Seller Disclosure from the Listing Agent's Point of View

Hello Michigan Realtors® and welcome back to the Letter of the Law. Well, remember when I said that we were doing a two-episode arc on Sellers Disclosure? I told a little lie. We have had so many good questions on seller disclosure requirements and nuances that we thought it deserved one more look. So in today's installment, we will be looking at the Seller Disclosure Act ('SDA") from the point of view of the listing agent.

The Seller's Disclosure form states that the representations are being made solely by the seller and are not representations of the listing agent. This does not mean that a real estate agent can never be responsible for inaccuracies in a Seller's Disclosure Statement. The SDA provides that a listing agent will not be liable for false statements **unless** the listing agent "knowingly acts in concert" with the seller. In other words, a listing agent is not required to confirm the accuracy of the seller's representations, but cannot knowingly conspire with the seller to conceal a known defect. If the listing agent is aware that their seller has made false statements in the Seller's Disclosure Statement, both the seller and the listing agent may be liable to the buyer for fraud.

A listing agent should advise the seller to fill out the Seller's Disclosure Statement honestly and completely. If a seller knows of a defect, they cannot avoid disclosure by skipping the question or answering "unknown." In addition, Michigan courts have said that sellers are not only responsible for inaccuracies that they **knew** were false, but also for inaccuracies that they s**hould have known** were false through "the exercise of ordinary care." Sellers who have reason to know of a defect--for example, as a result of an inspection--cannot avoid responsibility through deliberate ignorance. In all events, a listing agent should **never** advise against disclosure. A

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listing agent does not want their seller to be able to claim that they wanted to disclose something, but their agent advised against it.

By signing a Seller's Disclosure Statement, sellers are certifying that the information is correct to the best of sellers' knowledge <u>as of the date of the sellers' signature</u>. The SDA provides, and Michigan courts have acknowledged, that sellers have an obligation to amend a Seller's Disclosure Statement, but only in the case of changes in the "structural/mechanical/appliance systems." If something happens that triggers the sellers' duty to amend their seller's disclosure statement, and they do not, they may be liable for fraud or silent fraud. A sellers' listing agent who "acts in concert" may also be liable for fraud or silent fraud.

Sometimes, sellers may contractually agree to update their Seller's Disclosure Statement in situations where they might not be statutorily obligated to do so. For example, some purchase agreement forms require updates in the event of **any** change to the condition of the property. For example:

> Seller will inform Buyer in writing of any changes in the content of the Seller's Disclosure Statement prior to closing and will be responsible for maintaining the condition of the property as disclosed.

Other purchase agreements contain language by which the seller recertifies the accuracy of the disclosure statement as of the date of the purchase agreement. For example:

> Buyer has received Seller's Disclosure Statement dated _______________. Seller certifies to Buyer that the property is currently in the same condition as Seller previously disclosed in that statement.

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Finally, it is the custom and practice of some closers to have the sellers re-sign and date their Seller’s Disclosure Statement at the closing table. In doing so, the sellers are, in effect, certifying that they are aware of no changes to the condition of the home since they first filled out the form.

Sellers often look to their listing agent for advice as to when they should amend their Seller’s Disclosure Statement. A seller may be reluctant to amend their Seller’s Disclosure Statement because it will trigger a buyer’s right to terminate the purchase agreement. A listing agent should proceed cautiously. A listing agent who advises the seller that they are not required to amend their Seller’s Disclosure Statement may be liable to the buyer if it turns out that advice was incorrect. But they may also be liable to their seller-client.

Suppose, for example, the listing agent forgets that the purchase agreement obligates their seller to update their Seller’s Disclosure Statement in the event of **any** change to the condition of the property. If that listing agent advises the seller that they need to amend only in the case of changes to the “structural/mechanical/appliances systems,” and the seller relies on that advice to their detriment, the listing agent may be liable to the seller. The same could be true if a seller signs a purchase agreement stating that there has been no change in the condition of the property since the Seller’s Disclosure Statement was signed and the listing agent is aware that is not true. If the buyer later sues the seller for fraud, the seller may, in turn, sue the listing agent on the basis that they relied on the agent for advice on their responsibilities under the SDA.

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The best advice a listing agent can give a seller may be when in doubt, they should update their Seller's Disclosure Statement. As we have discussed, even if the SDA does not require an amendment, the purchase agreement may. Sellers should also keep in mind that even if they have a strong legal argument that an amendment was not required, if there is a lawsuit, it will be costly to defend even if successful. If, for example, the Seller's Disclosure Statement says that the roof doesn't leak, and there is some evidence that at some point the seller knew that the roof leaked, a court will need to sort out when and how the sellers knew of the leak and whether this defect was a "structural" matter. This will be both time-consuming and costly and the outcome is not certain. For these reasons, sellers may be well advised to amend their Seller's Disclosure Statement even if they believe such an amendment is not required. If the seller updates their Seller's Disclosure Statement before there is a purchase agreement in place, they can avoid triggering a buyer's termination rights under the SDA.

That's all for today. Hopefully we've covered the waterfront on Seller's Disclosure, and these three segments will be helpful to you as a reference going forward. Keep those questions coming at the email below and we'll see you next time!

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