
Some Thoughts On Home Inspections

By Harold I. Levine

In real estate transactions, some things never change. Sellers usually feel they've given their houses away, buyers believe they've paid too much, and realtors fear neither side will ever get to the closing table. There is, however, one thing that has been inconsistent in real estate transactions: the quality of the home inspection.

Recent surges in the popularity of home inspections have created an overpopulated inspection industry in which not all inspectors have the training and experience to do a good job. Cost-conscious consumers find out too late that trying to save \$50 to \$100 on an inspection can result in an inadequate review. Unfortunately, this can translate into thousands of dollars in unexpected repairs being discovered after the sale.

Home inspections create a false sense of security. The Buyer, after having had a home inspected, believes the home is in good order and repair. However, since the home inspector's inspection is basically visual, and not invasive, the buyer becomes extremely frustrated when serious structural damage is subsequently discovered. Due to shortages of skilled labor there is anecdotal evidence that much of the current and future damage will be structural. An example is a situation where water is found to have made its way into the room between the walls.

A home inspection is a visual examination of the actual condition of the house, with an accompanying written report. It informs the buyer of problems and repairs, the correction of which the buyer might wish to negotiate with the seller. A home inspection usually costs between \$200-\$350 and takes anywhere from one to three hours to complete. The American Society of Home Inspectors (ASHI) lists ten areas to inspect: structural components, exterior, roofing, plumbing, electrical, heating, central air conditioning, interiors, insulation, and ventilation. Additionally, most home inspectors will include pools and hot tubs or spas in their inspection.¹

A home inspector will not usually alter anything in the house to examine a system.

For example, an inspector will not ordinarily comment on the quality of electrical or plumbing behind walls or under floors. Furthermore, a home inspection is not an appraisal, engineering analysis, code inspection, pest infestation determination, or termite inspection. Buyers must contract separately for those services. Home inspectors will not inspect for environmental problems. However, if specifically contracted, some will conduct a transactional screening for a lender as a way to determine if a Phase I Assessment will be necessary.²

In Illinois, some case law exists that begins to define the role of home inspections in real estate transactions and the extent to which a home inspector is liable for representations or mistakes in a report. The causes of action asserted against home inspectors in these cases include negligence, negligent misrepresentation, and breach of contract. To proceed past summary judgment for all of these causes of action, the courts have required that the buyer has reasonably and actually relied upon a home inspector's statements and had no knowledge of the defect.³ The following cases illustrate these points.

Connor v. Merrill Lynch Realty, Inc., 220 Ill. App. 3d 522, 581 N.E. 2d 196, 163 Ill. Dec. 245 (1st Dist. 1991). In this summary judgment case, the buyers brought actions for negligent misrepresentation and breach of contract against the home inspector (among other parties) because the basement flooded. During the home inspection, the inspector and buyers had a conversation about a water stain on the baseboard in the basement. The parties allege that different things were said about where the water originated. The court found that the inspectors and buyers knew there had been flooding and had relied on the seller's explanation, and affirmed the summary judgment granted in favor of the home inspector on the issue of negligent misrepresentation. The court also affirmed the summary judgment in favor of the inspector on the breach of contract issue because the buyers relied upon the seller's

explanation, and the home inspector had fulfilled the obligation to point out the defect.

Does buyer's use of home inspector insulate seller from liability? (See *Mitchell v. Skubiak*, 248 Ill. App. 3d 1000, 618 N.E.2d 1013, 188 Ill. Dec. 443 (1st Dist. 1993)). This case addressed the issue of whether the purchaser's use of a home inspector insulated the sellers from liability for defects that the inspector did not find. The purchasers brought an action for negligence against the inspection company and actions for fraud, concealment, and nondisclosure against the sellers. Basing its decision upon the *Connor* case, the court held that the negligence action against the home inspector did not preclude an action against the sellers for defects the sellers actively concealed from both the inspector and the purchasers. On the other hand, no action existed against the sellers or the inspector for defects of which the purchasers were actually aware. In this case the Court ruled in favor of the seller and the home inspector because the purchasers were aware of the defects. As a matter of trial strategy, a seller who is sued by a purchaser in a building defect case where the purchaser has retained a home inspector, should consider raising the inspection report as a defense to demonstrate, that by obtaining and relying on the home inspection report, there could not have been detrimental reliance on the seller's representations. As a tactical matter, it is useful to use the report as an exhibit in pleading or when responding to a motion for summary judgment on the issue of detrimental reliance.

Howard v. Druckemiller illustrates the folly of arguing with your client. *Howard v. Druckemiller*, 238 Ill. App. 3d 937, 611 N.E.2d 1, 183 Ill. Dec. 148 (2nd Dist. 1992). Here, the attorney represented to the clients (purchasers) that an inspection by the Veterans' Administration (VA) would be sufficient and an adequate home inspection was unnecessary. After closing, the purchaser found many problems that lowered the value of the home. The VA stated its appraisal did not ensure that the house had no defects, recommended that the buyer

either inspect the property or have a home inspection, and advised that the inspection served only for loan purposes. In reversing the Section 2-615 Motion to Dismiss previously granted in favor of the attorney, the Appellate Court held that the attorney's recommendation to rely upon the VA inspection was given within the attorney-client relationship as advice about the real estate transaction and was the exact type of advice the client hired the attorney to provide.

There is one area where lawyers are regularly lacking in candor. They fail to advise their client that the fine print in many home inspection agreements practically insulates home inspectors from liability. Consider the language from this contract, which is not unusual.

"Should legal action take place the prevailing party shall be reimbursed for the attorney's fees and associated court costs from the other party. I agree to indemnify the inspection company against all third party liabilities arising from the use of the inspection report or other information given during or related to the inspection. The parties agree its employees and agents assume no liability for the cost of repairing or replacing any unreported or reported defects or deficiencies, either current or arising in the future. THE INSPECTION AND THE REPORT ARE NOT INTENDED TO BE USED AS A GUARANTEE OR WARRANTY EXPRESSED OR IMPLIED REGARDING THE ADEQUACY, PERFORMANCE OR CONDITION OF ANY INSPECTED STRUCTURE, ITEM, OR SYSTEM. IT IS NOT AN INSURER OF ANY INSPECTED CONDITIONS. As an acknowledgment of the limitations of this inspection, a limited warranty has been offered to the client.

SHOULD A PROBLEM ARISE, CLIENT AGREES THAT THE TOTAL LIABILITY FOR ERRORS AND OMISSION IN THE INSPECTION AND INSPECTION REPORT IS LIMITED TO THE AMOUNT OF THE FEE PAID FOR THE INSPECTION. CLIENT AND THE INSPECTION COMPANY FURTHER AGREE TO SUBMIT ANY DISPUTES TO ARBITRATION IN ACCORDANCE WITH THE CONSTRUCTION INDUSTRY ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION, EXCEPT FOR THE RULES PERTAINING TO ARBITRATOR SELECTION. The three

arbitrators should have knowledge of the home inspection industry and one arbitrator must be a member of ASHI with at least five years of home inspection experience. Any legal action must be filed within one year of inspection date. THIS CONTRACT IS PRESENTED AT THE TIME OF INSPECTION AND IS NOT NEGOTIABLE."

So the prospective Purchaser is agreeing in writing that:

1. Prevailing Party pays attorneys fees.
2. Purchaser will indemnify the home inspector from third party claims over which they may have no control.
3. Purchaser waives any claim for costs of repair or replacement of unreported or reported defects or deficiencies.
4. Liability is limited to the amount paid for inspection report.
5. Any dispute must be submitted to arbitration on the following conditions.
 - a. Three arbitrators having knowledge of Home Inspection.
 - b. One arbitrator must be a member of ASHI
6. Legal action must be filed in one year.

Now, how's that for a level playing field?

In their never ending quest for vertical integration, some real estate brokers may refer buyers to a captive home inspection service or an entity with whom they deal on a continuing basis. An interesting West Virginia case dealing with negligent referral of a home inspector may give rise to caution in this area.

In *Thomas v. McGinnis*, 195 W. Va. 465, 463 S.E. 2d 922, the following occurred:

The broker informed the purchaser that she would "take care of getting an inspection of the furnace" in the home. There were no other representations. The inspector testified the broker had employed him on other occasions. The inspection consisted solely of listening to the furnace to see if it was running correctly. The furnace turned out to be defective and the buyer sued the broker for negligent referral. In ruling for the purchaser, the court stated:

"Accordingly, we hold that while a real estate broker bears no responsibility to conduct an independent investigation of a latent defect, when such broker volunteers

to secure an inspection of the premises, or some part thereof, by retaining on behalf of the buyer a third party to conduct the inspection, then that real estate broker may be held liable to the buyer for civil damages if the broker in retaining said third party is negligent in the selection and retention of the third party and if such negligence proximately causes harm to the buyer."

Unfortunately, some inspectors front for repair companies and they may tend to exaggerate problems as a way to persuade buyers or sellers to hire their companies to fix the problems.

One interesting issue is: where does a home inspector's report come down on the Moorman issues? (See *Moorman Manufacturing Co. v. National Tank Co.* (1982) 91 Ill.2d 69, 435 N.E.2d 443, 61 Ill.Dec. 746.) In *Stewart v. Thrasher*, 242 Ill. App. 3rd 10, the court held that the provider of a termite inspection could be liable for economic damages stemming from negligent misrepresentation. The court went on to say as follows:

"Plaintiffs' action in the present case is not against the provider of the termite inspection report; rather the action is against the sellers of the property. Unlike the provider of a termite inspection report, the seller of a home is not in the business of providing information. The Thrashers (sellers) were under no statutory duty to file information with a government or municipal authority, nor was information made a matter of public record. Hence, the Stewarts cannot recover from the Thrashers for purely economic loss resulting from alleged negligent misrepresentation."

Whether economic damages can be assessed against the home inspector based on its report is an interesting question. Their services have many of the characteristics of other information gathering activities, which lead to economic damages. On the other hand, the court in *Thrasher* places emphasis on the fact that there is no statutory duty to file the information with a governmental authority or to make a public record. It is a close call.

What if the inspection report prepared for the buyer doesn't conform to the one the seller paid for? In Florida, a standard contract clause clarifies what happens next: If the seller disagrees, he may at his own cost have a second inspection. If the buyer and seller still can't agree, they split the cost of a third inspection. The third inspection's results act as the tie breaker.⁴ In most cases, the buyer and seller eventually come to an agreement and a deal is struck. But in too many instances, buyers use the home inspection to beat up the seller. The president of ASHI states that "too many buyers treat our reports as a repair list."

Once the buyer and the inspector have settled on what the inspection will entail, the buyer must make sure the inspection is conducted, a written report prepared and repair demands submitted to the seller within any deadlines set forth under the contract or by statute. Illinois, for instance, does not set a statutory time period, but it is customary in the Chicago area to have inspections conducted within five days after the seller's acceptance of the contract.⁵

The buyer, or the buyer's attorney or other representative should accompany the inspector. Often home inspectors will point out more defects than they include in their written reports, and problems are often easier to understand when they can be seen.⁶

N.J. recently adopted a comprehensive license ordinance to correct what one commentator described as the existing defects in the New Jersey system; many of which are applicable to Illinois.⁷

As the commentator stated, under current law (N.J.), the home inspector may have been practicing without errors and omissions coverage, undermining the homeowner's ability to collect a final judgment from a culpable inspector. The state legislature's enactment of the licensing act will help to provide even broader protections to the public from the dangers that come with an unregulated home inspection profession.

Furthermore, since a seller may be long gone and outside of the jurisdiction, it may be costly and difficult to prosecute legal claims against the seller. Therefore, in addition to asserting a claim against the homeowner, the New Jersey statute seeks to assert a claim against the home inspector

who failed to observe and report the defect. This is particularly true when the defect is of monumental proportions, such as an undisclosed environmental condition on the property.

The New Jersey Law, P.L. 1997 CH 32 3(2), is an excellent statute to use as a basis of such legislation in Illinois.

The New Jersey Act

The act requires the licensing of all home inspectors after July 6, 1998. It not only requires home inspectors to acquire and maintain a license to do business in New Jersey through a commission specifically created by the act to oversee the profession, but also creates a set of ethical guidelines to be adhered to by all inspectors, and, establishes requirements for errors and omissions insurance, as well as the establishment of training, testing and continuing education requirements. A "home inspection" is defined by the act as "an inspection and written evaluation of the following components of a residential building: heating system, cooling system, plumbing system, electrical system, structural components, foundation, roof, masonry structure, exterior and interior components or any other related residential housing component as determined by the board by regulation." Home Inspection Professional Licensing Act, P.L. 1997, Ch. 323 (2). No person is entitled to "present, call or represent himself as able to provide a home inspection for compensation unless licensed in accordance with [the act]." Section 7. The act establishes two tiers of inspectors: home inspectors and associate home inspectors. It requires that all inspectors have passed ASHI's examination.

The act is intended to provide recognition that an individual has attained a degree of competence in his field, and also provides accountability when things go wrong. Under the new law, inspectors must be licensed by a Home Inspection Advisory Committee of the New Jersey Department of Consumer Affairs, which operates under the supervision of the New Jersey State Board of Professional Engineers and Land Surveyors. The committee will be comprised of five members appointed by the governor, who will establish training requirements, standards of practice and a code of ethics.

During the first year after enactment, even home inspectors who have been in

the business at least three years and performed at least 300 inspections for pay will have to pass the six-hour exam developed by ASHI. All licensed inspectors will be required to carry \$500,000 in liability insurance (per occurrence), with proof of insurance to be filed with the committee. The act provides that all errors and omissions policies submitted to the board must contain a clause to the effect that "cancellation or nonrenewal of the policy shall not be effective unless and until at least 10 days' notice of intention to cancel or nonrenew has been received in writing by the board." Section (16)(b). Associate inspectors, too, must have passed the ASHI examination, and have performed not less than 50 home inspections in the presence of a licensed home inspector, in order to receive a license. Licenses will be issued by the committee for a fee, and for a period of two years. Section (13)(a).

The New Jersey Act would be an excellent starting point for the establishment of such an Act in Illinois. In fact, such legislation has already been proposed. ■

¹. "Home Inspections" ATA Concept, May 1998, reprinted with permission of Attorney's Title Guaranty Fund, Inc.

². Supra, "Home Inspections."

³. Supra, "Home Inspections."

⁴. Lew Sichelman, "Seller May Find Hiring Own Inspector Will Fend Off Trouble," Chicago Tribune. Dec. 10, 2000.

⁵. "Home Inspections Are Essential In Real Estate Transactions," Siobhan Morrissey, ABA Journal, August 2000, Page 76, et seq.

⁶. Supra, Morrissey, ABA Journal, August 2000.

⁷. Inspecting Home Inspectors Tough New Laws AIMS To Protect New Jersey Consumers New Jersey Law Journal, Vol. CLIV No. 1, Index 17, 1998 N.J.L.J. ____.

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