

Court Rejects Argument That Home Inspection Form Contract Was Contrary to Public Policy and Unconscionable

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The Illinois Appellate Court for the Fifth District recently considered whether a form home inspection contract should have been invalidated as contrary to public policy and because it was unconscionable and unreasonable. *Jackie Zerjal v. Daech & Bauer Construction, Inc.*, 939 N.E.2d 1067 (5th Dist. 2010). Plaintiff home buyer entered into a contract to have an existing house inspected by defendant home inspector. The buyer signed a two-page, 13-paragraph form contract, which provided only for a visual inspection of the property and preparation of a report on the apparent condition of the readily accessible systems and components of the property existing at the time of inspection. Latent and concealed defects and deficiencies were excluded from the inspection. The inspector assumed no liability for the costs of repairs or replacement arising from unreported defects unless given notice within 72 hours. The inspector also disclaimed any warranties and limited his liability to the \$175 cost of the inspection. Additionally, the contract provided that any legal action was to be brought within two years of the date of the inspection. Only the warranty disclaimer was printed in all capital letters.

The home inspection took place in 2006 and the buyer purchased the house in the same year. More than three years later, the buyer sued, alleging that the inspector should have reasonably known that the foundation and footing were decayed and unstable. The trial court granted the inspector's motion to dismiss based on the running of the two-year limitations period. The buyer appealed, arguing that the whole form contract was contrary to public policy and unconscionable.

The appellate court affirmed, finding that the exculpatory clause did not violate public policy. The court noted that in the recently enacted Illinois Home Inspection License Act (225 ILCS 441/1-1 (West 2008) the legislature did not address the scope of an inspector's liability. Additionally, there was no special relationship of a semi-public nature between a home inspector and a prospective home buyer sufficient to invalidate an exculpatory clause.

The court also found the liquidated damages provision valid because it was clear and explicit and located on the first page of the contract, despite the fact it was not in all capital letters. The buyer was under no compulsion to

sign the contract and the fact that it was on a preprinted form did not render the contract unconscionable. The court refused to follow *Lucier v. Williams*, 366 N.J. Super. 485, 841 A.2d 907 (2004), a New Jersey case based on a consumer protection-oriented Home Inspection Act where a court held otherwise.

As to the two-year limitations period, the appellate court found that the private limitations period was valid and enforceable. It is well-established law that parties to a contract can agree to replace a statute of limitations as long as it is reasonable. The buyer presented no facts to support an argument that the two-year limitation was unreasonable. The inspector had no duty to inform the other party of the contents of the two-page contract of only 13 paragraphs and there were no allegations that the buyer was rushed or forced into signing this contract.

This opinion demonstrates that Illinois courts will uphold form contracts containing exculpatory clauses, liquidated damages provisions and private limitation periods in a consumer setting as not violative of public policy where the contract is short in length and the provisions are readily ascertainable to the consumer.

Practice Note

Professional service providers who are paid a small fee to render a limited service, where the potential liability could be huge because of the possibility of latent defects, should adopt a form contract with similar provisions to those mentioned in this decision. Performing even limited services like this based on a mere handshake almost guarantees a claim or lawsuit down the road. The form contract should be short and sweet, and the key provisions made conspicuous to the reader.

For further information, please contact your regular Hinshaw attorney.

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