

NWMLS PURCHASE AND SALE AGREEMENTS
The Economic Loss Rule
SPECIFIC TERM No. 9 AND GENERAL TERM “y”

1. Introduction

In March 2007, the Washington Supreme Court decided *Alejandre v. Bull*. The Court ruled that a legal doctrine called the “economic loss rule” prohibits a buyer from suing a seller for negligently misrepresenting the condition of the property. In short, the economic loss rule bars negligence claims when the property is sold by a purchase and sale agreement and the buyer suffers an “economic” loss, which does not involve personal injury or damage to property other than the real property itself. The Court ruled that a buyer has a claim for economic loss for a seller’s negligent misrepresentations only if the purchase and sale agreement permits a buyer to bring that claim. In November, 2008, the Washington Court of Appeals decided *Carlile v. Harbour Homes*. In *Carlile*, the court decided that the economic loss rule also applies to a seller’s *intentional* misrepresentations.

2. The Buyer and the Seller Can Allocate the Risk of Economic Loss for the Seller’s Negligent Misrepresentations.

Prior standard form residential purchase and sale agreements, including “Form 21,” did not provide the parties with an easy way to allocate the risk of economic loss resulting from a seller’s negligent misrepresentation. Form 21 and the other NWMLS purchase and sale agreements have been revised to allow the parties the option to allocate the risk of a seller’s negligence in failing to disclose defects in property. Specific Term No. 9 provides as follows:

Disclosures in Form 17: Buyer will _; will not _ have a remedy for Seller’s negligent errors, inaccuracies, or omissions in Form 17.

This provision gives the parties the right to determine whether the buyer or the seller bears the risk of economic loss resulting from the seller’s negligent misrepresentation in Form 17. In other words, if the parties agree that the buyer will have a remedy for seller’s negligent errors, inaccuracies, or omissions in Form 17, then the buyer may sue the seller if the seller negligently fails to disclose material facts in Form 17, which result in an economic loss to the buyer. This remedy only applies to negligent misrepresentations in Form 17. If the seller makes other negligent misrepresentations to the buyer (e.g. through other documents such as marketing materials or through conversations with the buyer), the economic loss rule would prevent the buyer from bringing a claim based on those negligent misrepresentations.

3. The Buyer May Still Make a Claim Against the Seller for Intentional Misrepresentations.

NWMLS standard form residential purchase and sale agreements (revised 01/09) also provide that the buyer may pursue a claim to recover economic losses resulting from seller’s intentional misrepresentations in Form 17. The buyer can also pursue any other claim against the seller permitted under the common law, including fraudulent concealment. However, in most instances, fraud is much more difficult to prove than negligent misrepresentation.

4. Inspections and Buyer’s Due Diligence Remain Critical

There is no term in the purchase and sale agreement that is a substitute for an inspection. Regardless of how the parties decide to allocate the risk of economic loss for negligent misrepresentations in Form 17, buyers are always best protected by a completing a thorough, competent inspection of the property. Buyers should utilize professional inspectors who are trained to discover existing and potential problems that even the seller may not be aware of.

5. Legal Advice

As always, if you have question regarding the economic loss rule, the purchase and sale agreement, or any other legal issue, please seek the advice of an attorney.

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