

# Real Property

The newsletter of the Illinois State Bar Association's Section on Real Estate Law

## Real Estate Information Providers – Liability

BY R. KYMN HARP

**AS REAL ESTATE PROFESSIONALS,** we rely on third parties to provide us with most of the information we use to conduct a due diligence investigation of real estate underlying our client's transaction. Land surveys; property inspection reports; termite inspection reports; environmental site assessment reports; etc. What happens if the information is wrong, causing our clients to suffer a loss?

If the party providing the faulty information is a contracting party with our client, a breach of contract claim is, of course, possible – subject to all usual contract defenses and limitations to contract damages. Consequential damages are often expressly excluded in contracts for the purchase, sale, or lease of commercial real estate, making a contract claim for purely economic losses, such as loss of use, loss of income, and lost profits, unavailable.<sup>1</sup>

An alternative may be a claim for negligent misrepresentation. To state a claim for negligent misrepresentation,<sup>2</sup> a plaintiff must allege:

- (1) A false statement of a material fact;
- (2) Carelessness or negligence in ascertaining the truth of the statement by the party making it;
- (3) An intention to induce our client to act;
- (4) Action by our client in reliance on the truth of the statement;
- (5) Damage to our client resulting from such reliance; and
- (6) A duty on the party making the statement to communicate accurate information.

Negligent misrepresentation is a tort. As a general proposition, subject to exception, recovery of purely economic losses in tort actions is barred in Illinois by the so-called

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## Tech Tip

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## Real Estate Information Providers

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### *Moorman Doctrine.*<sup>3</sup>

There are three exceptions to the Moorman Doctrine: (a) torts resulting in personal injury or property damage; (b) fraud; and (c) “where the plaintiff’s damages are proximately caused by a negligent misrepresentation by a defendant in the business of supplying information for the guidance of others in their business transactions.”<sup>4</sup> These information providers are sometimes referred to as “pure information providers” because the information they provide is analytical work rather than a tangible product.

In Illinois, to recover lost income, lost profits, or other purely economic damages based upon negligent misrepresentation, a plaintiff must prove the six elements of a claim for negligent misrepresentation and must prove that the defendant is in the business of supplying information for the guidance of others in their business transactions.<sup>5</sup>

A land surveyor is a pure information provider liable for negligent misrepresentation if the survey includes material errors.<sup>6</sup> The *Rozny*<sup>7</sup> decision was influenced at least in part by the broad and unequivocal language that “this plat of survey carries our absolute guarantee of accuracy. . .” reasoning that reliance on the survey by others is foreseeable by a surveyor, creating a duty to all persons relying on the survey to communicate accurate information. Though it may seldom be the case that a survey today will include the “absolute guarantee of accuracy” language as existed in *Rozny*, all land surveys in Illinois must comply with specified minimum survey requirements established by law,<sup>8</sup> creating a duty to communicate accurate survey information upon which reliance may be placed.

Other examples of pure information providers include: accountants; a bank providing credit information to a potential lender; pre-purchase aircraft inspectors; pre-purchase inventory inspectors; termite inspectors; real estate brokers; and stockbrokers.<sup>9</sup>

In *Fox Associates*,<sup>10</sup> the court additionally listed title insurers as pure information providers, citing *Notaro Homes, Inc. v. Chicago Title Ins. Co.* (citation omitted). Three years later *Notaro* was explicitly overruled in *First Midwest Bank v. Stewart Title Guar. Co.*,<sup>11</sup> with the Illinois Supreme Court concluding that a title insurer is not a pure information provider but rather is an insurer of title, and that a title commitment and title policy constitute tangible title insurance products creating duties only as specified by the written title insurance contract.

When the product is purely information, the recipient receives analytical data and information rather than a tangible product. “In other words, the end product [is] the ideas, not the documents or other objects into which the ideas [are] incorporated.”<sup>12</sup>

One may envision a continuum [of enterprises] with pure information providers at one end and pure tangible goods providers at the other. At the pure information end are accountants and attorneys, insurance brokers, stockbrokers, real estate brokers, termite inspectors, and environmental assessors [environmental site assessment consultants]. At the tangible product end are manufacturers of computers and software, manufacturers of products of any type, and sellers of crop sprayers. Between are the difficult cases, which include life insurance companies (found not to be information providers), banks and financial services providers (found to be information providers), financing inspectors (found to be information providers) and sellers who prepared provenances for paintings it sold (found to be information providers).<sup>13</sup>

The focus must be on whether the defendant is in the business of supplying information as opposed to providing something tangible.<sup>14</sup> The Illinois Supreme Court has considered whether an architect is a pure information provider, and determined that an architect preparing construction plans is not, stating “while it may be the case that an architect does in fact supply information to be used by others, we do not believe that the character of that function should be overstated.”<sup>15</sup>

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### OFFICE

ILLINOIS BAR CENTER  
424 S. SECOND STREET  
SPRINGFIELD, IL 62701  
PHONES: 217-525-1760 OR 800-252-8908  
WWW.ISBA.ORG

### EDITORS

Michael J. Maslanka  
Nicolette L. Sonntag

### COMMUNICATIONS MANAGER

Celeste Niemann  
✉ [cniemann@isba.org](mailto:cniemann@isba.org)

### ART DIRECTOR

Ticara Turley  
✉ [tturley@isba.org](mailto:tturley@isba.org)

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Explaining further, the court held that “*the economic loss rule (i.e., specifically, the third exception to the Moorman doctrine) attempts to define the contours of duty*” and since an architect’s responsibilities are defined by contract, their duty “*should be measured accordingly.*”

Supplying information need not encompass the enterprise’s entire undertaking for the defendant to fall within the information provider exception, but information must be central to the business.<sup>16</sup>

An attorney providing inaccurate information to a client may be guilty of legal malpractice. But an attorney providing a third-party legal opinion rendered to a non-client in a secured finance transaction is a pure information provider with liability based upon a theory of negligent misrepresentation.<sup>17</sup>

Attorneys providing services to title insurance companies otherwise than in an attorney/client capacity may be included in the “difficult cases” falling toward the middle of the continuum described above. The outcome will depend upon the precise

relationship between the attorney and the title insurance company, and the nature of the service performed.

If the attorney undertakes to review record title and make a summary of all title defects, liens and encumbrances, the attorney is acting as a title abstracter and is likely to be a pure information provider with a duty to the title insurance company to provide accurate information and would therefore be liable in tort if the duty is breached.<sup>18</sup>

If an attorney examining a search package provided by the title company for the purpose of preparing a title commitment negligently fails to raise a title defect in Schedule B that was disclosed in the search package, the attorney will not likely be held liable in tort via the pure information provider exception to *Moorman*,<sup>19</sup> but rather the attorney’s liability will be determined by the terms of the contract between the title insurance company and the attorney.

Determining whether a supplier of information is *in the business of supplying information for the guidance of others in*

*their business* requires a “precise, case-specific inquiry.”<sup>20</sup> ■

1. *Moorman Mfg. Co. v. Nat’l Tank Co.*, 91 Ill. 2d 69 (1982).
2. *First Midwest Bank, N.A. v. Stewart Title Guar. Co.*, 218 Ill. 2d 326 (2006).
3. Named after *Moorman*, 91 Ill. at 77, 88-89.
4. *Id.* at 88.
5. *Id.*
6. *Rozny v. Marnul*, 43 Ill. 2d 54, 250 N.E.2d 656 (1969).
7. *Id.*
8. Ill. Admin. Code, Title 68, § 1270.56 – *Minimum Standards of Practice; implementing the Illinois Professional Land Surveyor Act of 1989*, 225 ILCS 330.
9. *Fox Associates, Inc. v. Robert Half Int’l, Inc.*, 334 Ill. App. 3d 887, 891 (2003) (internal citations omitted).
10. *Id.*
11. 218 Ill. 2d 326, 341 (2006).
12. *Tolan and Son, Inc. v. KLLM Architects*, 308 Ill. App. 3d 18, 719 N.E.2d 288, 297 (1999); citing *Congregation in Passion, Holy Cross Province v. Touche Ross & Co.*, 159 Ill. 2d 137, 163.
13. *Id.* at 296-97.
14. 176 Ill. 2d 160, 168 (1997).
15. 2314 Lincoln Park West Condo. Ass’n v. Mann, Gin, Ebel & Frazier, Ltd., 136 Ill. 2d 302, 313 (1990).
16. *Id.* at 297.
17. *Managing Professional Liability Risks in Preparing Legal Opinions*, 41 No. 2, PRACREL 8, Practical Real Estate Lawyer, Sterling Scott Willis, March 2025 [Secondary Sources | National | Westlaw Precision].
18. *First Midwest Bank, N.A.*, 218 Ill. 2d at 340.
19. *Moorman*, 91 Ill. 2d at 88.
20. *Tolan*, 308 Ill. App. at 296 (internal citations omitted).

## Ethics FYI

**MANY DIFFERENT TYPES OF REAL ESTATE TRANSACTIONS** and related litigation can present ethical issues, questions, concerns, and quagmires. (I have been wanting to use that word for a long time!) So, if ever confronted with one, remember (312) 565-2600 or (800) 826-8625 are the ARDC hotline numbers for calling to start the needed inquiry on how to navigate your situation. You never have to go it alone. ■



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# Rural Illinois Data Center Boom: Landowners, Are You Ready?

BY RUTH ROBINSON

## ARTIFICIAL INTELLIGENCE (“AI”)

is coming, and it is coming fast. It is poised to transform industries, automate complex tasks, analyze data faster, and supposedly make smarter decisions for businesses. In particular, the demand for AI will change real estate and rural America, due to heightened demand for data centers.

Tech companies, including Meta, are pressing into unexpected parts of the country, on the hunt for huge swaths of flat land that have access to natural gas and transmission lines. Sleepy parts of Illinois, with large tracts of farmland that have nearby infrastructure to support the huge electricity demand that data centers

require, are being shopped right now. The boom is on.

## The Benefits and Pitfalls of Data Centers

Related Companies, one of the most prominent privately-owned real estate firms in the U.S., [announced this week that it was looking to raise up to \\$8 billion to develop data centers](#). Although its first project is located in Ontario, Canada, additional projects are planned in Illinois, Missouri, and Wyoming. Since Chicago’s suburbs have become a national hotspot for data center investment, it is no surprise Illinois is a desirable location for these data centers. Among their benefits is the huge financial rewards to the landowner. Cushman & Wakefield’s [2025 Data Center](#)

[Development Cost Guide](#) for the U.S. noted the average per-acre price for land that data centers were paying through October, 2024, was \$224,000. The average data center parcel is 224 acres.

In addition to financial benefits, data centers will also bring money, jobs, and local tax revenue. According to an article in the Wall Street Journal authored by Jennifer Hiller, permanent jobs for a Meta data center are expected to have average salaries of \$82,000/year. This is likely much more than what currently exists in the area, resulting in other infrastructure demand for those moving into the area, including housing, food, etc.

Despite these benefits, concerns remain. Chief among them is the huge electricity burden to the area and on



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existing electricity customers. In addition, while sales of land have yielded huge figures, other projects (such as housing development) are being scrapped.

## Key Takeaways

The increased demand for data centers presents exciting new opportunities for real estate developers and landowners. Those looking to capitalize on these projects should:

- Investigate the proximity of needed infrastructure to your property site.

- Determine if there are any local impediments; such as zoning restrictions or community resistance.
- Understand project-specific risks and external challenges.
- Prepare for deals that require careful negotiation and review of contract terms.
- Consider appropriate entity formation ahead of time for realty ownership; such as LLC or corporation.

*Working with experienced and knowledgeable legal counsel maximizes the likelihood of securing the most lucrative opportunities. Ruth E. Robinson: [rrobinson@amundsendavislaw.com](mailto:rrobinson@amundsendavislaw.com)*



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