

The owner of a residence advertised it for sale in various media. A buyer who lived in another state decided to purchase it. The buyer neither visited the residence prior to the purchase nor personally spoke with the seller. All of their communication was by mail. The buyer never asked the seller about the condition of the residence, nor did the seller say anything about it except to ask if the buyer wanted to inspect the property because he intended to sell it "as is." The buyer did not inspect the residence because, as she told the seller, she was an experienced land buyer, and also because privately she felt that the seller, being relatively inexperienced in real estate matters, was selling the residence below its fair market value.

Both parties signed a contract that was silent concerning the condition of the residence except to note that the sale was "as is." Two weeks later, the buyer sent the seller a check and the seller sent the buyer a warranty deed.

After receiving the deed, the buyer visited the residence for the first time and discovered termite infestation that had caused substantial damage. The seller had not known of the termites.

There is no applicable statute.

The buyer sued the seller for damages and/or rescission of the contract.

For whom will the court find?

- A. For the buyer, because an "as is" clause is per se unconscionable in a residential sales transaction.
- B. For the buyer, because she received a warranty deed.
- C. For the seller, because he breached no duty.
- D. For the seller, because of the doctrine of merger.

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Collecting Statistics

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Explanation:

Seller's duty to disclose

Common law (minority) rule	Caveat emptor	No duty to disclose property defects unless otherwise provided
Modern (majority) rule	Commercial property	
	Residential property	Must disclose known material defects that buyer could not reasonably discover
		Exception: "as is" clause or specific disclaimers without seller's fraud

In a **majority of jurisdictions** (default rule), a **seller of residential property** has a **duty to disclose** all **material physical defects** that are **known** to the seller and **cannot be reasonably discovered** by the buyer. If the seller fails to do so, then the buyer may rescind the sales contract or seek damages. A defect is material if it:

substantially affects the value of the residence
impacts the health or safety of a resident *or*
affects the desirability of the residence to the buyer.

However, the seller **can disclaim** the duty to disclose if (1) the disclaimer is **clearly and specifically stated** in the real estate contract and (2) the seller has **not fraudulently misrepresented or concealed** the condition of the property.

Here, the seller did not disclose a termite infestation, which affected the value, safety, and desirability of the residence. But the seller had *not* known of the infestation, so he had no duty to disclose this defect. And even if the seller had been aware of the infestation, the duty to disclose it was disclaimed because the real estate contract noted that the sale was "as is." That clause is valid because there is no indication that there was a fraudulent misrepresentation or concealment of the condition (**Choice A**). Therefore, the court will find for the seller.

(Choices B & D) A **warranty deed** provides protection for title issues. And under the merger doctrine, acceptance of a warranty deed extinguishes all the seller's contractual promises relating to the quality of title. But since this suit concerns the physical condition of the residence (not title), the buyer's receipt of a warranty deed and the merger doctrine are irrelevant.

Educational objective:

Most jurisdictions require residential sellers to disclose all known, material physical defects that cannot be reasonably discovered by the buyer. However, this duty can be disclaimed if

(1) clearly and specifically stated in the sales contract and (2) the property's condition has not been fraudulently misrepresented or concealed.

References

77 Am. Jur. 2d Vendor and Purchaser § 265 (2020) (discussing "as is" sales clauses).

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