In 2005, a married couple signed a contract with a builder to purchase a unit in a condominium building that was being developed in a luxury resort community. The contract specified that the condominium would be built within two years, although the contract included a "force majeure" provision that allowed for delays under certain circumstances. The contract also specifically waived the buyers' right to speculative, punitive, and special damages.

After the housing bubble burst, the buyers had second thoughts about their decision to purchase the condominium unit. Wanting out of the deal, they seized upon the Interstate Land Sales Full Disclosure Act, a federal statute that has become, in the words of the court that heard their case, "an increasingly popular means of channeling [a] buyer's remorse into a legal defense to a breach of contract claim."

Just three weeks before the condominium was completed-ahead of the two-year deadline in the contract, in fact-the buyers gave the builder notice that they were terminating the contract because the builder had failed to provide them with a property report as required by the Disclosure Act. They also demanded the return of the substantial deposit they had paid.

The builder refused, and a federal appellate court sided with the builder. The contract between the parties fit within an exemption set out in the Disclosure Act that applies to "the sale or lease of any improved land on which there is a residential, commercial, condominium, or industrial building, or the sale or lease of land under a contract obligating the seller or lessor to erect such a building thereon within a period of two years."

The buyers could have waited and hoped that the builder did not finish by the deadline, at which point they could have rescinded the contract, demanded their money back with interest, and recovered any actual damages that they had suffered. As for the force majeure clause in the contract, it covered unlikely events, such as acts of God and labor strikes. It did not render "illusory" the builder's contractual duty to complete the condominium within two years.

Lapsed Flood Insurance

Hurricane Katrina destroyed Merlin's house in August of 2005. About two weeks before Katrina hit, he had missed a deadline to pay a premium to keep his flood insurance policy in effect for 2005 to 2006. After Katrina, the Federal Emergency Management Agency extended a grace period of 90 days for paying premiums to keep policies in force.

When Merlin submitted a claim under the policy shortly after Katrina, his insurer told him that he would be covered and even sent a small advance check for the claim. Merlin had many telephone calls with the insurer's representatives during this period, but none of them told him a critical fact: Any payments under the policy were conditioned on Merlin later paying the delinquent premium by the extended due date. When that date came and went without the payment having been made, the insurer demanded the return of its advance payment and told Merlin that he had no coverage.

Merlin sued the insurer for the state law claim of negligent misrepresentation. The insurer responded that such a claim was foreclosed, or "preempted," by federal law. The insurer was relying on legal authorities stating that certain tort claims against an insurer participating in the National Flood Insurance Program are preempted. However, only tort claims arising from the "handling" of insurance claims are preempted. The federal appellate court considering Merlin's lawsuit ruled that it could proceed.

When the alleged misrepresentation happened, Merlin only held the status of a former, and a potential future, policyholder. If the case was about a "claim" at all, it was a legally fictitious claim, because the policy had expired. Since his dispute with the insurer was really about whether he could even have a policy at all, Merlin's negligent misrepresentation claim stemmed from the procuring of insurance, not from the "handling" of a claim.

Misrepresentation About Water Damage Is Not "Property Damage"

About a year after a married couple sold their home, the buyers sued them for fraudulent misrepresentation. The buyers contended that the sellers had falsely represented that the home

had no moisture or water problems, no damage due to flooding, and no problems with its foundation. The sellers, in turn, asked a state court to declare that the carrier on their homeowners insurance policy was obligated to defend and indemnify them against the buyers' lawsuit.

A state court ruled that the sellers' insurer was within its rights to deny that there was coverage under the policy with the sellers. As with so many disputes over insurance coverage, the meaning of the terms used in the policy was crucial. The homeowners policy covered an occurrence that resulted in either bodily injury or property damage. An "occurrence" was defined by the policy as "an accident that results in damage."

The court conceded that the commonplace use of the term "occurrence" in insurance policies generally has the effect of broadening coverage and removing the need to find an exact cause of damage, so long as damages are not intended or expected by the insured.

However, the bottom line is that the occurrence must still stem from an accident.

An accident, by nature, is an unforeseen occurrence of an untoward or disastrous character, or, put a little differently, an undesigned sudden or unexpected event of an inflictive or unfortunate character. In the litigation against which the sellers wanted the insurer to defend them, the gist of the allegations was that the sellers had made false statements, not that they had caused property damage by means of an occurrence/accident.

The sellers would have to defend themselves without the assistance of their homeowners insurance company.