

# ***Real Estate Agents & Brokers Liability in Illinois***

**(A resource guide for claims handlers)**

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Illinois Courts and the Illinois legislature have taken what was once a very narrow scope of liability by real estate brokers to purchasers and substantially expanded the ability to recover.

The following causes of action have been recognized in Illinois.

1. Common Law Fraud and Intentional Misrepresentation;
2. Negligent Misrepresentation;
3. Breach of Fiduciary Duty of Good Faith;
4. Consumer Fraud and Deceptive Business Practices Act;
5. Illinois Real Estate Brokers and Salesman License Act.

What follows is an outline of the requirements for establishing a cause of action under each of the foregoing theories and how Illinois Courts have responded to each type of claim.

## **I. FRAUD**

### **A. PLAINTIFF MUST PROVE EACH OF THESE REQUISITE ELEMENTS:**

1. A false statement, misrepresentation, or concealment of a material fact;
2. The broker must either know the falsity of the statement, believe it to be false, or make the statement in culpable ignorance of its truth or falsity;
3. The plaintiff must rely on the statement or concealment to his detriment;
4. The statement or concealment must be made for the purpose of inducing the plaintiff's reliance; and
5. The plaintiff's reliance must cause injury or damage.

Each element must be proven by clear and convincing evidence, as opposed to the lesser standard of a preponderance of the evidence that applies to the other theories.

The question of whether a plaintiff has established each of these elements is usually determined by the trier of fact (a jury in a jury trial or a judge in a bench trial).

- B. Generally, Illinois Courts have been unwilling to find a duty on the part of a real estate broker to discover any concealed or latent material defects on a piece of property which the seller has not disclosed prior to sale. However, if the broker knows of a problem, she must tell the prospective buyer. Munjal v. Baird &

Warner, Inc., 485 N.E.2d 855 (2d Dist. 1985). Omissions of a material fact may constitute fraud.

**C. CASES FINDING AGAINST BROKER:**

1. In Riley v. Fair & Co. Realtors, 502 N.E.2d 45 (2d Dist. 1986), the brokers were guilty of fraud by not telling purchasers that the property was susceptible to flooding, a fact of which the brokers had personal knowledge.
2. In Zimmerman v. Northfield Real Estate, 510 N.E.2d 409 (1st Dist. 1987), on a challenge to the sufficiency of the pleadings, the complaint against the brokers for fraud was held to be sufficient where the brokers concealed and made false statements about property size and water problems on a multiple listing sheet. The brokers' silence with respect to a known defect may have constituted fraudulent concealment.
3. In Richmond v. Blair, 488 N.E.2d 563 (1st Dist. 1985), a claim of failure to tell the purchaser of obvious basement water seepage was actionable fraud.
4. In Shaw v. Ortello, 484 N.E.2d 780 (1st Dist. 1985), a broker was guilty of fraud where he had knowledge of structural defects and misrepresented the condition of the property to the purchaser.
5. In Duhl v. Nash Realty, 429 N.E.2d 1267 (1st Dist. 1982), fraud was established when a broker told a purchaser that his current home could be sold quickly for a certain price. The home was not sold quickly and was overpriced. The purchaser bought another home and was stuck with two mortgages.
6. In Salisbury v. Chapman Realty, 465 N.E.2d 127 (3d Dist. 1989), fraud was established where a broker failed to pay off a pre-existing mortgage and then absconded.

**D. CASES FINDING FOR BROKER:**

1. In Fischer v. G & S Builders, 497 N.E.2d 1022 (3d Dist. 1986), a broker represented to the purchasers that a strange odor probably came from a stack of laundry. It turned out to be sewer gas. Plaintiffs failed to establish that defendant knew that its statement was untrue or that plaintiffs relied on the statements when purchasing the property.
2. In Munjal v. Baird & Warner, Inc., 485 N.E.2d 855 (2d Dist. 1985), brokers were sued for fraudulent non-disclosure of flooding problems. The brokers knew of water in the basement, but thought it was from a

defective sump pump. The court found that the brokers had no knowledge of flooding and were not required to investigate further.

## II. **NEGLIGENT MISREPRESENTATION**

### A. **REQUISITE ELEMENTS:**

1. A duty owed by the broker to the purchaser;
2. A breach of that duty by failing to use due care in obtaining and communicating to purchaser information upon which the purchaser reasonably may be expected to rely;
3. The representation must be false;
4. Injury must be a proximate result of the alleged misrepresentation.

Under these claims, the broker may innocently believe her statements are true but still be liable if she could have discovered the falsity of the representation by exercising ordinary care. Additionally, a broker may be liable to a purchaser if the purchaser makes an affirmative inquiry and the broker does verify the accuracy of her response. However, courts have been hesitant to find a duty on the part of a broker to undertake an investigation for hidden, concealed, or latent defects on property. Harkala v. Wildwood Realty, Inc., 558 N.E.2d 195 (1st Dist. 1990); Lyons v. Christ Episcopal Church, 389 N.E.2d 623 (5th Dist. 1979); Flowers v. Era Unique Real Estate, Inc., 227 F. Supp. 2d 998 (N.D. Ill. 2002).

### B. **CASES FINDING AGAINST BROKER:**

1. In Zimmerman, 510 N.E.2d 409, the broker allegedly had information indicating prior flooding and that the lot size was smaller than represented, but failed to disclose either matter to the purchasers.
2. In Richmond, 488 N.E.2d 563, the broker made representations to the purchaser about the condition of a basement without actual knowledge of their truth or falsity.
3. In Capiccioni v. Brennan Naperville, Inc., 791 N.E.2d 553 (2d Dist. 2003), plaintiffs sufficiently alleged that the broker knew that they would rely upon the representations regarding the school district in which the property was located when deciding whether to make the purchase. The misrepresentations regarding the school district constituted negligence and a breach of the broker's duty to properly inform purchasers. The complaint further alleged that the broker failed to verify the accuracy of her representations regarding the applicable school district.

C. **CASES FINDING FOR BROKER:**

1. In Harkala, the court found no duty by brokers to investigate a home for concealed impairment due to termite infestation. No concealment of termite repairs or specific reassurances to the purchasers, by the brokers, was shown.
2. In Lyons, the court found no duty by brokers to check the accuracy of the seller's representation that the property was connected to a city sewer system.

III. **BREACH OF FIDUCIARY DUTY:**

As a general rule, real estate brokers occupy a position of trust *vis a vis* the purchasers with whom they are negotiating. Brokers thus owe a duty to the purchasers to exercise good faith in such dealings, even where there is no agency relationship. The test for a breach of fiduciary duty is basically analogous to that of a negligence claim.

IV. **CONSUMER FRAUD AND DECEPTIVE BUSINESS PRACTICES ACT, 815 ILCS 505/2:**

- A. This Act is intended to provide broader protection to consumers than the common law action of fraud. It has thus recently become the preferred cause of action for broker liability.

However it is not intended to be used as a vehicle for transforming non-deceptive and non-fraudulent statements or omissions into actionable ones. Brokers receive special treatment under the Act in that they must have **actual knowledge** of the false nature of their statements or intentionally omit a material fact in order to be liable.

Under the Act,

1. There is no broker liability for hidden or latent defects, unless she has prior knowledge;
2. There is no duty to investigate for concealed problems;
3. Plaintiffs need not show actual reliance, but rather, may show that the broker intended for her misrepresentations to be relied upon;
4. Plaintiffs need not show diligence in ascertaining the accuracy of misstatements;
5. Attorneys' fees and costs are permitted.

B. **CASES FINDING AGAINST BROKER:**

1. In Beard v. Gress, 413 N.E.2d 448 (4th Dist. 1980) the Court found a private cause of action under the Consumer Fraud Act. Brokers innocently misrepresented the interest rate of a loan secured by a mortgage encumbering realty. The purchaser assumed the mortgage. Now that the Act has been amended to require a broker's knowledge of the falsity of the representation, a different result is likely.
2. In Buzzard v. Bolge, 453 N.E.2d 1129 (2d Dist. 1983), liability was found where brokers made statements which "created a likelihood of confusion or misunderstanding" dealing with the sellers being required to repair defects, Veteran's Administration approval and the need for the purchasers to retain an attorney. This case also preceded the "knowledge" requirement amendment to the Act.
3. In Warren v. LeMay, 491 N.E.2d 464 (5th Dist. 1988) liability was found where the broker failed to give the purchasers page two of a positive termite report, giving them the impression that there was no termite activity.
4. In Zimmerman v. Northfield Real Estate, Inc., 510 N.E.2d 409 (1st Dist. 1987), the court held that a successful common law fraud claim equates to a successful claim under the Act, which gives rise to fees and costs.
5. In Salisbury, 465 N.E.2d 127, the court held that liability under the Act could be imputed to others under a vicarious liability theory.
6. In Stefani v. Baird & Warner, Inc., 510 N.E.2d 65 (1st Dist. 1987), a broker submitted a bid on behalf of purchasers without telling them of another interested buyer. The other buyer outbid the plaintiffs. The broker obtained the listing after the expiration date and earned twice the commission. This violated the Act.
7. In Riley, 502 N.E.2d 45, the failure to disclose to purchasers that the property was in a flood plain violated the Act.
8. In Malooley v. Alice, 621 N.E.2d 265 (3d Dist. 1993), the broker's statements about the property being "maintenance free" pertained to a material fact and induced the purchasers to purchase the property. The broker's statements intended to create reliance.
9. In Washington Courte Condominium Association v. Washington-Golf Corp., 643 N.E.2d 199 (1st Dist. 1994), evidence was presenting supporting that the defendant brokers knew of the water infiltration

problems. The brokers' failure to disclose the water infiltration problems to prospective purchasers was found to violate the Consumer Fraud Act.

10. In Capiccioni, 791 N.E.2d 553, plaintiffs sufficiently pled that the broker in her brochure misrepresented the school district in which the property was located. Plaintiffs also sufficiently alleged that they took reasonable steps to confirm the broker's representations, such as by speaking with the school district's employees. This misrepresentation was found to be material based on the purchasers' allegations that they purchased the home because it was located in a particular school district.

**C. CASES FINDING FOR BROKERS:**

1. In Munjal, 485 N.E.2d 855, the broker believed the property to be free from flood problems at the time of the misrepresentation. On the date before closing, the purchasers and the broker noticed flooding. The broker protected herself by telling the purchasers to contact their attorney.
2. In Fischer, 497 N.E.2d 1022, the broker's incorrect but knowing misrepresentation regarding the source of the odor was not actionable. The broker's offer to take the purchasers back to the property as often as they wanted helped to mitigate against liability.
3. In Harkala, 558 N.E.2d 195, when the sellers took great care to hide termite infestation, the broker had no duty to conduct an investigation.
4. In Sohaey v. Van Cura, 607 N.E.2d 253(2d Dist. 1992), the statements made by the broker about the property with respect to his opinions and future economic prognostications were not actionable under the Act.

**V. REAL ESTATE BROKERS AND SALESMAN LICENSE ACT:**

The court held in Stefani v. Baird & Warner, 510 N.E.2d 65, that no private right of action exists under the Act.

**VI. DISCLOSURES:**

Under Article 4 of the Real Estate License Act, 225 ILCS 455, a broker must disclose to a purchaser all material adverse facts pertaining to the physical condition of the property that are known by the broker and that could not be discovered by a reasonably diligent inspection. Sawyer Realty Group, Inc. v. Jarvis Corp., 89 Ill. 2d 379 (1982).

However, a broker is not liable for relaying to the purchaser information provided by the seller which the broker did not know was false. A broker thus has no duty to independently corroborate a seller's representations unless the broker knows or should know that the representations are false. Zimmerman, 156 Ill. App. 3d 154.

The Residential Real Property Disclosure Act (765 ILCS 77/35) requires the seller of residential real property to disclose in writing to purchasers certain conditions, including but not limited to:

- Any flooding or recurring leakage problem
- Termite infestations
- Boundary disputes
- Unsafe concentrations of radon, lead, or asbestos
- Unsafe conditions in the drinking water
- Any defects in the foundation, roof, ceilings, walls, floors, heating and air conditioning systems, sanitary sewer, plumbing system, and electrical system
- Violations of local, state, or federal laws or regulations relating to the property

It is unclear whether a broker's failure to disclose defects or correct the representations made by the sellers pursuant to this Act is actionable independent of the remedies discussed above. However, the Act by its own terms only places duties of disclosure upon Sellers, which would not include Agents or Brokers under most circumstances.

### **DAMAGES:**

Generally, the proper measure of damages in cases of misrepresentation or concealment is the value that the property would have at the time of sale if there were no defects less the value that the property actually had at the time of sale due to the defects. Basically, the purchaser is entitled to the "benefit of his bargain." Munjaj, 485 N.E.2d 855.

### **CONCLUSION:**

This area of law has stabilized in the past decade after many years of uncertainty as to the true scope of liability. This primer will hopefully serve as a ready source of information for those who investigate and analyze the exposure of real estate brokers and agents when faced with claims of property defects.