# EGBL LEGAL REPORT

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## Home seller's disclosures must be complete

by Gary R. Gehlbach

Persons thinking about selling their homes should also be thinking about what they must disclose to potential purchasers. As an Illinois appellate court recently reminded us, a seller's failure to fully disclose a home's material defects can subject the seller to considerable liability.

Since 1994, the Residential Real Property Disclosure Act has required sellers of residences to disclose certain information to potential buyers. The Act includes a disclosure report sellers must fill out, sign and date. The completed report then must be delivered to a prospective buyer before the buyer signs a purchase contract.


The report contains 21 questions about possible material defects with the property and requires the seller to indicate matters of which the seller has actual knowledge. The statute, however, does not require the seller to investigate before completing the form. In other words, the standard is not whether the seller should reasonably know of a material defect but rather whether the seller actually knows of it.

The Act encourages a potential purchaser to have an inspection of the property done, considering that there may be problems of which the seller is unaware.

The Act does not define "material defect." Nor does it specify how much detail a seller must include when disclosing a material defect. An Illinois appellate court, however, recently left no doubt that a seller's disclosure must be full and complete.

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## Inside



## Illinois Personnel Record Review Act imposes obligations on employers

by Stephanie L. Shallenberger*

One of the first signs an employer might be headed for trouble with an employee or former employee is a request for the employee's personnel file. Fortunately (or maybe unfortunately), Illinois law is clear about how an employer must respond to such a request.

The Illinois Personnel Record Review Act requires any employer with more than five employees to permit its employees to inspect personnel documents that are, have been or are intended to be used in determining the employee's qualifications for employment, promotion, transfer, additional compensation, discharge or other disciplinary action. An "employee" under the Act includes a person currently employed, a person subject to recall after layoff, a person on a leave of absence who has a right to return and a former employee who has terminated service within the preceding year.

The employer can require that the employee's request be in writing. The employer also can limit such requests to two in any calendar year and can deny the second request if the interval between the two requests is unreasonably short.

*Stephanie L. Shallenberger, a recent graduate of the Northern Illinois University School of Law, clerked at EGBL last summer.

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# Employers face liability for employees' misuse of credit reports

by Megan G. Heeg

More and more, businesses use credit reports to evaluate whether to extend credit to potential customers. As one Illinois company recently learned, a business utilizing credit reports must have procedures in place to prohibit its employees from using this information for improper purposes. Failure to do so may result in liability under the federal Fair Credit Reporting Act.

The FCRA prohibits persons from using or obtaining a consumer's credit report for other than permissible purposes. Any person who fails to comply with the Act is liable to the consumer for actual damages, attorneys' fees and costs. Willful violations may also result in punitive damages. In addition, a person who knowingly obtains a credit report under false pretenses must be fined, imprisoned for not more than two years or both.

The FCRA does not specifically provide for vicarious liability (liability because of another's wrongful acts), but


in *DelAmora v. Metro Ford Auto Sales*, an Illinois court held that imposing vicarious liability against an employer was "consistent with Congress's intent to protect consumers from improper use of credit reports and to deter statutory violations."

In *DelAmora*, Jesus Roman, a non-supervisory car salesman, had employer authorization to obtain potential customers' credit reports. Without his employer's knowledge, however, Roman used his employer's equipment to obtain the credit report of his brother-in-law, who was in the midst of divorce proceedings with Roman's sister. Upon learning of Roman's actions, the brother-in-law sued Roman's employer for violating the FCRA.

Everyone in the case agreed that Roman obtained the credit report without his employer's knowledge or consent. The employer therefore argued it should not be liable for Roman's misconduct. The court rejected this argument, holding the employer's lack of knowledge was not enough to escape liability.

An employer can be vicariously liable for an employee's willful conduct, the court said, if the employee's violation was "accomplished by an instrumentality, or through conduct associated with the agency status." Because Roman was able to obtain the credit report solely by virtue of his position and the resulting access to his employer's consumer reporting facilities, the employer was vicariously liable for Roman's willful actions. The court also noted that, under these circumstances, "the employer is in the best position to prevent future FCRA violations through employee training and screening programs."

## Disclosure. . .

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In *Hogan v. Adams*, Mr. and Mrs. Adams purchased a home in Springfield in 1993. The home was fitted with two sump pumps. In 1995 the Adamses' basement flooded when one of the sump pumps failed to operate after a tornado. A year or so later the basement flooded again after a heavy rainfall. Later still, when an outside drain became clogged, some water entered the basement.

Five years after moving in, Mr. Adams was transferred out of state. The Adamses therefore hired a real estate agent to sell their home and with the agent's help completed a disclosure report. In the report they disclosed they were aware of flooding problems with the house but they offered as explanation only the 1995 power outage incident.

Less than a month after Donna Hogan purchased the home, the basement flooded twice. Mrs. Hogan eventually sued the Adamses, asserting they had defrauded her and violated the Act by not fully disclosing the several instances of flooding. The trial court found against Mrs. Hogan, ruling that the Adamses had acted in good faith and disclosed enough to put Mrs. Hogan on notice that there was a flooding problem.

The appellate court, however, reversed. Rejecting the "good faith" notion, the court ruled that the test was whether Mr. and Mrs. Adams had violated the Act by failing to disclose a material defect of which they had actual knowledge. Finding the Adamses knew of the flooding in 1996, which they did not disclose, the court held the Adamses failed to comply with the Act. Moreover, the court ruled, the Adamses had not disclosed the full extent of the 1995 flooding.

The Adamses' defense, in part, was that they relied on their real estate agent to complete the report. The appellate court found this reliance misplaced, stating that "the disclosure report itself suggests a seller should consult an attorney before completing the disclosure report." Unfortunately, this rarely happens.

The lesson of this case is clear: Disclose and provide sufficient detail. While the report is relatively simple and seemingly easy to fill out, failure to do so properly and completely can be very costly.

## Personnel records. . .

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The employer must allow the employee to inspect the file within seven working days of the request, unless the employer can show that this deadline reasonably cannot be met. In no event, however, can the deadline be extended more than seven additional working days.

The inspection must be allowed at a location reasonably near the employee's place of employment and during normal working hours, unless a different location or time is more convenient for the employee.

The Act does not allow an employee to remove any record from the file. An employee, however, is entitled to have all or part of the file copied, at the employee's expense. The cost charged to the employee may not exceed the actual cost of duplication.

If the employee disagrees with any information contained in the file, the employer and employee can agree to remove or correct the information. If the employer refuses to remove or correct the information, the employee can submit a written statement explaining the employee's position, which the employer must attach to the disputed portion of the file.

An employer may not gather or keep records of an employee's non-work-related associations, political activities, publications or communications unless those activities occur on the employer's premises or during working hours.

Under the Act, employees can refuse to disclose certain information. This information includes letters of reference, any portion of a test document, materials related to staff planning and operational goals, information about another person that would constitute a "clearly unwarranted" invasion of that person's privacy, records relevant to any pending claim between the employer and the employee and records maintained by the employer to investigate criminal or other harmful conduct by the employee, unless and until the employer takes action based on such information.

The Act also regulates what employers may disclose to persons other than the employee. Without the employee's consent or a court order, an employer may not disclose any disciplinary report or letter of reprimand without first providing written notice to the employee. A federal court interpreting the Act has held that this prohibition also applies to an employer's verbal dissemination of such information. Moreover, the Act prohibits an employer from disclosing any information about a disciplinary action that is more than four years old, unless the employer is complying with a court order.

Penalties for violating the Act include actual damages, payment of the employee's attorney's fees and criminal sanctions. Employers accordingly should be sure to review the Act whenever an employee requests records from his or her personnel file.

*From the pages of*


The first in a series of helpful reminders about how we occasionally butcher the written and spoken word.

by GARY R. GEHLBACH

Perry White's naive ejaculation, "Great Caesar's Ghost!" (he never did deduce the connection between Clark Kent and Superman) would be apt today. Latin, the language of the Caesar, is still with us in such abbreviations as *i.e.*, *e.g.*, *inter alia* and *etc.*

It seems, however, that over a couple thousand years we have strayed from the ancient Romans' meanings for and uses of these terms. Take *i.e.* and *e.g.*, for example. Often interchanged, these abbreviations are not synonymous but have distinct meanings. *I.e.* is Latin for *id est* and is translated "that is." This term is used to provide an explanation or another way of saying something. For example, "The property seller complied with the Residential Real Property Disclosure Act, *i.e.*, she completed the statutory disclosure form and presented it to the prospective buyer."

*E.g.*, on the other hand, is short for the Latin phrase, *exempli gratia*, meaning for the purpose of example or for instance. It is generally used preceding a list of one or more examples of something. For example, "The seller's attorney prepared all necessary documents for the transaction, including, *e.g.*, the statutory disclosure report."

Two other Latin terms that are often confused are *inter alia* and *et al.* or *et alia.* The former literally means among other things, while *et al.* refers to another person or other persons. The critical distinction is the difference between a thing and a person. The Declaration of Independence includes, *inter alia,* the proclamation that our unalienable rights include life, liberty and the pursuit of happiness. This Declaration was signed by John Hancock, Benjamin Franklin, Thomas Jefferson, *et al.*

Sometimes the problem is not in the misuse of a Latin phrase but in its pronunciation. As the king of Siam so emphatically if not redundantly boasted to Anna in Rodgers and Hammerstein's The King and I, *'et cetera, et cetera, et cetera!"* The meaning, of course, is "and so forth." When abbreviated, though, we sometimes reverse the t and the c. It is *etc.*, not *ect.* The c has a soft sound and follows the first syllable, *et.* The king may not have understood that Siam is not the largest country on earth but he knew his Latin. Do we?

# Court rejects sexual harassment claim against brothel

by Douglas E. Lee

Crime sometimes does pay, especially if you can't count the criminals.

That was the message - perhaps unintended - sent by the Seventh Circuit Court of Appeals in its recent decision in *Stinnett v. Iron Works Gym/Executive Health Spa.* In a ruling filled with irony, the Chicago-based federal appeals court rejected a male employee's sexual harassment claim because many of the employer's female employees are prostitutes.

At issue in the case was whether Stinnett, the manager of Iron Works Gym, could pursue a federal sexual harassment action against Kathy Andrews, his immediate supervisor and the sole shareholder of the company that owned the gym. The company argued the case could not proceed because Stinnett could not prove the company employed the 15 persons necessary to trigger the protections of federal law.

The court agreed. While accepting Stinnett's argument that the company's two businesses, the gym and a separate health spa, should be considered as one for the purpose of counting employees, the court said Stinnett had proved only that the gym had employed nine persons. Proving that the spa employed at least six others, however, was an "insurmountable task," the court admitted, because the spa is "a house of prostitution and criminal enterprises rarely keep accurate personnel or payroll records."

Stinnett attempted to satisfy the 15-employee threshold with anecdotal and other eyewitness testimony. The court found this evidence unpersuasive, particularly because the "somewhat sketchy" employment records did not establish whether the "spa attendants" were employees or independent contractors paid directly by the "massage" recipients. As a result, the court (sounding very relieved) said it had no choice but to dismiss Stinnett's claim.

## In Print and At the Podium

**Mr. Lee,** with research help from law clerk Stephanie Shallenberger, prepared seven articles for the new web site of The Freedom Forum First Amendment Center (www.firstamendmentcenter.org). In the articles, which can be found in the site's "Press" topic, **Mr. Lee** explained several freedom of the press issues, including access to courts, reporter's privilege laws and prior restraints . . . **Mrs. Heeg** co-authored an article published in the *Illinois Bar Journal*, a publication of the Illinois State Bar Association. The article outlined the Gramm-Leach-Bliley Act, which is aimed at protecting consumers' non-public personal information, and discussed what practicing attorneys must do to comply with the Act. **Mrs. Heeg** also spoke about the Act at the Illinois Credit Union League's 25th annual attorneys' conference . . . **Mr. Gehlbach** served as a member of a panel of real estate attorneys at the Illinois State Bar Association's annual real estate law seminar for attorneys . . . **Mr. Lee** recently was elected president of the Dixon school board and vice president of the board of the Lee County Special Education Association . . . **Mr. Gehlbach** presented a program on current real estate law to approximately 60 REALTORS® at a meeting of the Whiteside Association of REALTORS® . . . **Mr. Lee** recently spoke to a group of local risk managers about the Family and Medical Leave Act . . . **Mrs. Heeg** authored the "Legal Perspectives" article in the First Quarter 2003 issue of the *LAUTUM News*, a publication of the Illinois Association of Mutual Insurance Companies. The article addressed insurance companies' use of insureds' credit reports as part of the underwriting process.

## Deals and Decisions

**Mr. Lee** successfully represented Sauk Valley Newspapers in its efforts to clarify a juvenile court judge's order prohibiting the media from publishing the name of a juvenile accused of a brutal crime. As clarified after a court hearing, the order permitted the newspaper to publish the name, which it obtained from sources other than the juvenile court . . . **Mr. Lee** and two other attorneys representing clients accused by the Illinois Attorney General of violating the Prevailing Wage Act convinced the court to dismiss the claims . . . In representing a developer, **Mr. Gehlbach** recently completed negotiations with the City of Dixon for approval of a new 47-lot rural subdivision. He is also working with another developer on a larger residential subdivision in the Dixon area and is representing several owners of property on sales to developers . . . **Mr. Lee,** representing an Alabama client being sued in Illinois, obtained a court order dismissing the case on jurisdictional grounds . . . **Mr. Lee** was one of two lawyers representing the Livingston County Landfill in its efforts to expand the facility. The hearing before the Agriculture Committee of the Livingston County Board lasted four and one-half days. The County approved the expansion by a 19-4 vote. . . **Mrs. Heeg** continues to represent both creditors and debtors in various matters in federal bankruptcy court in Rockford and Geneva.