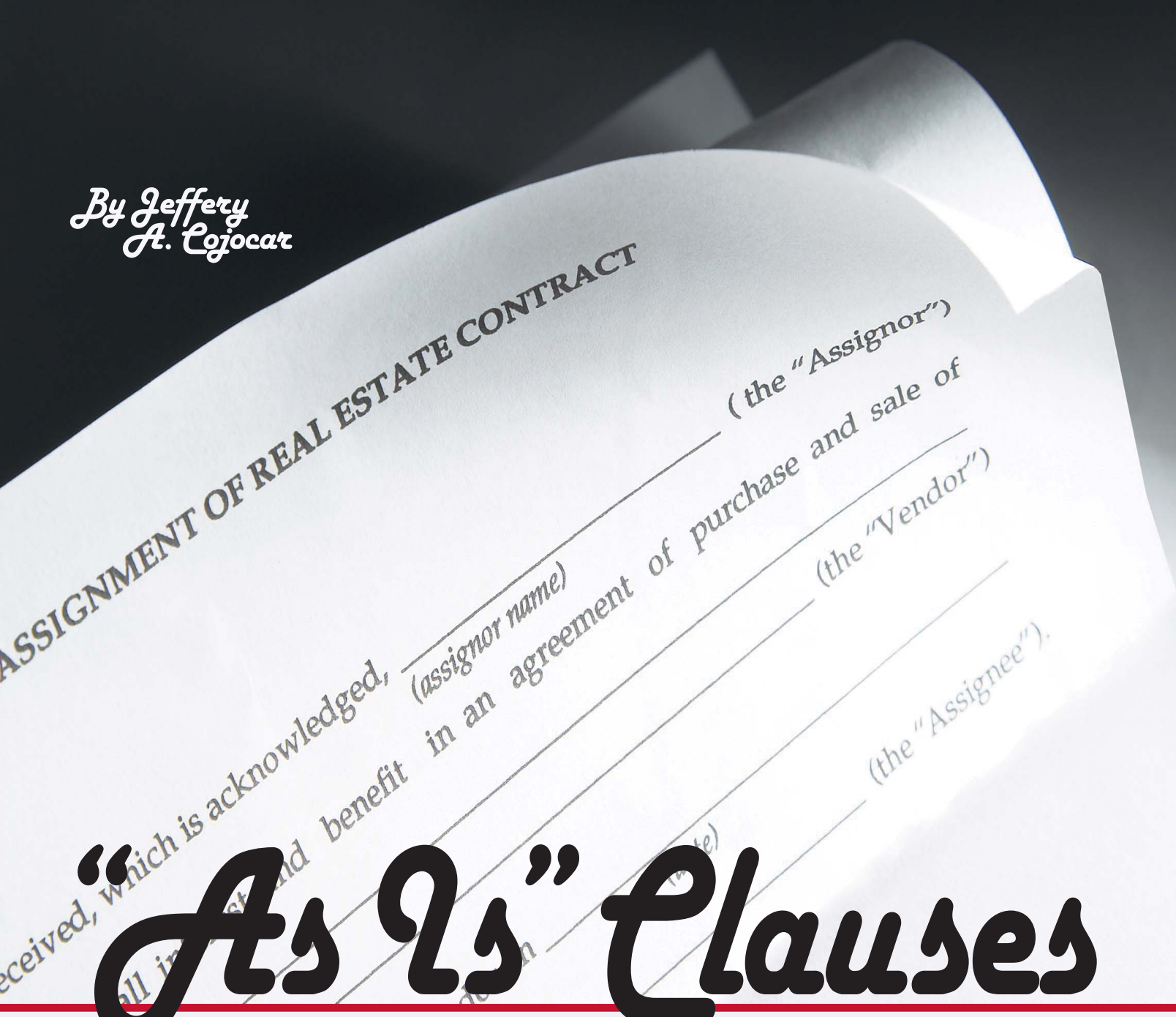

By Jeffery A. Cojocar

"As Is" Clauses

The law behind "as is" clauses in residential real estate transactions

Many of us are routinely contacted by potential litigants, both on the buyer's and seller's side of real estate transactions, with complaints being voiced due to allegations of defects with the residence. From a plaintiff/buyer's perspective, these cases are very trying because they deal with a heightened standard of proof, are routinely quite expensive, and pose various difficulties in compiling evidence against sellers. On the other end, from a defendant/seller's perspective, although the legal presumptions and heightened standards of proof act in his or her favor, the matter can still be quite litigious, involving great expense, and there is no foolproof defense. This article will briefly discuss the general principles of law surrounding the rule of caveat emptor and in interpreting "as is" clauses, and offer practical pointers for both pursuing a plaintiff's claims and emphasizing weaknesses in a plaintiff's claims.

Michigan's Seller Disclosure Act[1] governs transactions involving the sale of residential real estate. Section 565.955 of the Act reads in pertinent part:

> *Sec 5 (1) The transferor or his or her agent is not liable for any error, inaccuracy, or omission in any information delivered pursuant to this act if the error, inaccuracy, or omission was not within the personal knowledge of the transferor, or was based entirely on information provided by public agencies or provided by other persons specified in subsection (3), and ordinary care was exercised in transmitting the information. It is not a violation of this act if the transferor fails to disclose information that could be obtained only through inspection or observation of inaccessible portions of real estate or could be discovered only by a person with expertise in a science or trade beyond the knowledge of the transferor.*
>
> *(2) The delivery of any information required by this act to be disclosed to a prospective transferee by a public agency or other person specified in subsection (3) shall be considered to comply with the requirements of this act and relieves the transferor of any further duty under this act with respect to that item of information, unless the transferor has knowledge of a known defect or condition that contradicts the information provided by the public agency or the person specified in subsection (3).*

Moreover, parties' conduct in these types of transactions is governed by MCL 565.960. That statute reads as follows: "Each disclosure required by this act shall be made in good faith For purposes of this act, 'good faith' means honesty in fact in the conduct of the transaction."

In real estate transactions, in the absence of proof of reliance on allegedly false representations as to age, value, or condition, relief will usually be denied.[2] This rule does not apply where, by the fraud of the party making a representation, the other party is prevented from making inquiries that he or she would otherwise make.[3]

To be entitled to relief under a theory of fraud, plaintiffs must meet the required heightened standard of proof, being "clear, satisfactory and convincing."[4] The lesser standard of proof, by preponderance of the evidence, was formerly applied to fraud cases in Michigan, but is no longer considered sufficient.[5] Moreover, fraud is never to be lightly inferred in any case.[6]

In litigation involving Sellers Disclosure Act claims, plaintiffs typically bring their cause of action under one of three separate and related theories of fraud: fraudulent misrepresentation, innocent misrepresentation, and claims sounded upon silent fraud. A very brief explanation of these separate theories is helpful in understanding and applying the following analysis.

> *Fraudulent misrepresentation consists of the following elements:*
>
> *(1) the defendant made a material misrepresentation; (2) the representation was false; (3) at the time the defendant made the representation, the defendant knew the representation was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage.*[7]

An action for fraudulent misrepresentation must be predicated on a statement relating to an existing or past fact.[8] Mere puffing is not actionable because such statements are expressions of opinion, not fact.[9] With regard to innocent misrepresentation matters,

> *"A claim of innocent misrepresentation is shown if a party detrimentally relies on a false representation in such a manner that the injury suffered by that party inures to the benefit of the party who made the representation."*[10]

There is no need to prove a fraudulent purpose or an intent by the defendant that the misrepresentation be acted on by the plaintiff; however, it must be shown that an unintentionally false representation was made in connection with the making of a contract, and that the injury suffered as a consequence of the misrepresentation inured to the benefit of the party making the misrepresentation.[11]

Under the doctrine of silent fraud, a seller of real property may be held liable to a buyer for failing to disclose material defects in the property or its title.[12] The elements include: 1) a material representation that is false; 2) known by defendant to be false, or made recklessly without knowledge of its truth or falsity; 3) that defendant intended plaintiff to rely upon the representation; 4) that, in fact, plaintiff acted in reliance upon it; and 5) plaintiff thereby suffered injury.[13] In order for the suppression of information to constitute silent fraud, there must be a legal or equitable duty of disclosure.[14] Each of the above misrepresentation claims requires a showing of the plaintiff's "reliance" in order to be actionable.

"As is" clauses in contracts, including the sale of real property, allocate the risk of loss arising from conditions unknown to the parties, so as to bar claims of mutual mistake.[15] These types of clauses in contracts for the sale of real property transfer the risk of loss where there is a defect that reasonably should have been discovered upon inspection but was not. The only time the risk of loss is not transferred is when a vendor makes fraudulent representations before the vendee signs a binding agreement.[16]

A vendor's knowledge of a prior defect is essential to finding a deliberate concealment of a material fact.[17] There can be no recovery where a plaintiff sustains damage through his or her own acts or omissions, and not because of any reliance on the alleged fraudulent representations of the defendant or defendants, which plaintiff did not believe.[18] When a

Fast Facts

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vendor asserts that property he or she is negotiating to sell is of a particular value greatly above its real worth, or exaggerates its good qualities and productiveness, fraud does not take place.[19] Stated another way, statements concerning the value of property involved in a proposed real estate transaction are regarded as mere expressions of opinion and are nonactionable, even if the opinion exceeds the actual value of the land.[20] This is especially true when the party to whom the statements are made has the opportunity and does inspect the property before the exchange.

Further, the Michigan Supreme Court has stated "as is" clauses operate to waive the implied warranties that accompany the sale of property.[21] The *Messerly* court stated, "Since implied warranties protect against latent defects, an 'as is' clause will impose upon the purchaser the assumption of risk of latent defects."[22] In applying this rule of law, the Michigan Court of Appeals has stated that the language in an offer to purchase, which contained a clause providing that the purchasers had personally examined the property and agreed to accept the property in that condition, constituted an agreement to allocate the risk of loss to the purchasers for any mutual mistake as to the condition of the property.[23]

This doctrine has been well-established law at both the state and national levels for decades. As the United States Supreme Court has stated, in the case of a sale of personalty in the absence of an express warranty, if the buyer has an opportunity to inspect the property and the seller is guilty of no fraud, the maxim of caveat emptor applies.[24] This rule of law requires a purchaser to take care of his own interest, and is found to be best adapted to the wants of trade in the business transactions of life. Under Michigan law, the only exception to the rule of caveat emptor as applied to "as is" sales contracts exists for latent defects that are fraudulently concealed.[25] Michigan courts have stated that "as to the sales of land, the ancient doctrine of caveat emptor lingers on, and is still very largely in force."[26] The *Christy* court clearly stated that knowledge of any defects on the part of a purchaser relieves the vendor of any and all duty or liability.

Given this state of the law, the question becomes what type of evidence does a defendant have to look for, or alternatively speaking, what type of evidence can a plaintiff compile and present to support his or her allegations in a real estate transaction. Although not exhaustive, it has been my experience to attempt to locate and/or use the following types of evidence pursuant to a plaintiff's claim, or alternatively, note the lack of such evidence when defending sellers of their prior residence:

- Obviously, you should first look at the Buy and Sell Agreement itself, to determine whether any unusual language exists, or any other disclaimers have been expressly contracted for between the litigants. In this regard, from a defense perspective, give careful consideration to home inspection clauses, direct "as is" clauses, and clauses discussing the invalidity of verbal agreement language.
- A very useful tool for both sides can be the witness statements and testimony of neighbors about the property in question. Typically, these individuals will have had discussions with the defendant/sellers, to either promote or refute their defenses to a filed complaint. This is sound impeachment evidence, if so needed. Furthermore, neighbors themselves may have observed certain maladies of a piece of property, or alternatively, can vouch for the unconcealed condition of a home before and shortly after a sale is consummated.
- In cases involving property where acreage exists and flooding issues may arise, topographical surveys and county records involving schematics discussing catch basins, drains plains, etc., are a most useful resource.
- You should pull records at the local municipality to determine whether certain permits were pulled, and whether certain tasks passed code and inspection by the local municipality building inspector. This evidence, which will be memorialized in documentary form, is extremely helpful and beneficial to either side, depending on what documents are uncovered or do not exist.
- From a defense perspective, you should obviously take a very scrutinous and meticulous deposition of the plaintiff, attempting to corner them into various admissions, acknowledgements of timeframes, and other "loaded" questioning, which can benefit the defense. Extreme detail should be administered during the deposition concerning the weather conditions at the time the sale was consummated; the nature, duration, and specifics of any home inspection that took place; grueling questions concerning the purchase agreement itself and the presumptions inherent in same; and other similar topics that will typically "corner" a plaintiff, such that a motion for summary disposition may eventually be successful.
- The existence of photographs, or lack thereof, allegedly showing maladies of the property, can be of most benefit to a plaintiff if present, or likewise, extremely helpful to the defense if no such photographs exist.
- A Home Inspection Report, as well as the testimony of the inspector, can place a stake into the heart of a plaintiff's claim, or on the other end, hurt the defense by verifying that certain defects may have indeed been concealed or otherwise not disclosed.
- Lastly, any practitioner involved in one of these matters, whether it be from the plaintiff's or defendant's side, must visit the property and see firsthand

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what exactly is in existence for purposes of the case.

This list is actually a double-edged sword—it can promote a plaintiff's claims, or if not in existence, defeat a plaintiff's allegations and allow a defendant to succeed in defense of his or her prior sale. Although not exhaustive, hopefully this brief statement of the law and summary of potential evidence will point you in the right direction when you become involved with contested residential real estate transactions. ◆

Jeffery A. Cojocar is a private practitioner involved in all types of litigation, including real estate, criminal, domestic, general civil, commercial, probate, sports/entertainment, employment, business, contract, and tenancy matters. He has been a member of the State Bar of Michigan since 1996, and has run his own multi-purpose law firm since 1998. Jeffery also provides ADR services through private facilitative mediations and arbitrations.

Footnotes

1. MCL 565, 951 et seq.
2. *Wyndahm v Morris,* 370 Mich 188 (1963).
3. *Hammer v Martin,* 205 Mich 359 (1919).
4. *Higgins v Lawrence,* 107 Mich App 178 (1981).
5. *Kirk v Vaccaro,* 344 Mich 226 (1955).
6. *Goodrich v Walker,* 314 Mich 456 (1946).
7. *M&D, Inc v WB McConkey,* 231 Mich App 22, 27, 585 NW2d 33 (1998).
8. *Eerdmans v Maki,* 226 Mich App 360, 366; 573 NW2d 329 (1997).
9. *George v Spencer,* 56 Mich App 249, 254; 223 NW2d 736 (1974).
10. *M&D, Inc,* supra at 27.
11. Id. at 28.
12. *McMullen v Joldersma,* 174 Mich App 207, 212; 435 NW2d 428 (1988).
13. Id. at 213.
14. *US Fidelity & Guarantee Co v Black,* 412 Mich 99, 125; 313 NW2d 77 (1981).
15. *Lorenzo v Neil,* 206 Mich App 682 (1994).
16. Id.
17. *Williams v Benson,* 3 Mich App 9 (1966).
18. *Candler v Heigho,* 208 Mich 115 (1919).
19. *Kowalski v Rusin,* 242 Mich 1 (1928).
20. *Sutton v Benjamin,* 231 Mich 153 (1925).
21. *Lenawee County Board of Health v Messerly,* 417 Mich 17 (1982).
22. Id.
23. *Miller v Varilek,* 129 Mich App 703 (1983).
24. *Barnard v Kellogg,* 77 US 383 (1870).
25. Id.
26. *Christy v Glass,* 415 Mich 684 (1981).