

# LOOKING OUT FOR THE ILLINOIS HOME BUYER: ANALYZING THE COURT'S NARROW APPROACH IN *KALKMAN V. NEDVED*, 2013 IL APP (3D) 120800, 991 N.E.2D 889\*

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## I. INTRODUCTION

For many, purchasing a home is the ultimate American dream.<sup>1</sup> But for some, this dream can turn into a nightmare full of unexpected repairs and unforeseen headaches.<sup>2</sup> To this day, many naïve home purchasers continue to get saddled with costly material defects and deteriorating conditions in their dream homes that were never disclosed by sellers before the real estate transaction.<sup>3</sup> Although the Illinois legislature has made protective strides, this dream-gone-bad dilemma continues to be a concern, especially today, as home sales in Illinois are up over last year and median prices are on the rise.<sup>4</sup>

Throughout the last half-century, a large number of states have made the switch from the *caveat emptor* (or “buyer beware”) common law doctrine towards a more buyer-friendly principle that requires sellers to disclose known material defects in residential properties.<sup>5</sup> In Illinois, for example, sellers of residential real estate have been required to disclose certain material defects since the Residential Real Property Disclosure Act (the Act) took effect on October 1, 1994.<sup>6</sup> The purpose of the Act is to provide prospective buyers with information about material defects in a home that are known to

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1. Ellen J. Curnes, *Protecting the Virginia Homebuyer: A Duty to Disclose Defects*, 73 VA. L. REV. 459, 459 (1987).

2. *Id.*

3. Leroy Gatlin II, *Reforming Residential Real Estate Transactions: An Analysis of Oklahoma's Disclosure Statute*, 22 OKLA. CITY U. L. REV. 735, 735 (1997).

4. *Illinois Bouncing Back with Strong Home Sales and Median Price Recovery*, AUCTION.COM (Aug. 28, 2013), <http://www.auction.com/blog/illinois-bouncing-back-with-strong-home-sales-and-median-price-recovery/> (“Illinois home sales were up 28.5 percent year-over-year in July, and median prices surged 14.2 percent over that time.”).

5. Gatlin II, *supra* note 3, at 735.

6. See Nancy Hyzer, *Recent Changes to the Residential Real Property Disclosure Act*, 86 ILL. B.J. 159, 159 (1998).

the seller.<sup>7</sup> Thus, the Act protects the buyer from unanticipated defects that were not readily discoverable upon inspection but known by the seller.<sup>8</sup>

However, like many changes in policy, Illinois' mandatory disclosure law has left behind loopholes that sellers seemingly take advantage of by failing to disclose to the buyer information about known material defects in their property.<sup>9</sup> For example, in a case of first impression, the Illinois Third District Court, in *Kalkman v. Nedved*, recently held that a seller is not obligated to disclose defective windows or doors in a home, even if those defects are known to the seller.<sup>10</sup> Put another way, the *Kalkman* court held that a seller's duty to disclose defects under the Act in the property's walls did not extend to material defects in the property's windows or doors because those features were not expressly mentioned in the statute.<sup>11</sup>

The court's analysis of "wall" within the meaning of the Act was too narrow and therefore failed to give enough weight to the purpose of the Act. This Note examines *Kalkman v. Nedved* in regards to the Illinois Third District Court's interpretation of the Act. It argues that the majority's decision was incorrect in determining a seller's duty to disclose defects in a property's walls did not also require a seller to disclose defects in windows or doors. Specifically, the term "wall" within the Act is ambiguous and the court should have focused on its functional definition to carry out the purpose of the statute. Additionally, the majority incorrectly dismissed both parties' applications of a Pennsylvania Supreme Court case, which directly analyzed an important issue in the case. Section II of this Note analyzes the nation's shift from the seller-friendly *caveat emptor* doctrine, and reviews the Act's disclosure requirements and its purpose. Section III discusses the facts and findings of the *Kalkman* court regarding the Act's obligations on sellers of residential real estate. Lastly, Section IV explains why the court incorrectly interpreted the Act and went against its purpose. The *Kalkman* ruling essentially permits home sellers to withhold vital information about defects in some of the most common structures of a home for sale, thereby creating a loophole in a statute designed to protect Illinois home buyers.

## II. LEGAL BACKGROUND

Prior to enacting its own disclosure requirement statute, real estate transactions in Illinois were governed by common law,<sup>12</sup> but the Illinois General Assembly has since moved away from this rule towards promoting

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7. *Muir v. Merano*, 882 N.E.2d 716, 716 (Ill. App. Ct. 2008) (quoting *Coughlin v. Gustafson*, 772 N.E.2d 864 (2002)).

8. *See id.*

9. *Kalkman v. Nedved*, 2013 IL App (3d) 120800, ¶ 26, 991 N.E.2d 889, 895.

10. *Id.* at ¶ 1, 991 N.E.2d at 890.

11. *Id.*, 991 N.E.2d at 890.

12. *Mitchell v. Skubiak*, 618 N.E.2d 1013, 1017 (Ill. App. Ct. 1993).

a more buyer-friendly atmosphere, like many other states.<sup>13</sup> Currently, more than two-thirds of states have mandatory seller-disclosure statutes intended to uphold that position.<sup>14</sup> However, defining the scope and purpose of these kinds of statutes has been a struggle for the courts and the Act's legislative intent continues to be debated.<sup>15</sup> In fact, few courts have directly analyzed whether windows and doors are meant to be part of a wall under similar statutes, adding to the difficulty.<sup>16</sup>

#### A. The Evolution from *Caveat Emptor* to Mandatory Disclosure

Traditionally, sellers of real estate were not required to disclose defects in homes under the *caveat emptor* common law principle.<sup>17</sup> A 1942 Massachusetts case, *Swinton v. Whitinsville Savings Bank*, provides a classic example of *caveat emptor*'s harsh impact on unknowing home purchasers.<sup>18</sup> In *Swinton*, the purchaser claimed that the seller failed to disclose termite damage, which the seller knew about.<sup>19</sup> Although the court sympathized with the home buyer's dilemma, it did not hold the seller liable, noting that the law had not yet "reached the point of imposing upon the frailties of human nature a standard so idealistic" as holding a seller liable for not disclosing known material defects.<sup>20</sup>

This was the law of the land until a consumer protection movement came about in the 1960s<sup>21</sup> and states began recognizing a number of inequities that arose from *caveat emptor*'s application to real estate transactions.<sup>22</sup> Soon thereafter, courts and legislatures became open to the idea of imposing obligations on sellers to disclose information about that property being sold that "could not be discovered upon a reasonable and diligent inspection."<sup>23</sup> A landmark 1984 California Court of Appeals opinion first imposed this radical duty on real estate brokers and encouraged state

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13. See Stephanie A. Waxler, *Liabilities of Homeowners and Real Estate Brokers for Non-Disclosure in Illinois*, 12 LOY. CONSUMER L. REV. 340, 340 (2000).

14. George Lefcoe, *Property Condition Disclosure Forms: How the Real Estate Industry Eased the Transition from Caveat Emptor to "Seller Tell All,"* 39 REAL PROP. PROB. & TR. J. 193, 228 (2004).

15. See *Muir v. Merano*, 882 N.E.2d 716, 716–18 (Ill. App. Ct. 2008).

16. See *Lopez v. Gukenback*, 137 A.2d 771, 775–76 (Pa. 1958).

17. See *Mitchell*, 618 N.E.2d at 1017.

18. See *Swinton v. Whitinsville Savings Bank*, 42 N.E.2d 808, 808–09 (1942).

19. *Id.* at 808.

20. *Id.* at 808–09.

21. Josh Crowfoot, "Seller Beware!": Making Necessary Revisions to the South Carolina Seller Disclosure Statement and South Carolina Residential Property Condition Disclosure Act, 6 CHARLESTON L. REV. 599, 602 (2012).

22. Philip Lucrezia, *New York's Property Condition Disclosure Act: Extensive Loopholes Leave Buyers and Sellers of Residential Real Property Governed by the Common Law*, 77 ST. JOHN'S L. REV. 401, 409 (2003).

23. *Mitchell v. Skubiak*, 618 N.E.2d 1013, 1019 (Ill. App. Ct. 1993); see also Crowfoot, *supra* note 21.

legislators throughout the country to do the same.<sup>24</sup> The decision ripped through California's real estate seller community who cried out to the legislature to limit their potential liability.<sup>25</sup> Their effort spurred a California Association of Realtors-sponsored statute that put limits on the evolving common law.<sup>26</sup> This statute laid the foundation for other states' mandatory disclosure statutes; however, none are as comprehensive or far-reaching in protecting the home buyer as the California law.<sup>27</sup>

Following this trend, the Illinois legislature enacted its own disclosure requirements for sellers of residential property less than a decade later, on October 1, 1994.<sup>28</sup> The mandatory disclosure report lists twenty-three specific conditions or defects that sellers are required to certify whether they are aware of their presence in the home.<sup>29</sup> The Act's disclosure report covers features of a typical property from top-to-bottom, requiring a home seller to disclose material defects in the roof, walls, and basement.<sup>30</sup> The Act further requires sellers to disclose the inner-workings of a home, such as problems

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24. Lucrezia, *supra* note 22, at 409.

25. Eric H. Franklin, *Mandating Precontractual Disclosure*, 67 U. MIAMI L. REV. 553, 585 (2013).

26. *Id.*; Robert M. Washburn, *Residential Real Estate Condition Disclosure Legislation*, 44 DEPAUL L. REV. 381, 409 (1995).

27. Lucrezia, *supra* note, 22 at 409.

28. Hyzer, *supra* note 6, at 159.

29. 765 ILL. COMP. STAT. 77/35 (2009). The twenty-three specific material defects to disclose include:

1. Seller has occupied the property within the last 12 months. (No explanation is needed);
2. I am aware of flooding or recurring leakage problems in the crawl space or basement;
3. I am aware that the property is located in a flood plain or that I currently have flood hazard insurance on the property;
4. I am aware of material defects in the basement or foundation (including cracks and bulges);
5. I am aware of leaks or material defects in the roof, ceilings, or chimney;
6. I am aware of material defects in the walls or floors;
7. I am aware of material defects in the electrical system;
8. I am aware of material defects in the plumbing system (includes such things as water heater, sump pump, water treatment system, sprinkler system, and swimming pool);
9. I am aware of material defects in the well or well equipment;
10. I am aware of unsafe conditions in the drinking water;
11. I am aware of material defects in the heating, air conditioning, or ventilating systems;
12. I am aware of material defects in the fireplace or woodburning stove;
13. I am aware of material defects in the septic, sanitary sewer, or other disposal system;
14. I am aware of unsafe concentrations of radon on the premises;
15. I am aware of unsafe concentrations of or unsafe conditions relating to asbestos on the premises;
16. I am aware of unsafe concentrations of or unsafe conditions relating to lead paint, lead water pipes, lead plumbing pipes or lead in the soil on the premises;
17. I am aware of mine subsidence, underground pits, settlement, sliding, upheaval, or other earth stability defects on the premises;
18. I am aware of current infestations of termites or other wood boring insects;
19. I am aware of a structural defect caused by previous infestations of termites or other wood boring insects;
20. I am aware of underground fuel storage tanks on the property;
21. I am aware of boundary or lot line disputes;
22. I have received notice of violation of local, state or federal laws or regulations relating to this property, which violation has not been corrected; and
23. I am aware that this property has been used for the manufacture of methamphetamine as defined in Section 10 of the Methamphetamine Control and Community Protection Act.

*Id.*

30. *Id.*

with the air conditioning and heating units, plumbing and electrical systems, and unsafe conditions with the drinking water.<sup>31</sup> Most pertinent here, the Act requires sellers to disclose whether they are aware of material defects in the main contours of a room, including the ceiling, walls, and floors.<sup>32</sup>

Additionally, the Act does not hold home sellers liable for inaccuracies, omissions, or errors so long as the seller had no knowledge of such or the seller thought the condition had been properly addressed and repaired.<sup>33</sup> That said, a seller who knowingly violates the Act and fails to truthfully comply with its disclosure requirements can be held liable for damages.<sup>34</sup> The seller also does not necessarily have to conceal the defective condition in the home to be liable, but the home buyer nonetheless must prove the seller had an intent to deceive.<sup>35</sup> The Act, also, does not relieve the seller of its duty to disclose defects once the buyer hires a professional inspector to investigate the property.<sup>36</sup>

Moreover, courts have struggled to define the scope and purpose of this and similar statutes, and the Act's legislative intent continues to be debated.<sup>37</sup>

#### B. Legislative Intent and the Purpose of the Act

Since its enactment, some courts have attempted to interpret the legislative intent behind the Act to help determine its scope and purpose.<sup>38</sup> Although the Act has undergone several changes since its original enactment, its purpose has remained the same: "to provide prospective buyers with information about material defects in the residential real property."<sup>39</sup> Further, Illinois courts have held that statutes must be given their plain and ordinary meaning, which is ascertained by looking at the term's dictionary definitions, but the existence of multiple definitions, that each make sense, suggests statutory ambiguity.<sup>40</sup>

For instance, in *Bauer v. Giannis*, the court determined that the Act's purpose was to provide prospective buyers with information about defects in the home and to subsequently seek recourse for their misplaced reliance on the seller's disclosures in the report.<sup>41</sup> In *Bauer*, the home sellers failed to disclose a leakage problem in the home's basement, and a few years after

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31. *Id.*

32. *Id.*

33. *Hirsch v. Feuer*, 702 N.E.2d 265, 271–72 (Ill. App. Ct. 1998).

34. *Id.* at 272.

35. *Woods v. Pence*, 708 N.E.2d 563, 565 (Ill. App. Ct. 1999).

36. *Mitchell v. Skubiak*, 618 N.E.2d 1013, 1019–20 (Ill. App. Ct. 1993).

37. *See Muir v. Merano*, 882 N.E.2d 716, 716–18 (Ill. App. Ct. 2008).

38. *See Bauer v. Gianis*, 834 N.E.2d 952, 956 (Ill. App. Ct. 2005); *Muir*, 882 N.E.2d at 716; *Penn v. Gerig*, 778 N.E.2d 325, 330 (Ill. App. Ct. 2002); 765 ILL. COMP. STAT. 77/35 (2009).

39. 765 ILL. COMP. STAT. 77/35; *see also Hyzer*, *supra* note 6, at 159.

40. *Landis v. Marc Realty, L.L.C.*, 919 N.E.2d 300, 303–06 (Ill. 2009).

41. *Bauer*, 834 N.E.2d at 956.

purchasing, the home flooded after a heavy rain, filling the basement with as much as eight feet of water.<sup>42</sup> The court held that “allowing a seller to . . . avoid reporting a material defect, and thereby defeat a buyer’s subsequent claim [for fraud] would only encourage the evils the legislature sought to remedy.”<sup>43</sup>

Similarly, in *Penn v. Gerig*, the court opined that the Act was enacted to strike a balance between the interests of home buyers and sellers: giving home buyers certain protections not previously enjoyed (such as recovering damages for repairs) while protecting the seller against unlimited liability under the Act (such as a statute of limitations on a buyer’s ability to bring suit).<sup>44</sup> Thus, the court seemingly recognized Illinois’ shift from “buyer beware” towards providing the buyer certain legal remedies.<sup>45</sup>

Moreover, in *Muir v. Merano*, the court held that the purpose of the Act’s disclosure report is to provide the prospective buyer with knowledge of any material defects in the home equal to that of the seller, which the buyer may rely on when deciding whether to purchase the property.<sup>46</sup> The court also highlighted the importance of requiring sellers to fill out the Act’s disclosure report truthfully or to the best of their ability.<sup>47</sup>

On a related note, in *Landis v. Marc Realty, L.L.C.*, the court analyzed statutory ambiguity and held that “the existence of alternative dictionary definitions of [a word], each making sense under the statute, itself indicates that the statute is open to interpretation.”<sup>48</sup> Opining that statutory language must be accorded to its “plain and ordinary meaning” to determine the intent of the legislature, the Supreme Court of Illinois in its analysis looked at several dictionary definitions, but ultimately determined that the dictionary definitions did not definitively reveal the intent of the legislature.<sup>49</sup> Thus, the court determined that the term was ambiguous and resorted to other aids of construction to discern its meaning.<sup>50</sup> Upon that determination, the court concluded that the legislature intended the broader meaning of the ambiguous term because “it [was] a general principle of statutory interpretation that [they] give statutes the fullest, rather than the narrowest, possible meaning to which they are susceptible.”<sup>51</sup>

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42. *Id.*

43. *Id.* at 960.

44. *Penn v. Gerig*, 778 N.E.2d 325, 330 (Ill. App. Ct. 2002).

45. *Id.*

46. *Muir v. Merano*, 882 N.E.2d 716, 716 (Ill. App. Ct. 2008).

47. *See id.* at 715–17.

48. *Landis v. Marc Realty, L.L.C.*, 919 N.E.2d 300, 306 (Ill. 2009) (quoting *Nat’l R.R. Passenger Corp. v. Bos. & Me. Corp.*, 503 U.S. 407, 418 (1992)).

49. *Id.* at 303–06.

50. *Id.* at 306.

51. *Id.*

In sum, Illinois has come a long way from the *caveat emptor* common law doctrine, evidenced by enacting its own mandatory disclosure requirements to protect home purchasers.<sup>52</sup> A summary of case law and the express language of the Act also suggest that the central purpose of the Act is quite clear: to provide potential home buyers with information about known defects in the residential real estate.<sup>53</sup> Additionally, when attempting to ascertain a statute's plain and ordinary meaning, Illinois courts have held that the existence of several dictionary definitions suggests ambiguity.<sup>54</sup>

Despite this, in *Kalkman v. Nedved*, the court's analysis of "wall" within the meaning of the Act was too narrow and failed to give enough weight to the purpose of the Act.

### III. EXPOSITION OF THE CASE

In *Kalkman v. Nedved*, the Illinois Third District Court considered whether the obligation to disclose material defects in "walls" of a home-for-sale also required a seller to disclose material defects in the home's windows and doors under the Act.<sup>55</sup> The *Kalkman* court held that a seller's duty to disclose material defects under the Act's disclosure requirements did not extend to windows or doors because the dictionary definition suggests "windows" and "doors" are not part of the walls.<sup>56</sup>

#### A. Facts

In 2009, Defendants George and Maureen Nedved put their lakefront home in Knox County, Illinois, up for sale.<sup>57</sup> The following year, Plaintiffs Jason and Lucia Kalkman became interested in the Nedveds' home from an online advertisement listing the property.<sup>58</sup> After falling in love with the home, the Kalkmans submitted a purchase offer.<sup>59</sup>

Prior to the sale, the Nedveds filled out the mandatory disclosure report required under the Act, claiming no knowledge of any material defects or conditions of the home and answering in the negative for all twenty-three items.<sup>60</sup> Upon receipt of the Nedveds' completed disclosure report, the parties executed a contract for purchase of the home, subject to an inspection

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52. 765 ILL. COMP. STAT. 77/35 (2009).

53. See *Bauer v. Gianis*, 834 N.E.2d 952, 956 (Ill. App. Ct. 2005); see also *Muir v. Merano*, 882 N.E.2d 716, 716 (Ill. App. Ct. 2008); 765 ILL. COMP. STAT. 77/35.

54. *Landis*, 919 N.E.2d at 306.

55. *Kalkman v. Nedved*, 2013 IL App (3d) 120800, ¶ 1, 991 N.E.2d 889, 890.

56. *Id.* at ¶ 20, 991 N.E.2d at 894.

57. *Id.* at ¶ 3, 991 N.E.2d at 890.

58. *Id.*

59. *Id.*

60. *Id.* at ¶ 4, 991 N.E.2d at 891.

and on the condition that the Kalkmans were allowed to spend a night in the home and examine it themselves.<sup>61</sup> After a formal inspection revealed no significant problems and the sale was finalized, the Kalkmans moved in.<sup>62</sup>

However, shortly after the move in, the Kalkmans discovered a variety of leaks in the windows and doors.<sup>63</sup> For example, water entered the house through an improperly-installed patio door on the second floor when it rained, which soaked the carpet, floor, and walls in the first floor below.<sup>64</sup> Upon closer examination, the new home buyers discovered many of the windows would not close normally because they, too, had been improperly installed or warped by the elements.<sup>65</sup>

As a result, the Kalkmans filed a formal complaint against the Nedveds in the Circuit Court of Knox County, alleging that the Nedveds' failure to disclose the defects in the windows and doors constituted a violation of the Act as well as common law fraud.<sup>66</sup> The circuit court granted partial summary judgment in favor of the Nedveds on several issues, but the remaining issue before the court was whether the Nedveds were required to disclose the defective windows and doors under item six of the disclosure report, which reads "I am aware of material defects in the walls and floors."<sup>67</sup>

The circuit court found that the "problems with the windows [and] patio door . . . were material defects, that they existed when the home was sold, and that the Nedveds were aware of those defects when they filled out the disclosure report."<sup>68</sup> The circuit court then decided that the Act should be interpreted broadly to best give effect to the intent of the legislature in protecting home buyers from hidden defects known by sellers.<sup>69</sup> Thus, the court determined defects in the windows and doors were required to be disclosed under the Act's provision governing disclosure of defects in walls.<sup>70</sup>

The circuit court's rationale followed that windows and doors ultimately serve the same purpose as walls: to protect the interior of the home from the outside elements.<sup>71</sup> The court determined that, although "[windows and doors] may serve the additional function of allowing light to pass through, and may provide a means of ingress and egress from the building . . . when they are closed their purpose is the same as a wall" and

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61. *Id.* at ¶ 5, 991 N.E.2d at 891.

62. *Id.*, 991 N.E.2d at 891.

63. *Id.* at ¶ 6, 991 N.E.2d at 891.

64. *Id.*, 991 N.E.2d at 891.

65. *Id.*, 991 N.E.2d at 891.

66. *Id.* at ¶ 7, 991 N.E.2d at 891.

67. *Id.*, 991 N.E.2d at 891.

68. *Id.* at ¶ 8, 991 N.E.2d at 891.

69. *Id.*, 991 N.E.2d at 891.

70. *Id.*, 991 N.E.2d at 891.

71. *Id.*, 991 N.E.2d at 891.



because they are not specifically excluded from the disclosure report, the defects in windows and doors must be reported.<sup>72</sup> Due to the Nedveds' failure to disclose, the circuit court ruled in favor of the Kalkmans.<sup>73</sup>

## B. Majority Opinion

As a result, the Nedveds appealed the circuit court's ruling, alleging that they were not required to disclose material defects in the windows or doors because those conditions were not expressly listed under the Act.<sup>74</sup> As such, the Illinois Third District Court was tasked with analyzing whether sellers were required to disclose material defects in a home's windows and doors under the Act.<sup>75</sup> The court began its analysis by attempting to "ascertain and effectuate the legislature's intent."<sup>76</sup>

### 1. Plain and Ordinary Meaning Analysis

The *Kalkman* court opined that the case turned on how broadly it construed the term "wall," which is not defined in the Act, and noted that this was a case of first impression in Illinois.<sup>77</sup> The appellate court first dismissed both parties' arguments regarding whether the Act's use of the term "wall" includes windows and doors within the definition, as the arguments based on the *Lopez* majority and dissent were both unpersuasive.<sup>78</sup>

Then, the court reviewed a dictionary definition to determine the term's plain and ordinary meaning, citing the Nedveds' supplied definition from the *Random House Dictionary of the English Language*.<sup>79</sup> This definition termed "wall" as "any of various permanent upright constructions having a length much greater than the thickness and presenting a continuous surface except where pierced by doors, windows, etc.," which the majority held implies windows and doors are not included within the definition of wall, but are instead separate components.<sup>80</sup> The Kalkmans failed to cite a dictionary definition, and thus the court determined that, using the Nedveds' definition

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72. *Id.*, 991 N.E.2d at 891.

73. *Id.* at ¶ 9, 991 N.E.2d at 892.

74. *Id.*, 991 N.E.2d at 892.

75. *Id.* at ¶ 1, 991 N.E.2d at 890.

76. *Id.* at ¶ 12, 991 N.E.2d at 892.

77. *Id.* at ¶¶ 16–17, 991 N.E.2d at 893.

78. *Id.* at ¶ 18, 991 N.E.2d at 893 (finding that neither the *Lopez* majority nor dissent was particularly persuasive. "The majority relies on an outdated notion that a wall must support a building's structure . . . The thrust of the dissent is that the majority did not adequately distinguish a previous Pennsylvania case. Therefore, neither's rationale determines whether the Act's use of the term walls includes windows and doors within its definition.").

79. *Id.*, 991 N.E.2d at 893.

80. *Id.* at ¶ 19, 991 N.E.2d at 893 (quoting RANDOM HOUSE DICTIONARY OF ENGLISH LANGUAGE 2139 (2d ed. 1987)).

as well as common usage, it was reasonable to conclude that the ordinary definition of wall does not include windows and doors.<sup>81</sup>

## 2. *Maxims of Statutory Construction Analysis*

Because the Act modifies the common law *caveat emptor* rule, the court ruled that the statute must be strictly construed.<sup>82</sup> Citing *Williams v. Chester*, the court held that “a statute in derogation of the common law cannot be construed as changing the common law beyond what the statutory language expresses, or is necessarily implied from what is expressed.”<sup>83</sup> Given the supplied dictionary definition, the court found that it was not necessarily implied that windows and doors are included within the legislature’s concept of walls.<sup>84</sup> Additionally, the court employed the *expresio unius est exclusion alterius* canon, which provides that lists in statutes are complete, and, thus, the omissions should be understood as exclusions.<sup>85</sup>

As a result, the court held that the twenty-three enumerated conditions or defects listed in the Act which a seller must disclose implied the legislature’s intent not to include windows or doors to be covered by the disclosure report.<sup>86</sup> The court further held that the Act is “clearly not intended to cover all potential material defects in a residential property,” based on the plain language of the statute, which is a “disclosure of *certain conditions*.”<sup>87</sup> For instance, the court mentioned other state disclosure statutes include a “catch-all” provision requiring the seller to disclose all known material defects to a property and the Illinois legislature could have included such a provision if it wanted.<sup>88</sup>

## 3. *Purpose of the Statute Analysis*

The appellate court did not believe the purpose of the statute would be injured if the seller was not required to disclose known defects in the windows or doors of a home.<sup>89</sup> Specifically, the court dismissed the Kalkman’s citing of *Bauer* because its holding did not apply to the issue of the case at bar. Rather, *Bauer* addressed a material defect (*e.g.*, a flooding problem) that was not disclosed by the sellers of a home, which is specifically

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81. *Id.* at ¶ 20, 991 N.E.2d at 894.

82. *Id.* at ¶ 21, 991 N.E.2d at 894.

83. *Id.*, 991 N.E.2d at 894 (citing *Williams v. Manchester*, 888 N.E.2d 1 (Ill. 2008)).

84. *Id.*, 991 N.E.2d at 894.

85. *Id.* at ¶ 22, 991 N.E.2d at 894.

86. *Id.*, 991 N.E.2d at 894.

87. *Id.* at ¶ 23, 991 N.E.2d at 894 (quoting 765 ILL. COMP. STAT. 77/35 (2009) (emphasis added)).

88. *Id.* at ¶ 23, 991 N.E.2d at 894.

89. *Id.* at ¶ 25, 991 N.E.2d at 895.

required by the Act to be disclosed.<sup>90</sup> That said, the court stated “allowing sellers to avoid reporting what they are obligated to disclose would encourage the evils the legislature sought to remedy,” but the Act does not contain such an obligation for doors and windows, so it was essentially a moot point.<sup>91</sup> The court also believed that its ruling would neither create a loophole in the Act nor put buyers at a disadvantage; rather, its ruling acknowledged the Act’s limits that only call for certain, specified disclosures.<sup>92</sup>

### C. Justice Lytton’s Special Concurrence

Justice Lytton agreed with the majority’s reasoning but wrote separately to analyze whether the Illinois legislature intended to include windows and/or doors in the Act.<sup>93</sup> “Since the language of the Act is narrow, our narrow interpretation of the statute is the correct one.”<sup>94</sup> However, Justice Lytton continued, if the legislature’s intent was to avoid situations like the case at bar, the legislature should be made aware and the Act’s intent may be more fully realized if it were amended.<sup>95</sup>

## IV. ANALYSIS

The majority in *Kalkman* was incorrect in its determination that a seller’s duty to disclose defects in a property’s walls also did not impose an obligation to disclose defects in windows or doors. The term “wall” within the Act is ambiguous, and therefore, the court should have focused on its functional definition to carry out the purpose of the statute, which is to ensure home buyers are protected from unknown conditions that materially affect various functions of the residence. The *Kalkman* court’s decision essentially creates a loophole that permits home sellers to knowingly withhold information about defects in a property that could significantly affect a home’s value (e.g., leaky windows or doors that do not seal properly). Part A of this Section discusses why the appellate court’s failure to recognize the various alternative definitions of the term “wall” was inappropriate and ultimately led to the wrong outcome. Part B analyzes why the majority should have taken a broader approach and why its narrow approach was incorrect. Lastly, Part C reviews why the majority’s holding goes against the central purpose of the Act.

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90. *Id.*, 991 N.E.2d at 895; *see also* 765 ILL. COMP. STAT. 77/35.

91. *Kalkman*, at ¶ 25, 991 N.E.2d at 895.

92. *Id.* at ¶ 26, 991 N.E.2d at 895.

93. *Id.* at ¶ 32, 991 N.E.2d at 895–96 (Lytton, J., concurring).

94. *Id.*, 991 N.E.2d at 895–96.

95. *Id.*, 991 N.E.2d at 895–96.

## A. “Wall” Does Not Exclude Windows and Doors

Several dictionary definitions and relevant case law suggest the *Kalkman* court incorrectly determined “wall” excludes windows and doors.<sup>96</sup> The majority erred in reaching this conclusion because it wrongly limited the scope of its analysis and determined that the term was not ambiguous.<sup>97</sup> The court utilized only the *Random House Dictionary* definition supplied by the Nedveds and what it termed “common usage” to determine that the wall’s plain and ordinary meaning excluded windows and doors.<sup>98</sup> Although the court correctly reasoned that “[b]ecause ‘wall’ is not defined by the Act, the court may look to a dictionary definition to determine the term’s plain and ordinary meaning,”<sup>99</sup> the majority failed to take into account other relevant definitions of “wall” that are pertinent to a proper analysis. Had the majority broadened its analysis beyond the Nedveds’ supplied definition it would have found that the term was reasonably susceptible to more than one meaning.<sup>100</sup> Thus, the term “wall” is ambiguous and could encompass windows and doors within its meaning.

For instance, *The Law Dictionary* defines wall as “an erection of stone, brick, or *other material*, raised to some height, and intended for purposes of security or *enclosure*.”<sup>101</sup> Similarly, *Merriam-Webster* defines the same as “the structure that forms the side of a room or building” and more fully as “something resembling a wall (as in appearance, function, or effect); especially: something that acts as a barrier or defense.”<sup>102</sup> Windows and doors certainly fall under the scope of these other definitions that the Illinois Third District Court failed to consider. Like walls, windows are also made of “other material, raised to some height . . . intended for . . . enclosure.”<sup>103</sup> Windows and doors are intended to keep the outside weather elements from entering a home and are therefore similar to walls. Moreover, windows and doors are also part of a structure that “forms the side of a room” and closely resembles the function of a wall, acting as a barrier or defense.<sup>104</sup> Contrary to the majority’s rationale, these definitions imply windows and doors are included within the definition of wall and are not considered separate

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96. See *What is Wall?*, THE LAW DICTIONARY, <http://thelawdictionary.org/wall/> (last visited Feb. 16, 2015) (emphasis added); *Wall*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/wall> (last visited Jan. 16, 2015); *Lopez v. Gukenback*, 137 A.2d 771, 777 (Pa. 1958).

97. See *Kalkman*, at ¶¶ 20–24, 991 N.E.2d at 894.

98. *Id.* at ¶ 20, 991 N.E.2d at 894.

99. *Id.* at ¶ 19, 991 N.E.2d at 893.

100. *Id.* at ¶ 20, 991 N.E.2d at 894.

101. THE LAW DICTIONARY, *supra* note 96 (emphasis added).

102. MERRIAM-WEBSTER.COM, *supra* note 96.

103. THE LAW DICTIONARY, *supra* note 96.

104. MERRIAM-WEBSTER.COM, *supra* note 96.

components.<sup>105</sup> However, the court incorrectly limited its analysis to the Nedveds' definition and what they defined as "common usage."<sup>106</sup>

Additionally, the majority should have followed suit with the trial court's analysis that doors and windows have similar functions.<sup>107</sup> Specifically, the trial court held that "'doors and windows and walls all serve the same purpose, i.e., to protect the interior of the building from the elements . . . [windows and doors] are not specifically excluded from the [Act's] Disclosure Report and therefore defects to doors and windows must be reported.'"<sup>108</sup> This is yet another example proving the term "wall" is ambiguous and subject to more than one interpretation and further evidence windows and doors are viewed quite similar to walls in terms of function and purpose.<sup>109</sup>

Along those same lines, the majority incorrectly dismissed both parties' applications of a Pennsylvania Supreme Court case, which directly analyzed whether a window was an inherent and integral part of the wall of the building.<sup>110</sup> The *Kalkman* majority found the *Lopez* decision unpersuasive to the issue-at-hand because the Pennsylvania majority relied on an outdated notion that a wall supports a building's structure and, additionally, the thrust of its dissent did not particularly analyze whether a window was part of a wall.<sup>111</sup> Although *Lopez* was a personal injury case centered on Pennsylvania landlord-tenant law, it is most certainly relevant to the case-at-bar because it is one of few opinions-on-point that attempts to directly analyze the similarities and concurrent relationship between a wall and a window.<sup>112</sup> For example, while the *Lopez* majority ultimately held that a window was not part of a wall because its presence "contributed nothing to, nor had it any functional use in connection with the other apartments or parts of the building,"<sup>113</sup> Justice Musmanno's dissent reasoned that if a skylight is part of a roof, then a window is part of a wall, primarily due to its function and location within a wall.<sup>114</sup> The dissenting justice further opined that "a window dow [sic] is as much an integral part of a wall as the skylight is an integral part of the roof."<sup>115</sup> Although this analogy was not the focus of the

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105. THE LAW DICTIONARY, *supra* note 96; MERRIAM-WEBSTER.COM, *supra* note 96.

106. *Kalkman v. Nedved*, 2013 IL App (3d) 120800, ¶ 20, 991 N.E.2d 404, 404.

107. *Id.* at ¶ 8, 991 N.E.2d at 401.

108. *Id.*

109. *Id.*

110. *Lopez v. Gukenback*, 137 A.2d 771, 777 (Pa. 1958) (holding that a window was not an integral part of the wall; thus, the court reasoned that the landlord could not be held liable for injuries sustained by the tenant because he was not in sole possession or control of the defective window).

111. *Kalkman*, at ¶ 18, 991 N.E.2d at 893.

112. *See Lopez*, 137 A.2d at 777.

113. *Id.* at 776.

114. *Id.* at 779.

115. *Id.*

dissent,<sup>116</sup> it nonetheless is persuasive and at the very least establishes some similarities between a wall and a window due to the fact that they both make up a structure and perform similar functions.<sup>117</sup>

#### B. The Act Should Be Interpreted Broadly

Caselaw also suggests that the *Kalkman* majority should have taken a broader approach when interpreting this statute because the meaning of “wall” does not have one single plain meaning, rather, it is ambiguous.<sup>118</sup> Most relevant is the Illinois Supreme Court’s holding in *Landis*, which held “‘the existence of alternative dictionary definitions of [a word], each making sense under the statute, itself indicates that the statute is open to interpretation’” and the court should resort to other aids of statutory construction.<sup>119</sup> As shown above, several alternative dictionary definitions of the term “wall” exist and each make sense when applying them under the Act.<sup>120</sup> Thus, following the holding in *Landis*, in light of the alternative definitions, it should be “clear that the dictionary definitions do not definitively resolve the question as to which meaning the legislature intended.”<sup>121</sup> The *Kalkman* majority therefore should have taken a broader approach and used other methods of interpretation, such as giving greater weight to the express purpose of the Act.<sup>122</sup>

Although *Kalkman* adhered to the principle that statutes in derogation of the common law must be strictly construed,<sup>123</sup> the majority should have taken the method followed by *Landis* because “wall” is ambiguous within the Act. *Landis* held it to be a general principle of statutory interpretation to give statutes their fullest, rather than narrowest, possible meaning to which they are susceptible in the case of ambiguity.<sup>124</sup> The Illinois Supreme Court decision also stated that the “absence of any indication that the legislature intended the term . . . to have a narrower meaning, we conclude that the legislature intended the broader meaning.”<sup>125</sup> Given the multiple dictionary definitions and no evidence suggesting the Illinois legislature meant for “wall” to have a narrower meaning, the *Kalkman* majority should have given the fullest possible meaning to which the term “wall” is susceptible, instead

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116. *Kalkman*, at ¶ 18, 991 N.E.2d at 403.

117. *Id.* at ¶ 8, 991 N.E.2d at 401.

118. See *Landis v. Marc Realty, L.L.C.*, 919 N.E.2d 300, 306 (Ill. 2009).

119. *Id.* (quoting *Nat’l. R.R. Passenger Corp. v. Bos. & Me. Corp.*, 503 U.S. 407, 418 (1992)).

120. MERRIAM-WEBSTER.COM, *supra* note 96; THE LAW DICTIONARY, *supra* note 96.

121. *Landis*, 919 N.E.2d at 306.

122. 765 ILL. COMP. STAT. 77/35 (2009).

123. *Kalkman v. Nedved*, 2013 IL App (3d) 120800, ¶ 21, 991 N.E.2d 889, 894.

124. *Landis*, 919 N.E.2d at 306.

125. *Id.*

of narrowing its interpretation and inappropriately adhering to the “derogation of common law” principle.<sup>126</sup>

Further, the majority’s utilization of the *expresio unius est exclusion alterius* canon of statutory construction was inappropriately applied and relied on because the *Kalkman* court should have taken a more functional approach in its analysis.<sup>127</sup> Using the statutory maxim, the majority inferred “when a statute lists the things to which it applies, the omissions should be understood as exclusions” and, therefore, the listing in the Act is complete.<sup>128</sup> While it is true the legislature chose to enumerate twenty-three specific defects to be disclosed by the seller, the omission of the terms “windows” and “doors” does not mean that the legislature purposefully intended to exclude those types of material defect disclosures under the Act.<sup>129</sup> Rather, in light of the reasons above, a more functional approach suggests the legislature assumed mentioning windows and doors was unnecessary because they intended for those terms to be included within the definition of wall, thus requiring mandatory disclosure of those features.

Moreover, as the majority pointed out, the Act is not intended to cover all potential material defects in residential property, which would burden the seller.<sup>130</sup> However, the court incorrectly suggested that the legislature purposefully intended to leave out windows and doors.<sup>131</sup> For instance, among the twenty-three listed items, the Act expressly requires the seller to disclose whether they are aware of material defects in the floors, walls, and ceilings.<sup>132</sup> The legislature could have followed other states’ leads<sup>133</sup> and assumed enumerating the common structural components of a room would have made the disclosure requirements adequately all-encompassing, as a room is generally made up of a floor, walls, and a ceiling.<sup>134</sup> Further, it is important to note that “a seller’s underlying common-law obligation, which survives [the mandatory disclosure statute], is to disclose all known material latent defects.”<sup>135</sup> This suggests that the legislature did not intend to permit sellers to dodge their duty to disclose defects in the components that make

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126. *Kalkman*, at ¶ 5, 991 N.E.2d at 891.

127. *Id.* at ¶ 22, 991 N.E.2d at 894.

128. *Id.* at ¶ 6, 991 N.E.2d at 891.

129. *Id.*, 991 N.E.2d at 891.

130. *Id.* at ¶ 23, 991 N.E.2d at 894.

131. *Id.* at ¶¶ 23–24, 991 N.E.2d at 894–95.

132. 765 ILL. COMP. STAT. 77/35 (2009).

133. “Most other states’ disclosure forms list structural components of a property, such as such as driveways, retaining walls, bearing walls, chimneys, windows, doors, exterior stucco, floors, foundations, and roofs,” to name a few. Lefcoe, *supra* note 14, at 233.

134. See generally *Examples of What Are or Aren’t Structural Components of Buildings*, Fed. Tax Coordinator Second Series (RIA), ¶ L-17243, 1997 WL 553570 (2015).

135. Lefcoe, *supra* note 14, at 235.

up a wall, such as drafty windows or leaky doors, as was the occurrence in *Kalkman*.<sup>136</sup>

### C. The Majority Goes Against the Purpose of the Act

The majority's decision in *Kalkman* goes against the purpose of the Act, which is to protect home buyers.<sup>137</sup> This is demonstrated by the statute's express language as well as a brief summary of caselaw.<sup>138</sup>

The Act's purpose is expressly stated in the statute, which is "to provide prospective buyers with information about material defects in the residential real property."<sup>139</sup> Caselaw puts it a similar way, holding the purpose of the Act is to provide potential buyers with information about *known* material defects in the home.<sup>140</sup> In *Kalkman*, the home sellers even acknowledged their awareness of the defective windows, but the court still refused to hold them liable for such non-disclosures—in contradiction to the legislature's purpose.<sup>141</sup> This suggests that the *Kalkman* majority gave inadequate deference to the purpose of the Act because, as discussed above, the legislative intent was to include windows and doors within the definition of "wall."

Although the majority denies its decision will create a loophole in the statute, its holding does in fact put buyers at an unfair disadvantage.<sup>142</sup> Sellers of real estate have far greater knowledge about the condition of their homes than a potential buyer and thus should be compelled to share that information.<sup>143</sup> Additionally, although the *Kalkman* majority suggested that home buyers should obtain an inspection and conduct due diligence before purchasing residential real estate property to avoid this problem, that suggestion has no merit because the Kalkmans had a formal home inspection done, and it failed to reveal any significant problems.<sup>144</sup>

Finally, on a policy level, the *Kalkman* majority goes against the gradual progress Illinois has made from the principle of *caveat emptor* and reverts the state back to the "buyer beware" days of old. Even the majority admits that the Act grants a home buyer certain recourse if a defect in the property is discovered, "modifying the harsh common law doctrine of *caveat*

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136. *Kalkman*, at ¶ 6, 991 N.E.2d at 891.

137. *Muir v. Merano*, 882 N.E.2d 716, 716 (Ill. App. Ct. 2008).

138. *See id.*; *see also Kalkman*, at ¶ 25, 991 N.E.2d at 895; 765 ILL. COMP. STAT. 77/35 (2009).

139. 765 ILL. COMP. STAT. 77/35.

140. *Kalkman*, at ¶ 16, 991 N.E.2d at 893 (emphasis added); *Muir*, 882 N.E.2d at 716.

141. *Kalkman*, at ¶ 11, 991 N.E.2d at 892.

142. *Id.* at ¶ 26, 991 N.E.2d at 895.

143. Florrie Young Roberts, *Disclosure Duties in Real Estate Sales and Attempts to Reallocate the Risk*, 34 CONN. L. REV. 1, 40 (2001).

144. *Kalkman*, at ¶ 5, 991 N.E.2d at 891.



*emptor*.”<sup>145</sup> The Illinois legislature’s enactment of the mandatory disclosure statute demonstrates its willingness to depart from this common law principle towards a more buyer-friendly landscape. The legislative action further suggests the General Assembly’s recognition of this problem and its intent to enact statutes that protect home buyers from the unknown, such as faulty components that are essential to a home (*e.g.*, windows and walls).

## V. CONCLUSION

The Illinois Court of Appeals for the Third District was incorrect in determining a seller’s duty to disclose defects in a property’s walls did not also impose an obligation to disclose defects in windows or doors. The dictionary definition of “wall” gives no clear guidance of its plain and ordinary meaning, and the term’s ambiguity therefore suggests it does not necessarily exclude windows or doors from its definition. On the contrary, limited on-point caselaw further demonstrates a window can, in fact, be interpreted to be part of a wall because of its similar function and placement within a wall. Similarly, the Illinois circuit court’s reasoning that windows, doors, and walls all serve the same purpose, which is to protect the interior from the elements, suggests they can all be one within the same. Therefore, windows and walls are not necessarily excluded from the definition of “wall” within the meaning of the Act. Additionally, the Act should have been interpreted broadly, rather than narrowly, to give the statutory language the fullest possible meaning to which it is susceptible. A broader interpretation should have been taken by the *Kalkman* majority because of the statute’s multiple interpretive possibilities. Although the legislature chose to enumerate twenty-three specific conditions to disclose under the Act, the legislature’s omission of windows and doors does not suggest it purposefully intended to exclude disclosure of those conditions. Further, if sellers are not required to disclose known material defects in a home’s windows and doors, then the purpose of the Act will be injured and such a policy would encourage the exact evils the legislature sought to remedy. The Illinois Fourth District Court’s decision to allow property defects to stay hidden from the buyer goes beyond common sense and is contrary to the legislature’s purpose to protect the home buyer from unforeseen headaches known by the seller.

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145. *Id.* at ¶ 3, 991 N.E.2d at 890.