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Wisconsin Case Update: Misrepresentation in Real Estate Condition Reports

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A recent Wisconsin Court of Appeals case highlights the risks and obligations of making representations in real estate contracts.

The case involves a buyer of a condominium unit from individual sellers who enlisted the help of a real estate broker. Four days after closing in 2015, the buyer became aware of leaks in the ceiling of the condo unit. The buyer reported the issue to the condominium association president, who stated that the association had been aware of the leaks and that the issue had been going on for a while. The leaks continued until the association was able to eventually repair the roof the following year.

The buyer insisted that the leaks caused mold within her unit; she unilaterally removed and replaced drywall and other materials. Eventually, the buyer moved out of the unit, asserting that mold was affecting her health. The buyer then stopped paying the mortgage and the property was eventually sold after the bank foreclosed. The buyer next sued the sellers and the real estate broker, alleging breach of contract, negligence, and misrepresentation.

During litigation, the buyer discovered that the sellers previously attempted to sell the condo in 2014. At that time, on the Real Estate Condition Report (RECR) the sellers answered “yes” to the question of whether they were aware of defects in the roof—acknowledging they had experienced leaking but stating that “everything is believed to be fixed.”

But in the 2015 RECR provided to the buyer, the sellers simply answered “no” to the same question. The court of appeals remanded this issue to the trial court, thinking that a jury could reasonably infer that such facts could support the buyer’s misrepresentation claims. Notably, the misrepresentation claim was filed against the sellers as well as their real estate broker (although sellers typically prepare and sign RECRs, presumably the broker might have been

aware of the discrepancies between the 2014 and 2015 RECRs).

On the buyer's separate claims for damages relating to the mold, the court dismissed such claims because the buyer failed to provide an expert opinion on the matter within the deadline set by the trial court. The court stated that if the buyer "wanted to show that the leaks caused mold, which adversely affected her health and rendered her unit uninhabitable, she needed to provide expert testimony" due to the complexity/technicality of the issue.

While the seller and real estate broker were able to avoid liability on mold damages due to the failure of the buyer to follow the trial court's deadlines, the case highlights the risk that sellers – and real estate brokers – face when selling and showing real property. It is all too common for sellers and/or brokers to try to bury, overlook, or conceal defects in real property. To avoid unnecessary risks and liability, it is critical that sellers and real estate brokers are upfront and forthcoming with any and all information, good and bad, that may exist relates to the real estate. This is compounded when the real property is a condominium, where there is an association and other unit owners that are often unwittingly a fact-checker to any buyer. Of course, a solid and well drafted "AS-IS" clause can limit – but not entirely eliminate – risk and liability. Wisconsin law will not protect a seller under "AS-IS" clause if that seller makes false or inaccurate representations within a contract, including the Wisconsin form RECR.

For further questions, or to ensure you are avoiding unnecessary risk and liability in your real estate contracts, contact Michelle Ebben or Justin Mertz.

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