

## REPORT FROM COUNSEL

Insights and Developments in the Law

Spring 2008

### Real Estate Roundup

#### Flood Zone Fraud

A jury recently gave a hefty damages award to homeowners who sued a real estate company for falsely representing that the home they were buying was not located in a flood zone. When the rains came after the homeowners had moved in, the front yard, backyard, and a patio were under three feet of water. The house itself was never

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flooded. While this was fortunate, it limited the economic damages that a lawsuit would yield, prompting the homeowners to use an unusual legal theory.

The homeowners successfully argued that the realty company had committed fraud. The use of fraud as a cause of action allowed the homeowners to recover noneconomic damages of the kind not commonly awarded in litigation between the buyers and sellers of real estate. In addition to recovering damages for the difference between what they paid for the property and its real value, the homeowners also received a significant award for mental anguish, and an even larger amount as punitive damages.

The company and, in particular, its manager knew about the flooding problem and kept that fact from the home buyers. There was evidence that others who bought nearby property from the same company had battled flooding and had complained about the flooding to the realty company. Moreover, real estate agents testified that sales contracts with prospective buyers for the very property that was in dispute had fallen through when those

buyers became aware of the potential for flooding.

The failure to disclose continued in the time after the purchase, when the company manager unsuccessfully tried to get the new homeowners to sign a drainage release, which would have absolved the company of liability for any damage from flooding.

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### Careful What You Click

A Texas online purchaser used her daughter-in-law's credit card to order some automobile seat covers and have them delivered to the daughter-in-law in Alabama. When they were delivered, it was discovered that the covers were the wrong color. The daughter-in-law sent them back to the company and reversed the charge on her credit card. The company claimed that it never received the seat covers, and eventually sued the purchaser and the daughter-in-law for breach of contract.

The lawsuit against the customers was reason enough for heartburn, but adding to the problem was the fact that the action was filed in a state court in Indiana, far from either of the defendants' homes. The defendants' attempt to avoid having to defend the suit in

Indiana failed. The "clickwrap" agreement that the customer had accepted with a click of the mouse when she purchased the items included a requirement that any legal proceeding between the purchaser and seller had to be filed in Indiana and governed by Indiana law.

It may be that most customers only skim the language in a clickwrap agreement, if they read it at all, while looking for the "I accept" button. However, the agreement, and everything in it, is no less binding because of that. Both the customer and the owner of the card she used were bound to litigate the dispute in Indiana.

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