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Illinois Appellate Court Issues Important Decision Regarding Implied Warranty of Habitability

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On Feb. 17, the First District of the Illinois Appellate Court issued an important decision that confirms and clarifies Illinois law regarding the implied warranty of habitability. *Sienna Court Condominium Ass'n v. Champion Aluminum Corp*., 2017 IL App (1st) 143364.

Addressing issues raised in three consolidated appeals, the decision first confirms that the implied warranty of habitability does not extend to design professionals or material suppliers that do not participate in the construction. The decision also confirms that subcontractors remain potentially liable to homeowners under the implied warranty, and clarified that "the insolvency of the builder-vendor is the determining factor."

With respect to design professionals, the decision reiterates the court's reasoning in *Board of Managers of Park Point at Wheeling Condominium Ass'n v. Park Point Wheeling, LLC*, 2015 Il. App. (1st) 123452. In that decision, the court refused to extend the implied warranty of habitability to design professionals because (a) the implied warranty is traditionally applied to those who engage in construction, and (b) architects do not construct structures, they perform design services pursuant to contracts. On similar grounds, *Sienna Court* holds that the implied warranty of habitability also does not extend to material suppliers that do not perform construction work.

The decision then refuses to extend its prior decision in *Minton v. The Richards Group of Chicago*, 116 Ill. App. 3d 852 (1st Dist. 1983), to allow the implied warranty of habitability to be asserted against architects or material suppliers where the builder-vendor is insolvent. In Minton, the court permitted subcontractors to be sued directly under the implied warranty of habitability if the builder-vendor was insolvent. The court reasoned that where "the innocent purchaser has no recourse to the builder-vendor and has sustained loss due to the faulty and latent defect in their new home caused by the subcontractor, the warranty of habitability applies to such subcontractor." *Id*. at 855. But *Sienna Court* rejects the invitation to expand *Minton* to architects and material suppliers that do not perform construction work, finding that insolvency of the builder-seller "does not justify expanding *Minton's* holding to an entirely different category of defendant."

With respect to *Minton* claims against subcontractors, the decision explains that insolvency means that the vendor-builder's liabilities exceed the value of its assets, and that it has stopped paying debts in the ordinary course of business. The decision further confirms that the applicable date for

determining the builder-vendor's solvency is the date on which the complaint is filed, and that that the plaintiff/purchaser bears the burden of establishing that the builder-vendor is insolvent before it can proceed against the subcontractor on such a claim.

Finally, based in large part on the court's prior analysis in *1324 W. Pratt Condominium Ass'n v. Platt Construction Group, Inc.,* 2013 IL App (1st) 130744, the decision holds that insolvency is the "bright line rule" for *Minton* claims, and not whether the plaintiff had "no recourse" against the builder-vendor. Accordingly, the decision holds that potential recovery from insurance policies held by an insolvent vendor-builder does not preclude an implied warranty of habitability claim against subcontractors who participated in the construction of the residence. Similarly, the recovery of proceeds from an insolvent developer's "warranty fund" does not bar the cause of action.

The *Sienna Court Condominium Ass'n v. Champion Aluminum Corp*. decision has not yet been published and remains subject to change.

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