



Not Your Average Professor

TO HIS PROPERTY AND CONTRACTS STUDENTS, ALEX Johnson, the Pierre Brown and Thomas F. Bergin Research Professor at the Law School, might seem like just another law professor. He is anything but. Few could match his varied experiences, diverse interests, or impact on the Law School, the wider University community, and the legal academy in general.

Alex Johnson did not take the traditional path to academia. He grew up in Los Angeles at a turbulent time for race relations. As a teenager in 1965, he watched the Watts riots unfold from his front porch in South Central Los Angeles, and three years later was again reminded

of the salience of race with the reoccurrence of rioting following the assassination of Dr. Martin Luther King, Jr. Johnson attended public

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schools that were essentially all black. One of his heroes was Thurgood Marshall, who was appointed to the Supreme Court while Professor Johnson was in junior high. Although Perry Mason was perhaps the most important influence in his decision to become a lawyer, the historical significance of Justice Marshall's appointment—as well as a baffling course in organic chemistry—convinced him that law was the career he ought to pursue.

Neither of Johnson's parents graduated from high school, but they encouraged him to excel in academics and sacrificed to ensure that he had every opportunity to succeed. As a result, he was fortunate to be offered several scholarships to some of our most prestigious universities and matriculated at Princeton University. A combination of home sickness and his parents' failing health necessitated a transfer to Claremont McKenna College (then, Claremont Men's College), from which he graduated magna cum laude in 1975. Following graduation, he turned down opportunities to leave Los Angeles to attend law school and enrolled at U.C.L.A. Law School.

While a student at U.C.L.A., a number of Johnson's professors strongly encouraged him to pursue a career in academia. Johnson would have none of it. He declined an invitation to join the Law Review, refused to interview for a judicial clerkship, and instead set his sights on becoming a partner in a large law firm, Latham & Watkins, in Los Angeles. He had noticed, while clerking at a large firm during the summer after his first year of law school, that there were very few attorneys of color in Los Angeles law firms in 1976, and he vowed to become one of the first black partners in Los Angeles.

Antitrust changed Johnson's mind. He had hoped to work in the real estate section, but his firm assigned him to a large and lengthy antitrust matter. Consequently, when he was offered a tenure track position at the University of Minnesota Law School in the fall of 1980, he accepted with the promise that he would be allowed to teach Property and Real Estate. He eventually made his way to the University of Virginia in 1984 and felt immediately at home.

Professor Johnson has been a major presence at the Law School and within the larger university ever since. He has paid particular attention to efforts to increase diversity among law students and faculty. As a result of his interest in student diversity, for example, Professor Johnson was appointed to the Admissions Committee of the Law School, where he worked closely with then Dean of Admissions Al Turnbull to guarantee that the Law School's classes were exceptionally talented and as diverse as possible.

While Johnson was actively involved in key committees at the Law School, he was simultaneously involved in several leadership positions at the University level. In addition to serving on several University-wide search committees, Johnson chaired the Athletic Department's Athletic Advisory Panel that counseled athletes about their prospects for a professional career and on the selection of an agent. In that capacity he befriended several of UVA's most notable athletes, including the Barber twins, Chris Slade, Charles Way, and Matt Schaub.

In 1995, Provost Peter Low appointed Johnson as Vice-Provost for Faculty Recruitment and Retention. Johnson was responsible for several initiatives and standing committees, but was most notably responsible for faculty hiring and the University's Promotion and Tenure practices and policies, chairing that committee. At the same time, Johnson expanded his reach beyond the University of Virginia by becoming active in several professional and academic organizations, most notably the Law School Admission Council (LSAC). The LSAC, which is owned by all of the ABA approved law schools, produces and administers the LSAT and, as a result, Johnson has become an expert on the efficacy of the test and an advocate for its continued use. Johnson was appointed to the Minority Affairs Committee in 1989, subsequently served on several of its standing committees, and was ultimately elected to Chair of its Board of Trustees, a position he held from 2001–2003. He also served on several standing committees of the Association of American Law Schools, chairing its Curriculum Committee and its standing committee on Bar Admission and Lawyer Performance.

In 2002, Johnson left the Law School to serve as the Dean of the University of Minnesota Law School. He returned to the Law School in 2007, and he is delighted to be back in the classroom regularly and to have the chance to return to his scholarship.

Johnson's scholarly interests are diverse and have evolved over time. He initially focused on importing contract principles into property and real estate law in an effort to bring a fresh perspective to supposedly moribund areas of law. In one of his early articles, Professor Johnson deployed relational contract theory, developed by his colleagues Charles Goetz and Robert Scott, and applied it to long-term commercial leases. Johnson concluded that courts were incorrectly eliminating the default rule that allowed lessors to withhold consent to an assignment of a long-term leasehold. He correctly argued that the elimination of this right would result in a windfall to the existing lessees (who would benefit from the sale of leaseholds), but ultimately result in the imposition of higher costs on new lessees who would be forced to bear the costs resulting from a regime in which lessors could not withhold consent to transfers.

While pursuing his interest in contract theory, property, and real estate law, Johnson also became intrigued by Critical Race Theory. This curiosity led Johnson to research and write in the area, and culminated in a major article, "The New Voice of Color," which was published in the *Yale Law Journal*. That article, which is excerpted below, was Johnson's second writing on the issue of whether scholars of color address or speak to certain issues with a different perspective or voice than their majoritarian colleagues. Although the academic debate has largely embraced this position, the issue was recently reignited when Judge Sonia Sotomayor was nominated by President Obama for appointment to the United States Supreme Court. In 2001 Judge Sotomayor, essentially embracing the tenets of Critical Race Theory and the articulation of the voice of color stated, "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life." Johnson's prescient article explains what that voice is, why it is distinct for scholars and, in this case, judges of color, and how it is articulated.

Johnson has continued to pursue these quite disparate interests in contract theory, property, real estate, trusts, and critical race theory, as well as some others. Over the last decade, for example, Johnson has authored several articles in the Critical Race area, including his most recent: “The Re-emergence of Race as a Biological Category: The Societal Implications—Reaffirmation of Race,” which is forthcoming in the *Iowa Law Review*. Johnson wrote the article to celebrate the twentieth anniversary of the emergence of Critical Race Theory, and in it he explores the possibility of destabilizing existing and hegemonic racial classifications as a way to eliminate societal discrimination. In addition, Johnson, ever the eclectic scholar, has written articles advocating the expanded use of *cy pres* in charitable trusts and also several articles focused on the legal and other issues impeding the flow of students of color into law school and the practicing bar.

Johnson’s most recent work, motivated in large part by his recent addition of Contract Law to his teaching portfolio, has focused anew on the imposition of contract principles to resolve issues and disputes in the property area. In his article, “An Economic Analysis of the Duty to Disclose Information: Lessons Learned from the Caveat Emptor Doctrine,” Johnson applies contract principles to explain why the caveat emptor doctrine has evolved to require the seller to disclose all defects with respect to sold property notwithstanding the doctrine’s original maxim providing a safe harbor to the seller who makes no disclosure. Modern contract doctrine has convincingly theorized when a party to a contract should be required to disclose information to the opposing contracting party. In brief, efficiency requires one party to disclose information to the other in three situations: 1) when that information is casually acquired—not the product of a deliberate investment, like obtaining an MBA; 2) the information redistributes wealth instead of creating it; and 3) the information is clearly more accessible at a lower cost to the party possessing it. Mapping contract theory onto the typical residential real estate transaction, Johnson argues that caveat emptor was originally correctly applied to real estate transactions because it developed at a time when

information regarding the quality of a dwelling was accessible equally to both parties. However, as dwellings became more complex, with HVAC, modern plumbing, etc., the information possessed by the selling homeowner regarding the quality of the dwelling sold is casually acquired, redistributive rather than wealth producing, and more accessible to the seller rather than the buyer. This development led to exceptions in the doctrine of caveat emptor that caused its total erosion in many states. Johnson's article not only explains this erosion but neatly analyzes why the caveat emptor doctrine is making a return in the form he characterizes as "caveat emptor light."

In his forthcoming *Pepperdine Law Review* article, "Preventing a Return Engagement: Destroying the Negotiability of the Mortgagor's Note via the Unconscionability Doctrine," Johnson again deploys contract theory to argue that the holder in due course doctrine, which protects assignees/transferees of mortgage notes from personal defenses, is a key factor in the predatory and subprime lending that helped create the perfect circumstances for the recent real estate collapse. Johnson focuses on the development and increasing use of "exotic financing devices" (adjustable rate mortgages, graduated payment mortgages, shared and negative amortization mortgages, to name a few), the parties to the residential mortgage transaction, and the subsequent transfer of the mortgage on the secondary market through the securitization of mortgages to identify the differing incentives of the parties that creates the perfect opportunity for predatory lending and mortgagor default. For example, the originator of the mortgage obtains fees by initiating the mortgage. Because the mortgage is securitized and transferred on the secondary market, banks and other originators have no incentive to insure that the mortgagor has the ability to perform the mortgage when it adjusts after it is transferred. On the other hand, purchasers on the secondary market are purchasing a negotiable instrument secured by a mortgage and are protected against most mortgagor claims via the provisions of the Uniform Commercial Code. These purchasers are holders in due course under the Code and are immune from any claims by the maker that the originator lied or engaged

in fraud (so-called personal defenses). As a result, purchasers of these mortgages have no incentive to insure that the originators acted appropriately in dealing with the mortgagor. In addition, the purchaser of the note, relying on ratings of the security, makes no effort to verify the value of the underlying security. The mortgagor, who is an unwitting party to a predatory loan, has no recourse against the holder of the note and will remain liable on a predatory loan, resulting ultimately in a foreclosed mortgage. Johnson theorizes that eliminating the holder in due course doctrine and applying the UCC sections on unconscionability will appropriately align the parties' incentives and prevent a return of what he characterizes as the current "mortgage miasma."

Consequently, Johnson's scholarship has come full circle. His second major published article, "Correctly Interpreting Long-Term Leases Pursuant to Modern Contract Law: Toward a Theory of Relational Leases," focused on the intersection of contract and real estate law to argue for the continued enforceability of clauses restricting the transferability of long-term leases by commercial tenants. Although there have been many scholarly detours along the way, Johnson's latest article again explores the intersection of contract and real property law and explains why he so eagerly began teaching Contracts for the first time in the fall of 2008. His teaching interests are now totally aligned with his scholarly interests and Johnson predicts that there will be many more articles that explore the intersection of property and contract law. Johnson eventually hopes to develop a theory detailing when unique (and some would say archaic) property rules should correctly depart from larger contract principles and doctrines.

Although Johnson's students might not realize how varied his legal career has been, they undoubtedly recognize his energy and passion for the law and his wide-ranging intellectual curiosity. They, like his colleagues at the Law School, will be the beneficiaries of the latest chapter of Johnson's storied career, as he returns his seemingly limitless energy, passion, and commitment to teaching and scholarship. ❁

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The New Voice of Color

100 *Yale L.J.* 2007 (1991)

BRIEFLY, PROPONENTS OF THE EXISTENCE AND VALUE OF THE voice of color allege that scholars of color speak to all issues with a distinctive voice, especially to certain race-related ones, because scholars of color have shared the molding experiences created by racism that caused the voice of color to emerge. Randall Kennedy of the Harvard Law School is engaged in a debate with other scholars over the existence and worth of the voice of color. Kennedy rejects the existence of the voice and its monolithic character, basing his position on a lack of objective proof that a distinctive voice exists. He questions whether the voice of color contains anything unique to distinguish it from other “voices.” Stephen Carter of the Yale Law School likewise questions the existence and worth of voice, although he equivocates more than Kennedy.

In a similar vein, Kennedy refutes Richard Delgado’s claim that the academic contributions “of minority scholars [are] frequently either unrecognized or underappreciated by white scholars blinded by limitations of their own racially defined experience or prejudiced by imperatives of their own racial interests.” Kennedy challenges this claim by asserting that, “Delgado fails to shoulder the essential burden of championing on substantive grounds specific works [by scholars of color] that deserve more recognition than they have been given.” More importantly, Kennedy questions whether the otherwise excluded articles are *worthy* of citation when judged by the objective, meritocratic standard employed by his colleagues and accepted by him.

More charitably, Carter believes there may be a more benign explanation for the general lack of scholarship: there may be a “lack of literature”

from scholars of color to be cited since there are so few scholars of color in academia, and our entry into the profession is historically recent. However, Carter's hypothesis does not stop there. He goes on to suggest that articles authored by scholars of color are not as heavily cited as their majoritarian peers because "our work must be, on the whole, not as good as the work of white scholars." Carter buttresses his hypothesis with the following statement: [B]ecause racial preferences in faculty hiring are intended to hire the best potential scholars of color rather than simply the best potential scholars, they might produce a group of scholars who will produce work of lower median quality than the work produced by those hired simply because they are the best potential scholars.

What I find intriguing about Kennedy's and Carter's contentions is their representation in the current debate over Critical Race Theory and the existence and value of voice. Simply put, Kennedy and Carter represent the voice of color that I call Hierarchical and Majoritarian—two terms which at first glance present an odd, if not impossible, coupling. Their views are majoritarian in the sense that the standard they articulate and use to measure, judge, and evaluate has been developed by this country's dominant culture—white males—with little or no input from persons of color, irrespective of class affiliation. Moreover, in this Article I use "majoritarian" in a very limited sense to refer to the racial and gender make-up of the majority of members of the professoriate, a body within which the voice debate is now raging. Consequently, in this context, being labeled a "majoritarian" or adopting majoritarian values has nothing to do with general societal values or norms.

Narrowing my focus to an analysis of the professoriate explains this coupling of "majoritarian" and "hierarchical." The terms are complementary for my purpose: constituting a label for what is the consensus of an insular group (the legal academy) who embrace a hierarchical standard—which may have a discriminatory impact on minority members of that insular group—and accept the majoritarian paradigm, based upon that standard, to establish what is "best." By "hierarchical standard" I mean that its proponents maintain that there is a neutral, objective, evaluative

standard by which the “best” scholarship can be ascertained, ranked, differentiated from other works, and rewarded.

Most importantly, implicit in the notion of a Hierarchical Majoritarian standard is the perception or belief that all have an equal shot at satisfying that standard as long as no *substantive* hurdles are employed to either assist or impede one class or type of individual. It is a belief that there is but one standard by which to make judgments on what is valuable and best.

I have elsewhere defined my conception of the voice of color as one encompassing the author’s intent, reader perception and acceptance of the author’s intent, and reader belief that the author’s status as a scholar of color imbues the author with some unique perspective. My conception of the voice of color is therefore contextual; not all scholars of color possess it or use it all of the time. When scholars of color speak, they are not a priori speaking in the voice of color. The scholar of color must draw on her experiences and general insight gained *as* a person of color before the voice of color is articulated. In other words, the *voice* of color is not synonymous with one’s status within the academy as a scholar of color, although I have argued elsewhere that only scholars of color may speak in the voice of color. Kennedy and Carter correctly reject the position that the voice of color exists whenever a scholar of color speaks.

However, Kennedy, and to a lesser degree Carter, appear to be hostile to the conception of the voice of color because of its potentially stigmatizing effect on the interpretation of scholarship contributed by scholars of color. At base, perhaps what concerns Kennedy is the development of evaluative scholarly norms that have the potential for creating “segregated” scholarship. In other words, if it is indeed impossible to apply the concept of voice of color selectively to the work of some scholars of color, then it is possible that the scholarship of *all* scholars of color will be evaluated by a different—though not necessarily lesser—evaluative standard. This scenario could lead to the unfortunate development, either actual or perceived, of “separate-but-[un]equal” scholarship: scholarship authored by scholars of color would be judged by an as yet undefined standard;

scholarship produced by majority scholars would be judged by the Hierarchical Majoritarian standard.

I firmly believe that Carter in “The Best Black” and Kennedy in his article, “Racial Critiques of Legal Academia,” speak in the voice of color. And, despite the fact that the substance of what they say is that scholars of color should embrace the Hierarchical Majoritarian standard and excel pursuant to those norms, they ultimately address the same issue raised by those I have characterized as speakers of the “Monistic dialect of the voice of color”: developing the best strategy to improve the plight of people of color and to achieve racial equality in our society. Kennedy and Carter, drawing upon *their* experience as scholars of color, have apparently determined that the best strategy to achieve progress in the legal academy is via an “integrationist,” mainstream approach that embraces the so-called “neutral” evaluative norms of the dominant cultural group.

The Carter/Kennedy approach presupposes the existence of an objective “truth,” which requires that a scholar be computer-like in assessing the value of other scholars’ work. The standard used by Kennedy is based on universalism—that “truth claims ... are to be subjected to *preestablished impersonal* criteria.” Yet this standard, like others, is not based on certainty and objective truths. Such a standard must by definition be premised on a form of “consensus” among scholars that claims to be independent of “truth” notions about what is good and what is better. Consequently, Kennedy’s meritocratic paradigm is premised on a value-objective truth—that in this context is inapplicable and inappropriate, and, since people are made of flesh and not silicon, it is a standard impossible to realize.

The voice of color, on many levels, challenges this concept of consensus. Scholars of color do not speak in a monolithic voice because they have not all had the same experiences. Focusing on the author’s nonacademic, real world context, a scholar of color speaks in the voice of color when she makes a claim to a perspective that is not shared by her majoritarian peers because her experiences as a scholar of color are different. Put another way, “[t]he author of color is making a claim to

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a perspective that is not shared,” and is therefore necessarily different, because the crucial value-forming experiences that have defined the perspective are not universally shared by scholars of color. I contend that scholars of color writing in the voice of color not only belong to a community of legal academics, for which they write and speak in a manner interpretable by that community without reference to the identity of the author/scholar, but also belong to different communities based on their race and background. Further, membership of scholars of color in these unique communities provides them with insight and knowledge-insight and knowledge a majority scholar/reader may be able to grasp only after accepting an interpretive strategy that requires the reader to recognize the identity of the writer. ❧

An Economic Analysis of the Duty to Disclose Information: Lessons Learned from the Caveat Emptor Doctrine

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SEVERAL LEADING LAW SCHOLARS HAVE ATTEMPTED TO EXPLAIN why certain legal rules require a party to disclose information to the other contracting parties, often competing parties, in certain transactions. Most notably, Dean Anthony Kronman, in his article, “Mistake, Disclosure, Information, and the Law of Contracts,” presents an economic theory explaining why unilateral mistake is allowed as a defense to preclude contract formation in some cases, but not others. As part of his argument, Dean Kronman discusses when a party has a duty to disclose information to the other contracting party when the other contracting party does not ostensibly possess that information. The obverse of the rule mandating disclosure is also discussed—when a party is privileged to remain silent even though the party possesses relevant information (a material fact) that the other contracting party would prefer to know. Dean Kronman concludes that there is no duty to disclose relevant information that is a product of deliberate investment, but that one has a duty to disclose relevant information that is “casually acquired.”

Similarly, Professors Cooter and Ulen in their economic treatise, *Law and Economics*, put forth a theory to determine when the disclosure of a material fact is required from the knower to the knowee. They attempt to draw a distinction between those facts which they determine are productive (wealth producing or enhancing), which are not required to be disclosed between contracting parties, and those facts which are merely *redistributive*, which the knower is required to disclose to the knowee. Lastly, in a fascinating book addressing the legal issues and rights that flow from, and are related to, the phenomenon of “secrecy,” Professor Scheppele theorizes that one party to a contract is privileged to keep a

secret premised on the relative cost of each party's access to the material fact or relevant information. Briefly, Professor Scheppele's disclosure theory mandates disclosure of secret information if the marginal cost of that information is much less for one party to the contract than for the other party to the contract.

Although most of these theories have been articulated to explain why disclosure is or is not required in certain contracting situations having to do with the sale of personalty, it is clear that these theories, if correct, must also apply to contracting situations involving the sale of realty. That is, when the vendor and vendee enter into the contract for the purchase and sale of real property, they execute a contract that allocates their respective rights and liabilities. A critical issue at the time of contract formation has to do with what, if any, facts the vendor-seller (knower) must disclose to the vendee-buyer (knowee) regarding the condition of the premises being sold. Enter the doctrine of *caveat emptor*, which at common law, in its purest form, provides a safe harbor to the vendor-seller not to disclose *any* information to the vendee-buyer. *Caveat emptor*, then, is a huge exemption to any doctrine requiring the disclosure of information from the knower to the knowee.

This Article examines the economic theories that model rules requiring the disclosure of information between contracting parties in light of the development and evolution of the doctrine of *caveat emptor*. If correct, these theories predicting when information must be disclosed must account for the common law usurpation of disclosure requirements in the purchase and sale of realty. In other words, if the economic analysis is correct, these theories must explain why no disclosure of information is required with respect to the sale of realty at common law. The alternative explanation is that the *caveat emptor* doctrine should not be applied with respect to the sale of realty—that its use has been erroneous for centuries. Hence if the theories are accurate, some disclosure is or should be required with respect to the sale of realty. Conversely, if the economic theory mandates disclosure of certain information even with respect to the sale of realty, perhaps the common law doctrine of

caveat emptor is ill-suited to address issues that arise from modern-day real estate transactions.

Mapping these economic theories on the doctrine of caveat emptor is, however, not without problems. The doctrine has not remained static over time. Indeed, although it is fair to say that the common law doctrine is fairly easy to articulate and apply, the doctrine itself, as applied by the courts, has become riddled with exceptions and has been made null and void by certain legislative enactments. Thus, a case can be made that the rationale for the use of caveat emptor with respect to the sale of realty may have been appropriate at the time the doctrine was developed. However, changes in the nature of the property being sold may have resulted, over time, in the need for information to be disclosed consistent with the theories discussed above. This requirement of disclosure of information from seller to buyer in the residential real estate transaction, expressed as exceptions to the caveat emptor doctrine, may demonstrate the efficacy of the economic theories put forth to explain disclosure rules. However, in one final twist, these theories must also explain why the doctrine of caveat emptor, in a modified form that I characterize as “caveat emptor light,” is now emerging as a result of court opinions and legislative enactments.

In other words, applying these economic theories to the doctrine may have power to explicate what is currently a puzzle: Why has the common law doctrine of caveat emptor been obliterated through exceptions causing yet another version of caveat emptor—caveat emptor light—to emerge as a result? Factor in the changing nature of the real estate being sold (agrarian land to complex residential dwellings) and the stage is set for a historical analysis of a doctrine that has transformed itself to adapt to current transactional norms. Consequently, following a brief primer on the three economic theories which attempt to explain when disclosure is or should be required among contracting parties which would tend to eliminate or disprove the need for caveat emptor in any real estate transaction, this Article begins with a historical exegesis of the doctrine of caveat emptor.

As a result, this Article examines the evolution of the caveat emptor doctrine from its common law origins to its current status in American

law. In so doing, this historical analysis tests several economic theories and attempts to analyze the same in light of the doctrine's evolution. By using economic theory regarding when material facts should be disclosed, I hope to demonstrate that the original formulation of caveat emptor at common law was the correct and efficient rule for the parties at that time. Conversely, I demonstrate that the exceptions which have become associated with the caveat emptor rule—which have riddled the rule—represent attempts by the courts to align disclosure requirements to parties to a transaction which bears little resemblance to the vendor-vendee transaction that originated at common law in agrarian England.

What I hope to demonstrate is that caveat emptor in its pristine common law form is deemed inapposite for the modern residential real estate transaction, yet perfectly suited for the real estate transactions that took place as the doctrine was originally developed and applied. It is the change in the very nature of the real estate transaction that caused the doctrine of caveat emptor to become inapposite for real estate transactions. However, the mandatory disclosure of all information from seller, or knower, to buyer, or knowee, as mandated by courts and laws focusing on the status of the parties, is also incongruent and inapposite with the economic theories requiring the disclosure of information. This is so because these new laws require inefficient disclosure of information by mandating the disclosure of all information, including that which is the product of deliberate investment and, relatedly, information that is equally available to both parties. As a result, and efficiently, caveat emptor light is emerging, which I will document is consistent with the economic theories requiring disclosure of information and correctly establishes the correct duty for disclosure of information from the knower, or vendor-seller, to the knowee, or vendee-buyer.

The evolution of caveat emptor also serves to validate Professor Rose's theory in her article, "Crystals and Mud in Property Law," which is addressed in the fourth and final part of this Article. Pro-

fessor Rose, analyzing the evolution of common law through judicial opinions, hypothesizes that, broadly speaking, judicial opinions often have the effect of taking what she terms a “crystal” rule—a rule that is easy to interpret and apply because its contours are certain, like caveat emptor—and ultimately transforming it into a “mud” rule—the antithesis of a crystal rule or a rule that is difficult to interpret and apply because of the rule’s complexity or the fact-related nature of the rule which requires precise application of certain facts to a rule to produce a predictable outcome. In effect, I argue that the courts have done to the caveat emptor rule exactly what Professor Rose hypothesized. The courts have taken a simple and easy-to-apply rule and have muddied it to the extent that treatises and articles are now written regarding its applicability. The evolution of caveat emptor light represents an attempt to transform what is now a mud rule into a new crystal rule. This process by which the crystal rule becomes the mud rule and is in the throes of becoming crystal again is caused by courts’ attempts to align the parties’ duties to disclose information in the residential real estate transaction consistent with their acquisition of information about the residences being sold.



Caveat emptor, then, represents the epitome of a rule that evolves from crystal to mud and thence to crystal. First, crystal rules are extended—overused—to situations that are inapposite leading to inefficient and unjust outcomes. Caveat emptor, in its pristine common law form, applied to a very simple structure in which all defects were essentially immediately visible. Furthermore, the seller, by residing in the dwelling, gained no particular unique knowledge of the premises as a result. Hence, the parties to the common law transaction possessed equal bargaining power and equal knowledge with respect to the quality of the building. Subsequently, as a result of the increasing complexity of the dwelling, these positions changed, although the doctrine did not. Sellers became more knowledgeable about defects in the premises that were not easily discov-

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erable by the buyer. As a result, when the buyer found himself fleeced, now in the role of the mope, to use Professor Rose's terminology, courts were more willing to muddy the crystal rule to provide exceptions in order to grant the buyer relief from her necessitous circumstances.

Second, although the contract is not relational, the requirement that information not be conveyed, as allowed by caveat emptor, is once again inapposite in a situation where the seller acquires information in a relational context and is privileged not to convey same in the context of the contingent contract entered into with the buyer. That inequality of bargaining power-relational knowledge in a contingent contract setting leads to scoundrels fleecing, sometimes inadvertently, sometimes not, the foolish (mope) buyers who fail to adequately protect themselves by undertaking an adequate inspection and the acquisition of the necessary information regarding the quality of the premises. Just as predicted by Professor Rose, courts in these settings were moved to make post hoc readjustments that led to the erosion of the doctrine and resulted in the imposition of a mud rule.

But in addition to the three factors that Professor Rose has identified to explicate why crystals turn to mud and thence crystals, an examination of caveat emptor reveals two heretofore additional reasons why these rules change and become muddied. Professor Rose's theory is incomplete in one respect because she does not take into account how the property or resource that is the subject of the crystal rule might also evolve to become inapposite to the crystal rule. In other words, these are not static rules or doctrines affecting static and unchanging properties. Quite the contrary, as technology evolves and changes, ill-fitting rules must also evolve and change to address those changes.

In other words just like the law is not static, neither is the object or subject of the rule being analyzed. What works initially for a crystal rule may not work for something that is called the same thing but has technologically evolved far beyond its original form or design. It should be self-evident that the caveat emptor doctrine worked as a default rule at common law due to the simplicity of the dwelling it was designed to

regulate or govern. As the dwelling became more complex, morphing into something that is nothing like the agrarian dwelling to which the original rule applied, the courts were unable to declare the old rule obsolete and develop a new rule given how common law rules evolve via court decisions instead of legislative fiat and declaration. As the property evolved slowly and inexorably to its current form, the doctrine of caveat emptor also evolved to take into account the different characteristics of the property regulated.

This evolution of the property being regulated represents a different challenge than, say, the creation of a new property right like the Internet. The development of a new form of property also creates the recognition and awareness that there is a void in the existing regulatory structure to govern the new entity. Scholars and judges jump into the fray to fill the void created when the new property is created. With respect to existing and evolving property, no void exists. Instead judges and legislators must modify the crystal rules, making them mud, in order to regulate the newly evolved species of property. The insight that is missing from Professor Rose's theory regarding how mud rules become crystal is the lack of analysis and recognition of the evolution of the property that is being regulated by the rules. That evolution of the property should also force an evolution in the norms, mores, et cetera, and in the rules governing the property rights.

The second insight gained by an analysis of caveat emptor and its evolution into caveat emptor light is the fact that crystal rules are more likely to be used for what I designate "objective" determinations, and mud rules are more likely to be used for "subjective" determinations where multiple variants play into the equation concerning how resources or rights should be allocated. Put another way, as determinations become more subjective with more variables being considered by the courts, the muddier the rules become. An analysis of the three fact situations described by Professor Rose in her article as prototypical crystal rules involves objective determinations. Thus the fact that the seller has no duty to disclose (caveat emptor); the mortgagor did not make the payment on law date (the

equity of redemption); and the losing party was not the first to record (the operation of recording acts) entails a determination made by the trier of fact that is bipolar—yes or no—not maybe or partially, but definitive and dispositive. Crystal rules, thus, work best when the fact to be decided is either up-down or yes-no with no subtle gradations to be made.

Think of it this way: the common law sale of a house was a crystal transaction—objective and verifiable—something akin to a contingent one-shot transaction in which the parties were not repeat players. In fact, many have alleged that the residential real estate transaction is the epitome of a contingent contract that should lead to the use of crystal rules. However, I contend that today's transaction is more subjective and akin to a relational contract. In order to determine the enforceability of the transaction, the court must determine what this seller knows and what is important to this buyer. It is individualized and subjectivized to an extent that was not relevant at common law. Hence, importantly, even though the parties in a real estate contract represent prototypical contingent contracting parties, the nature of the information sought is in fact relational. Underlying the theory of relational versus contingent contracts is the notion that in contingent contracts the parties are dealing at arm's length and each can take the maximum steps to protect their respective positions. That is not true in the sale of the residence and has caused the further erosion of the doctrine of *caveat emptor*.

Consequently, adding these two elements to Professor Rose's theory makes its explanatory power more robust. I would expect to see crystal rules become mud rules not only when: (1) crystal rules are extended to non-obvious situations; (2) when parties are in a relational contract; and (3) when courts are called to make an *ex post* adjudication that will involve the forfeiture of a significant asset; but also (4) in situations where the variable being decided is subjectivized; and (5) the asset or variable about which the decision is made is itself evolving into a significantly different asset due to technological advances. When all five of these variables are aligned, crystal rules will inevitably become mud rules and lead to the development of crystal rules to replace the muddied rules. ❄

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