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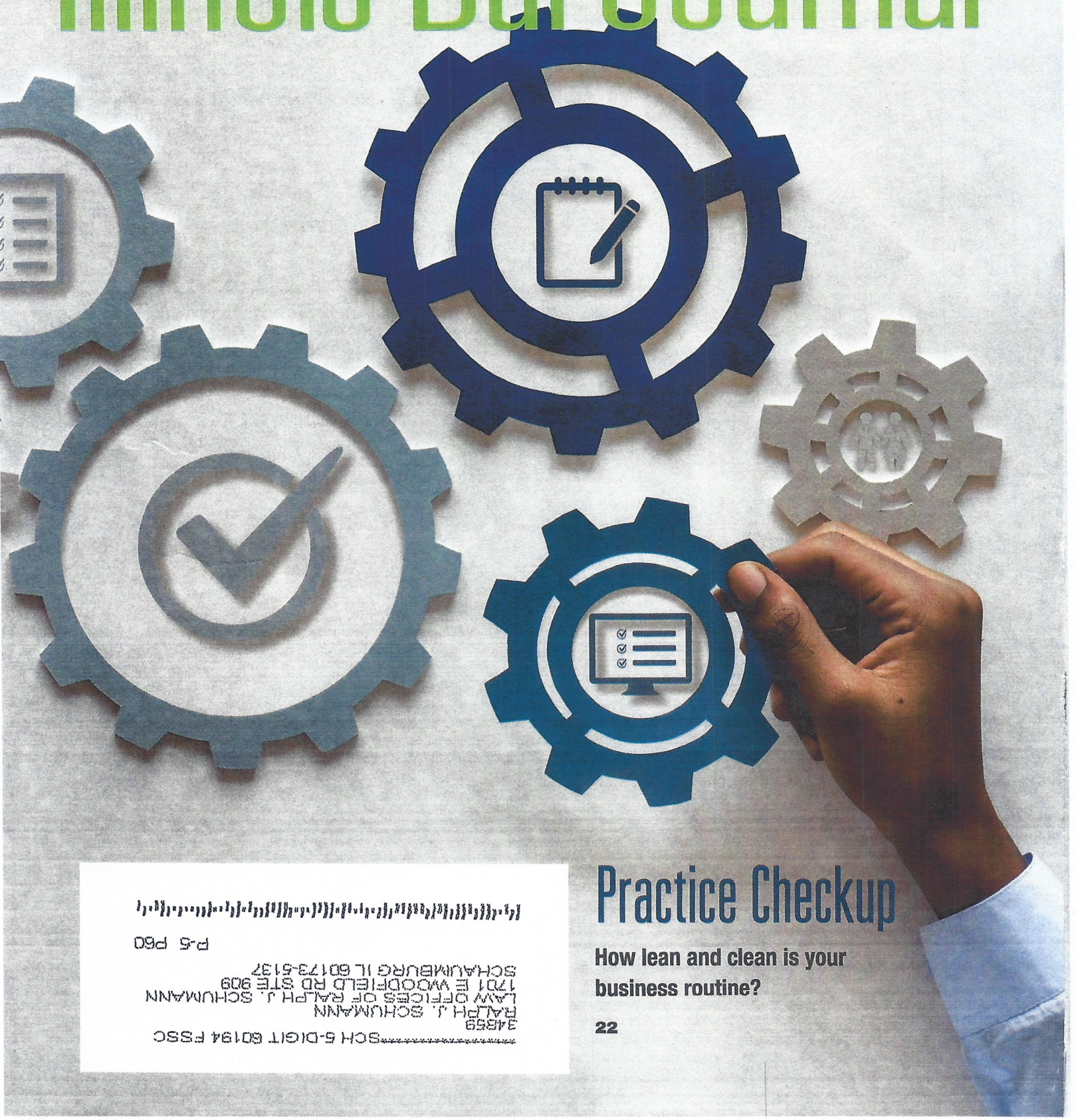

Practice Checkup

How lean and clean is your business routine?

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Unimplied Warranty

Illinois Supreme Court rules that buyers of new homes can't sue subcontractors under an implied-warranty-of-habitability theory.

AN ILLINOIS SUPREME COURT opinion that eliminates a consumer protection for homeowners seeking a financial remedy against subcontractors for defective construction could have profound effects throughout the state.

On Dec. 28, 2018, the Supreme Court found in *Sienna Court Condominium Ass'n v. Champion Aluminum Corp.* that a purchaser of a new home cannot sue a subcontractor that had no contractual relationship with the purchaser (the case can be read at law.isba.org/2PWY3Ea). The opinion also overrules *Minton v. The Richards Group of Chicago*, an appellate court decision that held a homebuyer who sustained loss due to a subcontractor's construction defects could bring an implied-warranty-of-habitability claim against the subcontractor when there is no recourse against the contractor.

"What this decision means is that purchasers have more reason to hire a lawyer now than ever before," says Ralph Schumann, a member of the ISBA Real Estate Law Section Council and a past president of the Illinois Real Estate Lawyers Association. "It's kind of luck-of-the-draw for the consumer. Whatever recourse you might have as an owner against a contractor under an implied-warranty-of-habitability theory now does not apply equally to the subcontractor."

"Arguably, however," says Schumann, "the public policy considerations underlying the *Petersen v. Hubschman Construction Co* and *Redarowicz v. Ohlendorf* cases apply equally to both builder-vendors and their subcontractors."

High-rising consequences

The Supreme Court's decision could have more severe financial consequences for associations of Chicago-area high-rise condominiums because fixing defects in large construction projects could cost millions of dollars, Schumann says.

In *Sienna*, a condominium association filed a lawsuit against the developer, the general contractor, architectural and engineering design firms, material suppliers, and several subcontractors. Most of the counts claimed breach of implied warranty of habitability based on construction defects that made the individual units and common areas unfit.

Before the complaint was filed, the developer and general contractor had declared bankruptcy. The subcontractors moved to dismiss the case, arguing that they were not subject to any implied warranty-of-habitability claims.

When a condominium board finds construction defects years after construction is completed, it often struggles to recover damages from the original developer because a limited liability company was formed only for that project. Associations also may be hampered by waivers signed at the time of purchase, Schumann says.

Construction defect cases in Illinois have relied on *Minton* since 1983. The 1983 ruling allowed homeowners to seek financial recovery from subcontractors under an implied-warranty-of-habitability theory if they could not recover from the builder-developer.

The dissent

Illinois Supreme Court Justice Thomas Kilbride was the lone justice to dissent in *Sienna*, relying on *Petersen* and *Redarowicz*, Schumann says.

"In his dissent, what Justice Kilbride is saying is that the policy considerations that led to the development of the doctrine in *Petersen* and its expansion in *Redarowicz* to subsequent purchasers apply equally to the subcontractor," Schumann says.

In *Petersen*, the court held that an implied warranty of habitability protects the first purchaser of a new home against latent defects that render the house unfit. Such a warranty was necessary due to changes in construction methods and the "unusual dependent relationship" between the builder-vendor and the vendee.

"The court explained that many 'new houses are, in a sense, now mass produced,' that the buyer often purchases the house 'from a model home or from predrawn plans,' and that the buyer of a newly constructed house 'has little or no opportunity to inspect' the construction," court documents state. For those reasons, the *Petersen* court determined that recognition of an implied warranty of habitability was appropriate.

The *Petersen* court also recognized that the implied warranty of habitability is a "creature of public policy," but could be waived by the person purchasing the home.

Buyer beware

"The more important question here is why builder-vendors are allowed to eliminate their responsibility in this way," Schumann says. "Why are they allowed to force an individual purchaser, who is a layperson, to sign a waiver and accept a very narrow, very limited warranty for only a short period of time?"

"Purchasing new construction is not for the faint of heart," Schumann adds. "The range of legal remedies for pursuing financial recovery in these types of cases is now more limited than it was before. The result may be a boon for the construction industry, but not for purchasers."

– By Rhys Saunders