DEVELOPMENT NEWS

Freeborn & Peters LLP

Make Sure You Are Correctly Waiving the Implied Warranty of Habitability in Residential Purchase and Sale Agreements

The fastest growing cause of action against residential developers, contractors and subcontractors in the State of Illinois is the claim for breach of the implied warranty of habitability. Once a vestige of landlord and tenant disputes, the action for breach of the implied warranty of habitability has slowly been extended over the past 30 years to its present form where it has become a cause of action for latent construction defects. Because it allows for direct suit against parties with whom the purchaser wasn't in privity, the implied warranty circumvents the economic loss doctrine that, with few exceptions, generally prevented previous construction defect suits against parties whom the purchaser did not directly contract.

The class of plaintiffs with standing to sue for violation of the implied warranty has been expanded to successive purchasers in relatively new developments. And the types of structures covered by the warranty have also been expanded from new homes to include new additions to existing homes, homes built on pre-existing foundations, common elements and lots to townhomes and condominiums. *1324 W. Pratt Condo. Ass'n. v. Platt Construction*, 404 Ill. App. 3d 611, 616, 936 N.E.2d 1093, 1098 (1st Dist. 2010).

The Freeborn & Peters Real Estate and Land Use Practice Group has recently been involved in several disputes regarding the implied warranty of habitability where defendants who thought they had received waivers of the implied warranty of habitability through their purchase and sale agreements were shocked to discover that the waivers their attorneys drafted actually failed to achieve a waiver of the implied warranty, thereby exposing them to liability.

In *Petersen v. Hubschman Construction*, the Illinois Supreme Court first announced that a purchaser could waive the implied warranty of habitability.

> "Although the implied warranty of habitability is a creature of public policy, we do not consider a knowing disclaimer of the implied warranty to be against the public policy of this State. However, we do hold that any such a disclaimer must be strictly construed against the builder-vendor."

76 Ill. 2d 31, 43, 389 N.E. 2d 1154, 1159 (1979).

Since that time, Illinois courts have given more guidance on the language, form and content of an effective waiver stating that:

1. The provision must be conspicuous (make it in bold face type and use a font that is different than the rest of the document or a different case);
2. The provision must fully disclose the consequences of the inclusion (it must inform the buyer that the buyer is losing a cause of action);
3. The provision must be brought to the attention of the buyer and the buyer must agree to the provision (having the buyer initial or sign a separate agreement with a signature in addition to the signature in the agreement); and
4. The provision must use the words "implied warranty of habitability".

In 1993, faced with a question about the effect of specific language, the Illinois Appellate Court in *Breckenridge v. Cambridge Homes*, decided that the specific language used in the purchase agreement was an effective waiver when the provision, set in bold-face type, where the purchasers had to read and initial next to the following language, was sufficient to waive the implied warranty of habitability. 246 Ill. App. 3d 810, 813, 616 N.E. 2d 615, 616-17 (2nd Dist. 1993).

This was the first and only time that specific language was found adequate for the waiver. This language was addressed in the context of the factors from *Petersen* and the court noted that it properly explained the consequences of the waiver.

Oddly, many developers and those drafting their contracts have failed to heed the lessons learned from *Breckenridge*. Few if any have properly included the language explaining the consequences of the waiver. Last month, a Cook County Court found the following language was wanting for this same failure.

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As you can see, the above language specifically references the implied warranty of habitability and is in bold type. But the waiver failed to adequately address, or even use the word “consequences”.

The fact that 19 years out from *Breckenridge*, parties still find themselves in situations where their purchase and sale agreements fail to protect them from the implied warranty of habitability is troubling. Parties are advised to check with their attorneys and check their agreements to make sure something as simple as not including one sentence regarding the consequences of the waiver is exposing them to potential liability.

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