

GRADER'S GUIDE

*** QUESTION NO. 4 ***

SUBJECT: REAL PROPERTY

1. Discuss the likelihood of Jim's success on his claims under Alaska's Disclosures in Residential Real Property Transfers statute. (70 points)

The Alaska Disclosures in Residential Real Property Transfers act requires sellers of residential real property to make a written disclosure to buyers: "Before the transferee of an interest in residential real property makes a written offer, the transferor shall deliver by mail or in person a completed written disclosure statement . . ." AS 34.70.010. The Alaska Real Estate Commission prescribes the form of the disclosure required. See AS 34.70.050.

[**Note:** Applicants are not expected to know the form of the required disclosure statement with any particularity. This paragraph is provided simply for background and because some applicants may know the form.] The current form of the disclosure includes a section entitled "Structural Components." As noted above, the instructions require the seller to:

Circle only those items that have known defects, malfunctions, or have had major repairs performed within the last five years. Also...describe the defect, malfunction, or repair on the Addendum/Amendment(s) To The Disclosure Statement.

State of Alaska, Residential Real Property Transfer Disclosure Statement, at 2 (Rev. 11/02)(available at <http://www.dced.state.ak.us/occ/pub/rec4229.pdf>). The list of bulleted items in the structural components section is lengthy but includes the foundation, exterior walls, and interior walls. See *id.* The section also provides for "Other items not covered above?" and a section for comments. *Id.*

Here, Jim is claiming that Denise violated the disclosure requirement for failing to list the rot problem in the solarium and the foundation problem.

1.1 Solarium.

Jim's claim is that Denise intentionally, or at least negligently, failed to disclose the severe rot problem in the solarium's framing. Denise claims that her notation: "Minor condensation problem in solarium. Vent regularly," is enough to preclude liability on the solarium claim.

Under AS 34.70.030:

A transferor is not liable for a defect or other condition in the real property interest being transferred if the transferor discloses the existence of the defect or condition in the disclosure statement.

The question is, then, whether Denise's notation is enough to notify Jim of the problem under AS 34.70.030. It almost certainly is not enough.

The Alaska Supreme Court has held that "[s]ellers of residential real property must make good faith efforts to disclose defects." *Cole v. Bartels*, 4 P.3d 956, 960 (Alaska 2000); *see also* AS 34.70.060 (requiring good faith in disclosures). It has further noted that the disclosure form "does not indicate that only major defects need to be disclosed." *Id.*

In *Beaux v. Jacob*, the Alaska Supreme Court reviewed a case in which a buyer argued that the seller's disclosure statement was ambiguous. 30 P.3d 90, 94-95 (Alaska 2001). There, the seller's disclosure form noted that "Sump pumps must be maintained and used" to prevent water intrusion in the basement. *Id.* at 94 (emphasis added). The buyer argued that the disclosure was ambiguous because there was only one permanent sump pump installed: the other "sump pump" was a portable pump the seller had used occasionally in a separate area to remove water from a pipe below the basement. *See id.* at 94-95. The Court held that the seller must exercise the care of a "reasonably prudent person" in preparing the disclosure statement so as to avoid ambiguities in informing potential buyers of known defects. *See id.* The Court affirmed the trial court's finding of liability against the seller based on the ambiguity. *See id.*

Here, a court is likely to find that Denise's disclosure was inadequate. First, her disclosure notation did not accurately describe the problem. It may even have been describing a different problem with the solarium (water intrusion and rot from an external source as opposed to condensation from an internal source). In any event, it clearly did not completely describe the problem or the extent of the problem. *See Beaux*, 30 P.3d at 95. To make a full disclosure consistent with her knowledge of the problem, Denise would have had to describe the rot in the framing and that the rot was being caused by water intrusion from the outside of the house.

Moreover, a court is likely to find that Denise's failure to disclose was intentional given that she instructed the contractor to simply cover the problem up and then failed to disclose the problem on the disclosure form.

1.2 Foundation

Jim's claim on the foundation is a much weaker claim. There is no indication that Denise had any actual knowledge of the problem. Under these facts, Jim's claim boils down to: (1) whether Denise acted in a reasonably prudent fashion in filling out the disclosure form relative to the foundation problem; and, (2) whether an innocent misrepresentation is actionable under the Residential Disclosure Act.

A court is likely to hold that Denise fulfilled her responsibilities as to the foundation problem in filling out the disclosure form. There is no requirement that sellers engage engineers to inspect houses prior to filling out the disclosure form, but Denise did so anyway. The engineer's report indicated no problem with the foundation. A court is likely to hold Denise acted prudently with respect to the foundation. *See Amyot v. Luchini*, 932 P.2d 244, 247 (Alaska 1997)(affirming finding of no liability where sellers' engineer did not find foundation problem and defect was not disclosed). (Here, an examinee may even plausibly argue that the evidence presented in the problem does not unequivocally establish that the problem began during Denise's ownership of the home – only that the second engineer determined that the water main leak was slowly causing the foundation to fail.)

The Alaska Supreme Court has held that an innocent misrepresentation is not actionable under the Residential Disclosure Act. *See Amyot*, 932 P.2d at 247 (“[I]t is clear that innocent misrepresentations do not violate the good faith standard [of the Disclosure Act].”).

In short, Jim is unlikely to prevail on his foundation claim.

2. If Jim is successful on his claims, what remedies are available to him under the Alaska Residential Disclosures statutes? [30 points]

If Jim succeeds on his claims (and he is likely to succeed on the rot claim), his remedies under the Residential Disclosure Act are spelled out in AS 34.70.090, which provides:

- (a) A transfer that is subject to this chapter is not invalidated solely because a person fails to comply with this chapter.
- (b) A person who negligently violates this chapter or fails to perform a duty required by this chapter is liable to the transferee for the amount of the actual damages suffered by the transferee as a result of the violation or failure.
- (c) A person who willfully violates this chapter or fails to perform a duty required by this chapter is liable to the transferee

for up to three times the actual damages suffered by the transferee as a result of the violation or failure.

(d) In addition to the damages allowed under (b) or (c) of this section, a court may also award the transferee costs and attorneys fees to the extent allowed under the rules of court.

Notably, even though Jim is likely to succeed on his rot claim, he may not “invalidate[]” or rescind his purchase of the house based on Denise’s violation of the disclosure requirements. *See id.* at § (a). (Note: Jim is likely to have brought other contract, and possibly tort claims, unrelated to the statutory claims discussed here that may provide such a rescission remedy, *see e.g. Nielson v. Benton*, 903 P.2d 1049 (Alaska 1995)(affirming rescission based on contract clause regarding misrepresentation in pre-Residential Disclosure Act case)).

Jim should have a strong argument for recovery of up to three times his actual damages on the solarium rot claim since he is likely to be able to prove that Denise acted willfully in failing to disclose the rot problem in the solarium. *See* AS 34.70.090 (c). In any event, Jim can recover the actual costs of repairing the rot damage. *See id.* § (b). The measure of those actual damages is at issue here.

The problem notes that Jim seeks money damages for the installation of a new seamless glass system to replace the rotted wood framing and existing glass. The court will not measure Jim’s damages by the cost of the new seamless glass system, which is twice as expensive as the traditional system. *See Beaux*, 30 P.3d at 97. As the Alaska Supreme Court has held:

In negligent nondisclosure cases, an appropriate measure of damages is the “cost of putting the property in the condition that would bring it into conformity with the value of the property as it was represented.”

Id. (quoting *Carpenter v. Donohoe*, 388 P.2d 399, 401 (Colo. 1964)).

Here, Denise did not represent that the house had a seamless glass solarium, and Jim did not expect to purchase a house with this feature. Therefore the proper measure of damages on the solarium claim is the cost of a wood framed replacement of the rotted solarium. *See id.* (As noted above, the amount of damages may be tripled if the court finds Denise intentionally misrepresented the condition of the solarium).

Finally, the statute provides for the recovery of attorney fees and costs under the court rules.