d 363, 365 (Fla. 4th Dist. Ct. App. 1994) (declining to consider whether *Johnson* ought to extend to commercial real property transactions with added limitations).

A. The Problems with the Inconsistency

In 1993, eight years after *Johnson* was handed down and only two years after the Third District Court's holding in *Futura Realty*, the First District Court of Appeal recognized that there is little justification for affording different protections to property purchasers based on land use categorizations.¹²¹ In *Haskell Co. v. Lane Co.*,¹²² Haskell entered into a contract to construct a commercial building for Lane, the owner of the property.¹²³ In 1981, after the building was constructed, Lane entered into a lease with Wilson, a third party that would later become a wholly-owned subsidiary of Service Merchandise, and also sold the structure to First Capital Income Properties, Ltd.¹²⁴ Unfortunately, part of the building's roof collapsed during a rainstorm in 1986, which injured customers shopping in the building, and damaged Service Merchandise's property.¹²⁵

Service Merchandise and Wilson filed suit against Lane and Haskell, arguing that Haskell had constructed the roof negligently and that Lane was also negligent in failing to disclose the allegedly inadequate drainage system or at least ensure that the problems with the roof were fixed.¹²⁶ Haskell brought a cross-claim against Lane, asserting that Lane was contributorily liable because Lane failed to fix the roof when it "knew or should have known" that the drainage system was faulty.¹²⁷ The trial court had granted summary judgment for Lane, finding that the building constituted commercial property and thus *caveat emptor* barred any negligence claim against Lane.¹²⁸

After reviewing the doctrine's history and decisions from its sister circuits, including the Third District Court's holding in *Futura Realty*, the First District Court concluded that *caveat*

121. *Haskell Co. v. Lane Co.*, 612 So. 2d 669, 675 (Fla. 1st Dist. Ct. App. 1993) ("Is it reasonable to assume that a prospective buyer (or lessee) of commercial property is significantly more likely to be capable of examining the property to determine whether hidden defects exist than is a prospective buyer (or lessee) of residential property?").

122. *Id.* at 669.

123. *Id.* at 670.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 671.

emptor still applies to commercial real property leases and sales.¹²⁹ On this basis, the Court ruled—with clear reluctance—that *caveat emptor* precluded recovery against Lane since the property at issue was commercial property.¹³⁰ With intent to make its reluctance known, the Court used its decision as an opportunity to criticize *caveat emptor* and its continued application: “It seems to us that there is little justification for continuing to draw a distinction between transactions involving residential real property and transactions involving commercial real property.”¹³¹ While acknowledging that the Florida Supreme Court was the appropriate court to eradicate the doctrine entirely from real property transactions, the First District Court stated that “the time ha[d] come to add caveat emptor to the trash heap of discarded legal doctrines.”¹³² The Court instead required full disclosure of all facts materially affecting the property’s condition or value to buyers and lessees in real property transactions.¹³³ Likewise, other District Courts of Appeal have acknowledged the chorus of criticism that *caveat emptor* has received.¹³⁴

In closing, the *Haskell* court certified the following question to the Florida Supreme Court: “Should the common law doctrine of caveat emptor continue to apply to commercial real property

129. *Id.* at 674. To support its conclusion that *caveat emptor* still applied to commercial real property sales, the First District Court cited only *Futura Realty, Inc. v. Lone Star Bldg. Ctrs. (E.), Inc.*, 578 So. 2d 363 (Fla. 3d Dist. Ct. App. 1991), *review denied*, 591 So. 2d 181 (Fla. 1991). The Court cited *Veterans Gas Co. v. Gibbs*, 538 So. 2d 1325 (Fla. 1st Dist. Ct. App. 1989) for support that *caveat emptor* still applied to commercial property leases. *Id.* In *Veterans Gas Co.*, a landlord leased an office building to Way and Associates, Inc., which employed people on the leased premises. 538 So. 2d at 1326. Two employees were injured in a gas explosion at the office because a Way subcontractor had previously bent a copper gas line. *Id.* at 1326–27. The Court reiterated that *caveat emptor* was alive and well with respect to commercial property leases since *Mansur* was limited to residential dwellings. *Id.* at 1327.

130. *Haskell Co.*, 612 So. 2d at 674.

131. *Id.* at 675.

132. *Id.* at 675–76.

133. *Id.* at 675 (“[T]he time has come to add caveat emptor to the trash heap of discarded legal doctrines In its place, we would require in all real property transactions (sales or leases) full disclosure to the buyer or lessee of all facts material to either the value or the condition of the property.”). The Court also noted that such a duty to disclose would “extend only to the buyer.” *Id.*

134. See *Green Acres, Inc. v. First Union Nat’l Bank of Fla.*, 637 So. 2d 363, 365 (Fla. 4th Dist. Ct. App. 1994) (reviewing the *Haskell* court’s criticism of *caveat emptor* before explicitly declining to consider whether *Johnson* should be extended to commercial real property transactions with added limitations); *Kaplan v. Peterson*, 674 So. 2d 201, 203 (Fla. 5th Dist. Ct. App. 1996) (“However, although questioned and criticized, the doctrine still prevails in Florida with regard to sales of commercial real property.”) (footnote omitted).

transactions; and, if not, with what legal principles should it be replaced?”¹³⁵ Twenty-three years later, the Florida Supreme Court has yet to answer this question.¹³⁶ The issues raised by the *Haskell* court highlight the faults with continuous application of *caveat emptor* to commercial real estate transactions. These faults persist today. Can a true distinction be made between allegedly sophisticated commercial property investors and simpler, ordinary purchasers? Should such alleged sophistication bar the law’s protection?

B. Further Muddying the Waters

Unfortunately, the failure to eradicate *caveat emptor* from commercial property sales and leases—and to provide equal protection for commercial property purchasers and lessees—is further complicated by the courts’ failure to establish a bright line between residential property and commercial property. Consequently, this failure creates further harm to purchasers in the real estate market since a court may classify a commercial property as a residential property or a residential property as a commercial property. In *Agrobin, Inc. v. Botanica Development Associates, Inc.*,¹³⁷ Robinson formed a corporation called Agrobin for the purpose of purchasing a condominium unit.¹³⁸ He subsequently bought a condominium unit on Key Biscayne from Botanica Development Associates, which was to be used as a vacation home.¹³⁹ Agrobin additionally rented out the apartment, however.¹⁴⁰ Two years after the purchase, the owners of the apartment unit beneath Agrobin’s roof terrace filed suit against both Agrobin and Botanica for damages caused by leaks.¹⁴¹ Agrobin brought a cross-claim against Botanica for contribution, asserting that Botanica failed to disclose the problem under *Johnson*.¹⁴²

135. *Haskell Co.*, 612 So. 2d at 676.

136. See *Serv. Merch. Co. v. Lane Co.*, 620 So. 2d 762 (Fla. 1993) (acknowledging the Petitioner’s Voluntary Notice of Dismissal and subsequently dismissing the Petition for Review).

137. 861 So. 2d 445 (Fla. 3d Dist. Ct. App. 2003).

138. *Id.* at 446.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

In a one-page per curiam opinion, the Court reasoned that the condominium was a commercial property simply because the plaintiff had used a corporation to purchase the apartment for the purpose of a commercial venture.¹⁴³ The Court accordingly concluded that Botanica, as the seller, had not been under “a duty to disclose.”¹⁴⁴ The noticeable problem with the Court’s holding is it is divorced from precedent, like *Johnson*¹⁴⁵ and *Futura Realty*,¹⁴⁶ in which the nature of the property itself was used to determine whether the property was residential or commercial. *Agrobin* sets a dangerous precedent, though, by shifting the focus from an analysis of the nature of the property itself to the buyer’s intended use.¹⁴⁷

Agrobin thus serves as an additional hurdle in real estate transactions, at least for purchasers. Under *Agrobin*, purchasers of mixed-use properties face inconsistent treatment since courts have failed to fashion a test for separating uses or distinguishing residential property from commercial property. For example, imagine that Abe wants to purchase a building from Bob, intending to use that building as his real estate office. In order to afford the building, however, Abe must sell his or her home. After doing so, Abe uses the profits from the home sale to purchase the building from Bob. While looking for a new home, Abe temporarily moves into the vacant building, sleeping there every night for a few weeks. One night during a rainstorm, the building’s roof collapses while Abe is asleep, causing serious injury to Abe. Subsequently, Abe comes to learn that the roof had been fixed many times in the past for similar problems and that Bob knew of these previous problems, but did not disclose these problems to Abe. In light of *Agrobin*, Abe likely is unfortunately barred from bringing a claim against Bob because Abe intended to use the building as a real estate office, not a home. Therefore, *Agrobin* adds another level of analysis to real estate transactions and has the ability to further deprive purchasers of the protection of *Johnson*.

143. *Id.*

144. *Id.*

145. *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985).

146. *Futura Realty v. Lone Star Bldg. Ctrs. (E.), Inc.*, 578 So. 2d 363 (Fla. 3d Dist. Ct. App. 1991).

147. Whilden S. Parker, *Commercial vs. Residential Issue—Agrobin Decision*, 78 FLA. B.J. 7 (2004) (“It seems that the Third DCA has fashioned a rule that the buyer’s intended use determines whether a transaction is commercial or residential.”).

V. THE SOLUTION

The failure to abandon the *caveat emptor* doctrine and impose a duty to disclose on the seller in commercial real estate leases and sales transactions is harmful to prospective purchasers and lessees. This Part begins by (A) examining the *Johnson* nondisclosure action and arguing that the Florida Legislature should provide a broad definition for nondisclosure, and apply this standard to both residential and commercial real estate leases and sales. Included in this discussion is an examination of how other states have limited *caveat emptor*, as well as policy considerations. This Part next argues that (B) alternatively, if the Florida Legislature does not eradicate the *caveat emptor* doctrine from commercial property sales and leases, it should at least establish a bright line for distinguishing between residential real property and commercial property.

A. Extending the *Johnson* Nondisclosure Duty to Commercial Real Property Transactions

As extensively discussed above, one of the gravest problems with the failure to extend the *Johnson* nondisclosure duty to commercial real estate transactions is that purchasers and lessees of commercial real property do not receive the same protection as the purchasers and lessees of residential real property. This violates the principles of fair dealing, equity, and justice that the *Johnson* court stressed. Due to the courts' reluctance to extend *Johnson* to commercial real property transactions, commercial property sellers and lessors still maintain their impervious shields of *caveat emptor*—they are liable only for active concealments of known defects and material misrepresentations of the property's condition, but nondisclosure of a known defect is not actionable. The time has come to extend the *Johnson* nondisclosure duty.

Overall, the *Johnson* rule is a good standard. First, the standard is properly centered on the economics of the transaction by focusing on facts that materially affect the property's value. Naturally, any buyer or lessee is going to be concerned with the facts that materially affect the property's value. Hence, the *Johnson* standard seeks to safeguard buyers and lessees from severe economic loss. On the flip side of the coin, buyers and lessees may learn that the property is actually of a higher value than

advertised if the seller discloses a condition that materially affects the property's value in a positive way. Additionally, the standard utilized to determine materiality, as expressed in *Billian v. Mobil Corp*, properly requires an objective determination rather than a subjective determination.¹⁴⁸ Like all objective standards, this objective standard is a uniform standard of relevant law rather than a varying standard. In other words, an objective standard ensures that each purchaser's conduct is measured against the same standard.¹⁴⁹

Still, the *Johnson* standard is not blemish-free. The *Johnson* standard has received criticism before for neglecting to explain what constitutes a nondisclosure.¹⁵⁰ Attorney Whilden S. Parker posited a solution to this problem by pointing to the partial disclosure exception to *caveat emptor*, which, as aforementioned,¹⁵¹ states that a partial disclosure of facts mandates full disclosure of those facts.¹⁵² Mr. Parker explained that the partial disclosure exception provided the solution to the Florida Supreme Court's failure to supply a definition for nondisclosure because, by definition, a seller who discloses only some facts has inherently failed to disclose other facts, and thus, the partial disclosure exception to the doctrine kicks in.¹⁵³ Mr. Parker accordingly advocated that juries should be instructed that a defendant's partial disclosure does not satisfy his legal duty to disclose.¹⁵⁴

Mr. Parker's conclusion not only utilizes one of the well-established exceptions to *caveat emptor*, but it is also consistent with the *Johnson* court's notions of justice, equity, and fair dealing. An example is illustrative here: imagine the seller of a home discloses to the buyer that the home has had a problem in the past month with its support beams bending, but the necessary repairs

148. 710 So. 2d 984, 987 (Fla. 4th Dist. Ct. App. 1998) (citing *Johnson*, 480 So. 2d at 629). The *Johnson* standard was criticized in the 1980s for lacking guidance on how to define the material effect of a nondisclosed fact, but *Billian* corrects this problem. See Craine, *supra* note 10, at 368–69 (advocating for an objective standard).

149. See Kevin Jon Heller, *Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases*, 26 AM. J. CRIM. L. 19 (1998) (examining the objective standard of reasonableness in criminal law).

150. See, e.g. Parker, *supra* note 76, at 32 (questioning whether “any suggestion of a specific problem get[s] the seller off the hook.”).

151. *Supra* Part II.

152. Parker, *supra* note 76, at 32.

153. *Id.* Mr. Parker noted that the “only qualifier” is that such undisclosed facts are concealed and materially affect the property's value. *Id.*

154. *Id.*

were made. The seller further somehow relays to the buyer that he does not know of any material facts affecting the home's value or condition. In reality, however, the support beams were repaired five times within the preceding three months to prevent the home from caving in and the beams will almost certainly have to be repaired again. This seller certainly does not engage in fair dealing. Such examples of fraud are one of the reasons why the *Johnson* court sought to protect homebuyers.

Yet, while the solution serves as a laudable first step, it falls into the same trap that all disclosures in Florida fall into: failure to mandate written disclosures. In Florida, sellers may make disclosures either in writing or orally.¹⁵⁵ Florida law requires certain disclosures in real property sales.¹⁵⁶ Parties frequently utilize form contracts, such as the FR/FB Contract¹⁵⁷ and the CRSP-13,¹⁵⁸ in residential property sales.¹⁵⁹ However, both the FR/FB Contract and the CRSP-13 merely restate the *Johnson* nondisclosure duty and do not provide any space in their respective disclosure sections for the seller to make specific, written disclosures.¹⁶⁰ While the form contracts mandate the seller's disclosure for certain conditions, these conditions are extremely specific, such as radon gas levels and mold.¹⁶¹ For commercial property sales, the Florida Bar acknowledges that "written representations and warranties by the seller" may afford "some measure of protection" to the buyer "in view of the seller's superior knowledge," but admits that negotiations between the parties on such provisions are often quarrelsome and controversial.¹⁶²

Oddly enough, the failure to mandate written disclosures ends up providing buyers and lessees with too much protection. The failure of Florida law to mandate written disclosures is that buyers

155. See Rebecca Taylor, *Selling a Florida Home: What Are My Disclosure Obligations?*, NOLO, <http://www.nolo.com/legal-encyclopedia/florida-home-sellers-disclosures-required-under-state-law.html> (last visited July 7, 2017) (referencing *Johnson*, discussed *supra* Part III(A)). It is worth noting that disclosures of certain real estate broker or agent's duties to a residential property buyer or seller must be written or somehow documented. See FLA. STAT. § 475.278 (2017) (specifying required disclosures in authorized brokerage relationships).

156. FLORIDA REAL PROPERTY SALES TRANSACTIONS § 3.46 (8th ed. 2015).

157. Members of the Florida Bar and the Florida Association of Realtors developed the FR/FB form. *Id.* § 3.12.

158. Unlike the FR/FB Contract, the development of the CRSP-13 did not involve members of the Florida Bar, but merely the Florida Association of Realtors' legal staff. *Id.*

159. *Id.*

160. *Id.* §§ 3.64, 3.66.

161. *Id.*

162. FLORIDA REAL PROPERTY COMPLEX TRANSACTIONS § 1.48 (7th ed. 2013).

and lessees can end up relying on oral disclosures, which are later difficult for a seller to prove in a lawsuit from the buyer or lessee.¹⁶³ In other words, the combination of the *Johnson* ruling and the failure to mandate written disclosures in residential real estate transactions affords so much protection to buyers and lessees that it comes at the expense of the seller. It is still possible to maintain the protections of *Johnson* and institute mandatory written disclosures in all real estate transactions. In fact, many jurisdictions have similarly limited *caveat emptor* and required mandatory written disclosures in real estate transactions.¹⁶⁴ For example, the Alaska Legislature passed the Disclosures in Residential Real Property Transfers law in 1992 that required such mandatory disclosures, due to similar concerns that the buyers were afforded too much protection.¹⁶⁵ Similarly, Iowa has retreated from imposing *caveat emptor* in real property transactions by requiring all real property sellers to complete disclosure forms relating to property's condition, characteristics, and structures.¹⁶⁶ Therefore, for all the aforementioned reasons, the *Johnson* nondisclosure rule should be maintained in residential property transactions, extended to commercial real property transactions, and the Florida Legislature should require written disclosures in all real property transactions.

Proponents of *caveat emptor* argue that there is some justification for retaining *caveat emptor* in the context of commercial real property transactions. First, they point out that the doctrine is premised on the idea that sophisticated parties do not deserve the law's protection because they can fend for themselves.¹⁶⁷ In this respect, *caveat emptor* embraces basic freedom to contract principles and dispenses with any assumption

163. See Taylor, *supra* note 155. Significantly, however, the Florida Legislature has required residential property sellers to present prospective purchasers with a disclosure summary of the residential property's ad valorem taxes. FLA. STAT. § 689.261 (2017).

164. *E.g.*, ALASKA STAT. § 34.70.010 (2015); CAL. CIV. CODE § 1102.1 (2000); HAW. REV. STAT. § 508D-3.5 (2013); IOWA CODE § 558A.2 (2010).

165. James R. Pomeranz, *The State of Caveat Emptor in Alaska As It Applies to Real Property*, 13 ALASKA L. REV. 237, 242 (1996). The Alaska Supreme Court even went as far as to hold a real estate broker liable under the same rationale for an "innocent misrepresentation." *Id.* at 245; Unlike Florida, Alaska had already limited *caveat emptor* in all real property sales by that point. See *Cousineau v. Walker*, 613 P.2d 608, 616 (Alaska 1980) (holding "that a purchaser of land may rely on material representations made by the seller and is not obligated to ascertain whether such representations are truthful").

166. IOWA CODE § 558A.4(1) (2010); *Arthur v. Brick*, 565 N.W.2d 623, 625–26 (Iowa Ct. App. 1997).

167. *Supra* Part III(B).

that the parties have equal bargaining positions.¹⁶⁸ Departure from freedom to contract in commercial property transactions, in which the parties are expected to bear a higher level of sophistication, can thus be viewed as unnecessary and having the possibility to paralyze business transactions.¹⁶⁹ Eliminating *caveat emptor* in commercial property transactions could also effectively diminish the seller's bargaining position.¹⁷⁰

Proponents have also distinguished commercial property purchasers from residential property purchasers, recognizing a commercial property purchaser as an "income-seeker."¹⁷¹ Perhaps the Florida Supreme Court summed up this position best in *Conklin*, noting that "the investor may always choose to invest his excess capital elsewhere. [Whereas][t]he typical family looking for a residence not only is seeking the basic necessity of shelter, but often must do so within the time constraints imposed by career demands."¹⁷² Thus, under this argument, elimination of the doctrine from commercial property transactions is not justified because commercial purchasers are not as vulnerable as residential purchasers. Finally, eliminating *caveat emptor* from commercial property transactions in place of broad, mandatory disclosure laws may invite more litigation¹⁷³ since every case will have to be evaluated on a case-by-case basis.¹⁷⁴ Maintaining *caveat emptor*, on the other hand, would prevent this by imposing a bright line rule that discourages such case-by-case examinations.

The justifications for eliminating *caveat emptor* from commercial property transactions trump these arguments against eliminating *caveat emptor* from such transactions. First, a prospective commercial property purchaser or lessee is no more

168. Frona M. Powell & Jane P. Mallor, *The Case for an Implied Warranty of Quality in Sales of Commercial Real Estate*, 68 WASH. U. L.Q. 305, 335 (1990).

169. See Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 629 (1943) (explaining that "[s]ociety, therefore, has to give the parties freedom of contract; to accommodate the business community the ceremony necessary to vouch for the deliberate nature of a transaction has to be reduced to the absolute minimum").

170. See Kathleen McNamara Tomcho, Note, *Commercial Real Estate Buyer Beware: Sellers May Have the Right to Remain Silent*, 70 S. CAL. L. REV. 1571, 1592 (1997) (explaining that a commercial investor enjoys a better bargaining position than a typical residential property purchaser).

171. Powell & Mallor, *supra* note 168, at 320.

172. *Conklin v. Hurley*, 428 So. 2d 654, 659 (Fla. 1983).

173. See Tomcho, *supra* note 170, at 1602 (remarking that disappointed buyers would bring suit in nearly every real estate transaction).

174. *Id.* at 1601.

likely to notice defects in a property than a prospective residential property purchaser or lessee. Notwithstanding, the law does not afford prospective purchasers and lessees any protection in commercial property transactions. Although this justification may have been reasonable when commercial buildings were smaller and simpler, the characteristics of modern commercial properties make the task of detecting defects more difficult.¹⁷⁵ Thus, even if there is some difference in sophistication between purchasers or lessees in residential property and commercial property transactions, such a difference does not matter since it is unlikely that any purchaser or lessee would detect defects.

Similarly, there will always be a “first time” for lessees and purchasers of commercial property, but the law disregards this and assumes that these parties have superior and advanced knowledge before the first purchase. Commercial property purchasers and lessees do not always have the level of sophistication that the law presumes them to have, though, especially when gentrification is resulting in smaller, less sophisticated companies purchasing buildings in run-down areas.¹⁷⁶ Our society acknowledges the problems of maintaining a *caveat emptor* policy in automobile and electronics purchases,¹⁷⁷ so why must the doctrine prevail for commercial property purchases and leases, most of which are certainly going to be much more expensive than the purchase of a car or a new stereo system? Furthermore, instructing buyers and lessees to fend for themselves in commercial property transactions in a state that is constantly faced with Mother Nature’s wrath is nothing short of preposterous. Florida faces a severe threat from hurricanes for six months each year,¹⁷⁸ while properties across the

175. See Powell & Mallor, *supra* note 168, at 310, 331–32 (discussing the effect of complex home construction on detecting hidden defects and discussing how certain structural defects may be undetected).

176. See Alexandra Fitos, Graduate Thesis, *Where the Palm Grows: The Ybor City Revitalization Project*, U. S. FLA. SCHOLAR COMMONS 14, 14–17 (Apr. 1, 2004), available at <http://scholarcommons.usf.edu/cgi/viewcontent.cgi?article=2035&context=etd> (discussing gentrification processes and effects).

177. See Howard Kleinberg, *Bloated Sticker Prices? Caveat Emptor*, ORLANDO SENTINEL (Dec. 28, 1992), http://articles.orlandosentinel.com/1992-12-28/news/9212280479_1_caveat-emptor-price-list-electronics-shop (discussing certain advertisements).

178. Fla. Climate Ctr., Fla. State Univ., Ctr for Ocean-Atmospheric Prediction Studies, *Hurricanes*, CLIMATECENTER.FSU.EDU, <http://climatecenter.fsu.edu/topics/hurricanes> (last visited July 8, 2017).

state meanwhile fall into sinkholes¹⁷⁹ or drown in flash floods.¹⁸⁰ Consequently, commercial properties can be damaged prior to sale or lease and yet buyers and lessees are expected to fend for themselves. Therefore, holding property purchasers and lessees to a different standard depending on the land use categorization of the property harms prospective purchasers and lessees, and does not have any legitimate justification.

Finally, eradicating *caveat emptor* from commercial property transactions also has some economic justification. For example, some have pointed out that the seller who discloses information is the “cheapest cost avoider” given his access to information relating to the property’s value and condition.¹⁸¹ In other words, in the long run, the preferable economic choice is to disclose the defects because doing so protects against the costs of a lawsuit. Commentators have also remarked that legislative efforts to eliminate fraudulent trade practices from the marketplace typically result in an effect “of restoration rather than destruction” on free markets.¹⁸² Richard Cordray, the head of the Consumer Financial Protection Bureau, has also criticized *caveat emptor* as being “obsolete.”¹⁸³

Thus, for all the aforementioned reasons, the *Johnson* nondisclosure duty should be extended to commercial property transactions, thereby eliminating *caveat emptor* from such business deals.

B. Correcting *Agrobin*

Alternatively, if the Florida Legislature does not eradicate the *caveat emptor* doctrine from commercial property sales and leases, it should at least establish a bright line for distinguishing between

179. Michael Snyder, *Why Are Giant Sinkholes Appearing All Over America? Is Something Happening to the Earth's Crust?*, INFOWARS.COM (Mar. 4, 2013), <http://www.infowars.com/why-are-giant-sinkholes-appearing-all-over-america-is-something-happening-to-the-earths-crust/>.

180. See Ada Carr, *Miami Area Experiencing Chronic Nuisance Flooding Due to Annual King Tides*, WEATHER CHANNEL (Oct. 21, 2015, 12:00 AM EDT), <http://www.weather.com/news/news/miami-beach-flooding-high-king-tide> (describing flash floods in Miami).

181. Johnson, *supra* note 28, at 89.

182. James T. Hodge & Sheryl Glenn Snyder, *Can the Kentucky Consumer Ever Forget Caveat Emptor and Find True Happiness?*, 58 KY. L.J. 325, 325 (1969).

183. Satoshi Kambayashi, *Caveat Vendor: A New Regulator Takes an Expansive View of Its Remit*, ECONOMIST (Feb. 7, 2014), <http://www.economist.com/news/finance-and-economics/21595488-new-regulator-takes-expansive-view-its-remit-caveat-vendor>.

residential and commercial property. As previously discussed, *Agrobin* set a dangerous precedent by shifting the focus in determining a property's land use categorization from the nature of the property itself to a buyer's intended use.¹⁸⁴ Consequently, a purchaser who believes he will receive the *Johnson* protections for residential property transactions may be exposed to a seller's impervious shield of *caveat emptor* in a commercial real property transaction, and he thus will lose any right to recover from the seller.

The Florida Legislature should establish a well-defined and more favorable standard than the current *Agrobin* rule fashioned by the Third District Court of Appeal. The solution to this problem is quite simple: a property's land use categorization should be determined by focusing on the buyer's actual and primary use of the property immediately following the time of the purchase, rather than the buyer's intended use at the time of the purchase.¹⁸⁵ This standard accomplishes two main goals. First, it corrects the problem of *Agrobin* by establishing a consistent standard for all properties and eliminating the current subjective component. This more reliable standard is also consistent with the objective materiality standard. Furthermore, this standard provides all buyers with notice of how the property will be viewed, which provides a remedy for the instances in which a buyer has difficulty proving his or her intended use. Thus, although this protection would not solve the problem that real property purchasers receive different protections based on the type of property, it would at least limit the harm that such purchasers face.

VI. CONCLUSION

Unless *caveat emptor* is eradicated from all real property transactions and the *Johnson* nondisclosure duty is extended to

184. *Supra* Part IV(B).

185. Florida already utilizes a similar analysis for ad valorem taxes, holding that a property's actual use on the first day of the new calendar year is dispositive of the property's tax treatment. *Dade Cnty. Taxing Auths. v. Cedars of Lebanon Hosp. Corp.*, 355 So. 2d 1202, 1204 (Fla. 1978); *Lake Worth Towers, Inc. v. Gerstung*, 262 So. 2d 1, 3 (Fla. 1972). The Illinois Supreme Court has utilized a similar standard for determining the tax-exempt status of property, holding that a property's primary use, rather than its incidental uses, demonstrates its status for tax exemption. *People ex rel. Kelly v. Avery Coonley Sch.*, 145 N.E.2d 80, 82 (Ill. 1957). Not surprisingly, other jurisdictions have used taxes as a land use control device. See 5-33 ZONING AND LAND USE CONTROLS §33.03(3)(c)(vi) (2017) (detailing the Vermont Legislature's tax measures to control land use value).

commercial real property transactions, prospective commercial property purchasers and lessees will continue to face harm. Furthermore, the Florida Legislature should follow the lead taken by other states and adopt a law that mandates written disclosures in all real property sales. Alternatively, if the Legislature does not eradicate the *caveat emptor* doctrine from commercial property transactions, it should at least establish a bright line standard for distinguishing between residential and commercial property in real estate sales transactions. This standard should focus on the property's actual and primary use immediately following the time of the purchase, rather than the buyer's intended use at the time of the purchase. This standard would not fix the overall problem, but it would certainly limit the harm that purchasers of commercial real property face. Until the overall problem is corrected, however, sellers and lessors will continue to hold onto those impervious shields.