

Five years ago, a woman acquired a lot improved with a 15-year-old dwelling. This year, the woman listed the property (lot and dwelling) for sale with a licensed real estate broker. The woman informed the broker of several defects in the house that were not readily discoverable by a reasonable inspection, including a leaky basement, an inadequate water supply, and a roof that leaked.

A man responded to the broker's advertisement, was taken by the broker to view the property, and decided to buy it. The broker saw to it that the contract specified the property to be "as is," but neither the broker nor the woman pointed out the defects to the man, who did not ask about the condition of the dwelling. After closing and taking possession, the man discovered the defects, had them repaired, and demanded that the woman reimburse him for the cost of the repairs. The woman refused, and the man brought an appropriate action against the woman for damages.

If the woman wins, what is the likely reason?

- A. The "as is" provision in the contract controls the rights of the parties.
- B. The broker became the agent of both the man and the woman and thus knowledge of the defects was imputed to the man.
- C. The seller of a used dwelling that has been viewed by the buyer has no responsibility toward the buyer.
- D. The woman fulfilled the duty to disclose defects by disclosure to the broker.

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

Under the common-law rule of caveat emptor, a seller had no duty to disclose property defects to the buyer. However, the majority of jurisdictions now require **sellers of residential property to disclose material defects** that are **known to the seller** and **cannot be reasonably discovered** by the buyer. 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.

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 broker disclaimed the woman's duty to disclose by ensuring that the contract specified the property to be "as is." Since the man did not ask about the condition of the dwelling, the woman made no misrepresentations regarding its condition. Therefore, the woman will likely prevail because the "as is" provision in the contract controls the rights of the parties.

(Choice B) The real estate broker is the woman's agent since only she contracted with the broker to list the property. The broker would have been a dual agent representing both parties had the man also hired the broker. But dual representation would *not* have imputed knowledge of the defects to the man.

(Choice C) Unless otherwise provided, the seller of a used dwelling that has been viewed by the buyer still has a duty to disclose known material defects that cannot be reasonably discovered by the buyer.

(Choice D) Disclosure to the broker was not sufficient to fulfill this duty. The woman could have been vicariously liable for the broker's failure to disclose the defects had this duty not been disclaimed.

Educational objective:

Sellers of residential property must disclose known material defects that the buyer cannot reasonably discover. However, the seller can disclaim this duty (eg, with an "as is" clause) so long as the seller has not fraudulently misrepresented or concealed the condition of the property.

References

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

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