

Washing Your Hands Through "AS IS" Sales

Feb 01 1999

Practice Area: Real Estate

In a perfect world, someone who is selling real property would like to close the transaction and move in to his or her new home or move on to the next real property transaction, and forget any problems associated with the sold property. In an effort to achieve this result some real estate contracts will include "as is" provisions. The goal in an "as is" contract is to convey the property in its present condition without making any warranties or representations about the condition of the property. While the "as is" contract may provide some protection to a seller, it must be carefully drafted and it has its limitations. Generally, the insertion of an "as is" clause puts the burden on the buyer of the real property to inspect the property and ensure that the property conforms to the buyer's expectations.

The "as is" shield will not protect a seller, or for that matter a broker, from any affirmative representations made about the property. Once an affirmative representation about the property is made, a buyer may, under some circumstances, be entitled to rely upon the representation and may be entitled to a full disclosure of all material facts relating to the representations.

In the Wisconsin Supreme Court case, *Grube v. Daun*, 173 Wis.2d 30 (1992), the court discussed the impact and significance of "as is" clauses. One of the issues in the case was that a well on the property was contaminated from a gasoline tank leak that occurred many years prior to the transfer of the property.

Prior to the sale, and in response to a question from the buyer regarding the wells on the property, the seller's real estate broker stated that they were shallow wells which had just gone dry and that he would find out the depth of them for the buyer. The court held that this representation was sufficient to warrant an expectation that the broker should fully and fairly disclose all aspects about the wells, including any contamination or potential contamination. The court also pointed to the broker's statement that the land was "suitable for business, residential, and family purposes." This statement was deemed an affirmative representation that was not negated by the "as is" clause. The court determined that the buyer had the right to rely on the broker's statements as representations which survived the closing and sale of the property.

Sellers should be aware that real estate contracts and real estate condition reports contain a laundry list of representations regarding the property. These warranties often take the form of the statement that the seller either has or does not have notice or knowledge of a certain problem with the property. In *Major v. County of Milwaukee*, 196 Wis.2d 939 (1995), the County made a representation that it had "no notice or knowledge of . . . the presence of any dangerous or toxic materials or conditions affecting the property." The contract was an "as is" contract. The County had an appraisal report in its files which indicated a presence of potentially hazardous substances on the property.

The Court held that, despite the fact that there was no evidence that an employee of the County was aware of the report, the County should not have made the representation without checking its files. The bottom line is that when a seller wants to ensure that a transaction truly is an "as is" sale, the seller should either make no representations regarding the property or if a representation is required, conduct some investigation to be sure that the representation is accurate.

One of the other issues in "as is" contracts is whether the buyer understood the implications of the term "as is." If the buyer is a sophisticated buyer of real property, he or she may be held to a higher standard of responsibility for understanding the terms and conditions of the contract and the "as is" clause may provide greater protection for a seller. Similarly, if the buyer is represented by a lawyer or other professional with significant real estate experience the "as is" clause may significantly reduce the seller's risk of liability for any claims associated with the property in the future.

"As is" contracts will also not preclude claims for fraudulent misrepresentations or fraudulent nondisclosure. If the seller is aware of material problems with the property which have been concealed and would not be discovered upon a reasonable inspection, a claim for fraudulent misrepresentation or fraudulent nondisclosure may be successful.

Sellers of real property should keep in mind that any statements they make regarding the property being sold could be held to be representations. Any representations made about the property could create a duty upon the seller to fully disclose all aspects of the representations made. Depending on its nature and timing, a statement that the property "is suitable for a particular purpose" could be deemed a representation upon which a buyer may rely. If a buyer later discovers that one aspect of the property does not conform to a general representation made by the seller, the buyer may bring a claim for misrepresentation.

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