MAINSTREET ORGANIZATION OF REALTORS®

Case Law Update 2025

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RESIDENTIAL REAL PROPERTY DISCLOSURE ACT; MISREPRESENTATION; MULTIPLE ATTEMPTS AT REPAIR; METHOD OF CALCULATING DAMAGES, PREJUDGMENT INTEREST AND AWARD OF ATTORNEY'S FEES

The case of ***Poundstone vs. Cook*, 202 IL App (3rd) 240322 (March 5, 2025)** provides an important lesson to add to the body of case decisions under the Residential Real Property Disclosure Act, found at 765 ILCS 77/1 *et seq*. The facts of the case help us to interpret the provision in the statute that a seller truthfully disclose known defects. The case also discusses a buyer's duty to investigate and the effect of as "As-Is" provision in a contract. Finally, we are reminded that judgments accrue interest at 9%, including on the amount of attorney's fees recoverable by a prevailing party, and when added together, the amount recoverable is significant.

Plaintiff bought a home in Ottawa, Illinois in February 2016 from the defendant for $425,000. The defendant's statutorily required disclosure indicated that seller had lived in the home for the prior twelve months and was unaware of "flooding or recurring leakage problems in the crawlspace or basement"; "material defects in the basement or foundation"; "leaks or material defects in the roof, ceilings or chimney"; and 'material defects in the walls, windows, doors or floors." Buyer did not conduct a home inspection before closing and taking possession.

Buyer sued for violating the Disclosure Act and common-law fraud. He claimed in his complaint that after a heavy rain in April 2016 water entered the basement bedrooms and interior of the house. He then found watermarks on the framing and drywall in the basement, mold in the wall framing behind the basement drywall, watermarks on the deck boards under a kitchen window, rotted deck boards, water entering the house from behind flashing, and other structural damage.

Buyer's contractor determined that some of the boards and joists on the deck had recently been replaced, and found multiple attempts to repair prior water damage and boards removed, apparently to look for damage. Buyer argued that, based on the extent of the leaks and scope of the damage, the affected areas had suffered damage for some time and that seller had actual knowledge of it. At trial, after the contractor testified, seller testified that he had made many repairs himself (he essentially built the house by himself), including the drywall, which he claimed was damaged when he fell from a treadmill. He claimed he had no knowledge of water intrusion. The trial judge did not believe seller, and found that seller knew or should have known of water damage, and that merely replacing boards did not solve the water intrusion problem. Had seller patched the drywall that was damaged when he allegedly fell into it, he would have observed the water damage and mold growth behind the wall, but he still made no effort to determine the source of the water. Therefore, it was unreasonable for seller to claim that the repairs he claimed to make resolved the water issue such that he was relieved of the obligation to disclose the damage.

Nor can seller claim that buyer was contributorily negligent when the damage could not have been observed because it was behind walls or below ground. The facts were disputed as to the "As-Is" nature of the transaction, but an "As-Is" sale does not relieve a seller from the obligations of disclosure of known defects. The trial judge awarded $104,000 to buyer for damages plus ~ $34,500 in attorney's fees.

The appellate court, in reviewing the evidence, affirmed the trial judge's ruling on appeal. They deferred to the trial judge on the determination of the credibility of the parties, but also noted that, despite the disclosure to the contrary, seller testified that he had not resided in the home during the twelve months prior to the signing of the contract. They determined that the water damage was due to ongoing leakage issues, and not to flooding, and that seller's "hands-on" approach to the construction of the house "uniquely sets his knowledge of the structure apparat from that of a typical homeowner."

Buyer's testimony about cash payments to his contractor, without receipts, was sufficient to support the damages award, which the law does not require with absolute certainty.

Interest on judgments accrues at the rate of 9% per year. The date for calculating post-judgment interest on the damage award was held to begin in 2020, when the original trial court judgment was entered, and not the date in 2024 when all post-judgment issues, including the attorney fee award, was decided. Interest on the attorney's fee award began to run separately on the date in 2024 when the attorney's fee award was reduced to judgment.

MORTGAGE FORECLOSURE – JOINT TENANCY; SIGNING A MORTGAGE "TO WAIVE HOMESTEAD RIGHTS"; RATIFICATION OF MORTGAGE OBLIGATION; EQUITABLE REMEDIES

The case of ***Thomas vs. U.S. Bank Trust, N.A 2025 IL App (1st) 230439 (February 27, 2025)*** involved a refinance of a loan where the note and mortgage were signed by a husband only. The mortgage contained the name of the husband typed on it, with the name of the wife included in handwriting, with the added language beneath her signature line "solely for the purpose of waiving homestead rights". At the time the loan was refinanced, husband and wife held title as joint tenants. The wife did not sign the note (the promise to repay the loan).\

The husband and wife divorced thereafter in 2015. Their marital settlement agreement provided that he would deed the house to her, and she would be solely responsible for the mortgage, real estate taxes and insurance. She continued to make mortgage payments for 2 years thereafter. In 2018 Wells Fargo, plaintiff's predecessor, filed a foreclosure suit. The wife brought her own suit to quiet title, which was consolidated into the foreclosure action. Her claim was that she received no benefit from the loan and didn't understand what she was signing when she signed the mortgage in the way she did. The lender answered, arguing that she ratified the mortgage by making payments, and received benefit by residing in the home when she continued to live in the property. The wife asked that she be allowed to set off the amount she paid in fees incident to the refinance, if the court found in favor of the mortgage company.

The trial court allowed the foreclosure of the mortgage and denied all relief to the wife.

The appellate court cited authority holding that when only one spouse signs a mortgage without qualification, that spouse is the only mortgagor. Here, where the husband and wife were joint tenants at the time the mortgage was signed by the husband, he could mortgage his interest if that was his intention. The allegation that the wife was a co-borrower was rebutted by the plain language added to the signature space and the fact that the wife did not sign the note. Therefore, the husband was the only borrower.

But was the wife still liable for the loan? The lender argued equitable theories of unjust enrichment, equitable subrogation and equitable lien. The statute of limitations on claims of unjust enrichment is five years, and that time period had elapsed, making the defense of unjust enrichment unavailable to the lender.

The remedy of equitable subrogation is based on the fact that the refinanced loan paid off a prior mortgage loan, and the new lender should "stand in the shoes" of the prior lender to the extent the new loan proceeds repaid the old loan balance. But the lender here asked that the new loan be determined to be enforceable, which is a different remedy. The appellate court found that while the mortgage was not enforceable against the wife, it was enforceable against the husband when he signed it. When he conveyed his interest to the wife at the time of the divorce, the property was encumbered as to his half interest, against which the mortgage remained enforceable, allowing the lender to foreclose on only a one-half interest in the property.

[*Note: no one wants to buy a half interest in real estate at a foreclosure sale, except, possibly, the mortgage lender.*]

INSURABLE INTEREST IN REAL ESTATE POST-FORECLOSURE; FORESEEABLE CREATION OF A "MORAL HAZARD"

In ***Werner v. Auto-Owners Insurance Company*****, Case # 18-cv-3190**, the Seventh Circuit U.S. Court of Appeals affirmed the district court's finding that a homeowner's insurable interest, after a judicial sale but before confirmation of the sale, is limited to the value of the homeowner's temporary right of possession.

William Werner's home in Springfield was in foreclosure proceedings when it burned down in 2017. At the time the home was destroyed, it was insured against damage through Auto-Owners Insurance Company. Werner filed an insurance claim to recover the policy limit on the home plus two additional coverages for other structures and debris removal, seeking a total of $190,000. Upon investigating the claim, Auto-Owners learned the property was recently sold in a judicial sale and denied the claim for the full replacement value of the home.

Following the denial of his claim, Werner filed a diversity case in federal district court, bringing two claims against Auto-Owners: one for breach of his insurance contract, and another for vexatious delay in settling his claim. The court granted summary judgment to Auto-Owners on the vexatious delay claim. It also granted partial summary judgment to Werner on the breach-of-contract claim, finding that his insurable interest in the home was limited to his right to occupy the premises for up to 30 days after the state court's confirmation of the judicial sale. Accordingly, the court awarded Werner $3,966.67—the rental value of his right to occupy the property.

Werner then appealed the district court's decision on the breach of contract claim, objecting to its decision to limit his insurable interest to the value of his temporary right of possession. He contended his insurable interest was the full replacement value of his home when it was destroyed because he retained title since the judicial sale had not been confirmed.

The Seventh Circuit, exercising diversity jurisdiction over claims arising from state law, adhered to the Erie doctrine and applied Illinois law as it believed the Illinois Supreme Court would have. In its review, the court relied on Illinois insurance law and the principles of insurable interest developed in Illinois case law. Two factors were key in reaching its decision: (1) Werner's loss of control over the property, and (2) the foreseeable creation of a moral hazard.

Loss of Control - Regarding the loss of control, the court relied on case law which established that a person has an insurable interest in property when they would benefit from its continued existence and suffer loss from its destruction. In analogous cases, where some change in ownership, control, or physical condition of the property is imminent or underway (*e.g.,* demolition, condemnation, foreclosure), courts have found that insurable interest is evaluated at the moment the loss occurs and hinges on whether the insured person had control of the property.

Here, Werner averred that he maintained control of the property because he was the owner of record when the fire occurred. Furthermore, he sought to diminish the fact that the judicial sale had already occurred at the time of the fire by asserting that since the sale had not yet been confirmed, it was not final or inevitable. Auto-Owners, on the other hand, pointed to a line of cases that indicated when a loss occurs during foreclosure proceedings, **courts have found that an owner only had an insurable interest in the full value of the property when the owner's right of redemption had not expired.**

The court found Werner's argument that he maintained control, lacking, because **even though confirmation of the judicial sale was not certain, the sale still meant that he no longer had a legal path to retain ownership of the property, as his right to redemption had expired**. The court also rejected Werner's arguments that he could have retained control through redemption (as a matter of grace from the lender) or by vacating the foreclosure judgment (due to a showing of fraud or misrepresentation by the lender). To support its position, the court reasoned that both remote possibilities Werner offered that would have allowed him to retain control were meritless and would require the court to indulge in impermissible speculation about future, uncertain events.

The Foreseeability of a Moral Hazard - The court also considered two general policy arguments as support that Illinois courts would not find that Werner had an insurable interest in the full value of the home when it burned down. First, the court referred to case law that explains the purpose of insurance as putting the insured in the same position as if the loss had not occurred. Since Werner had no right to retain the property other than to occupy it until 30 days after confirmation of the judicial sale, the court concluded that finding in his favor would amount to a windfall. In other words, awarding Werner the full limits of his insurance policy would have put him in a much better position than he would have been in had the fire not occurred.

Furthermore, **finding that a debtor is entitled to recovery of the full value of his home after a foreclosure judgment has been rendered and the debtor could not retain title, would create a moral hazard by incentivizing owners with little left to lose to destroy their property**. Thus, considering its role in setting precedents for future cases, the court held (as other courts in Illinois and elsewhere have) that the doctrine of insurable interests is best used to avoid creating such destructive incentives.

CHICAGO RESIDENTIAL LANDLORD AND TENANT ORDINANCE; SECURITY DEPOSIT WAIVED; A RARE "COMMON SENSE" WIN FOR LANDLORDS; LACK OF STANDING; DAMAGES

The case of *__Hundley vs. WPD Management, 2023 IL App (1st) 230075 (November 3, 2023)__* is noteworthy because it resulted in a rare victory for a landlord under the Chicago Residential Landlord and Tenant Ordinance ("Ordinance"). It also provides guidance for landlords in coping with the potential problem areas created by the Ordinance.

Three tenants brought a class-action lawsuit against their landlord, requesting damages under a strict liability theory damages because the landlord did not include a copy of the Chicago security deposit summary along with the lease, as the Ordinance required. The landlord did include with the lease the general summary of the Ordinance published by the City of Chicago, which contained an overview of tenants' rights, but did not include the additional security deposit summary, because no security deposit was required by the lease. The tenants argued that because the RLTO imposes a strict liability standard on landlords if they fail to comply with the ordinance and its security deposit requirements, they were not required to show that they actually suffered any harm because they did not receive the security deposit summary – only that it was required under the Ordinance and the landlord failed to provide it.

For those who are not familiar with the Ordinance (as well as its "cousin", the Cook County Residential Tenant/Landlord Ordinance), the section on security deposits can be dangerous territory. The Ordinance dictates how much a landlord may require to be paid as a deposit, and how long a tenant has to pay it. It requires landlords to provide written receipts with specific information. It requires the deposits to be held in specific types of bank accounts, and the lease must provide the name and address of the financial institution where the money is held. There are regulations on the payment of interest on the deposits. These requirements, and more, are set forth in a summary prepared by the City, plus a separate disclosure of tenants' rights regarding the deposits. A landlord who fails to follow the requirements of the Ordinance, tenants may recover an amount equal to three times the deposit plus attorney's fees for the lawsuit. As a result, attorneys often advise Chicago landlords not to collect security deposits at all.

The appellate court in *Hundley* affirmed the dismissal of the suit by the trial court, stating that the plaintiffs did not have "standing to sue". It was clear to the court that the Ordinance was designed to protect tenants' rights regarding their security deposits, but because they did not pay a security deposit, there was no risk of injury by not providing them with information about their rights. The court distinguished this case from several others (not related to the Ordinance) in which the harm suffered by the plaintiffs was immediate and indistinguishable from the violation itself. Rather, in this case, the court said that fining a landlord who did not take a security deposit for not including the security deposit disclosure would be a "useless act," likening such an interpretation as allowing a "regulation designed as a shield to be used as a sword."

CHICAGO RESIDENTIAL LANDLORD AND TENANT ORDINANCE; ILLINOIS HOUSING DEVEOPMENT AUTHORITY; EVICTION vs. NON-RENEWAL

The case of *Ventus Holdings vs. Raddle, 2025 IL App (1st) 241169 (March 13, 2025)* is noteworthy because it resulted in another rare victory for a landlord under the Chicago Residential Landlord and Tenant ordinance. The case also involved the regulations of the Illinois Housing Development Authority (IHDA). Despite these formidable hurdles, the landlord prevailed.

The tenant remained in possession after his lease terminated and was not renewed. His stated justification for remaining in possession was that the subject property received assistance from the Illinois Housing Development Authority's rental housing support (RHS) program, which provides rental assistance payments to landlords to establish more affordable housing. The program delegates authority to IHDA to administer the program and adopt rules.

The landlord provided to the tenant the requisite 120-day notice of non-renewal of the tenancy, which expired July 30, 2023. The landlord did not inform the tenant of the reason for the non-renewal. Afterwards, tenant offered a rent payment, which the landlord returned to the tenant. The landlord filed eviction proceedings in late August 2023.

The regulations governing the program stated that landlords had the right to evict tenants from units for good cause. The tenant defended the eviction suit by claiming that the landlord did not have good cause.

The court entered an order for eviction, and the tenant appealed.

The appellate court noted the distinction between evictions and non-renewals. There was reference in the regulations that nothing in them was to be construed as changing the law. The regulations also acknowledged that leases would terminate. The court noted that to side with the tenant they would have to find that leases were automatically renewed indefinitely. Instead they rules that the lease had expired by its terms and that the landlord provided the required notice of non-renewal under the ordinance. The provision in the Ordinance allowing the landlord to send a notice of non-renewal was incompatible with the tenant's argument for automatic renewal. The court found that the "good cause' requirement applied to termination of leases prior to the expiration of their terms.

NEW CONSTRUCTION; RISK OF MECHANICS LIEN; PAYMENT TO CONTRACTOR IS NO PROTECTION FROM LIEN CLAIM BY SUBCONTRACTOR

In the case of ***Weather-Tite, Inc v University of St Francis*, 233 Ill 2d 285, 900 NE2d 830,** the facts were that the University of St. Francis (the University) contracted with general contractor Stonitsch Construction, Inc. (the general contractor) for renovation of a residence hall. Several subcontractors were hired by the general contractor, including Weather-Tite, Inc.

(Weather-Tite) and Excel Electric, Inc. (Excel). The general contractor supplied the University with sworn statements requesting payment and listing subcontractors and the amount due each of them; the University then paid general contractor in full in expectation that it would pay the subcontractors their owed amounts. The fifth such payment, however, was applied by the general contractor's bank to an outstanding debt. As a result, the subcontractors did not receive their fifth payment. Several of them served notice and claim for mechanic's liens on the University. Weather-Tite then filed an action to foreclose its lien; the action named Excel, as a mechanic's lien holder, as a defendant. Excel subsequently filed a counterclaim in order to foreclose its own mechanic's lien.

The University filed a motion for summary judgment on the theory that Excel did not have an enforceable lien. Excel filed its own motion for summary judgment, arguing that the lien was valid and enforceable. Because there was no issue of fact, only an issue of law, summary judgment was appropriate. The trial court found in the University's favor. The appellate court reversed that order and instead granted summary judgment to Excel. The University appealed that decision.

The Illinois Supreme Court affirmed the reversal by the appellate court. The question of law presented before the court was whether Excel had a valid mechanic's lien given that the University had provided the general contractor with the necessary money to pay Excel and it failed to do so. The University argued that the Mechanics Lien Act, 779 ILCS 60/1*et seq.*, provides that an owner may rely on the general contractor's sworn statement and pay the general contractors all funds due to both the general and the subcontractors. The court disagreed, however, and instead acceded to Excel's interpretation that the sworn statement is only a notice of subcontractor claims and that it instead creates a duty on the part of the owner to protect the claims of the subcontractor. As such, it was the University's duty to ascertain that Excel would be paid. Therefore, the mechanic's lien on the University for the remaining balance to be paid to Excel was valid, and the court affirmed the appellate court's order of summary judgment for Excel.

Mechanics Lien Risk: If you pay the contractor 20% at signing and 20% when the permits are obtained, a) the contractor has been paid its overhead and profit and does not have much of a financial incentive to complete the project and b) that will likely leave the owner liable to any unpaid subcontractor. *Weather-Tite* further noted per 770 ILCS 60/27 if the owner did not pay or hold back the amount due subcontractors it was an improper payment and to the extent of the improper payment the owner was liable to unpaid subcontractors even where the contractor was paid in full.

Lesson: Don't try this by yourself. Too many people think that legal advice and closing escrow fees are unnecessary expenses. Get competent legal advice and always use a construction escrow with title insurance protection.