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Real Estate

Duties in Disclosure of Defects in Single Family Residences in Texas

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PLEASE NOTE: I am not an attorney. I strongly advise all readers to seek further information from legal counsel on all issues pertaining to disclosure. However, I have been named an expert witness in over 220 cases nationwide since 1987 and have practiced real estate brokerage since 1978. I am also a certified instructor for the Texas Real Estate Commission in core and continuing education courses, including certification to teach the promulgated Legal/Ethics course. I have given written opinion or testimony more than 40 times in disclosure-related cases. All of the comments below are based upon my education, experience, training, and special certifications as a real estate instructor in Texas.

The State of Texas requires disclosure of known defects be made to potential purchasers of single family homes by both real estate agents and sellers. A real estate licensee's duty to disclose defects is found in the Texas Occupations Code, Chapter 1100, also known as the Real Estate License Act, Section 1101.652 (b) (3) and (4). In short, the Texas Real Estate Commission may revoke an agent's license if the agent fails to disclose to a potential purchaser structural or other latent (hidden) defects ***known*** to the agent. In fact, this duty to disclose applies to all types of real estate, not just single family homes, a fact many licensees in Texas fail to recognize. The key word in paragraph (3) is ***known***. Most attorneys who defend licensees in disclosure lawsuits demand proof of the accused licensee's actual knowledge of any alleged defect.

Plaintiff attorneys, on the other hand, feel the agent's conduct should be judged not only upon what the agent knew, but also what they heard, thought, said, did, decided, and failed to do. Many plaintiffs would like to see "should have known" added to paragraph (3) in the license act instead of simply "known." "Should have known" is considered constructive knowledge which is deemed to be actual knowledge. Experienced agents must be careful because disclosure duties are also subject to general duties found in the codes of ethics.

The statutory code of ethics for real estate licensees is found in the Rules of the Texas Real Estate Commission, codified as Title 22, Chapter 531, of the Texas Administrative Code. This code of ethics, effective since 1976, makes an agent a fiduciary for his/her client. Fiduciary duty, per the code of ethics, says that the agent must place his/her clients' interests above that of the agent, be scrupulous and meticulous when performing the work, avoid misrepresentation by acts of commission or omission, and exercise judgment and skill in the performance of the work. These duties are organized under the general headings of fidelity, integrity, and competence.

Does an agent who fails to review the seller's disclosure notice and fails to walk through the property and look for visible defects violate his/her duties under the code of ethics? These behaviors may violate the agent's duty to be scrupulous and meticulous, the agent's duty to avoid misrepresentation by acts of omission, and the agent's duty to exercise judgment and skill in the performance of the work. It really is pretty simple - Representing a client who is either a buyer or a seller, an agent, who walks through a property that has a visible stain on the ceiling and fails to ask about the stain, especially if this stain has not been disclosed by the seller in the disclosure notice, may not be conducting his/her work scrupulously and meticulously with judgment and skill. This behavior could also be a misrepresentation due to omission, or failure to ask the question about such an obvious indication of a defect as a stained ceiling. Each case is unique and should be considered in the context of the overall facts in the matter; however, it is clear that the code of ethics imposes additional standards of practice and obligations on licensees. All agents must conduct themselves in light of all the obligations under the license act and the rules of the real estate commission.

There is an additional code of ethics that applies for some real estate agents. Real estate agents who choose to join the National Association of Realtors (NAR) pledge themselves to honor NAR's Code of Ethics. The NAR Code of Ethics also recognizes the obligation of agents to disclose defects in properties. In 2001, NAR added a sentence to Article 1 of their Code of Ethics and Standards of Practice for Realtors clearly stating that information about defects is not considered confidential information. This provision makes it clear that the agent is not at risk of violating loyalty to his or her client under NAR's Code of Ethics when the agent discloses defects. Disclosure of defects is a nationally recognized duty of members of the National Association of Realtors.

Sellers of single family homes in Texas have a similar duty of disclosure, which is found in the Texas Property Code. Texas changed its property code in 1993, adding section 5.008, which created the duty for all sellers of single family residences to disclose known defects to any potential purchaser. With this change, it is my opinion that *caveat emptor*, or buyer beware, died in Texas in the sale of single family residences. The change imposed a duty on the seller, whether he or she is represented by an agent or not. The statute includes a brief form which sets out the minimum requirements of disclosure. Many sellers forget to disclose past defects, fail to understand what must be disclosed, or at times, deliberately attempt to hide known defects in the property from potential purchasers. Sellers are also subject to the Texas Deceptive Trade Practices Act.

Real estate agents, including both buyers' and sellers' agents, and sellers of property in Texas, have a clear duty to disclose defects known about a single family residence for sale to a potential purchaser. Sellers and real estate agents who fail to meet their duties under these statutes and codes of ethics can be vulnerable to lawsuits and

payment of potential damages to buyers. Sellers, even in 2010, sometimes do not fully understand their duty to disclose unless they have engaged the services of a real estate agent. While it is relatively easy to understand how a seller could be held liable for damages, understanding how agents become liable for damages requires further explanation.

How does an agent face liability for civil damages in these cases? Aren't the codes or ethics just models for preferred behavior? Isn't Chapter 1100 of the Texas Occupations Code just an administrative document from which violating agents can only be liable for fines or revocation of their licenses? These are questions I am asked all the time when I am giving an expert opinion to the court in a disclosure case. The answer lies in the concept of negligence.

In laymen's terms, negligence is failure to meet the ordinary standard of care. The standard of care is defined as what a reasonable and prudent person would do in a given situation. The Rules of the Texas Real Estate Commission's statutory code of ethics, the Occupations Code, and the NAR Code of Ethics set the basic standard of care for agents in Texas. If the agent fails to fulfill the duties outlined by these laws and regulations, therefore, not meeting the standard of care, the agent could be liable for civil damages due to negligence. When an agent fails to disclose a known defect, the agent is acting negligently, period.

In Texas, there are many seller's disclosure notice forms; no one form is promulgated (required to be used) by the Texas Real Estate Commission. The commission provides a form which may be used by sellers, but it is not the only form a seller may use. The Texas Association of Realtors provides a voluntary form, and some local boards of realtors offer a form to their members' clients as well. The Austin Board of Realtors (ABOR) has the most extensive seller's disclosure notice in the state, which is regularly updated and revised by its Risk Reduction Committee, and updated to meet any statutory revisions. ABOR maintains this extensive disclosure notice form not only as a service to their clients, but also to better educate and serve the public as a whole. The ABOR form helps sellers think about all the features and characteristics of their homes in an effort to jog their memories about known defects.

It is normal for plaintiffs to seek the easiest source of money to recover damages and the real estate agents are many times named as defendants. Unfortunately, even though no one knows more about the defects in a home than its seller, the agents often times are the first target, possibly the only target, because many sellers move, spend the proceeds of the transaction, or simply have limited resources to satisfy judgments. Agents, on the other hand, especially those with errors and omissions insurance coverage, offer another "port in the storm" for potential financial remedies for the plaintiff.

The only safe practice for sellers and real estate agents is to disclose anything and everything known about any defect in a single family residence for sale. A prudently behaving agent discloses all known defects and acts according to all the statutes and regulations, acts scrupulously and meticulously, puts the clients' interest above that of the agent's, avoids misrepresentation in any ways by acts of commission or omission, and exercises judgment and skill in the performance of the agent's work. The potential cost to unwitting sellers and agents who fail to disclose known defects can be substantial. Agents who conspire with sellers to hide defects should be held liable for damages and severely sanctioned by the real estate commission.

The public has a right to rely upon the representations of agents, and these representations must be accurate and true. Prudent agents and sellers disclose all defects in writing, prior to offering the home for sale, to help purchasers assess their risk while they are making their decision to purchase. In Texas, verbal disclosure is allowed, but it is a much more prudent practice to keep everything in writing. Remember, the new purchaser will have to disclose defects when they sell the home in the future, so buyer's agents acting prudently should assist their buyers in review of the disclosures. Buyer's agents should always recommend to their client to hire a licensed home inspector during the feasibility period in the purchase agreement. Grounded in the golden rule (do unto others as you would have them do unto you), the duties of disclosure of defects in single family residences for agents and sellers are just and fair.