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Seller's Liability for Water Damages Seeps Through "as is" Clause in Purchase Agreement

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In Wisconsin, as in other states, an "as is" clause is an effective tool for a seller of real property. A well drafted "as is" clause can prevent a buyer from claiming any damages against the seller for issues that arise with regard to the condition of the property. However, a recent Wisconsin Court of Appeal's decision explained that a seller cannot rely on such a clause to escape liability for untrue, deceptive or misleading statements.

In *Fricano v. Bank of America NA*, No. 2015AP20, 2015 WL9309194 (Ct. App. Dec. 23, 2015), Bank of America (the "Bank") acquired residential property through foreclosure. The Bank discovered that the property had suffered severe water damage due to a broken pipe. The Bank made several attempts to remediate the mold and repair the property, but the listing real estate agent informed the Bank that the work was unsatisfactory.

Despite the cloud of owning property saturated with mold, the Bank decided to move forward with the sale of the property. Offers rained down on the Bank, totaling fourteen before Fricano's bid was accepted by the Bank. The Bank sent Fricano an e mail requesting that Fricano sign an Addendum and a Water Damage, Toxic Mold Environmental Disclosure, Release and Indemnification Agreement. The Addendum included an "as is" provision, along with a number of exculpatory clauses and a statement that the Bank acquired the property by foreclosure and had "little or no direct knowledge about the condition of the property."

Shortly after closing, Fricano discovered that mold was prevalent throughout the house. The house was stripped to the studs and remediated. Fricano commenced an action against the Bank under Wisconsin Statutes Section § 100.18(1) alleging that the Bank misrepresented the fact that it had "little or no direct knowledge regarding the condition of the property." A jury returned a verdict in favor of Fricano and awarded her $50,000 in damages. The Bank appealed.

The Wisconsin Court of Appeals upheld the jury's verdict. The court concluded that "as is" provisions and exculpatory clauses do not, as a matter of law, relieve a seller from liability for deceptive, untrue or misleading statements. There was sufficient credible evidence to believe, as the jury found, that the misrepresentation was intended to and did induce Fricano into purchasing the

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property.

This is an important decision for all sellers of real property in Wisconsin, not just banks selling foreclosed properties. Sellers need to be cautious of statements made to prospective purchasers, and should carefully review all representations and warranties within the purchase agreement. "As is" and exculpatory clauses are not a universal bar prohibiting a purchaser from claiming damages against the seller. Even with an exculpatory clause, a misrepresentation by a seller may result in a costly day in court.

If you have questions about the topics covered in this e alert, please contact your Reinhart attorney or any member of Reinhart's Real Estate practice group.

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