Buyer Beware Revisited: Indiana Supreme Court Clarifies Application of Real Estate Disclosure Statutes

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I. Background

The doctrine of “caveat emptor” or “buyer beware” has a long and distinguished tradition in Indiana law governing real estate transactions. Traditionally, a purchaser of real estate had no right to rely upon representations of the seller as to the condition of the property. In 1993, Indiana enacted the Residential Real Estate Sales Disclosure Act (the “Act”) requiring most sellers of residential real property to complete and provide to the buyer a disclosure form setting forth any known defects in the condition of various aspects of the property being transferred. The Act does not require disclosures for, among others, transfers of properties containing more than four (4) units, transfers pursuant to Court Order (including trustees in bankruptcy, foreclosures and tax deeds), transfers of property acquired through foreclosure or deed-in-lieu of foreclosure, new construction that has not previously been inhabited, and transfers between or among common owners.

The Act required the real estate commission to adopt a specific form and prescribed certain areas to be covered within the mandated disclosures including: the foundation, mechanicals, roof, water and sewer, and other area the commission deems important. The Act also set forth language to be included in the form specifying that a disclosure form is not a warranty and therefore may not be used as a substitute for inspections by the buyer. The Act further provided that a seller was not liable for any omission or inaccuracy contained in the disclosure form if the matter “was not within the actual knowledge” of the property owner. Finally, the Act required the seller to disclose any changes in the property’s condition after the purchase agreement was signed and before closing, and grants buyers two (2) business days after the supplemental disclosures are made to rescind purchase agreements based on the changes.

Despite the language providing that disclosures are not a substitution for an inspection, it is clear the Act reflected a shift in the traditional relationships between buyer and seller. The degree, if any, to which that shift would erode the doctrine of caveat emptor has since been the subject of countless disputes and quite a few published appellate decisions. Not until 2013 did the
Indiana Supreme Court weigh in on the Act, however, when on June 25, 2013 it released the opinion in *Johnson v. Wysocki*.

II. The *Wysocki* case

The dispute in *Wysocki*, as do so many others involving the Act, began with the sale of residential property where, after closing and taking possession, the buyer discovered various defective conditions on the property. The seller of the property located in Lake County, Indiana was a trust, and the trustee completed the disclosure form indicating that there were no defective conditions. The buyers went on to have their own inspection performed, which also failed to disclose any defective conditions in the “readily accessible areas of the building,” specifically excluding “concealed defects and deficiencies ” from the inspection report.

The buyers then closed the transaction and accepted the property in “as-is” condition. Shortly after moving in, however, they found that rainwater leaked into the garage and under a porch. The investigation of that issue revealed structural problems with the porch and roof, and then an electrical issue was discovered with outdoor lighting and the pool system. The total cost to repair the issues was in excess of $13,000 and the buyers sued the seller to recover same. After a bench trial, the trial court found “the issues for which the complaint has been made here existed for some time and should have been obvious to the [sellers] prior to the time that they sold the Property.” The trial court then entered judgment for the buyers and against the sellers for the amount of repairs but denied other damages claimed by the buyers for attorney’s fees and litigation expenses incurred. Both parties appealed the trial court’s findings and the Court of Appeals reversed, holding that judgment should not have been entered absent a showing that the sellers had actual knowledge of the defects.

The Indiana Supreme Court granted transfer and issued the most comprehensive opinion to date regarding the reach and breadth of the Act. After parsing through the various decisions from the Indiana Court of Appeals applying one standard or another, Justice David concluded:

> for those types of residential real estate transactions to which they apply--and for the property features which are addressed within them--we hold that Indiana's Disclosure Statutes abrogated the common law principles originally set forth in *Cagney*. In such transactions, the seller may be liable for fraudulent misrepresentations made on the Disclosure Form when he or she had *actual knowledge* that the representation was false at the time he or she completed the form.

Finding that the trial court applied the incorrect standard when it ruled for the buyers because the seller “should have known” as opposed to the buyers establishing that the seller had “actual knowledge,” the Supreme Court remanded the case to the trial court for further proceedings.
III. Impact/Analysis

Upon remand, it will be the burden of the buyer to prove the seller had actual knowledge of the defects when it signed the Disclosure Statement. Justice Rucker concurred with the majority’s ruling as to interpretation of the Act but dissented in the outcome, finding that although the trial court did not use the “magic words ‘actual knowledge’”, “the record before us is more than sufficient to support the conclusion that the [Sellers] had such knowledge of the various defects prior to the time they sold the property…” xvii

Justice Rucker’s dissent draws attention to an obvious impediment to prevailing on claims of violations of the Act—how do you prove the seller had actual knowledge? The majority specifically “decline[d] to assess whether a finding of actual knowledge can be inferred from the facts and surrounding circumstances as reflected in the record” xviii, but does not provide further guidance on precisely how much circumstantial evidence must exist before “actual knowledge” can be inferred. We know that “should have been obvious” is not enough, so there would appear to require particular facts related to a seller’s knowledge in order to bridge that gap. For example, if a seller obtained an estimate to repair it, or if a neighbor had specifically pointed out the defect to the seller and testimony or evidence could be procured establishing same, such direct evidence of knowledge may be sufficient to meet the lofty “actual knowledge” burden. Absent any direct evidence, however, it would seem a trial court would adopt the majority’s reluctance to infer “actual knowledge,” and proving violations of the Act may indeed be tougher after Wysocki then before.

IV. Common Law Not Impacted for Transactions Outside the Scope of the Act

One crucial part of the Wysocki decision for real estate practitioners is some limiting language that should provide clarity to commercial real estate transactions or those occurring after a foreclosure has been completed. As noted in the course of the decision, courts confronted with cases under the Act are necessarily pitting the Act against the common law “no duty to disclose/no right to rely on disclosures” presumptions. The Supreme Court made clear, however, that “our common law principles [are] undisturbed for transactions falling outside the scope of the [Act].” xix Accordingly, except for the relatively narrow range of transactions (owner-occupied residential real estate) covered by the Act, it appears that caveat emptor remains alive and well in Indiana.

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i Cagney v. Cuson, 77 Ind. 494, 497 (1881).

ii Now codified at I.C. § 32-21-5-1, et seq. (formerly at I.C. § 24-4.6-2-1 et seq.).

iii I.C. § 32-21-5-1(b) contains a complete list of excepted transactions.

I.C. § 32-21-5-9. The Act further requires the form specify that that the representations on the form are those of the seller, and not the agent, and are not intended to be a part of any contract between the buyer and seller. I.C. § 32-21-5-7.

I.C. § 32-21-5-11. This provision also provides that a seller may rely on reports provided by public agencies or persons holding a professional license as to the matter insofar as the owner was not negligent in obtaining that report.


2013 Ind. LEXIS 476.

Id. at *2-4.

Id. at *24, citing the trial court judgment, emphasis added in opinion.

Id. at 5.

Id. at 22-23 (emphasis added).

Id. at 26.

Id. at 26-27.

Id. at 25.

Id. at 23.

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