The REAL-lity of Transactions: Avoiding Litigation in Real Estate by Understanding the Risks in the Transaction

Disclaimer: The views expressed herein are not a legal opinion. Every fact situation is different and the reader is encouraged to seek legal advice for their particular situation.

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About the Presenter

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Course Description

Course Presentation

Handling real estate closings can be fraught with peril if you are not contemplating the litigation that can rise for a client not properly advised of his obligations and rights.

This course will consider the common litigation issues that can arise from real estate transactions, specifically (1) failure to properly disclose known problems with the real estate; (2) partition suits that arise between unmarried partners purchasing real estate together; and (3) failure to comply with terms of the contract on issues that survive the closing.

Course Material

This material is intended to be a guide in general and is not legal advice. If you have any specific question regarding the state of the law in any particular jurisdiction, we recommend that you seek legal guidance relating to your particular fact situation.

The course materials will provide the attendee with the knowledge and tools necessary to identify the current legal trends with respect to these issues. The course materials are designed to provide the attendee with current law, impending issues and future trends that can be applied in practical situations.

Course Learning Objectives and Outcomes

This course is designed to provide the following learning objectives:

Participants will gain an understanding of the transaction beyond just reading the contract and accompanying documents.

Participants will develop an understanding of the risks in transactions that could cause litigation to be filed.

This is an introductory course which is good for a new attorney or new area for any attorney.

The primary practice areas for this course are Litigation and Real Estate/Property Law.

This course does not contain Ethics/Professionalism information.

Upon completion of the course, participants should be able to apply the course material; improve their ability to research, plan, synthesize a variety of sources from authentic materials, draw conclusions; and demonstrate an understanding of the theme and concepts of the course by applying them in their professional lives.

Timed Agenda:

Presenter Name: Erica Minchella
CLE Course Title: The REAL-lity of Transactions:
Avoiding Litigation in Real Estate by Understanding the Risks in the Transaction

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The REAL-lity of Transactions: Avoiding Litigation in Real Estate by Understanding the Risks in the Transaction

Many attorneys dealing with Real Estate Transactions can find themselves in the middle of some larger litigation issues.

1. Failure to property disclose
2. Partition Suits
3. Failure to comply with terms in the contracts or as documented by Attorney or Inspection Review Letters

Fail to Fully and Honestly Disclose

765 ILCS 77/35 of the Illinois Compiled Statutes provides for Sellers of Real Estate to disclose conditions of which they are aware – meaning that they have actual notice or actual knowledge without the requirement of any specific investigation or inquiry

For the Seller

- *Note Material defect means a condition that would have a substantial adverse effect on the value of the residential real property or that would significantly impair the health or safety of future occupants of the property

- Seller can acknowledge that they reasonably believe that the condition has been corrected either by themselves or by a contractor.

- Sellers of disclosed material defects may be under a continuing obligation to advise prospective buyers about the condition of the property even after the report is delivered.

- If Seller is not aware of defects, there is no obligation to disclose and there is no obligation to investigate. But if there is knowledge of defects there is an absolute obligation to disclose the defect and if repairs were done, what was done.

(765 ILCS 77/35)

Sec. 35. Disclosure report form. The disclosures required of a seller by this Act shall be made in the following form:

RESIDENTIAL REAL PROPERTY DISCLOSURE REPORT

NOTICE: THE PURPOSE OF THIS REPORT IS TO PROVIDE PROSPECTIVE BUYERS WITH INFORMATION ABOUT MATERIAL DEFECTS IN THE RESIDENTIAL REAL PROPERTY. THIS REPORT DOES NOT LIMIT THE PARTIES' RIGHT TO CONTRACT FOR THE SALE OF RESIDENTIAL REAL PROPERTY IN "AS IS" CONDITION. UNDER COMMON LAW, SELLERS WHO DISCLOSE MATERIAL DEFECTS MAY BE UNDER A CONTINUING OBLIGATION TO ADVISE THE PROSPECTIVE BUYERS ABOUT THE CONDITION OF THE RESIDENTIAL REAL PROPERTY EVEN AFTER THE REPORT IS DELIVERED TO THE PROSPECTIVE BUYER. COMPLETION OF THIS REPORT BY THE SELLER CREATES LEGAL OBLIGATIONS ON THE SELLER; THEREFORE THE SELLER MAY WISH TO CONSULT AN ATTORNEY PRIOR TO COMPLETION OF THIS REPORT.

Property Address: .....

City, State & Zip Code: .....

Seller's Name: .....

This Report is a disclosure of certain conditions of the residential real property listed above in compliance with the Residential Real Property Disclosure Act. This information is provided as of ...(month) ...(day) ...(year), and does not reflect any changes made or occurring after that date or information that becomes known to the seller after that date. The disclosures herein shall not be deemed warranties of any kind by the seller or any person representing any party in this transaction.

In this form, "am aware" means to have actual notice or actual knowledge without any specific investigation or inquiry. In this form, "material defect" means a condition that would have a substantial adverse effect on the value of

the residential real property or that would significantly impair the health or safety of future occupants of the residential real property unless the seller reasonably believes that the condition has been corrected.

The seller discloses the following information with the knowledge that even though the statements herein are not deemed to be warranties, prospective buyers may choose to rely on this information in deciding whether or not and on what terms to purchase the residential real property.

The seller represents that to the best of his or her actual knowledge, the following statements have been accurately noted as "yes" (correct), "no" (incorrect), or "not applicable" to the property being sold. If the seller indicates that the response to any statement, except number 1, is yes or not applicable, the seller shall provide an explanation, in the additional information area of this form.

	YES	NO	N/A	
1.	.....	.....	.....	Seller has occupied the property within the last 12 months. (No explanation is needed.)
2.	.....	.....	.....	I am aware of flooding or recurring leakage problems in the crawl space or basement.
3.	.....	.....	.....	I am aware that the property is located in a flood plain or that I currently have flood hazard insurance on the property.
4.	.....	.....	.....	I am aware of material defects in the basement or foundation (including cracks and bulges).
5.	.....	.....	.....	I am aware of leaks or material defects in the roof, ceilings, or chimney.

6.	.....	.....	.....	I am aware of material defects in the walls, windows, doors, or floors.
7.	.....	.....	.....	I am aware of material defects in the electrical system.
8.	.....	.....	.....	I am aware of material defects in the plumbing system (includes such things as water heater, sump pump, water treatment system, sprinkler system, and swimming pool).
9.	.....	.....	.....	I am aware of material defects in the well or well equipment.
10.	.....	.....	.....	I am aware of unsafe conditions in the drinking water.
11.	.....	.....	.....	I am aware of material defects in the heating, air conditioning, or ventilating systems.
12.	.....	.....	.....	I am aware of material defects in the fireplace or woodburning stove.
13.	.....	.....	.....	I am aware of material defects in the septic, sanitary sewer, or other disposal system.
14.	.....	.....	.....	I am aware of unsafe concentrations of radon on the premises.
15.	.....	.....	.....	I am aware of unsafe concentrations of or unsafe conditions relating to asbestos on the premises.

16.	.....	.....	.....	I am aware of unsafe concentrations of or unsafe conditions relating to lead paint, lead water pipes, lead plumbing pipes or lead in the soil on the premises.
17.	.....	.....	.....	I am aware of mine subsidence, underground pits, settlement, sliding, upheaval, or other earth stability defects on the premises.
18.	.....	.....	.....	I am aware of current infestations of termites or other wood boring insects.
19.	.....	.....	.....	I am aware of a structural defect caused by previous infestations of termites or other wood boring insects.
20.	.....	.....	.....	I am aware of underground fuel storage tanks on the property.
21.	.....	.....	.....	I am aware of boundary or lot line disputes.
22.	.....	.....	.....	I have received notice of violation of local, state or federal laws or regulations relating to this property, which violation has not been corrected.

23. .... I am aware that this property has been used for the manufacture of methamphetamine as defined in Section 10 of the Methamphetamine Control and Community Protection Act.

Note: These disclosures are not intended to cover the common elements of a condominium, but only the actual residential real property including limited common elements allocated to the exclusive use thereof that form an integral part of the condominium unit.

Note: These disclosures are intended to reflect the current condition of the premises and do not include previous problems, if any, that the seller reasonably believes have been corrected.

If any of the above are marked "not applicable" or "yes", please explain here or use additional pages, if necessary:

.....

.....

.....

Check here if additional pages used: .....

Seller certifies that seller has prepared this statement and certifies that the information provided is based on the actual notice or actual knowledge of the seller without any specific investigation or inquiry on the part of the seller. The seller hereby authorizes any person representing any principal in this transaction to provide a copy of this report, and to disclose any information in the report, to any person in connection with any actual or anticipated sale of the property.

Seller: ..... Date: .....

Seller: ..... Date: .....

THE PROSPECTIVE BUYER IS AWARE THAT THE PARTIES MAY CHOOSE TO NEGOTIATE AN AGREEMENT FOR THE SALE OF THE PROPERTY SUBJECT TO ANY OR ALL MATERIAL DEFECTS DISCLOSED IN THIS REPORT ("AS IS"). THIS DISCLOSURE IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THAT THE PROSPECTIVE BUYER OR SELLER MAY WISH TO OBTAIN OR NEGOTIATE. THE FACT THAT THE SELLER IS NOT AWARE OF A PARTICULAR

CONDITION OR PROBLEM IS NO GUARANTEE THAT IT DOES NOT EXIST. THE PROSPECTIVE BUYER IS AWARE THAT HE MAY REQUEST AN INSPECTION OF THE PREMISES PERFORMED BY A QUALIFIED PROFESSIONAL.

Prospective Buyer: ..... Date: ..... Time: ....

Prospective Buyer: ..... Date: ..... Time: ....

Problem with Failure to disclose

1. The statute of limitation is one year from either the date of possession, occupancy or recording, whichever comes first

2. Proving that the Seller had actual knowledge of any problem

Hogan v. Adams, 333 Ill.App.3d 141(4th Dist. 2002)

The court held that the buyers had no duty to investigate the seller's disclosures. Where the Sellers knew that their disclosures contained a material error, inaccuracy or omission, they were liable.

JUSTICE TURNER delivered the opinion of the court:

In April 1999, plaintiffs, Donna J. Hogan and Sarah Cole, filed a two-count complaint against defendants, William B. and Wilma Adams, alleging a violation of the Residential Real Property Disclosure Act (Act) (765 ILCS 77/1 through 99 (West 1998)) and common-law fraud related to plaintiffs' purchase of defendants' home. After an October 2001 bench trial, the trial court found in favor of defendants on both counts. Plaintiffs appeal, contending (1) the trial court erred in finding a violation of the Act required a showing of bad faith, (2) the trial court erred in finding a residential-property purchaser was required to investigate a seller's disclosure under the Act, and (3) the trial court's judgment was against the manifest weight of the evidence. We affirm in part, reverse in part, and remand with directions.

I. BACKGROUND

In May 1993, defendants purchased the subject property, commonly known as 25 Marquette Road, Springfield, Illinois. The house located on the property was bi-level. The basement level consisted of two bedrooms, a bathroom, a recreation room, a billiards room, and a laundry/utility room. A door in the

laundry room led to an outside stairwell. At the bottom of the stairwell was a sump pump pit with a sump pump. Another sump pump pit was located adjacent to the home's foundation on the northeast corner of the home.

In April or May 1995, after a tornado, the power went out and the stairwell sump pump could not operate. Water entered the basement under the laundry room door, saturating the carpet in a large portion of the basement. As a result of the water, the carpets had to be pulled out and the carpet pad replaced. Defendants also replaced the stairwell sump pump in 1995.

In May or June 1996 after a large rainfall, water again entered the basement, saturating the carpet of a large portion of the basement. This time the stairwell sump pump was operating. The carpet was again removed but this time was reinstalled without a carpet pad.

A third incident occurred when an outside drain became clogged and a small amount of water entered the basement under a patio door.

In April 1998, defendants hired Peter Steward as a real estate agent to sell the home. On April 10, 1998, defendants completed a residential real property disclosure report (disclosure report) as required by the Act (see 765 ILCS 77/20, 35 (West 1998)). Steward and defendants' friend Pam Morgan were present when defendants completed the disclosure report. Defendants marked "yes" on line No. 2 that states "I am aware of flooding or recurring leakage problems in the crawl space or basement." On the lines provided to explain any "yes" marks, defendants wrote "#2 tornado in 1995 interrupted power for 3 hours [—] sump pump was unable to operate and water entered lower[-]level well."

On April 20, 1998, plaintiffs made an offer to purchase the home. On that date, plaintiffs signed the disclosure report. The parties eventually entered into a contract for the purchase of the home for $125,500, and the property was conveyed to plaintiffs on May 28, 1998. Steward acted as a dual agent.

On June 11, 1998, water entered the basement under the laundry room door. Joseph "Jody" Hogan, Donna's husband, noticed the stairwell sump pump was not working, and he could not get it to function properly. The water was in the hallway, the bedrooms, the family room, and the laundry room. The next day, plaintiffs had a new sump pump installed in the stairwell.

On June 18, 1998, the same areas in the basement were again covered by water that had come in under the laundry room door. The sump pump was working properly when the water entered the basement.

As a result of the flooding, plaintiffs had the basement cleaned and new carpeting installed. Plaintiffs also purchased a new sump pump, drywall, and bathroom vanity and changed the grade of the yard with new landscaping.

In April 1999, plaintiffs sued defendants seeking damages for a violation of the Act and common-law fraud. On October 11, 2001, the trial court held a bench trial. Plaintiffs presented the testimony of Jody, Donna, Steward, the contractors hired by plaintiffs to make repairs after the June 1998 floods, and William as an adverse witness.

William testified he and his wife decided to sell their home because his employer required him to move to a different state. He further stated he had knowledge of the two flooding occurrences when he completed the report. He also stated he knew he had to disclose a defect in full. According to William, after writing down the first occurrence, Steward told defendants that was all that was required. William testified Steward had full knowledge of both flooding events when William was writing the explanation. William also testified it was his understanding he only needed to include an example of flooding in the explanation section of the disclosure report.

Steward testified he told defendants to fill out the report to the best of their ability. He further stated defendants only told him about one flooding incident in which the water was confined to the laundry room. Steward recalled a conversation in the laundry room between William and Jody where William told Jody the same information about the one flooding incident. Steward testified when he went through the home, he never noticed any evidence of prior flooding. He also testified he usually tells buyers to investigate all disclosures.

Donna testified she went through the home three times before purchasing it and did not notice any water damage. After purchasing the home, she noticed water lines on the furnace and in the bedrooms. She testified she and her husband had been concerned about the slope of the yard, but William and Steward had told her husband that they did not have water except for a trickle in the well area. She never was a part of a discussion with defendants about water in the lower level. Donna also testified they have not had water in the lower level since the grade of the yard was changed with landscaping.

Jody testified he went through the home with William before plaintiffs purchased the home. When they were in the laundry room, Jody asked if they ever got water in here and William replied that in 1995, the sump pump stopped, and water came in and went over to the drain. Jody also testified William told him to keep the sump pump and the drains in the yard clean.

Defendants presented the testimony of Morgan, themselves, and a plumber.

Morgan testified she was visiting defendants when they were filling out the report with Steward. She recalled a discussion about all three of the water incidents with Steward present. According to Morgan, William wanted to put more down on the report about the flooding, but Steward told him to just put down an example. Steward said it was not necessary to put all the information down.

William testified other measures existed to keep water out of the house. Besides the sump pumps, indentations in the ground directed water away from the home, and the area near the home contained surface drains, a retaining wall, and a gravel pit. Because of the location of the sump pumps, William would have to clean them sometimes as often as two times per week for them to run properly. After the two floods, defendants did not make any changes to the home because they believed the floods were isolated events.

As to the disclosure report, William testified he had never completed a report before April 1998. Steward told defendants they had to disclose the flooding even if they believed it might never occur again. William testified he discussed the three water incidents with Steward. Steward did not give William any suggestions regarding the explanation but he did agree with the language William used.

William further testified he was the one who initiated the discussion about water in the basement with Jody and Steward. William stated he told Jody that if the sump pump was not kept clean, it would not function and water would get in the house. According to William, plaintiffs never asked for an explanation of the disclosure report or whether the basement got water.

Wilma testified she did not discuss basement flooding with Donna. Wilma also testified she and Donna were present when William stated the home would get water if the occupants did not keep the sump pump and yard drains clean.

On October 15, 2001, plaintiffs submitted a second-amended computation of damages and a statement of costs with damages totaling $20,939.09 and costs at $1,741.25. On October 26, 2001, the trial court issued a memorandum opinion finding in favor of defendants on both counts. This appeal followed.

II. ANALYSIS A. State of Mind

Plaintiffs first assert the trial court erred in ruling a violation of the Act requires a showing of bad faith. Thus, the question before us is what state of mind of the seller-defendant does the Act require for a buyer-plaintiff to recover for a violation of the Act. Because the interpretation of a statute is a question of law, our review is de novo. People v. Shanklin, 329 Ill. App.3d 1144, 1145, 769 N.E.2d 547, 548 (2002).

In interpreting a statute, a fundamental canon is to ascertain and give effect to the intention of the legislature. Such an inquiry appropriately begins with the language of the statute itself, as the language used by the legislature is the best indication of legislative intent. People v. Bowden, 313 Ill. App.3d 666, 668, 730 N.E.2d 138, 140 (2000).

Section 55 of the Act states, in pertinent part, the following:

*"A person who knowingly violates or fails to perform any duty prescribed by any provision of this Act or who discloses any information on the [r]esidential [r]eal [p]roperty [d]isclosure [r]eport that he knows to be false shall be liable in the amount of actual damages and court costs * * *." (Emphasis added.) 765 ILCS 77/55 (West 1998).*

Additionally, section 25(a)(i) of the Act (765 ILCS 77/25(a)(i) (West 1998)) states the seller is not liable for any error, inaccuracy, or omission of any information delivered pursuant to the Act where the seller had no knowledge of the error, inaccuracy, or omission. Accordingly, the Act attaches liability to knowing violations. See Woods v. Pence, 303 Ill. App.3d 573, 576, 708 N.E.2d 563, 565 (1999) (a violation of the Act must be done knowingly).

In this case, citing two cases from other states (Amyot v. Luchini, 932 P.2d 244, 247 (Alaska 1997); Engelhart v. Kramer, 570 N.W.2d 550, 553-54 (S.D. 1997)), the trial court determined liability would not attach to misrepresentations made in good faith. The court noted "[g]ood [f]aith emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." The trial court concluded the evidence did not establish defendants acted in bad faith.

Unlike the statutes addressed in Amyot and Engelhart (see Alaska Stat. § 34.70.060 (Lexis 2000); S.D. Codified Laws § 43-4-41 (Michie 1997)), the Illinois Act does not use the term "good faith." Under the Act, a plaintiff need not prove the defendant actively concealed the material defect. The Act requires the seller to disclose known defects and imposes liability for failure to

do so. Woods, 303 Ill. App.3d at 577, 708 N.E.2d at 565. The Act also imposes liability on the seller for any material error, inaccuracy, or omission of any information delivered under the Act if the seller had knowledge of the material error, inaccuracy, or omission. See 765 ILCS 77/25(a)(i), 55 (West 1998)).

Moreover, defendants did not assert at trial that they were not liable because the error, inaccuracy, or omission was based on a reasonable belief that a material defect or other matter not disclosed had been corrected (see 765 ILCS 77/25(a)(ii) (West 1998)). Thus, defendants' reasonable belief is not at issue in this case.

Accordingly, the trial court did not apply the appropriate standard.

B. Purchaser's Duty to Investigate

Plaintiffs next contend the trial court erred in finding a purchaser had a duty under the Act to further investigate disclosures. Again, we are required to interpret the Act and apply a de novo standard of review. See Shanklin, 329 Ill. App.3d at 1145, 769 N.E.2d at 548.

In reviewing the Act, we find no language that requires a purchaser to further investigate a disclosure of a defect made on the report to determine its completeness. The language of section 35 encourages the purchaser to have an inspection done because defects unknown to the seller may exist. See 765 ILCS 77/35 (West 1998). While the disclosure report is not a substitute for inspections or warranties, a purchaser is entitled to rely on the truthfulness, accuracy, and completeness of the statements contained therein. See Woods, 303 Ill. App.3d at 577, 708 N.E.2d at 565. In fact, a buyer's knowledge of a defect does not relieve a seller from liability under the Act. See Woods, 303 Ill. App.3d at 577, 708 N.E.2d at 565. However, we agree with the Third District that such knowledge by the purchaser is relevant to the amount of damages awarded to a successful plaintiff. See Woods, 303 Ill. App.3d at 577, 708 N.E.2d at 565.

Here, the trial court noted the mention of the one incident was not a complete disclosure but the disclosure along with the positive response to question No. 2 was "sufficient information to require a reasonable purchaser to make further inquiry." The trial court further stated a "buyer cannot be silent through the disclosure process and then seek recovery based upon this failure to obtain additional information. Reasonable action is necessary for both parties to a contract."

Accordingly, the trial court erred in considering plaintiffs' failure to further investigate the disclosure in determining defendants' liability under the Act.

C. Manifest Weight of the Evidence

Plaintiffs next contend the trial court's judgment was against the manifest weight of the evidence. A judgment is against the manifest weight of the evidence only when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on evidence. Bazydlo v. Volant, 164 Ill.2d 207, 215, 647 N.E.2d 273, 277 (1995).

The Act imposes liability for a knowing violation of the duties prescribed by the Act. 765 ILCS 77/55 (West 1998); Woods, 303 Ill. App.3d at 576, 708 N.E.2d at 565. The Act requires the seller to complete all applicable items in the disclosure report described in section 35 of the Act (765 ILCS 77/35 (West 1998)) and to disclose all material defects of which the seller has actual knowledge. 765 ILCS 77/20, 25(b) (West 1998).

Here, the trial court found the case hinged upon the state of mind of the seller in completing the disclosure form. As determined earlier, the trial court applied the incorrect standard. Applying the correct state-of-mind requirement, we find the trial court's judgment as to the violation of the Act was against the manifest weight of the evidence.

At trial, the evidence was uncontested that when defendants completed the disclosure report, they knew their basement had flooded on two occasions. The first flood was the result of a sump pump not working due to power failure and the second occurred even with a functioning sump pump. Both floods covered a majority of the basement.

On the disclosure report, defendants marked "yes" on line No. 2 that states "I am aware of flooding or recurring leakage problems in the crawl space or basement." On the lines provided to explain any "yes" marks, defendants wrote "#2 tornado in 1995 interrupted power for 3 hours [—] sump pump was unable to operate and water entered lower[-]level well."

Thus, at a minimum, defendants did not disclose the actual extent of the flooding with the 1995 flood. The explanation stated the flooding occurred in the stairwell rather than the majority of the basement living space. Additionally, defendants did not disclose the 1996 flood, which again covered a majority of the basement and occurred even though the sump pump was properly functioning. Defendants' explanation is particularly misleading

because it suggests flooding would only occur if the sump pump was not properly functioning. We also note the word "recurring" modifies the word "leakage" and not "flooding." Thus, marking "yes" on line No. 2 of the report does not in itself disclose more than one flooding event.

William testified he knew he had to fully disclose all material defects. However, William later testified that after consulting with Steward, William believed only an example of flooding was necessary. William knew Steward was a realtor, not an attorney. The disclosure report itself suggests a seller should consult an attorney before completing the disclosure report. See 765 ILCS 77/35 (West 1998).

Based on the above evidence, defendants had knowledge the information they disclosed contained a material error, inaccuracy, or omission. Thus, the trial court's judgment regarding the violation of the Act was against the manifest weight of the evidence. Because defendants challenged the amount of damages incurred by plaintiffs, the cause must be remanded for a trial on the issue of damages only.

As to the common-law fraud count, the trial court found plaintiffs did not establish a false statement. Plaintiffs did not challenge that finding.

III. CONCLUSION

For the reasons stated, we affirm the trial court's judgment on the common-law fraud count, reverse on the violation-of-the-Act count, and remand for further proceedings consistent with this opinion.

Affirmed in part and reversed in part; cause remanded with directions.

KNECHT and STEIGMANN, JJ., concur

Cantrall v. Bergner, 2016 IL App (4th) 150984

The Court believed the case to have been filed for the sole purpose of recovering attorney's fees and did not award any attorney's fees to either side. Since the Plaintiff did not prevail on all of the counts in her complaint, the Court ruled that neither party had prevailed and awarded the $2500 in damages to the Plaintiff, but nothing to the attorney.

OPINION ¶ 1In March 2011, plaintiff, Andrea Cantrall, entered into a contract to purchase the home of defendants, Daniel and Vickie Bergner. Defendants delivered a residential real property disclosure report as

required by the Residential Real Property Disclosure Act (Act) (765 ILCS 77/35 (West 2010)) that indicated, in part, they were unaware of any leaks or material defects in the roof, ceilings, or chimney. After a home inspection revealed issues with the roof, the parties executed a repair addendum where defendants, if competent to do so themselves or by a qualified and reputable contractor, were required to repair or replace all wood rot and missing fascia on the home and garage. In April 2011, plaintiff moved into the home and noticed the roof was leaking. ¶ 2In February 2012, plaintiff filed a three-count complaint against defendants, alleging a violation of the Act (765 ILCS 77/1 to 99 (West 2010)) (count I), fraudulent concealment (count II), and breach of contract (count III). The trial court entered judgment for plaintiff on count III and for defendants on counts I and II and denied both parties' requests for attorney fees. Plaintiff appeals, arguing she was entitled to attorney fees under the fee-shifting provision in the sales contract. Defendants cross-appeal, claiming the court abused its discretion when it denied them fees under the Act because plaintiff engaged in knowing misconduct. ¶ 3I. BACKGROUND ¶ 4In March 2011, the parties entered into a residential real estate sales contract, where plaintiff agreed to purchase defendants' home. Soon thereafter, plaintiff ordered a home inspection. Plaintiff was present during a portion of the inspection and noticed a visible watermark on a wall in the back stairway of the house and observed it was "wet, two or three inches long and half an inch wide." The inspector noted the fascia was physically damaged and missing in places and there was rotted wood. The inspector further recommended plaintiff seek an evaluation by a roofer. Based on the inspection report, the parties agreed, via a repair addendum, that defendants, if competent to do so themselves or by a qualified and reputable contractor, would repair or replace all wood rot and missing fascia on the home and garage. ¶ 5Defendant (Daniel) repaired the fascia under the edge of the roof himself and applied caulk. He did not seek the assistance, presence, advice, or consultation of any engineer, carpenter, contractor, inspector, roofer, or other persons knowledgeable of the building trades or any other person, lay or professional. Defendant had no knowledge of roofing or building trades, but he had been a painter years ago. Prior to closing, plaintiff completed a final walk-through of the house. Plaintiff still noticed the watermark on the wall but assumed the agreed repairs were completed. Plaintiff was not concerned about the watermark because she assumed it was a stain and could be painted over. At this time, plaintiff did not have the roof evaluated by a roofer per the inspector's suggestion.

- 3 - ¶ 6In April 2011, plaintiff was assured by defendants at closing that all repairs had been made. A few days later, plaintiff moved into the home. Within two weeks, it rained and the roof leaked. Defendants refused to repair the leak. Eventually, plaintiff paid $2500 for a roofer to make the repairs. In February 2012, plaintiff filed a three-count complaint against

*defendants, alleging a violation of the Act (765 ILCS 77/1 to 99 (West 2010)) (count I), fraudulent concealment (count II), and breach of contract (count III). ¶ 7Before the trial court made its decision, both parties requested attorney fees. Plaintiff argued she was entitled to fees under the fee-shifting provision in the sales contract. The fee-shifting provision provided, "All costs, expenses[,] and reasonable attorney's fees incurred by one party in enforcing said party's rights under this [c]ontract may be recovered from the other party." Defendants argued they were entitled to fees under the Act because plaintiff engaged in knowing misconduct (765 ILCS 77/55 (West 2010)). In November 2015, the court issued a written order with the following findings: "A. The Plaintiff has failed to meet her burden of proof as to a knowing violation of the [Act]. There was insufficient evidence presented at trial that the Defendants had actual knowledge of a material defect in the roof at the time the residential real property disclosure was completed. B. The Defendants['] failure to supplement the residential real property disclosure pursuant to Section 30 of the [Act] is permissible as the wood rot was discovered by the Plaintiff and made known to Defendants by the Plaintiff through the Repair Addendum. ***D. The Plaintiff has failed to meet her burden of proof as to her claim for fraud. There was insufficient evidence presented at trial to support Plaintiff's claims that the Defendants knowingly deceived, concealed[,] or withheld information as to the condition of the roof. E. The Plaintiff's reliance upon the Defendants' representation was not reasonable or justifiable. Knowing her home inspector's opinion regarding the marginal condition of the roof and still seeing the watermark in the stairwell of the home, Plaintiff undertook no follow up to verify that the repairs had been completed in a reasonable and workmanlike manner. Additionally, Plaintiff chose not to have the roof inspected by a qualified roofer as her inspection report recommended. The Plaintiff could have learned the actual condition of the roof through the exercise of ordinary prudence. A plaintiff may not close her eyes and then claim that she has been deceived by others. [Citation.] F. The Defendants were, by virtue of the Repair Addendum, contractually obligated to repair, if competent to do so, or cause to be repaired by a qualified and reputable contractor all wood rot and missing fascia on the home and garage. G. The Defendants breached the Repair Addendum in that they did not repair, or cause to be repaired by a qualified and reputable contractor, all wood rot on the home and garage. H. The Plaintiff's damages arose from Defendants' breach of contract."The court entered judgment on count III for plaintiff and on counts I and II for defendants. The court denied (1) plaintiff's request for attorney fees pursuant to the fee-shifting provision in the*

- 4 - sales contract and (2) defendants' request for attorney fees pursuant to the Act. The parties filed motions to reconsider, which the court denied. ¶ 8This appeal followed. ¶ 9II. ANALYSIS ¶ 10On appeal, plaintiff argues that the

trial court erred when it denied her request for attorney fees because the fee-shifting provision in the sales contract made the award of attorney fees mandatory. Defendants argue that the trial court had discretion whether to award plaintiff attorney fees,and it appropriately denied plaintiff's request. On cross-appeal, defendants argue that the trial court erred when it denied them attorney fees pursuant to the Act (765 ILCS 77/55 (West 2010)) because plaintiff engaged in knowing misconduct. In response, plaintiff argues that, since she prevailed on count III, her claims were not meritless and defendants failed to establish she engaged in knowing misconduct. We address each of these contentions in turn. ¶ 11A. Attorney Fees Pursuant to the Fee-Shifting Provision ¶ 12Illinois follows the "American Rule," which provides, absent statutory authority or a contractual agreement providing otherwise, each party must bear his or her own attorney fees and costs. Housing Authority v. Lyles, 395 Ill. App. 3d 1036, 1038, 918 N.E.2d 1276, 1278 (2009). When a contract provides a fee-shifting provision for attorney fees, a reviewing court is required to strictly construe it to mean nothing more, but also nothing less, than the plain language of the provision. Bright Horizons Children's Centers, LLC v. Riverway Midwest II, LLC, 403 Ill. App. 3d 234, 254-55, 931 N.E.2d 780, 798 (2010). ¶ 13First, we clarify our standard of review. Plaintiff contends that, because her argument involves the interpretation of a contract, our review is de novo (citing Fontana v. TLD Builders, Inc., 362 Ill. App. 3d 491, 510, 840 N.E.2d 767, 784 (2005)). Defendants argue that the trial court had discretion as to whether it awarded attorney fees and its decision should not be disturbed absent an abuse of discretion (citing Powers v. Rockford Stop-N-Go, Inc., 326 Ill. App. 3d 511, 516, 761 N.E.2d 237, 241 (2001)). When interpreting a fee-shifting provision to determine whether the use of the term "may" is discretionary or mandatory, our review is de novo. Carr v. Gateway, Inc., 241 Ill. 2d 15, 20, 944 N.E.2d 327, 329 (2011). We then address whether a trial court's award or denial of attorney fees pursuant to a contractual fee-shifting provision is an abuse of discretion. McHenry Savings Bank v. Autoworks of Wauconda, Inc., 399 Ill. App. 3d 104, 113, 924 N.E.2d 1197, 1206 (2010). ¶ 14As previously noted, the contractual agreement between plaintiff and defendants contained the following fee-shifting provision for the award of attorney fees: "All costs, expenses[,] and reasonable attorney's fees incurred by one party in enforcing said party's rights under this [c]ontract may be recovered from the other party." (Emphasis added.)¶ 15Plaintiff suggests the term "may" simply confers on the prevailing party enforcing the contract the right to seek recovery of fees, and once initiated, the trial court is required to award attorney fees. Defendants argue that the contract language is unambiguous and the use of the term "may" indicates the awarding of fees is permissive and not mandatory, and as a result, whether to award attorney fees was within the court's discretion. We agree with defendants.

*- 5 - ¶ 16Black's Law Dictionary defines the term "may" as follows: "1. To be permitted to *** 2. To be a possibility ***." Black's Law Dictionary 1000 (8th ed. 2004). When effectuating legislative intent in interpreting statutes, courts have held "may" to be synonymous with "shall" or "must." Black's Law Dictionary 1000 (8th ed. 2004).A different publication by the editor of Black's Law Dictionary defines "may" as follows: "(1) has discretion to; is permitted to ***; (2) possibly will ***; or (3) shall." Bryan A. Garner, A Dictionary of Modern Legal Usage 552 (2d ed. 1995) ("courts not infrequently construe may as shall or must to the end that justice may not be the slave of grammar" (emphases in original and internal quotation marks omitted)). However, as noted by defendants, the use of "may" does not mean "shall" when interpreting private contracts (citing Lukasik v. Riddell, Inc., 116 Ill. App. 3d 339, 345, 452 N.E.2d 55, 59 (1983)). ¶ 17The plain and ordinary meaning of "may" indicates the fee-shifting provision is permissive. Although courts will sometimes construe statutes using "may" to mean "shall" by examining legislative intent, due to the steep ramifications of fee-shifting provisions in contracts, we are bound to strictly construe them to mean nothing more, but also nothing less, than the plain language used by the parties. Bright Horizons, 403 Ill. App. 3d at 254-55, 931 N.E.2d at 798. We disagree with plaintiff's assessment that the term "may" simply confers on the prevailing party enforcing the contract the right to seek recovery of fees. Based on the construction of the clause, the provision leaves the decision as to whether a prevailing party can receive fees to the discretion of the trial court. ¶ 18Nonetheless, plaintiff argues that this fee-shifting provision is similar to the fee-shifting provision presented in Pioneer Trust & Savings Bank v. Zonta, 96 Ill. App. 3d 339, 349, 421 N.E.2d 239, 247 (1981). In Pioneer, the fee-shifting provision provided "the lessee pay all 'reasonable costs, attorney's fees and expenses that may be incurred by Lessor, in enforcing the covenants and agreements of this lease.'" Pioneer, 96 Ill. App. 3d at 349, 421 N.E.2d at 247. In the case at bar, we find the fee-shifting provision distinguishable. The fee-shifting provision in Pioneer entitled the Lessor to all reasonable costs, attorney fees, and expenses that may be incurred by the lessor. The provision in the present case uses the term "may" to state fees and costs may be recoverable against the other party. The ordering of the words in the fee-shifting provision is significant, especially when the court is required to strictly construe the provision. See Bright Horizons, 403 Ill. App. 3d at 254-55, 931 N.E.2d at 798. ¶ 19Plaintiff argues that if this court finds the fee-shifting provision discretionary, it conflicts with this court's holding in Housing Authority v. Lyles, 395 Ill. App. 3d 1036, 1040, 918 N.E.2d 1276, 1279-80 (2009). In Housing Authority, a landlord filed a complaint in forcible entry and detainer alleging that the defendant-tenant breached the terms of the lease by keeping her unit in an unsanitary and unsafe condition. Housing Authority, 395 Ill. App. 3d at 1037, 918 N.E.2d at 1277. The trial court found for the defendant-tenant*

and awarded her $5,089.50 in attorney fees based on the fee-shifting provision contained in the lease. Housing Authority, 395 Ill. App. 3d at 1038, 918 N.E.2d at 1278. The fee-shifting provision provided, "'In the event one party to this lease defaults in fulfilling any of the provisions of this lease, the non[ ]defaulting party may recover all costs and reasonable attorney[ ] fees incurred in enforcing this lease, whether or not suit shall be required.' [Citation.]" Housing Authority, 395 Ill. App. 3d at 1039, 918 N.E.2d at 1279. ¶ 20In Housing Authority, the parties disputed on appeal whether the defendant-tenant was enforcing the lease and, therefore, could request fees pursuant to the fee-shifting provision.

*- 6 - The trial court's judgment was reversed because the defendant-tenant was not enforcinganything but, rather, defending against the forcible entry and detainer action alleging she had breached the lease. Housing Authority, 395 Ill. App. 3d at 1040, 918 N.E.2d at 1279. This court concluded, "[a]pplying these common definitions [of 'enforcing'] to the language of the lease, this court finds as a matter of law that the lessor or lessee would be entitled to attorney fees only if that party was suing to compel or make effective the covenants of the lease." Housing Authority, 395 Ill. App. 3d at 1040, 918 N.E.2d at 1279. ¶ 21This statement was made in the context of whether the defendant was enforcing the lease, and this court did not address whether the fee-shifting provision was mandatory or permissive. Plaintiff argues the following on this holding: "[w]hile not an explicit holding, this court did decide, perhaps in a left-handed way *** that a fee[-]shifting [provision] in a lease using the word 'may' warranted the award of attorney[] fees to the prevailing party as a matter of law." We disagree. As stated above, and as plaintiff points out, the context was entirely different, and this court was not presented with the issue of whether the term "may" in the fee-shifting provision was permissive or mandatory. See, e.g., People v. Flatt, 82 Ill. 2d 250, 261, 412 N.E.2d 509, 515 (1980) ("It is well settled that the precedential scope of a decision is limited to the facts before the court."). Therefore, our decision in Housing Authority is not instructive here. We conclude that the plain and ordinary meaning of the term "may" used in the fee-shifting provision indicates the trial court had discretion as to whether to award attorney fees. ¶ 22Next, we address whether the trial court abused its discretion when it denied plaintiff attorney fees pursuant to the fee-shifting provision. McHenry Savings Bank, 399 Ill. App. 3d at 113, 924 N.E.2d at 1206. "An abuse of discretion occurs only when the trial court's decision is arbitrary, fanciful, or unreasonable or where no reasonable person would take the view adopted by the trial court." Seymour v. Collins, 2015 IL 118432, ¶ 41, 39 N.E.3d 961. ¶ 23Based on our discussion above, the term "may" in the fee-shifting provision provided the trial with discretion as to whether to award fees and the amount awarded. In multicount cases, where the parties have each won and lost on different claims, it may be inappropriate to award attorney fees to either party. Timan v. Ourada, 2012*

IL App (2d) 100834, ¶ 29, 972 N.E.2d 744. In the present case, the trial court entered judgment in favor of plaintiff on count III and defendants on counts I and II. For count III, breach of contract, the court found defendants breached the repair addendum "in that they did not repair, or cause to be repaired by a qualified and reputable contractor, all wood rot on the home and garage." The court awarded plaintiff $2500 and court costs for the breach. Based on the facts of the breach and since plaintiff was unsuccessful on two of her three claims, we cannot say it was unreasonable for the court to deny her request for attorney fees. Therefore, the trial court did not abuse its discretion when it denied plaintiff's request for attorney fees.¶ 24B. Attorney Fees Pursuant to the Act ¶ 25In their cross-appeal, defendants argue that the trial court erred when it denied their request for attorney fees as the prevailing party pursuant to the Act (765 ILCS 77/55 (West 2010)). In response, plaintiff argues that defendants failed to prove plaintiff engaged in knowing misconduct to prevail under the Act for an award of attorney fees. The award of attorney fees under the Act is discretionary; therefore, we will not reverse a court's decision absent an abuse of discretion. Miller v. Bizzell, 311 Ill. App. 3d 971, 976, 726 N.E.2d 175, 179 (2000).

- 7 - ¶ 26Under section 25(b) of the Act, "[t]he seller shall disclose material defects of which the seller has actual knowledge." 765 ILCS 77/25(b) (West 2010). However, a seller is not required "to make any specific investigation or inquiry in an effort to complete the disclosure statement." 765 ILCS 77/25(c) (West 2010). In the present case, count I of plaintiff's complaint alleged defendants made false representations on the residential real property disclosure form because they stated they were unaware of any leaks or material defects in the roof. The trial court found plaintiff failed to show defendants had actual knowledge of a material defect in the roof at the time the disclosure statement was completed. Therefore, the court entered judgment for defendants on count I. ¶ 27Section 55 of the Act provides for liability and damages and states, in relevant part, as follows: "A person who knowingly violates or fails to perform any duty prescribed by any provision of this Act or who discloses any information on the Residential Real Property Disclosure Report that he knows to be false shall be liable in the amount of actual damages and court costs, and the court may award reasonable attorney fees incurred by the prevailing party." 765 ILCS 77/55 (West 2010).¶ 28Defendants argue that the trial court abused its discretion when it denied their request for attorney fees as the prevailing party because plaintiff engaged in knowing misconduct. More specifically, defendants argue that plaintiff engaged in knowing misconduct when she had actual knowledge of the roof's condition and decided to sue defendants anyway, causing unnecessary delay and/or a needless increase in the cost of litigation. Plaintiff argues that because she prevailed on count III, her actions were not meritless and defendants have failed to establish she engaged in

knowing misconduct. ¶ 29The parties do not dispute that defendants were the prevailing party on count I but instead argue whether plaintiff's actions demonstrated she engaged in knowing misconduct. When a defendant seeks attorney fees under the Act, he is required to show knowing misconduct on the part of the plaintiff. Miller, 311 Ill. App. 3d at 976, 726 N.E.2d at 179. Courts look to Illinois Supreme Court Rule 137 (eff. Feb. 1, 1994) for a guideline as to when attorney fees should be awarded to a defendant under the Act. Miller, 311 Ill. App. 3d at 975, 726 N.E.2d at 178; Krautsack v. Anderson, 223 Ill. 2d 541, 560, 861 N.E.2d 633, 647 (2006). "Under Rule 137, sanctions may be granted (1) if either party files a pleading or motion that to the best of the attorney's 'knowledge, information, and belief' is not 'well grounded in fact' and is not 'warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law,' or (2) if the pleading or motion is interposed to 'harass or cause unnecessary delay or needless increase in the cost of litigation.'" (Emphasis in original.) Miller, 311 Ill. App. 3d at 976, 726 N.E.2d at 179 (quoting Ill. S. Ct. R. 137 (eff. Feb. 1, 1994)). Factors a trial court might consider include "(1) the degree of bad faith by the opposing party, (2) whether an award of fees would deter others from acting under similar circumstances, and (3) the relative merits of the parties' positions." Miller, 311 Ill. App. 3d at 976-77, 726 N.E.2d at 179. ¶ 30Defendants argue that the evidence presented at trial showed plaintiff's misconduct and, as to count I, plaintiff caused unnecessary delay and/or a needless increase in the cost of litigation. Defendants rely on the following to support this proposition: (1) plaintiff testified she was present when the inspection took place and noticed the watermark, (2) defendants never received the inspection report, (3) plaintiff assumed the roof was fixed despite the visible

- 8 - watermark during the final walk-through, (4) plaintiff did not follow up with the repairs or seek advice from a qualified roofer, (5) plaintiff did not repair the roof until five months after she discovered it was still leaking, and (6) plaintiff could have learned the condition of the roof by exercising ordinary prudence. In response, plaintiff asserts that defendants failed to establish knowing misconduct and her claims were not meritless, as she prevailed on count III. ¶ 31We find the record devoid of any indication that plaintiff engaged in knowing misconduct. Even though plaintiff noticed the watermark at the time of the inspection and at the final walk-through, it is not indicative of whether defendants had actual knowledge that there was a leak and, therefore, failed to properly disclose items on the disclosure form. To make this determination, it was necessary for the parties to engage in discovery. If the watermark was visible, plaintiff would have a reasonable belief that defendants knew there was a roof leak and failed to disclose it. It does not matter that plaintiff was put on actual notice of the watermark by her own observation, as the only issue for count I was whether defendants were aware of the leak when they completed the disclosure form. As a

result, the trial court did not abuse its discretion when it denied defendants' request for attorney fees under the Act.¶ 32III. CONCLUSION ¶ 33For the foregoing reasons, we affirm the trial court's judgment.¶ 34Affirmed.

Sellers

Where damage to the property has been repaired, the Seller may rely on the repairs (unless they learn before closing that the repair was inadequate).

Buyer

The disclosure states that a repair has been made, they may want to get information about the contractor and warranties to allow for claims against the contract if appropriate.

2 Things that Protect Our Buyers

Where the Seller discloses that repairs have been made, but knows that they are inadequate, the Buyer is not bound by just the **Disclosure Act**. They can rely on claims of **fraudulent misrepresentation** or **fraudulent concealment**, in addition to **breach of contract claims**.

Elements of Fraudulent Misrepresentation are:

- A false statement of material fact;
- The sellers' knowledge or belief that the statement was false;
- The sellers' intent that the statement induces the buyers to act;
- The buyers' justifiable reliance upon the truth of the statement; and
- Damages resulting from reliance on the statement
- See **Bauer v Giannis**, 359 Ill.App.3d 897 (2d Dist. 2005)

Elements of Fraudulent Concealment are:

- The sellers concealed a material fact under circumstances that created a duty to speak;
- The sellers intended to induce a false belief;
- The buyers could not have discovered the truth through reasonable inquiry or inspection or were prevented from making a reasonable inquiry or inspection, and justifiably relied upon the sellers' silence as a representation that the fact did not exist;
- The concealed information was such that the buyers would have acted differently had they been aware of it; and
- The buyers' reliance resulted in damages. Id.

5 Years Statute of Limitations

Fraudulent Misrepresentation
Fraudulent Concealment

Other parties that maybe liable: Contractors, Brokers, Inspector, Attorneys

Misrepresentations: Other types of litigation that can occur from failures under the contract

Seller has no knowledge of, nor has Seller received any written notice from any association or governmental entity regarding:

- "zoning, building, fire or health code violations that have not been corrected;
- any pending rezoning;
- boundary line disputes;
- any pending condemnation or Eminent Domain proceeding;
- easements or claims of easements not shown on the public records;
- any hazardous waste on the Real Estate
- real estate tax exemption(s) to which Seller is not lawfully entitled." See paragraph 22 of the 7.0 Multi Board Contract

Failure to comply with terms in the contract

Getting prepared to sell

- Tax credits for home improvements
- Known special assessments

After Sale

- Seller not vacating or damaging the property.

Partition Suits

Partition suits necessitate due to failure to require partnership agreements between non-married parties

The Illinois Partition Statute, at 735 ILCs 5/17-101 et seq

(735 ILCS 5/17-101) (from Ch. 110, par. 17-101)

Sec. 17-101. Compelling partition. When lands, tenements, or hereditaments are held in joint tenancy or tenancy in common, other than in accordance with the Uniform Partition of Heirs Property Act, or other form of co-ownership and regardless of whether any or all of the claimants are minors or adults, any one or more of the persons interested therein may compel a partition thereof by a verified complaint in the circuit court of the county where the premises or part of the premises are situated. If lands, tenements or hereditaments held in joint tenancy or tenancy in common are situated in 2 or more counties, the venue may be in any one of such counties, and the circuit court of any such county first acquiring jurisdiction shall retain sole and exclusive jurisdiction. Ownership of an interest in the surface of lands, tenements, or hereditaments by a co-owner of an interest in minerals underlying the surface does not prevent partition of the mineral estate. This amendatory Act of the 92nd General Assembly is a declaration of existing law and is intended to remove any possible conflicts or ambiguities, thereby confirming existing law pertinent to the partition of interests in minerals and applies to all actions for the partition of minerals now pending or filed on or

after the effective date of this amendatory Act of the 92nd General Assembly. Nothing in this amendatory Act of the 92nd General Assembly shall be construed as allowing an owner of a mineral interest in coal to mine and remove the coal by the surface method of mining without first obtaining the consent of all of the owners of the surface to the mining and removal of coal by the surface method of mining. Ownership of an interest in minerals by a co-owner of an interest in the surface does not prevent partition of the surface. The ownership of an interest in some, but not all, of the mineral estate by a co-owner of an interest in other minerals does not prevent the partition of the co-owned mineral estate.

(Source: P.A. 101-520, eff. 8-23-19.)

Purchasing Property as Partners

If parties – such as engaged but unmarried couples – are purchasing property together, it is a good idea to have them draft a partnership agreement based on the contributions of down payment and mortgage payments and how they would like the division of the property to be in the event that they fail to marry.

(765 ILCS 77/) Residential Real Property Disclosure Act.

(765 ILCS 77/Art. 1 heading)

ARTICLE 1

SHORT TITLE

(Source: P.A. 94-280, eff. 1-1-06.)

(765 ILCS 77/1)

Sec. 1. Short title. This Act may be cited as the Residential Real Property Disclosure Act.

(Source: P.A. 88-111.)

(765 ILCS 77/Art. 2 heading)

ARTICLE 2

DISCLOSURES

(Source: P.A. 94-280, eff. 1-1-06.)

(765 ILCS 77/5)

Sec. 5. Definitions. As used in this Act, unless the context otherwise requires, the following terms have the meaning given in this Section.

"Residential real property" means real property improved with not less than one nor more than 4 residential dwelling units; units in residential cooperatives; or, condominium units, including the limited common elements allocated to the exclusive use thereof that form an integral part of the condominium unit. The term includes a manufactured home as defined in subdivision (53) of Section 9-102 of the Uniform Commercial Code that is real property as defined in the Conveyance and Encumbrance of Manufactured Homes as Real Property and Severance Act.

"Seller" means every person or entity who is an owner, beneficiary of a trust, contract purchaser or lessee of a ground lease, who has an interest (legal or equitable) in residential real property. However, "seller" shall not include any person who has both (i) never occupied the residential real property and (ii) never had the management responsibility for the residential real property nor delegated such responsibility for the residential real property to another person or entity.

"Prospective buyer" means any person or entity negotiating or offering to become an owner or lessee of residential real property by means of a transfer for value to which this Act applies.

(Source: P.A. 98-749, eff. 7-16-14; 99-78, eff. 7-20-15.)

(765 ILCS 77/10)

Sec. 10. Except as provided in Section 15, this Act applies to any transfer by sale, exchange, installment land sale contract, assignment of beneficial interest, lease with an option to purchase, ground lease, or assignment of ground lease of residential real property.

(Source: P.A. 88-111.)

(765 ILCS 77/15)

Sec. 15. The provisions of this Act do not apply to the following:

(1) Transfers pursuant to court order, including, but not limited to, transfers ordered by a probate court in administration of an estate, transfers between spouses resulting from a judgment of dissolution of marriage or legal separation, transfers pursuant to an order of possession, transfers by a trustee in bankruptcy, transfers by eminent domain, and transfers resulting from a decree for specific performance.

(2) Transfers from a mortgagor to a mortgagee by deed in lieu of foreclosure or consent judgment, transfer by judicial deed issued pursuant to a foreclosure sale to the successful bidder or the assignee of a certificate of sale, transfer by a collateral assignment of a beneficial interest of a land trust, or a transfer by a mortgagee or a successor in interest to the mortgagee's secured position or a beneficiary under a deed in trust who has acquired the real property by deed in lieu of foreclosure, consent judgment or judicial deed issued pursuant to a foreclosure sale.

(3) Transfers by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust.

(4) Transfers from one co-owner to one or more other co-owners.

(5) Transfers pursuant to testate or intestate succession.

(6) Transfers made to a spouse, or to a person or persons in the lineal line of consanguinity of one or more of the sellers.

(7) Transfers from an entity that has taken title to residential real property from a seller for the purpose of assisting in the relocation of the seller, so long as the entity makes available to all prospective buyers a copy of the disclosure form furnished to the entity by the seller.

(8) Transfers to or from any governmental entity.

(9) Transfers of newly constructed residential real property that has not been occupied.

(Source: P.A. 88-111.)

(765 ILCS 77/20)

Sec. 20. A seller of residential real property shall complete all applicable items in the disclosure document described in Section 35 of this Act. The seller shall deliver to the prospective buyer the written disclosure statement required by this Act before the signing of a written agreement by the seller and prospective buyer that would, subject to the satisfaction of any negotiated contingencies, require the prospective buyer to accept a transfer of the residential real property.

(Source: P.A. 88-111.)

(765 ILCS 77/25)

Sec. 25. Liability of seller.

(a) The seller is not liable for any error, inaccuracy, or omission of any information delivered pursuant to this Act if (i) the seller had no knowledge of

the error, inaccuracy, or omission, (ii) the error, inaccuracy, or omission was based on a reasonable belief that a material defect or other matter not disclosed had been corrected, or (iii) the error, inaccuracy, or omission was based on information provided by a public agency or by a licensed engineer, land surveyor, structural pest control operator, or by a contractor about matters within the scope of the contractor's occupation and the seller had no knowledge of the error, inaccuracy, or omission.

(b) The seller shall disclose material defects of which the seller has actual knowledge.

(c) The seller is not obligated by this Act to make any specific investigation or inquiry in an effort to complete the disclosure statement.

(Source: P.A. 90-383, eff. 1-1-98.)

(765 ILCS 77/30)

Sec. 30. Disclosure supplement. If, prior to closing, any seller has actual knowledge of an error, inaccuracy, or omission in any prior disclosure document after delivery of that disclosure document to a prospective buyer, that seller shall supplement the prior disclosure document with a written supplemental disclosure.

(Source: P.A. 90-383, eff. 1-1-98; 91-357, eff. 7-29-99.)

(765 ILCS 77/35)

Sec. 35. Disclosure report form. The disclosures required of a seller by this Act shall be made in the following form:

RESIDENTIAL REAL PROPERTY DISCLOSURE REPORT

NOTICE: THE PURPOSE OF THIS REPORT IS TO PROVIDE PROSPECTIVE BUYERS WITH INFORMATION ABOUT MATERIAL DEFECTS IN THE RESIDENTIAL REAL PROPERTY. THIS REPORT DOES NOT LIMIT THE PARTIES' RIGHT TO CONTRACT FOR THE SALE OF RESIDENTIAL REAL PROPERTY IN "AS IS" CONDITION. UNDER COMMON LAW, SELLERS WHO DISCLOSE MATERIAL DEFECTS MAY BE UNDER A CONTINUING OBLIGATION TO ADVISE THE PROSPECTIVE BUYERS ABOUT THE CONDITION OF THE RESIDENTIAL REAL PROPERTY EVEN AFTER THE REPORT IS DELIVERED TO THE PROSPECTIVE BUYER. COMPLETION OF THIS REPORT BY THE SELLER CREATES LEGAL OBLIGATIONS ON

THE SELLER; THEREFORE THE SELLER MAY WISH TO CONSULT AN ATTORNEY PRIOR TO COMPLETION OF THIS REPORT.

Property Address: .....

City, State & Zip Code: .....

Seller's Name: .....

This Report is a disclosure of certain conditions of the residential real property listed above in compliance with the Residential Real Property Disclosure Act. This information is provided as of ...(month) ...(day) ...(year), and does not reflect any changes made or occurring after that date or information that becomes known to the seller after that date. The disclosures herein shall not be deemed warranties of any kind by the seller or any person representing any party in this transaction.

In this form, "am aware" means to have actual notice or actual knowledge without any specific investigation or inquiry. In this form, "material defect" means a condition that would have a substantial adverse effect on the value of the residential real property or that would significantly impair the health or safety of future occupants of the residential real property unless the seller reasonably believes that the condition has been corrected.

The seller discloses the following information with the knowledge that even though the statements herein are not deemed to be warranties, prospective buyers may choose to rely on this information in deciding whether or not and on what terms to purchase the residential real property.

The seller represents that to the best of his or her actual knowledge, the following statements have been accurately noted as "yes" (correct), "no" (incorrect), or "not applicable" to the property being sold. If the seller indicates that the response to any statement, except number 1, is yes or not applicable, the seller shall provide an explanation, in the additional information area of this form.

	YES	NO	N/A	
1.	.....	.....	.....	Seller has occupied the property within the last 12 months. (No explanation is needed.)
2.	.....	.....	.....	I am aware of flooding or recurring leakage problems in the crawl space or basement.

3.	.....	.....	.....	I am aware that the property is located in a flood plain or that I currently have flood hazard insurance on the property.
4.	.....	.....	.....	I am aware of material defects in the basement or foundation (including cracks and bulges).
5.	.....	.....	.....	I am aware of leaks or material defects in the roof, ceilings, or chimney.
6.	.....	.....	.....	I am aware of material defects in the walls, windows, doors, or floors.
7.	.....	.....	.....	I am aware of material defects in the electrical system.
8.	.....	.....	.....	I am aware of material defects in the plumbing system (includes such things as water heater, sump pump, water treatment system, sprinkler system, and swimming pool).
9.	.....	.....	.....	I am aware of material defects in the well or well equipment.
10.	.....	.....	.....	I am aware of unsafe conditions in the drinking water.
11.	.....	.....	.....	I am aware of material defects in the heating, air conditioning, or ventilating systems.

12.	.....	.....	.....	I am aware of material defects in the fireplace or woodburning stove.
13.	.....	.....	.....	I am aware of material defects in the septic, sanitary sewer, or other disposal system.
14.	.....	.....	.....	I am aware of unsafe concentrations of radon on the premises.
15.	.....	.....	.....	I am aware of unsafe concentrations of or unsafe conditions relating to asbestos on the premises.
16.	.....	.....	.....	I am aware of unsafe concentrations of or unsafe conditions relating to lead paint, lead water pipes, lead plumbing pipes or lead in the soil on the premises.
17.	.....	.....	.....	I am aware of mine subsidence, underground pits, settlement, sliding, upheaval, or other earth stability defects on the premises.
18.	.....	.....	.....	I am aware of current infestations of termites or other wood boring insects.
19.	.....	.....	.....	I am aware of a structural defect caused by previous infestations of termites or other wood boring insects.

20.	.....	.....	.....	I am aware of underground fuel storage tanks on the property.
21.	.....	.....	.....	I am aware of boundary or lot line disputes.
22.	.....	.....	.....	I have received notice of violation of local, state or federal laws or regulations relating to this property, which violation has not been corrected.
23.	.....	.....	.....	I am aware that this property has been used for the manufacture of methamphetamine as defined in Section 10 of the Methamphetamine Control and Community Protection Act.

Note: These disclosures are not intended to cover the common elements of a condominium, but only the actual residential real property including limited common elements allocated to the exclusive use thereof that form an integral part of the condominium unit.

Note: These disclosures are intended to reflect the current condition of the premises and do not include previous problems, if any, that the seller reasonably believes have been corrected.

If any of the above are marked "not applicable" or "yes", please explain here or use additional pages, if necessary:

.....

.....

.....

Check here if additional pages used: .....

Seller certifies that seller has prepared this statement and certifies that the information provided is based on the actual notice or actual knowledge of the seller without any specific investigation or inquiry on the part of the seller. The

seller hereby authorizes any person representing any principal in this transaction to provide a copy of this report, and to disclose any information in the report, to any person in connection with any actual or anticipated sale of the property.

Seller: ..... Date: .....

Seller: ..... Date: .....

THE PROSPECTIVE BUYER IS AWARE THAT THE PARTIES MAY CHOOSE TO NEGOTIATE AN AGREEMENT FOR THE SALE OF THE PROPERTY SUBJECT TO ANY OR ALL MATERIAL DEFECTS DISCLOSED IN THIS REPORT ("AS IS"). THIS DISCLOSURE IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THAT THE PROSPECTIVE BUYER OR SELLER MAY WISH TO OBTAIN OR NEGOTIATE. THE FACT THAT THE SELLER IS NOT AWARE OF A PARTICULAR CONDITION OR PROBLEM IS NO GUARANTEE THAT IT DOES NOT EXIST. THE PROSPECTIVE BUYER IS AWARE THAT HE MAY REQUEST AN INSPECTION OF THE PREMISES PERFORMED BY A QUALIFIED PROFESSIONAL.

Prospective Buyer: ..... Date: ..... Time: ....

Prospective Buyer: ..... Date: ..... Time: ....

(Source: P.A. 98-754, eff. 1-1-15.)

(765 ILCS 77/40)

Sec. 40. Material defect. If a material defect is disclosed in the Residential Real Property Disclosure Report, after acceptance by the prospective buyer of an offer or counter-offer made by a seller or after the execution of an offer made by a prospective buyer that is accepted by the seller for the conveyance of the residential real property, then the prospective buyer may, within 3 business days after receipt of that report by the prospective buyer, terminate the contract or other agreement without any liability or recourse except for the return to prospective buyer of all earnest money deposits or down payments paid by prospective buyer in the transaction. If a material defect is disclosed in a supplement to this disclosure document, the prospective buyer shall not have a right to terminate unless the material defect results from an error, inaccuracy, or omission of which the seller had actual knowledge at the time the prior disclosure document was completed and signed by the seller. The right to terminate the contract, however, shall no longer exist after the conveyance of the residential real property. For purposes of this Act the termination shall be deemed to be made when written notice of termination is personally delivered to at least one of the sellers identified in the contract or other agreement or

when deposited, certified or registered mail, with the United States Postal Service, addressed to one of the sellers at the address indicated in the contract or agreement, or, if there is not an address contained therein, then at the address indicated for the residential real property on the report.

(Source: P.A. 90-383, eff. 1-1-98.)

(765 ILCS 77/45)

Sec. 45. This Act is not intended to limit or modify any obligation to disclose created by any other statute or that may exist in common law in order to avoid fraud, misrepresentation, or deceit in the transaction.

(Source: P.A. 88-111.)

(765 ILCS 77/50)

Sec. 50. Delivery of the Residential Real Property Disclosure Report provided by this Act shall be by:

(1) personal or facsimile delivery to the prospective buyer;

(2) depositing the report with the United States Postal Service, postage prepaid, first class mail, addressed to the prospective buyer at the address provided by the prospective buyer or indicated on the contract or other agreement; or

(3) depositing the report with an alternative delivery service such as Federal Express, UPS, or Airborne, delivery charges prepaid, addressed to the prospective buyer at the address provided by the prospective buyer or indicated on the contract or other agreement.

For purposes of this Act, delivery to one prospective buyer is deemed delivery to all prospective buyers. Delivery to an authorized individual acting on behalf of a prospective buyer constitutes delivery to all prospective buyers. Delivery of the report is effective upon receipt by the prospective buyer. Receipt may be acknowledged on the report, acknowledged in an agreement for the conveyance of the residential real property, or shown in any other verifiable manner.

(Source: P.A. 91-357, eff. 7-29-99.)

(765 ILCS 77/55)

Sec. 55. Violations and damages. If the seller fails or refuses to provide the disclosure document prior to the conveyance of the residential real property, the buyer shall have the right to terminate the contract. A person who knowingly violates or fails to perform any duty prescribed by any provision of this Act or who discloses any information on the Residential Real Property Disclosure Report that he knows to be false shall be liable in the amount of actual damages and court costs, and the court may award reasonable attorney fees incurred by the prevailing party.

(Source: P.A. 90-383, eff. 1-1-98.)

(765 ILCS 77/60)

Sec. 60. No action for violation of this Act may be commenced later than one year from the earlier of the date of possession, date of occupancy, or date of recording of an instrument of conveyance of the residential real property.

(Source: P.A. 88-111.)

(765 ILCS 77/65)

Sec. 65. A copy of this Act, excluding Section 35, must be printed on or as a part of the Residential Real Property Disclosure Report form.

(Source: P.A. 88-111.)

(765 ILCS 77/Art. 3 heading)

ARTICLE 3

PREDATORY LENDING DATABASE

(Source: P.A. 94-280, eff. 1-1-06.)

(765 ILCS 77/70)

Sec. 70. Predatory lending database program.

(a) As used in this Article:

"Adjustable rate mortgage" or "ARM" means a closed-end mortgage transaction that allows adjustments of the loan interest rate during the first 3 years of the loan term.

"Borrower" means a person seeking a mortgage loan.

"Broker" means a "broker" or "loan broker", as defined in subsection (p) of Section 1-4 of the Residential Mortgage License Act of 1987.

"Closing agent" means an individual assigned by a title insurance company or a broker or originator to ensure that the execution of documents related to the closing of a real estate sale or the refinancing of a real estate loan and the disbursement of closing funds are in conformity with the instructions of the entity financing the transaction.

"Counseling" means in-person counseling provided by a counselor employed by a HUD-approved counseling agency to all borrowers, or documented telephone counseling where a hardship would be imposed on one or more borrowers. A hardship shall exist in instances in which the borrower is confined to his or her home due to medical conditions, as verified in writing by a physician, or the borrower resides 50 miles or more from the nearest participating HUD-approved housing counseling agency.

"Counselor" means a counselor employed by a HUD-approved housing counseling agency.

"Credit score" means a credit risk score as defined by the Fair Isaac Corporation, or its successor, and reported under such names as "BEACON", "EMPIRICA", and "FAIR ISAAC RISK SCORE" by one or more of the following credit reporting agencies or their successors: Equifax, Inc., Experian Information Solutions, Inc., and TransUnion LLC. If the borrower's credit report contains credit scores from 2 reporting agencies, then the broker or loan originator shall report the lower score. If the borrower's credit report contains credit scores from 3 reporting agencies, then the broker or loan originator shall report the middle score.

"Department" means the Department of Financial and Professional Regulation.

"Exempt person or entity" means that term as it is defined in subsections (d)(1), (d)(1.5), and (d)(1.8) of Section 1-4 of the Residential Mortgage License Act of 1987.

"First-time homebuyer" means a borrower who has not held an ownership interest in residential property.

"HUD-approved counseling" or "counseling" means counseling given to a borrower by a counselor employed by a HUD-approved housing counseling agency.

"Interest only" means a closed-end loan that permits one or more payments of interest without any reduction of the principal balance of the loan, other than the first payment on the loan.

"Lender" means that term as it is defined in subsection (g) of Section 1-4 of the Residential Mortgage License Act of 1987.

"Licensee" means that term as it is defined in subsection (e) of Section 1-4 of the Residential Mortgage License Act of 1987.

"Mortgage loan" means that term as it is defined in subsection (f) of Section 1-4 of the Residential Mortgage License Act of 1987.

"Negative amortization" means an amortization method under which the outstanding balance may increase at any time over the course of the loan because the regular periodic payment does not cover the full amount of interest due.

"Originator" means a "mortgage loan originator" as defined in subsection (jj) of Section 1-4 of the Residential Mortgage License Act of 1987, except an exempt person.

"Points and fees" has the meaning ascribed to that term in Section 10 of the High Risk Home Loan Act.

"Prepayment penalty" means a charge imposed by a lender under a mortgage note or rider when the loan is paid before the expiration of the term of the loan.

"Refinancing" means a loan secured by the borrower's or borrowers' primary residence where the proceeds are not used as purchase money for the residence.

"Title insurance company" means any domestic company organized under the laws of this State for the purpose of conducting the business of guaranteeing or insuring titles to real estate and any title insurance company organized under the laws of another State, the District of Columbia, or a foreign government and authorized to transact the business of guaranteeing or insuring titles to real estate in this State.

(a-5) A predatory lending database program shall be established within Cook County. The program shall be administered in accordance with this Article. The inception date of the program shall be July 1, 2008. A predatory lending

database program shall be expanded to include Kane, Peoria, and Will counties. The inception date of the expansion of the program as it applies to Kane, Peoria, and Will counties shall be July 1, 2010. Until the inception date, none of the duties, obligations, contingencies, or consequences of or from the program shall be imposed. The program shall apply to all mortgage applications that are governed by this Article and that are made or taken on or after the inception of the program.

(b) The database created under this program shall be maintained and administered by the Department. The database shall be designed to allow brokers, originators, counselors, title insurance companies, and closing agents to submit information to the database online. The database shall not be designed to allow those entities to retrieve information from the database, except as otherwise provided in this Article. Information submitted by the broker or originator to the Department may be used to populate the online form submitted by a counselor, title insurance company, or closing agent.

(c) Within 10 business days after taking a mortgage application, the broker or originator for any mortgage on residential property within the program area must submit to the predatory lending database all of the information required under Section 72 and any other information required by the Department by rule. Within 7 business days after receipt of the information, the Department shall compare that information to the housing counseling standards in Section 73 and issue to the borrower and the broker or originator a determination of whether counseling is recommended for the borrower. The borrower may not waive counseling. If at any time after submitting the information required under Section 72 the broker or originator (i) changes the terms of the loan or (ii) issues a new commitment to the borrower, then, within 5 business days thereafter, the broker or originator shall re-submit all of the information required under Section 72 and, within 4 business days after receipt of the information re-submitted by the broker or originator, the Department shall compare that information to the housing counseling standards in Section 73 and shall issue to the borrower and the broker or originator a new determination of whether re-counseling is recommended for the borrower based on the information re-submitted by the broker or originator. The Department shall require re-counseling if the loan terms have been modified to meet another counseling standard in Section 73, or if the broker has increased the interest rate by more than 200 basis points.

(d) If the Department recommends counseling for the borrower under subsection (c), then the Department shall notify the borrower of all participating HUD-approved counseling agencies located within the State and direct the borrower to interview with a counselor associated with one of those agencies.

Within 10 business days after receipt of the notice of HUD-approved counseling agencies, it is the borrower's responsibility to select one of those agencies and shall engage in an interview with a counselor associated with that agency. The borrower must supply all necessary documents, as set forth by the counselor, at least 72 hours before the scheduled interview. The selection must take place and the appointment for the interview must be set within 10 business days, although the interview may take place beyond the 10 business day period. Within 7 business days after interviewing the borrower, the counselor must submit to the predatory lending database all of the information required under Section 74 and any other information required by the Department by rule. Reasonable and customary costs not to exceed $300 associated with counseling provided under the program shall be paid by the broker or originator and shall not be charged back to, or recovered from, the borrower. The Department shall annually calculate to the nearest dollar an adjusted rate for inflation. A counselor shall not recommend or suggest that a borrower contact any specific mortgage origination company, financial institution, or entity that deals in mortgage finance to obtain a loan, another quote, or for any other reason related to the specific mortgage transaction; however, a counselor may suggest that the borrower seek an opinion or a quote from another mortgage origination company, financial institution, or entity that deals in mortgage finance. A counselor or housing counseling agency that in good faith provides counseling shall not be liable to a broker or originator or borrower for civil damages, except for willful or wanton misconduct on the part of the counselor in providing the counseling.

(e) The broker or originator and the borrower may not take any legally binding action concerning the loan transaction until the later of the following:

(1) the Department issues a determination not to recommend HUD-approved counseling for the borrower in accordance with subsection (c); or

(2) the Department issues a determination that HUD-approved counseling is recommended for the borrower and the counselor submits all required information to the database in accordance with subsection (d).

(f) Within 10 business days after closing, the title insurance company or closing agent must submit to the predatory lending database all of the information required under Section 76 and any other information required by the Department by rule.

(g) The title insurance company or closing agent shall attach to the mortgage a certificate of compliance with the requirements of this Article, as generated by the database. If the transaction is exempt, the title insurance company or closing agent shall attach to the mortgage a certificate of

exemption, as generated by the database. Each certificate of compliance or certificate of exemption must contain, at a minimum, one of the borrower's names on the mortgage loan and the property index number for the subject property. If the title insurance company or closing agent fails to attach the certificate of compliance or exemption, whichever is required, then the mortgage is not recordable. In addition, if any lis pendens for a residential mortgage foreclosure is recorded on the property within the program area, a certificate of service must be simultaneously recorded that affirms that a copy of the lis pendens was filed with the Department. A lis pendens filed after July 1, 2016 shall be filed with the Department electronically. If the certificate of service is not recorded, then the lis pendens pertaining to the residential mortgage foreclosure in question is not recordable and is of no force and effect.

(h) All information provided to the predatory lending database under the program is confidential and is not subject to disclosure under the Freedom of Information Act, except as otherwise provided in this Article. Information or documents obtained by employees of the Department in the course of maintaining and administering the predatory lending database are deemed confidential. Employees are prohibited from making disclosure of such confidential information or documents. Any request for production of information from the predatory lending database, whether by subpoena, notice, or any other source, shall be referred to the Department of Financial and Professional Regulation. Any borrower may authorize in writing the release of database information. The Department may use the information in the database without the consent of the borrower: (i) for the purposes of administering and enforcing the program; (ii) to provide relevant information to a counselor providing counseling to a borrower under the program; or (iii) to the appropriate law enforcement agency or the applicable administrative agency if the database information demonstrates criminal, fraudulent, or otherwise illegal activity.

(i) Nothing in this Article is intended to prevent a borrower from making his or her own decision as to whether to proceed with a transaction.

(j) Any person who violates any provision of this Article commits an unlawful practice within the meaning of the Consumer Fraud and Deceptive Business Practices Act.

(j-1) A violation of any provision of this Article by a mortgage banking licensee or licensed mortgage loan originator shall constitute a violation of the Residential Mortgage License Act of 1987.

(j-2) A violation of any provision of this Article by a title insurance company, title agent, or escrow agent shall constitute a violation of the Title Insurance Act.

(j-3) A violation of any provision of this Article by a housing counselor shall be referred to the Department of Housing and Urban Development.

(k) During the existence of the program, the Department shall submit semi-annual reports to the Governor and to the General Assembly by May 1 and November 1 of each year detailing its findings regarding the program. The report shall include, by county, at least the following information for each reporting period:

(1) the number of loans registered with the program;

(2) the number of borrowers receiving counseling;

(3) the number of loans closed;

(4) the number of loans requiring counseling for each of the standards set forth in Section 73;

(5) the number of loans requiring counseling where the mortgage originator changed the loan terms subsequent to counseling;

(6) the number of licensed mortgage brokers and loan originators entering information into the database;

(7) the number of investigations based on information obtained from the database, including the number of licensees fined, the number of licenses suspended, and the number of licenses revoked;

(8) a summary of the types of non-traditional mortgage products being offered; and

(9) a summary of how the Department is actively utilizing the program to combat mortgage fraud.

(Source: P.A. 99-660, eff. 7-28-16; 100-509, eff. 9-15-17.)

(765 ILCS 77/72)

Sec. 72. Originator; required information. As part of the predatory lending database program, the broker or originator must submit all of the following information for inclusion in the predatory lending database for each loan for which the originator takes an application:

(1) The borrower's name, address, social security number or taxpayer identification number, date of birth, and income and expense information, including total monthly consumer debt, contained in the mortgage application.

(2) The address and a description of the collateral and information about the loan or loans being applied for and the loan terms, including the amount of the loan, the rate and whether the rate is fixed or adjustable, amortization or loan period terms, and any other material terms.

(3) The borrower's credit score at the time of application.

(4) Information about the originator and the company the originator works for, including the originator's license number and address, fees being charged, whether the fees are being charged as points up front, the yield spread premium payable outside closing, and other charges made or remuneration required by the broker or originator or its affiliates or the broker's or originator's employer or its affiliates for the mortgage loans.

(5) (Blank).

(6) All information indicated in connection with the TILA-RESPA Integrated Loan Estimate Disclosure or on the Good Faith Estimate and Truth in Lending statement disclosures given to the borrower by the broker or originator.

(7) Annual real estate taxes for the property, together with any assessments payable in connection with the property to be secured by the collateral and the proposed monthly principal and interest charge of all loans to be taken by the borrower and secured by the property of the borrower.

(8) Information concerning how the broker or originator obtained the client and the name of its referral source, if any.

(9) Information concerning the notices provided by the broker or originator to the borrower as required by law and the date those notices were given.

(10) Information concerning whether a sale and leaseback is contemplated and the names of the lessor and lessee, seller, and purchaser.

(11) Any and all financing by the borrower for the subject property within 12 months prior to the date of application.

(12) Loan information, including interest rate, term, purchase price, down payment, and closing costs.

(13) Whether the buyer is a first-time homebuyer or refinancing a primary residence.

(14) Whether the loan permits interest only payments.

(15) Whether the loan may result in negative amortization.

(16) Whether the total points and fees payable by the borrowers at or before closing will exceed 5%.

(17) Whether the loan includes a prepayment penalty, and, if so, the terms of the penalty.

(18) Whether the loan is an ARM.

All information entered into the predatory lending database must be true and correct to the best of the originator's knowledge. The originator shall, prior to closing, correct, update, or amend the data as necessary. If any corrections become necessary after the file has been accessed by the closing agent or housing counselor, a new file must be entered.

(Source: P.A. 100-509, eff. 9-15-17.)

(765 ILCS 77/73)

Sec. 73. Standards for counseling. A borrower or borrowers subject to this Article shall be recommended for counseling if, after reviewing the information in the predatory lending database submitted under Section 72, the Department finds the borrower or borrowers are all first-time homebuyers or refinancing a primary residence and the loan is a mortgage that includes one or more of the following:

(1) the loan permits interest only payments;

(2) the loan may result in negative amortization;

(3) the total points and fees payable by the borrower at or before closing will exceed 5%;

(4) the loan includes a prepayment penalty; or

(5) the loan is an ARM.

(Source: P.A. 95-691, eff. 6-1-08.)

(765 ILCS 77/74)

Sec. 74. Counselor; required information. As part of the predatory lending database program, a counselor must submit all of the following information for inclusion in the predatory lending database:

(1) The information called for in items (1), (6), (9), (11), (12), (13), (14), (15), (16), (17), and (18) of Section 72.

(2) Any information from the borrower that confirms or contradicts the information called for under item (1) of this Section.

(3) The name of the counselor and address of the HUD-approved housing counseling agency that employs the counselor.

(4) Information pertaining to the borrower's monthly expenses that assists the counselor in determining whether the borrower can afford the loans or loans for which the borrower is applying.

(5) A list of the disclosures furnished to the borrower, as seen and reviewed by the counselor, and a comparison of that list to all disclosures required by law.

(6) Whether the borrower provided tax returns to the broker or originator or to the counselor, and, if so, who prepared the tax returns.

(7) A statement of the recommendations of the counselor that indicates the counselor's response to each of the following statements:

(A) The loan should not be approved due to indicia of fraud.

(B) The loan should be approved; no material problems noted.

(C) The borrower cannot afford the loan.

(D) The borrower does not understand the transaction.

(E) The borrower does not understand the costs associated with the transaction.

(F) The borrower's monthly income and expenses have been reviewed and disclosed.

(G) The rate of the loan is above market rate.

(H) The borrower should seek a competitive bid from another broker or originator.

(I) There are discrepancies between the borrower's verbal understanding and the originator's completed form.

(J) The borrower is precipitously close to not being able to afford the loan.

(K) The borrower understands the true cost of debt consolidation and the need for credit card discipline.

(L) The information that the borrower provided the originator has been amended by the originator.

(Source: P.A. 97-813, eff. 7-13-12; 98-1081, eff. 1-1-15.)

(765 ILCS 77/76)

Sec. 76. Title insurance company or closing agent; required information. As part of the predatory lending database program, a title insurance company or closing agent must submit all of the following information for inclusion in the predatory lending database:

(1) The borrower's name, address, social security number or taxpayer identification number, date of birth, and income and expense information contained in the mortgage application.

(2) The address, permanent index number, and a description of the collateral and information about the loan or loans being applied for and the loan terms, including the amount of the loan, the rate and whether the rate is fixed or adjustable, amortization or loan period terms, and any other material terms.

(3) Annual real estate taxes for the property, together with any assessments payable in connection with the property to be secured by the collateral and the proposed monthly principal and interest charge of all loans to be taken by the borrower and secured by the property of the borrower as well as any required escrows and the amounts paid monthly for those escrows.

(4) All itemizations and descriptions set forth in or in connection with the TILA-RESPA Integrated Closing Disclosure or RESPA settlement statement, including items to be disbursed, payable outside closing "POC" items noted on the statement, and a list of payees and the amounts of their checks.

(5) The name and license number of the title insurance company or closing agent together with the name of the agent actually conducting the closing.

(6) The names and addresses of all originators, brokers, appraisers, sales persons, attorneys, and surveyors that are present at the closing.

(7) The date of closing, a detailed list of all notices provided to the borrower at closing and the date of those notices, and all information indicated on or in connection with the TILA-RESPA Integrated Loan Estimate Disclosure or the Truth in Lending statement and Good Faith Estimate disclosures.

(Source: P.A. 100-509, eff. 9-15-17.)

(765 ILCS 77/78)

Sec. 78. Exemption. Borrowers applying for reverse mortgage financing of residential real estate including under programs regulated by the Federal Housing Administration (FHA) that require HUD-approved counseling are exempt from the program and may submit a HUD counseling certificate to comply with the program. A certificate of exemption is required for recording.

Mortgages secured by non-owner occupied property, commercial property, residential property consisting of more than 4 units, and government property are exempt but require a certificate of exemption for recording.

Mortgages originated by an exempt person or entity are exempt but require a certificate of exemption for recording.

(Source: P.A. 98-463, eff. 8-16-13; 98-1081, eff. 1-1-15.)

(765 ILCS 77/80)

Sec. 80. Predatory Lending Database Program Fund. The Predatory Lending Database Program Fund is created as a special fund in the State treasury. Subject to appropriation, moneys in the Fund shall be appropriated to the Illinois Housing Development Authority for the purpose of making grants for HUD-approved counseling agencies participating in the Predatory Lending Database Program to assist with implementation and development of the Predatory Lending Database Program.

(Source: P.A. 98-1081, eff. 1-1-15.)

Erica Crohn Minchella

- Practicing over 35 years
- President and Founder of Assn of Foreclosure Defense Attorneys
- Board Member of Illinois RE Attorneys Association
- Member and former chair of ISBA RE Law Section Council
- Drafting Committee for the 7.0 Multi Board Contract
- Contributor to Chicago Daily Law Bulletin on RE issues

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Resources

Resources Specific to this Course

In addition, please see the resources cited within the material.

Resources for the Legal Professional

ABA Center for Professional Responsibility - www.abanet.org/cpr

Chicago Bar Association - www.chicagobar.org

Commission on Professionalism - www.2civility.org

Judicial Inquiry Board - http://www.illinois.gov/jib

Illinois Board of Admissions to the Bar - www.ilbaradmissions.org

Illinois Department of Financial and Professional Regulation - www.idfpr.com/default.asp

Illinois Lawyers' Assistance Program, Inc - www.illinoislap.org

Illinois State Bar Association - www.isba.org

Illinois Supreme Court - www.state.il.us/court

Lawyers Trust Fund of Illinois - www.ltf.org

MCLE Program - www.mcleboard.org