

## The "AS-IS" Clause is Not a Shield Against Misrepresentation

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Practice Area: Banking and Commercial Finance & Real Estate

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Recently the Wisconsin Court of Appeals found that a bank failed to properly disclose to a purchaser a known defect affecting the purchased residence even though the sale was "AS-IS."

The case involves a home that the bank acquired through foreclosure. After the foreclosure was completed, and after learning that there had been significant water damage in the home, the bank became concerned about mold growth and solicited bids for remediation of the water damage. However, despite receiving bids, the bank did not immediately authorize the remediation and the home became contaminated with mold. When the bank did authorize the remediation to be performed, it was subsequently notified by its real estate agent that mold was still present in various rooms of the house. The bank approved additional remediation work, including the installation of new drywall, painting, carpeting and flooring. Upon completion of the additional work, the bank was notified again by its real estate agent that the remediation was not satisfactorily completed. Despite this notification, the bank performed no further work and listed the house for sale.

The bank and the purchaser exchanged an offer and counter-offer for the sale and purchase of the residence. During that exchange, the bank presented to the purchaser an addendum to the offer. This is an important fact as the courts later determined that a contract was not formed between the bank and the purchaser when the addendum was presented. The addendum stated that the purchaser agreed to purchase the home in an "AS-IS" condition, which could include any hidden defects. The addendum also disclaimed any representations, warranties, covenants or guarantees by the bank with respect to water damage and mold, and specifically stated that the bank did not guarantee the home was free of mold. The addendum further stated that the bank had "little or no direct knowledge about the condition of the property." The bank and the purchaser entered into a contract, which included the addendum, giving the purchaser the right to terminate the offer if a home inspection revealed conditions that the purchaser deemed unacceptable.

The purchaser's home inspector noted evidence of prior water damage and substantial mold growth, including mold that remained in the basement. The purchaser had a mold remediation consultant inspect the home and the consultant provided a mold mitigation plan and proposal. The purchaser did not undertake the mold mitigation plan and proceeded to close on the purchase of the home.

Shortly after closing, the purchaser discovered that mold was saturated throughout the house. The entire house was stripped to its studs, subjected to mold and water damage remediation, and reconstructed. The purchaser filed a lawsuit against the bank under Wis. Stat. § 100.18(1), which covers fraudulent representations. The purchaser's lawsuit focused on the statement in the bank's addendum that the bank had "little or no direct knowledge regarding the condition of the property." The purchaser asserted that the bank knew the entire house had suffered water damage and was infested with mold.

At trial, the jury was informed that an "AS-IS" clause does not relieve a seller from disclosing material adverse facts about the property, but it is the purchaser's burden to prove the bank had knowledge of the property's condition, and that the bank failed to disclose that knowledge. The jury awarded the purchaser \$50,000 in compensatory damages because the bank had made a misrepresentation under Wis. Stat. § Section 100.18(1).

The bank appealed, asserting that this was an "AS IS" sale, that a violation of Wis. Stat. § 100.18(1) requires a misrepresentation to a member of "the public," and that the purchaser's negotiating position with the bank, through offers and counteroffers, was a "particular relationship" that precluded the application of Wis. Stat. § 100.18(1).

The Court of Appeals affirmed the lower court's decision and upheld the jury verdict for the purchaser. The Court of Appeals found no support for the bank's argument that the "AS-IS" clause, disclaimers and waivers in the purchase contract relieved the bank from liability under Wis. Stat. § 100.18(1) for the bank's misrepresentation that the bank had little to no knowledge of the condition of the property. The Court of Appeals also affirmed that an "AS-IS" clause is not a complete bar to a misrepresentation claim when a seller makes an affirmative misrepresentation.

The Court of Appeals also determined there was no final contract between the bank and the purchaser when the bank delivered the addendum which contained the bank's misrepresentation, i.e. that the bank had little or no direct knowledge regarding the condition of the property. Accordingly, no "particular relationship" existed between the bank and the purchaser, and the remedies of Wis. Stat. § 100.18(1) were available to the purchaser.

The holdings in this case once again demonstrate that Wisconsin courts will not look kindly on a seller who fails to fully disclose any known defect or condition that adversely affects a property. Similarly, a seller places itself at risk if it claims to lack knowledge about a property, when in fact the seller may have very detailed information about a particular defect affecting the property. A seller must carefully document and disclose known defects affecting a property, even if the seller never uses or occupies the property, and must review and consider all written and oral statements to any potential buyer.

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