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## Illinois Appellate Court Clarifies That Only “Incurred” Attorney’s Fees Are Recoverable Under The Illinois Real Estate Disclosure Act

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The Illinois Real Estate Disclosure Act requires that sellers of residential property in Illinois complete a statutory disclosure form and provide to any buyer. The form consists primarily of declarative statements about the condition of the property for sale, with which the seller must agree or disagree. For instance, one statement on the form says “I am aware of leaks or material defects in the roof, ceilings, or chimney,” next to which the seller must check a box marked “yes” or “no.” 765 ILCS 77/35.

There are penalties for any seller who knowingly violates the Disclosure Act or discloses information in the form that the seller knows to be false -- usually checking “no” when the seller knows the answer is “yes”. 765 ILCS 77/55. Because a claim under the Disclosure Act is essentially one for fraud, the Illinois Appellate Court has held that the proper standard of proof to establish a violation is the “clear and convincing” standard of proof applicable to fraud claims. *Butler v. Harris*, 2014 IL App (5th) 130163, ¶29. If the purchaser meets this heightened threshold, they may recover their actual damages and court costs. 765 ILCS 77/55.

The Disclosure Act also includes a prevailing party attorney’s fee provision -- *i.e.*, one which can be invoked by a successful plaintiff *or* defendant. Unlike other statutory causes of action that only allow a successful plaintiff to recover fees, the Disclosure Act “does not limit the award of attorney fees to a specific party [so] either plaintiffs or defendants, in appropriate circumstances, may recover fees” thereunder. *Butler*, 2014 IL App (5th) 130163, ¶39 (quoting *Miller v. Bizzell*, 311 Ill. App. 3d 971, 975 (4th Dist. 2000)). In particular, a defendant/seller may recover fees under the Disclosure Act if the court finds that the plaintiff/buyer filed a “meritless claim.” *Id.* (quoting *Miller*, 311 Ill. App. 3d at 974).

Very recently, the Appellate Court of Illinois, First District, clarified that the fees recoverable under the Disclosure Act are only those which the prevailing party actually “incurred” in the action. *Kroot v. Chan*, 2019 IL App (1st) 181392, ¶¶12-13. As noted by the court, the phrase “reasonable attorney fees” in a fee-shifting statute generally means an award calculated based on the prevailing market rate, and is not limited to fees “actually incurred or paid by the plaintiff.” *Id.* ¶11. Under this type of language, a plaintiff can obtain a fee award without proof of what they paid, or were obligated to pay -- even if the plaintiff was never required to pay anything.

But the Disclosure Act is different. It provides specifically that “the court may award reasonable attorney fees *incurred* by the prevailing party.” 765 ILCS 77/55 (emphasis added). The inclusion of the word “incurred” means that the only fees recoverable under the Disclosure Act (by either party) are those that are both reasonable *and* actually incurred -- *i.e.*, fees that the prevailing party paid, is “liable” for, or is “subject to.” *Kroot*, 2019 IL App (1st) 181392, ¶12. Thus, in *Kroot*, the court held that the proffered proof of total hours spent and prevailing rates was insufficient. Instead, the plaintiff had to prove what, if anything, the client was obligated to pay.

Based on *Kroot*, parties in Disclosure Act cases should be prepared to present evidence at trial of the reasonableness of their fees *and* the client’s obligation to pay them. This should include, at a minimum, the engagement letter, proof of any payments made by the client, and any outstanding invoices sent to the client. This will be simple in a case billed hourly. It may be more difficult in a contingency fee case, but proof of the engagement letter and agreement to pay a portion of the award ought to be enough to prove that the client is “subject to” that fee amount. But, if one is lucky enough to have a lawyer as a friend who takes your Disclosure Act case for free, under *Kroot* they will not be entitled to any fee award at all.

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