SELLER DISCLOSURE ACT

Hello, Michigan Realtors® and welcome back to the "Letter of the Law," a monthly video series designed to provide introduction and analysis on various legal issues impacting your industry. I'm Brian Westrin and today's Letter of the Law covers the Seller Disclosure Act.

In order to better understand how the Seller Disclosure Act is intended to work, it may be helpful to know a little bit of its history. The Seller Disclosure Act and the statutory disclosure form were developed in 1993. Prior to that time, sellers had no duty whatsoever to volunteer any information about the condition of the home they were selling. However, if sellers did volunteer information or answer buyers' questions about the condition of the home, and that information later turned out to be wrong, sellers were liable even if they had made the misrepresentation innocently.

Prior to the 1990s, before the statutory disclosure form was developed, information about the condition of a home was typically conveyed verbally. Questions from the buyer were communicated from the buyer to the buyer's agent to the listing agent to the seller. The seller's answers were then communicated back through the same chain. If it later turned out that the information that had been provided to the buyer was incorrect, there were often disputes as to just where in the chain the incorrect information had originated.

After the passage of the Seller Disclosure Act, for the first time, sellers had a legal obligation to make certain disclosures about the home that they were selling. Sellers now had an obligation to answer all of the questions on the seller's disclosure form to the best of their knowledge. While imposing a new obligation on sellers, the statute also protected sellers by providing that sellers would not be liable for innocent misrepresentations made while filling out the seller's disclosure form.

The Seller Disclosure Act applies to sales of residential property between one and four units. Certain sellers such as an estate, bankruptcy trustee or foreclosing lender are exempt. However, sellers are not exempt just because they have never lived in the home. Since even a non-occupant seller is likely to have some knowledge as to the condition of the home, it is not sufficient to simply indicate "seller has never lived in the home." If, for example, a landlord-seller is aware that the roof leaks, it would be fraudulent to indicate that the roof does not leak. It is no less fraudulent for such seller to indicate that he does not know whether the roof leaks. Both statements are obviously false.

If the seller fails to provide a buyer with an accurate, complete disclosure statement, the buyer has the right to terminate the purchase agreement at any time up until the actual closing. After the closing, the buyer can use any false statements in the disclosure statement as a basis for a lawsuit; specifically, a misrepresentation claim, assuming that the buyer can establish that the seller knew the statement was false when it was made.

Most, but not all, of the questions in the seller's disclosure form ask about the current condition of the property. So for example, if the roof leaked years ago but has been subsequently fixed, a seller is not required to disclose that there was a prior roof leak. On the other hand, if the basement has ever leaked, the seller must disclose that fact even if the problem was fixed over a decade ago.

What about information that a seller learns after completing the seller's disclosure form? In this instance, the seller is required to amend the form if the inaccuracy relates to "structural/ mechanical/appliance systems." Keep in mind, however, that even if a seller is not required to amend the seller's disclosure form, a seller may be well advised to voluntarily do so to avoid any post-closing disputes. Buyers who discover an undisclosed defect after closing often assume the

worst about the seller's motives. On the other hand, a buyer who has just fallen in love with a home is often willing to overlook defects actually disclosed in the seller's disclosure form.

So, sellers may avoid the time and expense of even a successful lawsuit by amending their seller's disclosure form to disclose the fact that they have made certain repairs discovered during an earlier buyer's home inspection. In all events, a listing agent should never try to discourage sellers from disclosing something that the sellers believe perhaps should be disclosed. Disclosure is always the safest course of action, and a Realtor® does not want to put herself in the position of having her clients testify that they wanted to disclose a particular defect but their Realtor® talked them out of it.

There have been a number of changes that have been made to the seller disclosure form to address particular issues that have come up during the 25 years since the Seller Disclosure Act was enacted.

- The form has been amended to state that a representation in the form that an appliance is in "working order" does not necessarily mean that such appliance is included in the sale. This language is intended to make clear that the question as to what is included in the sale is governed by the purchase agreement, not the disclosure form.
- Language has been added to the form advising buyers of the public availability of the sex offenders list, thereby hopefully removing any argument that it is the responsibility of the seller to disclose the fact that there is a registered sex offender in the neighborhood.
- Language has been added to the form advising buyers that the sale of the home will trigger a reassessment for real property tax purposes. This language is

intended to put buyers on notice that they should not assume that their real estate taxes will be the same as what the seller is paying.

- Questions have been added to the form asking about mineral rights, flood insurance, outstanding municipal assessments and pending litigation.

Finally, Realtors® should take some comfort in the fact that the Seller Disclosure Act specifically provides that the seller's agent shall not be liable for their seller's violation of the statute unless the agent "knowingly acts in concert." If the seller has made false statements while filling out the form, the listing agent should be protected by this language unless he or she actually knew that the seller was lying. Listing agents should never pass on information from their seller that they know to be false.

As always, thank you for tuning in. If you have questions or would like to suggest topics for next season, please see the email below. Again, thanks for watching and see you next time.