

A man owned a residential lot improved with a dwelling and conveyed it for a valuable consideration to a buyer. The dwelling had been constructed by a prior owner. The buyer had inspected the dwelling prior to the purchase and discovered no defects. After moving in, the buyer became aware that sewage seeped into the basement when the toilets were flushed. The man said that this defect had been present for years and that he had taken no steps to hide this fact from the buyer. The buyer paid for the necessary repairs and brought an appropriate action against the man to recover his cost of repair.

If the buyer wins, what will be the likely reason?

- A. The buyer made a proper inspection.
- B. The man breached the implied warranty of habitability and fitness for purpose.
- C. The man failed to disclose a latent defect.
- D. The situation constitutes a health hazard.

Explanation:

Seller's duty to disclose

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|-----------------------------------|-----------------------------|---|
| 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 |

The majority of jurisdictions impose a duty on **sellers of residential property** to **disclose** any **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.

Here, the man admitted that he had known for years that sewage seeped into the basement when the toilets were flushed. This clearly material defect could not be, and was not, reasonably discovered by the buyer after inspecting the dwelling. Therefore, the buyer will likely win because the man breached his duty to disclose this latent defect.

(Choice A) A proper or reasonable inspection may not unearth every defect with a property. As a result, the duty to disclose defects that are not readily discoverable applies even when a buyer conducts an inspection.

(Choice B) The warranty of habitability and fitness* is implied in almost all jurisdictions in a contract for the sale of a *newly* constructed residence, so it does not apply here.

*This is also referred to as the implied warranty of suitability, quality, or workmanlike construction.

(Choice D) The mere fact that the defect in question poses a health hazard is not enough to impose liability on the seller. For example, the man would not be liable for the hazardous defect if he had been unaware of the defect or if he had included an "as is" clause to disclaim the duty to disclose.

Educational objective:

A seller of residential property has a duty to disclose any known material defects that cannot be reasonably discovered by the buyer.

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