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July 21, 2007

## UFFI clause has outlived its purpose

Virtually every residential real estate sale agreement in Ontario contains a clause concerning urea formaldehyde foam insulation (UFFI). Typically, the clause is a warranty that the seller has never caused the house or condominium unit to be insulated with UFFI and that to the best of the seller's knowledge, the property does not contain UFFI.

A decision of the Nova Scotia Supreme Court in May casts doubt on the necessity of retaining this warranty in agreements of purchase and sale anywhere in Canada today.

Back in September 2002, Dorothy Gesner purchased a property on Maple Ave. in Lunenburg, N.S., from Donna Ernst for \$238,000. The seller had provided a property condition disclosure statement which noted that there was fibreglass insulation in the walls and ceilings. As well, the agreement contained a warranty that there was no UFFI in the house.

A home inspection company viewed the property and prepared a report for the purchaser. It made no mention of UFFI.

Shortly after moving in, Gesner discovered that the chimney area contained urea formaldehyde foam insulation. She retained an engineer to do a study of the house, and after receiving his report, she moved out and sued the seller, the real estate agent and broker, and the home inspector.

She claimed damages of more than \$328,000 to demolish and rebuild the house, plus an additional \$90,000 for aggravated, punitive and general damages.

After an astounding 23 trial days last June and October (much of it relating to other defects in the house), associate chief justice Deborah Smith ruled that Ernst had answered the property condition disclosure statement truthfully, since it was to the best of her knowledge, and she did not misrepresent her knowledge of UFFI to the purchaser. Nevertheless, the judge ruled that Ernst was in breach of the unconditional warranty that there was no UFFI in the house.

Gesner's position at trial was that it was necessary for her to vacate the house because of the presence of UFFI, but no evidence was offered to establish that UFFI can have a negative effect on a person's health.

Justice Smith concluded, "I am not satisfied that the advice that she (Gesner) received (to vacate the house) was sound."

On the UFFI issue, the judge awarded the plaintiff damages of only \$3,000 for the cost of removing the small amount of insulation and nothing for her claims arising from the presence of UFFI.

Ernst was ordered to pay the \$3,000 to Gesner for breach of warranty, but was allowed to recover the same amount from Zdenka Kaderka, who had sold the house to her in 1986 with the same absolute UFFI warranty. Kaderka had been added by Gesner as a third party to the litigation.

Although the home inspector was ordered to pay damages to be calculated at a later date with respect to moisture problems around the roof and chimney, my guess from reading the 75-page decision is that court costs for five lawyers at a 23-day trial will far exceed any damages awarded.

Clearly, cases like this should never reach a courtroom, but should be resolved by mediation or arbitration long before that stage.

The real message from the case is that UFFI is not nearly the problem that real estate agents seem to think it is. In a detailed study published on the website [www.carsondunlop.com](http://www.carsondunlop.com), veteran home inspector Alan Carson of Carson, Dunlop & Associates Ltd., and John Caverly, of Building Inspection Consultants & Associates, conclude that urea formaldehyde foam insulation has not been shown to be a health concern.

"We believe that those who have urea formaldehyde foam insulation in their homes should enjoy their houses, and sleep well at night," the report says. "UFFI is simply not the problem it was once feared to be."

In 1995, a test case against UFFI manufacturers reached the Quebec Court of Appeal after a marathon eight-year trial. In a massive 216,000-word judgment, the court ruled there was no basis for fear of health risks and no justification for removing UFFI.

Perhaps it's time to remove the UFFI clause from real estate purchase agreements.

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