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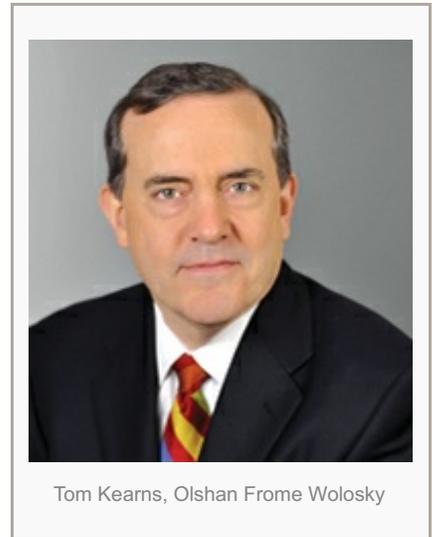
Specific disclaimers in New York real estate deals by Thomas Kearns

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As a young lawyer I learned about a 1959 Court of Appeals opinion in *Dannon Realty v. Harris* which held that a buyer of real estate can't sue a seller for fraud if the contract of sale included an express disclaimer about the matter complained of. The example frequently used to illustrate the issue is a leaky roof. If the contract is silent about the roof but the seller made an oral statement that the roof was in good shape, a buyer might be able to sue for fraud after the closing when the roof does in fact leak and needs to be replaced.

If, however, the contract contains a disclaimer similar to: "Seller makes no representation about the condition of the roof," the buyer can't sue for fraud based on an alleged oral assurance about the roof. This has led to contracts often having a long list of specific disclaimers. The longer the list, the more claims for fraud that are potentially defeated. While these clauses can be intimidating for a buyer, most sophisticated lawyers can easily explain the law.



In a curious episode, New York's attorney general issued a policy memo dated November 16, 2015 stating that the disclaimers violated the Martin Act regulatory regime governing the sale of newly constructed condominiums: "The Martin Act... expressly prohibits... disclaimers of liability..."

Then on April 8, 2016, the attorney general reversed course and withdrew the original memo: "Purchasers are advised that if a sponsor or its representatives make representations... that the purchaser views as material, but which are not set forth in the purchase agreement or offering plan, the purchaser should ensure that such representations... are set forth in a written document, e.g., in an individually negotiated rider to the purchase agreement between the purchaser and the sponsor."

The attorney general was right to withdraw its original position. Sellers of New York real estate are entitled to disclaim specific representations—the disclaimers protect sellers from unwarranted claims made about alleged oral statements. I have no doubt that the existing anti-fraud statutory framework will protect buyers from true fraudsters. In the meantime, buyers should read their purchase contracts including, in the context of the purchase of a newly

constructed condominium, the offering plan, and if there have been oral statements that contradict the terms of the contract or plan, they should insist on a modification of the contract to document the representation.

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