

# LEGAL ALERT

July 1999

## BUSINESS & PROPERTY LAW UPDATE

### What is *As Is*?

*By Robert W. Parker, J.D.*

**Y**ou've decided to sell your home or commercial property. Although the property is in good condition, you don't want to inadvertently walk into a lawsuit given these litigious times. So, you instruct your broker that the sale should be listed - *as is*. Have you absolutely covered yourself? Maybe.

The common understanding of an *as is* clause is that the sale is made by the seller without any promises, representations, or warranties. Normally, including such a clause in a sales contract for real property would not create any doubt that the seller is making no warranty regarding the condition of the property. However, the Michigan Court of Appeals has struggled with the meaning of this term for several years. In fact, two separate panels of the Michigan Court of Appeals adopted different definitions of *as is*. The courts appear to have struggled with the notion that sellers could insulate themselves from lawsuits resulting from any conditions of their property

thereby perpetrating frauds upon buyers through their silence regarding those conditions.

As a result of the confusion, the Court of Appeals convened a special, seven-judge panel to resolve the conflict. On July 31, 1998, the panel issued its decision.

Previously, in *Shimmons v Mortgage Corp of America*, the Court determined that an *as is* clause in a purchase agreement did not protect a seller from a hidden defect which was known to the seller but not disclosed to the purchaser. According to the court in *Shimmons*, a seller is obligated to disclose all known defects to a purchaser even if the purchaser had agreed to take the property *as is*. A conflict in the law arose when the holding in the *Shimmons* decision was refuted by another panel of the Court of Appeals in the case of *M&D, Inc v WB McConkey*.

The conflict was resolved when the special panel adopted the ruling of the *M&D, Inc* court last July. The special panel

held that when property is sold *as is*, the purchaser may only maintain an action for fraud if the seller "made a representation or admission that left them [the buyer] with a distinct impression" that the property did not contain a defect. Silence, in and of itself, cannot and does not constitute fraud unless it occurred under circumstances where there was a legal or equitable duty to disclose certain facts.

A legal duty to disclose may arise through a contractual obligation such as a purchase agreement, where the seller makes certain affirmative representations, or in a residential closing, where the seller provides a disclosure statement. An equitable duty to disclose arises when a buyer expresses a *particularized concern* or makes a direct inquiry of the seller which goes unanswered. What is a *particularized concern*? When the buyer says, "I'm concerned about those water stains on the ceiling," his statement is a *particularized concern* which gives rise to an obligation

of the seller to disclose facts related to the stains. Even though the sale is *as is*, the fact that the roof had been leaking for the last ten years must be disclosed in light of the buyer's expressions of concern. In addition, an equitable burden to disclose may arise when there is a direct inquiry by the seller. For example, "Does the roof leak?" is a direct inquiry. The seller in this instance needs to disclose to the buyer that the roof leaks. He or she cannot stand mute or deflect the conversation in another direction. In response to a direct inquiry or *particular concern*, the seller's silence is tantamount to fraud.

With these distinctions, the Michigan Court of Appeals has finally provided both sellers and buyers with some level of protection when property is sold *as is*. Sellers need to respond completely and accurately when particularized concerns are raised. On the other hand, absent a legal or equitable duty, there is no duty to disclose hidden defects in the *as is* sale. Stated another way, if the buyer expresses some concern about a condition or poses a direct question concerning a condition, the seller is obligated to respond completely and truthfully. Absent such inquiry, the seller carries no burden to disclose. In short, common sense applies.

Despite the clarification, we may not have seen the last of this issue. Fraud and misrepresentation claims are not uncommon, whether because of *buyer's remorse* or legitimate concerns. When involved in any real property transaction, you (either as a buyer, a seller, or on behalf of either) should seriously consider having the transaction reviewed by knowledgeable and experienced legal counsel.

*If you would like further information regarding this topic, please contact **Robert W. Parker**, or any member of our Business & Property Law Department listed below.*

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