

## TITLE ISSUES

### THE NEW ILLINOIS PROPERTY DISCLOSURE ACT

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On October 1, 1994 new legislation will take effect requiring sellers of residential real estate to disclose to prospective purchasers any known defects in the home being sold (offered for sale) through a report consisting of twenty-two questions. This legislation, known as the Residential Real Property Disclosure Act (Public Act 88-111 hereinafter "Act") is designed to provide additional protection to home purchasers and real estate agents. A copy of the Residential Real Property Disclosure Report as described in Section 35 of the Act has been reprinted in its entirety at the conclusion of this article.

By joining the ranks of nine other states: Alaska, California, Kentucky, Maine, New Hampshire, Ohio, Rhode Island, Virginia and Wisconsin, which already require seller's disclosure, the Illinois legislature has further eroded the doctrine of caveat emptor in the home purchasing arena.

#### Actions Involving Fraud

Currently, under Illinois law, a home purchaser may recover damages from a seller and a real estate agent for material defects. The most common actions against sellers and real estate agents relating to defects in the purchased property are through various actions including: fraud, negligent misrepresentation, breach of contract, and violations of the Consumer Fraud and Deceptive Business Practice Act and the Real Estate Brokers and Salesman License Act. With availability of these existing remedies, why did the state legislature feel the need to provide yet another remedy to home purchasers who have suffered damages due to material defects in the purchased property?

The answer to this question lies in the elements needed to establish a cause of action for fraud in cases involving material defects. The most common actions against sellers and real estate agents relating to defects in the home are those alleging fraud and misrepresentation. Currently under Illinois law, a seller is under no duty to disclose defects to the purchaser; silence alone will not constitute grounds for an action for fraud. However, an action for fraud may be maintained if the silence is accompanied by active concealment.

To maintain an action for fraud, it must be shown that the defendants intended to deceive the plaintiff. It is well settled in Illinois that for a statement or act to constitute fraudulent misrepresentation it must be; 1) of a material nature; 2) untrue; 3) known by the person making it to be untrue, believed by him to be untrue, or made in culpable ignorance

of its truth or falsity; 4) relied on by the victim to his detriment; 5) made for the purpose of inducing the reliance; and 6) such that the victim's reliance led to his injury.<sup>1</sup>

In a fairly recent decision the appellate court confirmed a lower court's ruling finding a defendant liable for not disclosing the full extent of flooding in the basement in response to questions asked by the plaintiff. Although the plaintiff was aware of water in the basement, the defendant was liable for fraudulent misrepresentation for stating that the basement had flooded only once and that standing water in the basement was caused by the location of the sump pumps, when in fact the basement flooded often and standing water was a result of the basement being situated below ground water level, not the positioning of the pumps.<sup>2</sup> The court found that the defendant's actions of not making a full disclosure when asked of the leaking water, "was an attempt to deceive plaintiffs which amount to fraud equal to an affirmative falsehood".<sup>3</sup> In reaching its decision the court utilized the holding of previous courts which held that "while silence in a business transaction does not necessarily amount to fraud, silence accompanied by deceptive conduct or suppression of material facts results in active concealment".<sup>4</sup>

Real estate agents are also likely to be targets in actions alleging fraud. In a similar case, the court found that a real estate agent's silence as to massive flooding problems in the home and surrounding area of which the agent had knowledge, could be tantamount to fraudulent concealment of a material fact.<sup>5</sup> Even though she was an agent of the seller, the court held that the real estate agent may be liable to the plaintiff for material defects stating "real estate brokers and salespersons occupy a position of trust with respect to purchasers with whom they are negotiating and owe a duty to exercise good faith in their dealings with such purchasers even absent the existence of an agency relationship".<sup>6</sup>

Although the modern trend has been shifting to erode the doctrine of caveat emptor and impose a duty on sellers to disclose material defects to prospective purchasers, Illinois courts are still unwilling to find fraud where a seller "covered up" a defect with silence alone. As recently as 1993, courts have held that liability for fraud will not be imposed for real estate seller's silence on defects if purchaser was aware of defects prior to purchase or could have discovered them through diligent inspection.<sup>7</sup>

It is against this background of the cases involving fraud, that the state legislators have enacted the Residential Real Property Disclosure Act. Upon a review of the report, it is clear that the Act places the duty squarely on the seller to affirmatively state whether he knows of any defects in the home: The seller can no longer remain silent on this issue. Therefore, even though the purchaser may already have several remedies at his disposal to pursue damages for material defects, the Act should eliminate those fraud cases involving silence alone. The twenty-two disclosure questions mandated by the Act must be answered by the seller and be presented to the purchaser prior to the execution of the sales contract. If the response to any question indicates a defect, that should trigger the prospective purchaser to inquire further and base his purchase offer with the knowledge of this new information.

## Requirements and Limitations of the Act

The Act does not apply to all conveyances of real estate but rather limits disclosure to residential property consisting of one to four units, including condominiums and cooperatives whether or not a licensed real estate broker or salesperson is involved in the transaction. It not only applies to sales of real estate, but also to exchanges, installment contracts, assignments of beneficial interest, leases with an option to purchase, ground leases or assignments of ground leases.

A "Seller" under the Act is; an owner; beneficiary under a land trust; contract purchaser; or lessee of a ground lease.

There are some exceptions which apply, they are:

1. Transfers pursuant to testate or intestate succession
2. Transfers to a spouse or ancestors or descendants of the seller
3. Transfers from a relocation firm
4. Transfers to or from a governmental entity
5. Transfers of newly constructed residential real property
6. Transfers by court order
7. Transfers arising out of foreclosure or collateral assignments of beneficial interest
8. Transfers by a fiduciary
9. Transfers by a co-owner to a co-owner

The report must be delivered to the prospective purchaser before he is contractually bound under the sales contract. If received afterwards, and the report contains notice of a material defect, the purchaser shall have three days to rescind the contract. Delivery may be made by personal delivery, facsimile, first class mail, Federal Express, U.P.S., Airborne, etc., and is effective upon receipt.

Under the Act, damages are limited to actual damages and a one year statute of limitations applies. Responses to the ques-

tions answered negatively by the seller which are later found to be true shall constitute a necessary element in maintaining a private cause of action under the Act. Any action brought under the Act will not preclude a purchaser's right to seek other remedies such as fraud or negligent misrepresentation.

It should be noted that the seller is not liable if he has no knowledge of the defect, has a reasonable belief that the defect has been corrected, or if his responses are based on information received by an independent third party, such as a surveyor, contractor or engineer. It should be further noted and perhaps most importantly, that the seller is not obligated to amend the report once it is given to the prospective purchaser. The seller is only obligated to answer the questions based on his actual knowledge, no investigation of the property is required.

## Life After The Act

Undoubtedly this legislation will have a major impact on the future business of buying and selling homes. It should go a long way in limiting those fraud cases where silence is an issue, but will the new legislation solve all the problems associated with home defects?

Although the report asks the seller if he is aware of material defects the question of what constitutes "material" will surely be placed before the courts for interpretation.

Also, will purchasers place too much reliance on the Act and interpret a clean report as an indication that the home contains no defects and thereby not exercise their option to have the home independently inspected?

Furthermore, the Act does not require the seller to amend the report after it is delivered to the purchaser. Hence, will we see more cases where as a defense, sellers argue that the defect occurred after delivery of the report and that the issue then becomes when did the defect occur or become known?

Although this law will raise many new issues, it will provide the purchaser with information about possible defects in the land being purchased.

## FOOTNOTES

1. *Kinsey v. Scott* 124 Ill. App. 3d 329, 463 N.E. 2d 1359 (1984)
2. *Munjal v. Baird and Warner, Inc.* 138 Ill. App. 3d 172, 485 N.E. 2d 855 (1985)
3. *Id* at 863.
4. *Russow v. Babola* 2 Ill. App. 3d. 837, 277 N.E. 2d 769 (1972)
5. *Zimmerman v. Northfield Real Estate, Inc.* 156 Ill. App. 3d 154, 510 N.E. 2d 409 (1986)
6. *Id* at 413
7. *Mitchell v. Skubiak* 240 Ill. App. 3d 1000, 618 N.E. 2d 1013 (1993) at 1017.

# RESIDENTIAL REAL PROPERTY DISCLOSURE REPORT

NOTICE: THE PURPOSE OF THIS REPORT IS TO PROVIDE PROSPECTIVE BUYERS WITH INFORMATION ABOUT MATERIAL DEFECTS IN THE RESIDENTIAL PROPERTY. THIS REPORT DOES NOT LIMIT THE PARTIES' RIGHT TO CONTRACT FOR THE SALE OF THE RESIDENTIAL REAL PROPERTY IN "AS IS" CONDITION. UNDER COMMON LAW SELLERS WHO DISCLOSE MATERIAL DEFECTS MAY BE UNDER COMMON LAW SELLERS WHO DISCLOSE MATERIAL DEFECTS MAY BE UNDER A CONTINUING COLIGATION TO ADVISE THE PROSPECTIVE BUYERS ABOUT THE CONDITION OF THE RESIDENTIAL REAL PROPERTY EVEN AFTER THIS REPORT IS DELIVERED TO THE PROSPECTIVE BUYER. COMPLETION OF THIS REPORT BY SELLER CREATES LEGAL OBLIGATIONS ON SELLER. THEREFORE, SELLER MAY WISH TO CONSULT AN ATTORNEY PRIOR TO COMPLETION OF THIS REPORT.

Property Address \_\_\_\_\_  
 City, State & Zip Code \_\_\_\_\_  
 Seller's Name \_\_\_\_\_

This Report is a disclosure of certain conditions of the residential real property listed above in compliance with the Residential Real Property Disclosure Act. This information is provided as of \_\_\_\_\_ (month) \_\_\_\_\_ (day) \_\_\_\_\_ (year), and does not reflect any changes made or occurring after that date or information that becomes known to the seller after that date. The disclosure herein shall not be deemed warranties of any kind by the seller or any person representing any party in this transaction.

In this form, "am aware" means to have actual notice or actual knowledge without any specific investigation or inquiry. In this form, a "material defect" means a condition that would have a substantial adverse effect on the value of the residential real property or that would significantly impair the health or safety of future occupants of the residential real property unless the seller reasonably believes that the condition has been corrected.

The seller discloses the following information with the knowledge that even though the statements herein are not deemed to be warranties, prospective buyers may choose to rely on this information in deciding whether or not and on what terms to purchase the residential real property. The seller represents that to the best of his or her actual knowledge, the following statements have been accurately noted as "yes" (correct), "no" (incorrect) or "not applicable" to the property being sold. If the seller indicates that the response to any statement, except number 1, is yes or not applicable, the seller shall provide an explanation, in the additional information area of this form.

- | YES       | NO    | N/A   |   |
|-----------|-------|-------|---|
| 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 a violation of local, state or federal laws or regulations relating to this property, which violation has not been corrected.               |

Note: These disclosures are not intended to cover the common elements of a condominiums, but only the actual residential real property including limited common elements allocated to the exclusive use thereof that form an integral part of the condominium unit.

If any of the above are marked "not applicable" or "yes", please explain here or use additional pages, if necessary: \_\_\_\_\_  
 \_\_\_\_\_

Check here if additional pages used: \_\_\_\_\_

Seller certifies that seller has prepared this statement and certifies that the information provided is based on the actual knowledge of the seller without any specific investigation or inquiry on the part of the seller. The seller hereby authorizes any person representing any principal in this transaction to provide a copy of this report, and to disclose any information in the report, to any person in connection with any actual or anticipated sales of the property.

Seller: \_\_\_\_\_ Date: \_\_\_\_\_ Time: \_\_\_\_\_  
 Seller: \_\_\_\_\_ Date: \_\_\_\_\_ Time: \_\_\_\_\_

PROSPECTIVE BUYER IS AWARE THAT THE PARTIES MAY CHOOSE TO NEGOTIATE AN AGREEMENT FOR THE SALE OF THE PROPERTY SUBJECT TO ANY OR ALL MATERIAL DEFECTS DISCLOSED IN THIS REPORT ("AS IS"). THIS DISCLOSURE IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THAT THE PROSPECTIVE BUYER OR SELLER MAY WISH TO OBTAIN OR NEGOTIATE. THE FACT THAT THE SELLER IS NOT AWARE OF A PARTICULAR CONDITION OR PROBLEM IS NO GUARANTEE THAT IT DOES NOT EXIST. PROSPECTIVE BUYER IS AWARE THAT HE MAY REQUEST AN INSPECTION OF THE PREMISES PERFORMED BY A QUALIFIED PROFESSIONAL.

Prospective Buyer: \_\_\_\_\_ Date: \_\_\_\_\_ Time: \_\_\_\_\_  
 Prospective Buyer: \_\_\_\_\_ Date: \_\_\_\_\_ Time: \_\_\_\_\_