

INSURANCE AND REINSURANCE PROPERTY SUBCOMMITTEE

April 2013

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Jay Barry Harris and Eric Rosenberg report on an interesting Pennsylvania case dealing with a claim for alleged psychological damages from the sale of a home where a murder-suicide occurred.

Murder – Suicide Need Not be Disclosed by Sellers of Residential Real Estate

ABOUT THE AUTHORS



Jay Barry Harris is a proud member of the International Association of Defense Counsel. As a named partner at Fineman, Krekstein & Harris, he represents businesses in complex civil litigation matters with a focus on the trucking industry and insurance coverage matters. He can be reached at jharris@finemanlawfirm.com.



Eric Rosenberg is a third year law student at Rutgers Law School. He has been an intern at Fineman Krekstein & Harris for the past two years and will be joining Fineman Krekstein & Harris as a litigation associate in the Fall 2013.

ABOUT THE COMMITTEE

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Sharon D. Stuart
Vice Chair of Newsletters
Christian Small, LLP
(205) 795-6588
sdstuart@csattorneys.com

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On December 26, 2012, an *en banc* panel of the Pennsylvania Superior Court decided *Milliken v. Jacono*, affirming a Delaware County trial court's grant of summary judgment to the seller of a \$610,000 home who had denied any duty to disclose to the buyer, under the Real Estate Seller Disclosure Law ("RESDL") that a murder-suicide occurred on the property. The majority opinion, penned by Judge Ford Elliot, and joined by Judges Musmanno, Donohue, Shogan, Lazarus and Olson, ruled that 68 Pa.C.S.A. § 7102 and 68 Pa.C.S.A. § 7304 of the RESDL do not require the disclosure of "psychological damage to the property." Rather, the statute covers the "actual physical structure of the house, with legal impairments on the property, and with hazardous materials located there." Judge Ford Elliot continued, arguing that this limitation on required disclosures is justified because allowing for the "consideration of possible psychological defects opens a myriad of disclosures that sellers will need to reveal, and starts a descent down a very slippery slope." However, Judge Bender, accompanied by Judges Updyke Mundy and Wecht, dissented, arguing that the majority's opinion "deprives [the plaintiff] of a legal remedy" and "truncates the ability of homeowners across this commonwealth to avoid potentially catastrophic losses in purchasing a home."

Plaintiff Janet S. Milliken originally brought this action for failure to reveal a material defect in a newly purchased home, alleging several consumer protection violations against the sellers and realtor of a property she purchased in a foreclosure auction. Milliken alleged that the murder-suicide that occurred on the property reduced the value of her new home by ten to fifteen percent. The sellers, Kathleen and Joseph Jacono, purchased the home at an auction from the estate of the murder-suicide victims. Before selling the property to Milliken, the defendants, along

with their real estate agents at defendant ReMax Town & Country, sought advice from the Pennsylvania Real Estate Commission and were told that a murder-suicide was not a "material defect" that required disclosure under the RESDL. After the Jacono's signed a listing agreement, ReMax agents sought advice from the Pennsylvania Association of Realtor's legal hotline and were informed that the murder-suicide need not be disclosed to potential buyers. Relying on this advice, ReMax listed the property for sale and closed a deal with the plaintiff in August 2007.

One month later, Milliken learned that a murder-suicide occurred inside of her new home. She filed suit and in August 2010, Delaware County Court of Common Pleas Judge Pagano granted the defendants' summary judgment motion. The plaintiff appealed and was granted a reversal in November 2011 from Judge Bender, who remanded the case for trial. Judge Ford Elliot dissented from Judge Bender's November 2011 opinion, maintaining that the RESDL did not require the sellers to disclose the murder-suicide to Milliken. A divided *en banc* panel reversed this ruling in December 2012, echoing many of the sentiments expressed by Judge Ford Elliot in her November 2011 dissent from Judge Bender's reversal of the trial court.

Specifically, Judge Ford Elliot reiterated her position that the mandatory disclosures required by the RESDL are related exclusively to the physical structure of a property, legal impairments related to the property, or hazardous substances that might exist in the home. Citing the text of the statute, she maintained that Milliken's claim was unfounded because "the legislature did not require disclosure of psychological damage to a property." She also argued that it would be difficult to impose time limitations upon the mandatory disclosure of

“psychological damage” because such damage will “obviously decrease over time as the memory . . . recedes from public knowledge.” Moreover, requiring sellers to reveal this information “may force the seller to sell the house under market value and allow the buyer to realize a windfall when . . . memories have faded.” By contrast, “the passage of time has no similar curative effect on structural damage, legal impairments or hazardous materials.” Judge Ford Elliot also expressed skepticism towards the idea that experts could assign a precise monetary value to quantify the “psychological damage” to the home. She supported this claim by arguing the “psychological effect will vary greatly from person to person,” rendering any valuation of damages too subjective and individualized for adequate determination.

Furthermore, Judge Ford Elliot raised a “slippery slope” argument, stressing that it would difficult to limit the types of crimes that would need to be disclosed if the mandatory disclosure requirements of the RESDL were extended to murder-suicide. She wrote that, “[a] buyer might want to know that a house has been burgled . . . because that might indicate that the neighborhood is dangerous.” Judge Ford Elliot also raised the possibility that such a disclosure requirement might even force homeowners to reveal “crimes that did not occur on the property itself,” such as “shootings in the neighborhood,” or that “a child molester lived in the neighborhood.” She concluded that the sellers and their realtor had no obligation to inform the buyer about the murder suicide. As such, the court affirmed the trial court’s original decision, ruling that Milliken had no claim under the RESDL and rejecting her fraud claim under Pennsylvania’s Unfair Trade Practices and Consumer Protection Law.

Not surprisingly, Judge Bender dissented, restating his view that the court’s decision prevented homeowners from seeking to remedy losses to property value. Bender also argued that the RESDL should be read alongside the Residential Real Estate Transfers Law (“RRETL”), which defines “material defect” more broadly, as a “problem with a residential real property or any portion of it what would have a significant adverse impact on the value of the property or that involves an unreasonable risk to people on the property.” He reasoned that, “a reduction of almost \$100,000 in value can be deemed a ‘significant adverse impact on the value of property’” under the RRETL, mandating “that the cause of the stigma be disclosed.” Yet, Judge Bender failed to receive enough support and Judge Ford Elliot’s opinion prevailed, affirming the trial court’s grant of summary judgment to the sellers.

This decision is significant for several reasons. First, Judge Ford Elliot’s opinion suggests that homebuyers have the burden of ensuring that a property is in sound condition from a “psychological” perspective. The practical fallout of this holding is that potential buyers must scour the media for evidence of criminal activity in and around a potential property.

Second, the court seems to hold that “psychological damages” are too intangible to quantify. Implicit in this finding is a suggestion that homebuyers may not be impacted by “psychological damages,” at least in the same way that owners may be affected by defects to the physical structure of a property. However, this argument is not completely sound because a potential buyer would certainly be wary of purchasing a home that was the site of a murder-suicide. Judge Ford Elliot rests her claim on the fact that “psychological damages” will eventually be forgotten, restoring the value of a property

to its fair market price. Thus, she claimed it would be unfair to force a property owner to disclose damaging information when knowledge of the crime will eventually fade. This argument ignores the reality of home ownership – some buyers may use a property for investment purposes, refurbishing a home and selling it quickly for a profit. Moreover, the memory of a recent crime may be forever recorded on the Internet, allowing potential buyers to see news of a murder many years later. Under those circumstances can it be said that a memory of a crime has truly faded?

Regardless, the lynchpin of Judge Ford Elliot's argument is her reliance on the text of the RESDL and her convincing slippery slope argument. The text of the statute does not mention so-called "psychological damages," providing evidence that the legislature never intended to address the issue. By requiring the disclosure of such damages to a property,

the dissent essentially sought to re-write the statute by incorporating definitions from the RRETL, a separate and distinct law.

The majority was not persuaded by the dissent's position, that the RESDL required disclosure of a murder-suicide. They feared that it would lead to including all other related criminal activity occurring in the house or the neighborhood. The end result would be to open the floodgates to a multitude of related fraud lawsuits relating to a potentially endless number of undisclosed "psychological defects." Instead, it is the buyer's responsibility to learn information that might impact the buyer's "psychic" value of the home.

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