

At common law, home purchases were governed by the principle known in Latin as *caveat emptor*—in English, “buyer beware.” Buyers were expected to perform their own investigation into the property and make their judgments on whether or not to purchase based on their own inquiry. Gradually the law has imposed duties of disclosure on sellers. Simply speaking, sellers must disclose to buyers any *material* defects in the property. Failure to disclose material defects is legally tantamount to making false representations.

Nondisclosure of Stigmatizing Information May Provide a Cause of Action

Usually, material defects in real property relate to physical flaws in the property or its structures. Some defects, however, are not manifested in physical aspects of the

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property. Real estate that suffers from nonphysical or emotional defects is called “stigmatized property.”

“[S]tigmatized property” . . . has been defined as “property psychologically impacted by an event which occurred or was suspected to have occurred on the property, such event being one that has no physical impact of any kind.” National Association of Realtors, Study Guide: Stigmatized Property 2 (1990), quoted in Robert M. Morgan, *The Expansion of the Duty of Disclosure in Real Estate Transactions: It’s Not Just for Sellers Anymore*, Fla. B.J., Feb. 1994, at 31.

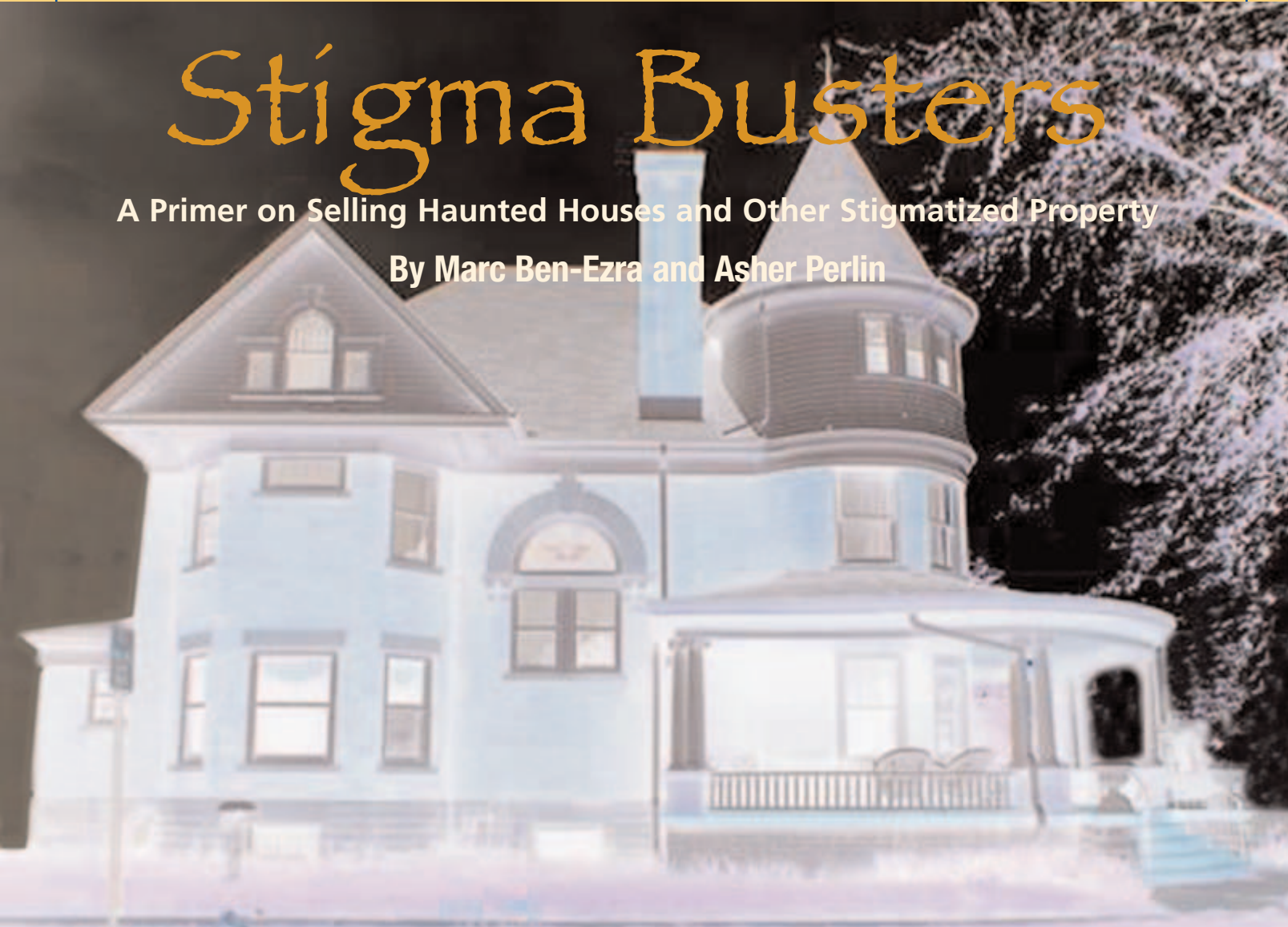
Strawn v. Canuso, 657 A.2d 420, 427 n.1 (N.J. 1995), superseded by statute as stated in *Nobrega v. Edison Glen Assoc.*, 772 A.2d 368 (N.J. 2001).

When can a buyer complain that the property is stigmatized and rescind a contract or state a cause of action on that basis? How would a buyer react upon discovering the house

Stigma Busters

A Primer on Selling Haunted Houses and Other Stigmatized Property

By Marc Ben-Ezra and Asher Perlin



The 101-year old A.J. Henry House in Michigan City, Indiana, site of the suicide of a previous resident. Photo by David VanFleet.

he or she had agreed to buy had been the site of a gruesome murder or suicide? What if the previous occupant suffered from HIV or AIDS? What if the house were haunted? These are serious questions—even the last one. At least one court recognized that a purchaser stated a cause of action to rescind the contract when she discovered that a woman and her four children were murdered in the house. *Reed v. King*, 193 Cal. Rptr. 130 (Cal. Ct. App. 1983). In another case, buyers tried to rescind the purchase contract when they learned that the previous owner died of AIDS. *Kleinfield v. McNally* (N.Y. Co. Sup. Ct., July 15, 1988), cited in Ross R. Hartog, Note, *The Psychological Impact of AIDS on Real Property and a Real Estate Broker's Duty to Disclose*, 36 Ariz. L. Rev. 757, 756–66 (1994). In addition, a New York appellate court allowed a purchaser to rescind his contract on a property when he ascertained that his new house was widely reputed to be possessed by poltergeists. *Stambovsky v. Ackley*, 572 N.Y.S.2d 672 (N.Y. App. Div. 1991). The “poltergeist court” held:

While I agree with Supreme Court that the real estate broker, as agent for the seller, is under no duty to disclose to a potential buyer the phantasmal reputation of the premises and that, in his pursuit of a legal remedy for fraudulent misrepresentation against the seller, plaintiff hasn't a ghost of a chance, I am nevertheless moved by the spirit of equity to allow the buyer to seek rescission of the contract of sale and recovery of his down payment.

Id. at 674–75. On learning of any of these types of “defects,” many buyers would have similar apparitions . . . er, apprehensions about the deal.

Several States Regulate Disclosure of Stigmatizing Information Statutorily

The usual claim is that the seller's failure to disclose the stigmatizing information was a material misrepresenta-

tion or omission that warrants rescission. Published decisions dealing with rescission or misrepresentation claims based on property stigmatization are rare perhaps because of the trend in state legislatures to address the issue statutorily. At least 21 states have adopted statutes speaking to stigmatizing issues in one way or another. Cal. Civ. Code § 1710.2; Colo. Rev. Stat. Ann. § 38–35.5–101; Conn. Gen. Stat. § 20–329dd; Del. Code Ann. tit. 24, § 2930; Fla. Stat. § 689.25; Ga. Code Ann. § 44–1–16; Haw. Rev. Stat. § 467–14(18); Idaho Code § 55–2802; Ky. Rev. Stat. Ann. § 207.250; La. Rev. Stat. Ann. § 37:1468; Md. Code Ann., Real Prop. § 2–120; Mo. Ann. Stat. § 442.600; N.M. Stat. Ann. § 47–13–2; Okla. Stat. tit. 59, § 858–513; Or. Rev. Stat. § 93.275; R.I. Gen. Laws § 5–20.8–6; S.C. Code Ann. § 27–50–90; S.D. Codified Laws § 43–4–44; Tex. Prop. Code Ann. § 5.008(c); Utah Code Ann. § 57–1–37; Va. Code Ann. § 55–524.

The statutory solution in Florida is typical. Fla. Stat. § 689.25 provides:

(1) (a) The fact that an occupant of real property is infected or has been infected with human immunodeficiency virus or diagnosed with acquired immune deficiency syndrome is not a material fact that must be disclosed in a real estate transaction.

(b) The fact that a property was, or was at any time suspected to have been, the site of a homicide, suicide, or death is not a material fact that must be disclosed in a real estate transaction.

(2) A cause of action shall not arise against an owner of real property, his or her agent, an agent of a transferee of real property, or a person licensed under chapter 475 for the failure to disclose to the transferee that the property was or was suspected to have been the site of a homicide, suicide, or death or that an occupant of that property was infected with human immunodeficiency virus or diagnosed with acquired immune deficiency syndrome.

Notice that the statute provides that this information is nonmaterial as a matter of law. Then, it provides immunity from suit for nondisclosure that property is stigmatized. Thus, the legislature has indicated that certain irrational fears—even those that are in fact “material” to many purchasers—are nonetheless legally immaterial.

In fact, buyers' reluctance to purchase stigmatized property is not based only on irrational fears, prejudices, and superstitions. The New York “poltergeist court” found that the house's reputation as being haunted could dramatically affect its market value. Nonetheless, the Florida statute (and most of the other state statutory solutions to the problem) relieves sellers of any duty to disclose these stigmatizing facts.

At the other extreme of the statutory spectrum is South Dakota, which requires certain nonphysical disclosures. Specifically, the seller must disclose whether, in the 12 months preceding the disclosure statement, a homicide or any other felony against a person or the property was committed on the property. S.D. Codified Laws § 43–4–44 (2004). The statute provides the buyer with the right to terminate a written offer to purchase the property based on these disclosures. *Id.* § 43–4–39 (2004). The statute also protects from liability any seller who truthfully provides the disclosures. *Id.* § 43–4–40 (2004).

Georgia's statute exemplifies a third approach. Although the statute protects the nondisclosure of stigmatizing information, it also provides an affirmative duty to respond honestly to questions relating to this same information. Ga. Code § 44–1–16(a)(1). Contrast Florida and many other states that immunize nondisclosure, even when the seller or broker is asked. Under this latter approach, a cause of action, even for an intentional misrepresentation, would appear difficult to maintain because under common law fraud and misrepresentation standards, liability is only for misrepresentations that are material. Under the Georgia model, the purchaser may, by asking, render stigmatizing information material.

Even when states have statutorily protected nondisclosure of stigmatizing information, lawyers must review the language of the particular statute. Most such statutes protect only specifically enumerated nondisclosures, such as whether an occupant had been diagnosed with AIDS or whether a murder or other serious crime occurred in or near the house. A few states, however, go so far as to protect nondisclosure of all information that would have only psychological impact on the value of the property. Colorado, for example, immunizes nondisclosure of any circumstance that could psychologically impact the property. Colo. Rev. Stat. Ann. § 38-35.5-101. If a buyer purchases a house in Colorado that turns out to be haunted, the buyer will be less likely to be able to bring an action for misrepresentation, than, say, in Florida, where only specifically enumerated stigmatizing circumstances are immunized.

One other variable that demands attention is whether the statute protects sellers, brokers, or both. The Colorado statute protects only brokers. Oklahoma's statute, which otherwise largely resembles Colorado's, protects both sellers and their licensees. Okla. Stat. tit. 59, § 858-513. In all cases when a particular statute leaves a gap, any case would default to the common law. Thus, practitioners, even those in states that have legislated on the subject, must educate themselves regarding problems under the common law and possible solutions. Although a lawyer's research into the client's obligation should not end here, a possible starting point could be to consider whether (hypothetically), if the house turns out to be haunted, the client (whether a seller or broker) could be liable, and for what.

Most States Continue to Treat Stigmatized Property Under the Common Law

More than half the states in the country continue to decide all issues relating to disclosure of stigmatizing information under the common law. Moreover, as noted above, even when states have legislated in this area, the statutes usually do not provide complete immunity to all possible defendants. Reference to common law is therefore necessary in

the vast majority of jurisdictions.

Case law on psychologically impacted property is sparse. But general legal principles regarding disclosure in real estate transactions strongly favor openness. Nearly 20 years ago, in a case dealing with a hidden physical defect in a residence, the Florida Supreme Court observed: "[T]he tendency of the more recent cases has been to restrict rather than extend the doctrine of caveat emptor. The law appears to be working toward the ultimate conclusion that full disclosure of all material facts must be made whenever elementary fair conduct demands it." *Johnson v. Davis*, 480 So. 2d 625, 628 (Fla. 1985). Except when legislatures have erected barriers, the courts have been steadily expanding sellers and brokers' affirmative duties of disclosure. In *Johnson v. Davis*, the Florida Supreme Court concluded:

[W]e hold that where 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. This duty is equally applicable to all forms of real property, new and used.

480 So. 2d at 629. This rule is widely accepted in other jurisdictions as well. See, e.g., *Layman v. Birms*, 519 N.E.2d 642, 644 n.1 (Ohio 1988) (listing cases). In view of the trend away from *caveat emptor*, when in doubt, disclosure would appear to be the recommended course of action.

Conclusion

It is surprising that so many legislatures have refrained from acting to limit liability for nondisclosure of stigmatizing information. Often the individuals handling the sales of properties are no better situated than the buyers to know about these psychological "defects" in the property. The obvious examples are brokers, who usually know what the seller tells them. Even some sellers should be shielded from liability for these types of nondisclosures. In many areas, foreclosures constitute a significant percentage of all property sales. The institutional sellers more often than not would not know about any stigmatizing circumstances. Psychological impact statutes remove a large degree of uncertainty from these transactions. ■

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