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# **Liabilities of Homeowners and Real Estate Brokers for Non-Disclosure in Illinois**

*Stephanie A. Waxler*

## **I. Introduction**

Buying a home is an important event in a person's life, and researching a new home can be a tremendous task. The Illinois legislature recognized the stress of this process and the potential problems that may confront prospective buyers. In response, the State legislature enacted the Consumer Fraud and Deceptive Business Practices Act ("Consumer Fraud Act"), the Residential Real Property Disclosure Act ("Disclosure Act"), and the Real Estate Brokers and Salesman License Act ("Brokers Act") to protect buyers from misrepresentations and non-disclosures made by selling homeowners and real estate brokers.

These three Acts extend statutory protection beyond common law fraudulent misrepresentation, compelling brokers and selling homeowners to use integrity in the sale of homes. In addition to actual damages, some of these acts provide for attorney's fees and court costs as an additional deterrent for misrepresentations and non-disclosures in home sales.

This Note will explore the disclosures that must be made when selling a home. To begin, this Note will describe the general duties of homeowners and brokers to potential buyers. Also relevant are the main causes of action used by buyers in misrepresentation and non-disclosure suits against both selling homeowners and real estate brokers, and the damages associated with such actions.

Part III analyzes relevant case law and the impact

such decisions has had on homeowners. Part IV will discuss the future of residential real estate disclosure laws.

## **II. Background**

### **A. Causes of Action in Misrepresentation and Non-Disclosure Suits**

#### *1. Homeowners*

The main causes of action that a buyer has against the selling homeowner fall under common law fraudulent misrepresentation and the Residential Real Property Disclosure Act.<sup>1</sup>

The traditional view of fraud with respect to sellers was very much caveat emptor.<sup>2</sup> Sellers were not required to, and therefore were not liable for failing to disclose latent, pre-existing defects.<sup>3</sup> However, the modern trend of real estate law has moved away from caveat emptor, and now a duty is imposed on sellers to disclose defects that could not have been discovered by the buyer through a reasonable and diligent inspection of the premises.<sup>4</sup> The policy behind the modern view is that "a prospective home buyer may not shut his eyes to the obvious and then charge that he has been deceived, particularly where there was ample opportunity to further investigate."<sup>5</sup> When pleading fraudulent misrepresentation, the buyer must allege, with specificity, the facts from which the fraud may be found, including what representations were made, when they were made, who made such misrepresentations, and to whom they were made.<sup>6</sup>

The elements which must be proved for common law fraud are: 1) a false statement of material fact; 2) the false statement was intentionally made; 3) the party to whom the statement was made had a right to rely on it; 4) the statement was made for the purpose of inducing reliance; and 5) reliance led to the injury.<sup>7</sup> A "material

fact" is a fact that, if known, would have changed the way the party acted.<sup>8</sup> However, silence by the seller alone is not enough to constitute concealment of a material fact; deceptive conduct is needed for active concealment and fraud.<sup>9</sup> With misrepresentation, the party claiming fraud (usually the buyer) is required to prove the element by a clear and convincing standard; proof beyond a reasonable doubt is not required.<sup>10</sup>

In *Mitchell v. Skubiak*, the plaintiff buyers noticed cracks in the ceiling.<sup>11</sup> The defendant homeowner explained that the cracks were due to humidity variances, when in reality, he knew that the cracks were due to faulty roof repair.<sup>12</sup> The Mitchell court noted that the defendant actively misled the plaintiff by telling him that the defect was due to something other than its actual cause.<sup>13</sup> The court also stated that there were no other marks in the area to lead the plaintiff to believe that something other than humidity had caused the problem.<sup>14</sup> Because the plaintiff inquired as to the cracks in the roof, the defendant seller had a duty to speak, and the court found the defendant liable for fraudulent misrepresentation.<sup>15</sup>

But the court only goes so far with respect to finding sellers liable for fraudulent misrepresentation. In the same case, the defendant seller told the plaintiff that water had to be swept off of the garage roof.<sup>16</sup> The plaintiff then sued the homeowner for misrepresentation when later water leaked into the garage.<sup>17</sup> The court found that the homeowner's statement was a not misrepresentation.<sup>18</sup> The court held that the seller fully disclosed this problem, and that it is a common-sense notion that if water is not swept off of a roof, it will leak.<sup>19</sup>

A second cause of action by buyers against selling homeowners for non-disclosure is under the Residential Real Property Disclosure Act.<sup>20</sup> The Act requires sellers of residential real estate to provide potential buyers with

a written disclosure report, disclosing defects and other conditions of the property.<sup>21</sup> The Act also provides that a seller is not liable for any inaccuracy, omission or error in the report if: 1) he had no knowledge of such error, inaccuracy or omission; 2) he had a reasonable belief that such error, inaccuracy or omission was correct; or 3) the error, inaccuracy or omission was based on information provided by a public agency or licensed professional, and the seller had no knowledge of such error, inaccuracy or omission.<sup>22</sup> A homeowner that knowingly violates this Act and fails to truthfully complete the disclosure report shall be liable for damages.<sup>23</sup>

In *Woods v. Pence* the buyers brought an action under the Residential Real Property Disclosure Act.<sup>24</sup> In *Woods*, the plaintiff buyers noticed water marks on the ceiling of the defendant homeowner's house, but nothing was mentioned on the disclosure report with respect to a leaky roof.<sup>25</sup> When the plaintiffs inquired about the marks, the defendants said that it was nothing.<sup>26</sup> Later, it was discovered that the defendants had the roof patched three times, and were told that the roof would soon have to be replaced.<sup>27</sup>

As mentioned before, the Disclosure Act requires the seller to complete the disclosure form "containing various statements about the condition of the property."<sup>28</sup> In order for the seller to be liable for non-disclosure, scienter or intent to deceive, must be proved.<sup>29</sup> Additionally, the seller need not conceal the defect in order to be found liable under this Act.<sup>30</sup> In *Woods*, the court held that the sellers may have known of the defective condition of the roof based on evidence that it had been patched three times.<sup>31</sup> Even though the plaintiffs noticed the water marks, they were entitled to rely on the truthfulness of the sellers' disclosure.<sup>32</sup> Issues of fact existed as to whether the defendants knowingly made the false statement concerning the roof, and the case was remanded.<sup>33</sup>

In addition, a seller is not relieved of his duty to

disclose defects when the buyer hires an inspector to investigate the premises.<sup>34</sup> In *Mitchell*, the plaintiff had a cause of action for misrepresentation against both the seller and the inspector for failing to disclose numerous defects in the house.<sup>35</sup> The *Mitchell* court noted that purchasers cannot hire an inspector and subrogate their common law duty to inspect the premises and then later claim they had no knowledge of the defect, which could have been discovered with reasonable diligence.<sup>36</sup> Also, a buyer's claim against the inspector, does not exonerate the seller who made the misrepresentation; the buyer can rely on both the seller's and a third party's representations about the premises.<sup>37</sup>

## 2. Real Estate Brokers

As real estate brokers are in a position of trust with respect to the purchasers with whom they are negotiating, actions can arise from violations of the Real Estate Brokers and Salesman License Act and the Consumer Fraud and Deceptive Practices Act. Real estate brokers have a duty to use due care in obtaining and communicating information upon which a potential buyer may rely.<sup>38</sup> Brokers also have a duty, as do homeowners, to disclose material facts to prospective buyers, and concealment of these facts constitutes fraud.<sup>39</sup>

In *Zimmerman v. Northfield Real Estate, Inc.*, the plaintiff buyers brought an action against the defendant brokers for violating the Brokers Act.<sup>40</sup> Even absent the existence of an agency relationship, brokers occupy a position of trust with respect to the potential buyers with whom they are negotiating and owe these buyers a duty to exercise good faith.<sup>41</sup> Here, the court held that the brokers had a duty to disclose the actual size of the lot.<sup>42</sup> Concealment of these facts constituted fraud.<sup>43</sup> The broker argued, with respect to the size of the lot, that the buyers were given a copy of the property survey, and

because of this there was no issue of non-disclosure with respect to the size of the lot.<sup>44</sup> The court denied this argument on grounds that, in addition to the survey not providing square footage, a typical buyer would be unable to read and understand such a survey, and this constituted concealment of a material fact.<sup>45</sup>

The Consumer Fraud and Deceptive Business Practices Act is designed to protect consumers from fraudulent and unfair methods of competition and deceptive acts or practices used in the conduct of any trade or business.<sup>46</sup> This Act has been applied to misrepresentations made by real estate brokers to potential buyers.<sup>47</sup> The Act imputes liability upon the broker only if he knows of the false or misleading character of the information that is communicated to the potential buyer but is not intended to make a broker liable for latent defects.<sup>48</sup> Additionally, to avoid placing an undue burden on brokers, a broker is not liable for latent defects left undisclosed by the seller prior to sale.<sup>49</sup> The potential buyer does not have to show either reliance or diligence in discovering such misstatements either.<sup>50</sup>

*Harkala v. Wildwood Realty, Inc.* illustrates the limitations of the Consumer Fraud Act in placing liability upon a broker. In *Harkala*, the buyers noticed a termite problem after the purchase of their home, and sued the broker for misrepresentation under the Consumer Fraud Act.<sup>51</sup> The buyers never inquired as to termite infestation or the structure of the house, and did not make use of their right to inspect the premises.<sup>52</sup> The court held that because the buyers never inquired as to these problems, and since this was not disclosed to the broker by the seller prior to the sale, the broker was not liable under the Act.<sup>53</sup>

## **B. Damages For Breach**

There are a few different ways of determining the amount of damages that a potential buyer may recover

for misrepresentations made by seller/homeowner or a real estate broker. Under the common law tort of fraudulent misrepresentation, plaintiff buyers can recover purely economic losses in tort against those who are in the business of supplying information for the guidance of others in business transactions.<sup>54</sup> Real estate brokers are in the business of supplying such information, and therefore a buyer can recover purely economic damages from a broker.<sup>55</sup> Damages for economic loss may be recovered from a homeowner only where the tort action is for intentional misrepresentation.<sup>56</sup> Therefore, in a cause of action for intentional fraud, an injured buyer may also recover damages for solely economic loss from a homeowner.<sup>57</sup>

In other cases, a purchaser who has established fraud is entitled to damages which will give him the benefit of the bargain.<sup>58</sup> One method of returning to the buyer the benefit of the bargain is to calculate the difference between the value of the property at the time of sale in absence of the defect, and the value of the property at the time of sale in the condition in which it was sold.<sup>59</sup>

In situations where a homeowner knowingly violated or failed to perform a duty required by the Disclosure Act, the homeowner shall be liable for actual damages.<sup>60</sup> Often, the court will also impose court costs and attorney's fees.<sup>61</sup> In these situations, a buyer's knowledge of potential defects is relevant in the amount of damages that may be recovered.<sup>62</sup>

### **III. Further Impact of Non-Disclosure Laws on Homeowners and Real Estate Brokers**

The non-disclosure laws place a large responsibility upon both selling homeowners and real estate brokers to divulge any and all information regarding a home. Though actions are available against both selling homeowners and brokers, some added protection is



given to brokers when their associated seller has not made a full disclosure to them. In *Munjal v. Baird & Warner, Inc.*, a real estate broker was protected from liability due to non-disclosure by the selling homeowner.

In *Munjal*, the plaintiff buyers had a contract to buy a house from the defendant homeowner.<sup>63</sup> During an inspection, the plaintiffs noticed pools of water in the basements, and the sump pump was running continuously.<sup>64</sup> The plaintiffs were told by the broker that the pooling was temporary and was caused by a leaky valve in the sump pump.<sup>65</sup> Once the valve was fixed, the water stopped pooling.<sup>66</sup> Just prior to their moving in, the plaintiffs went through the house again and saw that water was leaking in another spot in the basement and decided that they did not want to purchase the house.<sup>67</sup> The broker agreed that there was a problem and suggested that the plaintiffs see their attorney.<sup>68</sup> The plaintiffs hired their own expert, who testified that the water leaks were due to the foundation of the house being constructed lower than groundwater level. He also testified that such a defect would not be visible to the naked eye.<sup>69</sup>

The court noted that the homeowner was involved in the construction of the house, and had lived there for two and a half years prior to this sale.<sup>70</sup> There was also evidence that there were traces of water damage when the house was initially put up for sale.<sup>71</sup> The court found the continuous running of the sump pump circumstantial evidence to show that the homeowner had an opportunity to notice the chronic water problem in the basement.<sup>72</sup> Based on these facts, the court held the homeowner liable for misrepresentation because his failure to disclose the full extent of the water problem was an attempt to deceive the plaintiffs in order to induce them to purchase the house.<sup>73</sup> The intent behind this failure to disclose, the court noted, was proven by the circumstantial evidence of the sump pump running continuously.<sup>74</sup>

On the other hand, the court found no liability as to the real estate broker.<sup>75</sup> Although there is no agency relationship between the broker and the plaintiffs, the broker did have a duty to use good faith in his negotiations with the plaintiffs.<sup>76</sup> But the court found no evidence in this case that the broker intentionally misrepresented that the house did not have a water problem.<sup>77</sup> The original water leak stopped when the sump pump valve was repaired.<sup>78</sup> The broker did not conceal the defect, and agreed that there was a problem and told the plaintiffs to talk to their attorney.<sup>79</sup> The court stated that the broker's actions were "reasonable in light of the circumstances and absolved him from any question of deception or concealment in inducing plaintiffs to purchase."<sup>80</sup> The court also noted that the plaintiffs did not rely on the broker's statements.<sup>81</sup> The broker was not liable for the hidden defects of which he had no prior knowledge, and the selling homeowners were liable for damages.<sup>82</sup> The amount of damages was the difference between the value of the house at the time of sale including the water problems, and the value of the house at the time of sale without such problems.<sup>83</sup>

#### IV. Impact

The court's reasoning in *Munjal* and in similar cases is sound; it places a burden on both the homeowner and broker to disclose statements about the property, but does not place an undue and unfair burden on the broker to be responsible for the fraud of the homeowner. However, the courts should consider applying the Consumer Fraud and Deceptive Business Practices Act to homeowners. Currently, this Act only applies to brokers when misrepresentations are made to potential buyers.

The Consumer Fraud Act applies when any unfair methods of competition or deceptive sales practices are employed in the conduct of any trade or commerce.<sup>84</sup> The rationale behind excluding homeowners from this

Act is that an individual selling a home is not engaged in trade or commerce. Currently, it is thought that the "casual" sale of a home by an individual is outside of the scope of trade and commerce. However, section 1(f) defines trade and commerce as "advertising, offering for sale, sale, or distribution of any...thing of value...directly or indirectly affecting the people of this State."<sup>85</sup> From this definition of trade or commerce, an individual selling his own house should be included within the scope of the Act. The individual is offering for sale a thing of value that directly or indirectly affects the people of this State.

The courts have gone far in protecting a potential buyer from the dangers of non-disclosure in applying and enforcing the non-disclosure laws. By expanding the scope of the Consumer Fraud and Deceptive Business Practices Act so it applies to individual homeowners, the legislature could further protect the interests of consumers when buying a house.

## V. Conclusion

As the cases of *Mitchell v. Skubiak*, *Harkala v. Wildwood Realty, Inc.*, and *Munjal v. Baird & Warner, Inc.* suggest, the courts have given buyers considerable protection from the dangers of misrepresentation and non-disclosure by both homeowners and real estate brokers. Actions under the common law tort of fraudulent misrepresentation, the Real Estate Brokers License and Salesman Act, the Residential Real Property Disclosure Act and the Consumer Fraud and Deceptive Business Practices Act are common, and in many cases the holdings are in favor of the injured buyers. The courts, however, can go further in their protection of consumers by expanding the scope of the Consumer Fraud and Deceptive Business Practices Act to include individuals selling a home. Such an interpretation would offer more complete protection to the consumers during the difficult process

of purchasing a home.

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## Endnotes

1. *See* Residential Real Property Disclosure Act, 765 ILCS 77/20 (1994).

2. *See* Mitchell v. Skubiak, 618 N.E.2d 1013, 1017 (Ill.App. 1 Dist. 1994).

3. *See id.*

4. *See id.* (Holding no recovery if defects could have been discovered through a diligent inspection or if the buyer know of defects prior to the sale).

5. *Id.* at 1019.

6. *See* Hirsch v. Feuer, 702 N.E.2d 265, 272 (Ill.App. 1 Dist. 1998) (dismissing complaint for failure to plead allegations with enough specificity for defendants to know what they will have to defend).

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

8. *See* Chapman v. Hosek, 475 N.E.2d 593, 598 (Ill.App. 1 Dist. 1985).

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

10. *See* Munjal v. Baird & Warner, Inc., 485 N.E.2d 855, 856 (Ill.App. 2 Dist. 1985).

11. *See Mitchell*, 618 N.E.2d at 1016.

12. *See id.*

13. *See id.* at 1018.
14. *See id.*
15. *See id.*
16. *See Mitchell*, 618 N.E.2d at 1018.
17. *See id.*
18. *See id.*
19. *See id.*
20. *See* 765 ILCS 77/20.
21. *See Hirsch*, 702 N.E.2d at 271.
22. *See id.*
23. *See id.*
24. *See Woods v. Pence*, 708 N.E.2d 563, 565-66 (Ill.App. 3 Dist. 1999).
25. *See id.* at 564.
26. *See id.*
27. *See id.*
28. *Woods*, 708 N.E.2d at 565.
29. *See id.*
30. *See id.*
31. *See id.*

32. *See id.*

33. *See Woods*, 708 N.E.2d at 565 (Noting that a buyer's knowledge is relevant in awarding damages).

34. *See Mitchell*, 618 N.E.2d at 1019.

35. *See id.* at 1015.

36. *See id.*

37. *See id.* at 1020.

38. *See Zimmerman v. Northfield Real Estate, Inc.*, 510 N.E.2d 413, 414 (Ill.App. 1 Dist. 1986).

39. *See id.* at 413-414.

40. *See Zimmerman*, 510 N.E. 2d at 413.

41. *See id.*

42. *See id.* at 414.

43. *See id.*

44. *See id.* at 417 (stating broker represented the lot to be 40% larger than its actual size).

45. *See Zimmerman*, 510 N.E.2d at 419.

46. *See Consumer Fraud and Deceptive Business Practices Act*, 815 ILCS 505/1 et seq (1998).

47. *See Harkala v. Wildwood Realty, Inc.*, 558 N.E.2d 195, 199 (Ill.App. 1 Dist. 1990) (opining that the Act is not used against selling homeowners because "[a]n

individual in 'casual' sale of a single family home is not in trade or commerce within the scope of the Act, and therefore not liable under the Act). *See also* Carrera v. Smith, 713 N.E.2d 1282, 1285 (Ill.App. 2 Dist. 1999).

48. *See Harkala*, 558 N.E.2d at 199 (holding that there is no breach unless the real estate broker could have, and should have, realized the misrepresentation in the exercise of due care).

49. *See id.* at 201.

50. *See id.* at 198.

51. *See Harkala*, 558 N.E.2d at 198.

52. *See id.*

53. *See id.* at 199.

54. *See Zimmerman*, 510 N.E.2d at 415.

55. *See id.*

56. *See id.*

57. *See id.*

58. *See Munjal*, 485 N.E.2d at 865.

59. *See id.*

60. *See Hirsch*, 702 N.E.2d at 271.

61. *See id.*

62. *See Woods*, 708 N.E.2d at 565.

63. *See Munjal*, 485 N.E.2d at 859.

64. *See id.*

65. *See id.*

66. *See id.*

67. *See id.*

68. *See Munjal*, 485 N.E.2d at 863.

69. *See id.* at 862.

70. *See Munjal*, 485 N.E.2d at 863.

71. *See id.*

72. *See id.*

73..*See id.*

74. *See id.*

75. *See Munjal*, 485 N.E.2d at 863.

76. *See id.*

77. *See id.*

78. *See id.*

79. *See id.*

80. *Munjal*, 485 N.E.2d at 864.

81. *See id.* at 863.



82. *See id.* at 864, 867.

83. *See id.* at 867.

84. *See Carrera*, 713 N.E.2d at 1285, 815 ILCS 505/2 (1998).

85. *Carrera*, 713 N.E.2d at 1285, 815 ILCS 505/1(f) (1998).

