



A REPORT TO RELY UPON

By Hunter Emerick

Can a purchaser of real property rely on technical reports concerning the condition of the property, such as wetlands, soils, environmental or pests and dry rot assessments, commissioned by the property seller? Truly, this is a question only an attorney could worry about. Unfortunately, it is a question that every purchaser of real property ought to ask before assuming that technical reports commissioned by the property seller will also protect the purchaser of the property.

Many developers, contractors and prospective homeowners buy real property expecting that any technical reports concerning the condition of the property will be made available to them for consideration in their purchase decision. In fact, many sales agreements require that any such reports in the seller's possession must be turned over to the prospective buyer as part of the buyer's inspection of the property.

Frequently, those sales agreements expressly state that the seller will not make any warranties or representations concerning the nature and condition of the property. The agreements typically require that the buyer conduct its own inspection of the property. The buyer affirms that it is relying only on its own inspection of the property in deciding to purchase the property. When the seller has already completed a technical evaluation of the property, providing copies of the reports to the buyer speeds the due diligence process, reduces the costs of the transaction and allows the transaction to close more quickly.

When technical reports are turned over to the buyer, the opinions concerning the condition of the property are carefully reviewed by the buyer in deciding to purchase the property. Buyers, however, rarely review the report's "boilerplate" to determine whether the author of the report has agreed that the buyer, who didn't commission the report, can rely on the opinions concerning the condition of the property which are stated in the report.

Many technical reports have a section titled "user reliance." Careful technical writers will expressly limit those individuals who may rely on the opinions stated in the report. Typically, reports state that "The opinions and conclusions set forth in this report may be relied upon by only the person who purchased this report from the author. No other person or company may rely on the opinions and conclusions set forth herein, unless expressly authorized by the author".

If a report contains such a limitation, will Oregon courts enforce it and bar a negligence or misrepresentation claim against the author of such report by a purchaser of real property who relied on the report, but did not purchase the report from the author? If a report contained such a limitation, the Oregon courts would likely refuse to hold the author responsible to the property purchaser, even if the property purchaser relied on the report in closing the transaction and the author was negligent in conducting the evaluation of the condition of the property. In some cases, the courts may bar such a claim even if the report does not contain such a restriction.

If the courts refuse to hold the technical writer responsible for his negligence, would the purchaser of property which is found not to be fit for development or habitation have a claim against the seller of the property? In many cases, only if the seller of the property had actual

knowledge of the property's defect. If the property defects were of a technical nature, such as environmental contamination, wetlands, inadequate soils, etc., it is possible that the only person who actually knows or should have known of the defect is the expert hired to conduct the evaluation and issue an opinion concerning the suitability of the property for development or habitation. In such a case, if the property purchaser can not hold the expert responsible for his negligence, the purchaser may be without a remedy, even though the property can not be utilized.