

SELLER'S DISCLOSURE AND AGENCY DISCLOSURE AFTER 20 YEARS

The Michigan Seller Disclosure Act ("SDA") originally took effect on January 1, 1994. As we approach the 20th anniversary of the enactment of the SDA, the courts have gone a long way in interpreting and applying the SDA. REALTORS® who were in the business on January 1, 1994 will recollect that MAR pursued enactment of the SDA on the assumption that if sellers made full disclosure of what they knew about the physical condition of their properties to buyers, and could prove they made such disclosure, the incidents of litigation between sellers and buyers for alleged misrepresentations about defects in a home would decline. As a side benefit, REALTORS® would find themselves less involved in litigation between sellers and buyers as to the physical condition of the property at the time of sale. It would appear that the SDA has had that effect as long as the sellers have properly filled out the Seller's Disclosure Statement.

1. The Basics.

A. The SDA applies to transfers of any interest in real estate consisting of not less than one or more than four residential dwelling units. MCL 565.952. The SDA applies to the following transactions:

- 1) Sales of an interest in residential real estate.
- 2) Exchanges of interests in residential real estate.
- 3) Options to purchase residential real estate.
- 4) A ground lease coupled with proposed improvements by the purchaser or tenant.
- 5) A transfer of stock or an interest in a residential cooperative.

B. The following are exempt from compliance with the SDA (MCL 565.953):

- 1) Transfers made pursuant to a court order, including orders by a probate court in administration of estate; transfers by any foreclosure sale; transfers by a trustee in bankruptcy; transfers through condemnation; and transfers resulting from an order for specific performance.
- 2) Deeds in lieu of foreclosure or quit claim deeds from a mortgagor to a mortgagee.
- 3) Transfers by a fiduciary who does not occupy the residential real estate in the course of administration of a decedent's estate, guardianship, conservatorship or trust.
- 4) Transfers from one co-tenant to one or more other co-tenants.
- 5) Transfers made to a spouse, parent, grandparent, child or grandchild.
- 6) Transfers resulting from a judgment of divorce.
- 7) Transfers to or from any governmental entity.
- 8) Transfers made by a licensed home builder of newly constructed residential property that has not been inhabited.

C. A completed Seller's Disclosure Statement must be delivered to a buyer or other transferee within the following time limits (MCL 565.954):

- 1) Prior to a buyer executing a binding purchase agreement.
- 2) Prior to a vendee executing a land contract or a lessee executed a lease coupled with improvements by the lessee.
- 3) If the form is delivered after the purchase agreement is signed, the buyer may terminate the purchase agreement not later than 72 hours after receipt

of the form in the case of a hand delivery (or 120 hours in the case of registered mail).

D. Delivery to the buyer's, vendee's/lessee's agent is deemed delivery to the buyer/vendee/lessee.

E. An amendment of a previously delivered Seller's Disclosure Statement must only be made if any changes occur in the structural/mechanical/appliance systems of the property from the date the form is completed to the date of closing. MCL 565.954 (3) and MCL 565.956. Upon personal delivery of an amended Seller's Disclosure Statement to a buyer, the buyer has 72 hours to terminate the transaction after delivery to the buyer or the buyer's agent in person or 120 hours after delivery of the amended Seller's Disclosure Statement to the buyer or buyer's agent if the amended Seller's Disclosure Statement was delivered by registered mail.

F. A buyer's right to terminate the purchase agreement ends upon the transfer of the property by deed or land contract.

G. The following are limitations on the liability of a seller for the information contained in the Seller's Disclosure Statement:

- 1) A seller or his or her agent is not liable for any error, inaccuracy or omission in information provided in the Seller's Disclosure Statement if the error, inaccuracy or omission was not within the personal knowledge of the seller. MCL 565.955(1).
- 2) The seller does not violate the SDA by failing to disclose information that could only be obtained through inspection or observation of inaccessible portions of the property or could only be discovered by a person with

expertise beyond the knowledge of the seller (*e.g.*, an inspector, contractor, builder or engineer). MCL 565.955(1).

- 3) A seller must fill out the Seller's Disclosure Statement in "good faith," meaning honesty in fact in the conduct of the transaction. MCL 565.960.
- 4) A transfer that is subject to the SDA cannot be invalidated solely because of a seller's failure to comply with the SDA. MCL 565.964.

2. The Courts' Application of The SDA.

A. The SDA did not create any new causes of actions or claims against sellers or REALTORS®. *Vettese v Zehr*, docket number 255919; 2005 WL 3439788 (Dec 2005); *Pena v Ellis*, docket number 257840, 2006 WL 1006444 (April 2006). The only remedy permitted by the SDA for a buyer is to terminate a binding purchase agreement where a Seller's Disclosure Statement is not timely delivered or the seller has not otherwise complied with the SDA. The right to terminate expires upon the conveyance of the property.

B. The courts have not found a violation of the SDA when sellers who have not lived in the residence for sale indicate they generally have no knowledge of its condition. *Vettese*, *supra*. However, sellers who have been landlords of the property for sale should be very careful if they claim they have no knowledge of the condition of the residential property for sale.

C. Omitting information from a Seller's Disclosure Statement or providing false information in a Seller's Disclosure Statement may be used as evidence of common law fraud. *Smith v Cristoforo*, docket number 266942, 2007 WL 866229 (March 2007); *Elliott v Therrien*, docket number 288235, 2010 WL 293071 (Jan. 2010).

D. A seller cannot be found liable for an innocent misrepresentation in a Seller's Disclosure Statement because the SDA provides that a seller is "not liable for any error,

inaccuracy or omission in any information delivered pursuant to this Act if the error, inaccuracy or omission was not within the personal knowledge of the transferor . . .” MCL 565.955(1). *Roberts v Saffell*, 483 Mich 1089 (2009); *Bergen v Baker*, 264 Mich App 376 (2004).

E. In claims for fraud alleged against sellers by reason of a misrepresentation in the Seller’s Disclosure Statement, buyers are still required to demonstrate that they reasonably relied upon the misrepresentation. *Timmons v DeVoll*, docket number 241507 and 249015, 2004 WL 345495 (Feb. 2004).

F. It has been consistently recognized that it is not a violation of the SDA if after the Seller’s Disclosure Statement is completed and provided to a buyer, something changes before the closing to render the statement inaccurate. MCL 565.956. However, if the change causing the inaccuracy relates to “structural/mechanical/appliance systems,” then the seller has a duty to update the Seller’s Disclosure Statement. Once the Seller’s Disclosure Statement is amended, the purchase agreement once again becomes subject to revocation by the buyer. A failure to amend, when required, will give rise to a cause of action for silent fraud. *Pena*, supra. The Court of Appeals has held that the duty to amend does not apply to all questions in the Seller’s Disclosure Statement, but only “structural/mechanical/appliance system” changes. *Huhtasaari v Stockemer*, docket number 256926, 2005 WL 3481429 (Dec 2005).

G. The issue of whether a property subject to the SDA is in the “proximity” to a shooting range is a question of fact which may be decided by a jury. *Pena*, supra.

H. Question (1) under the heading “Property Conditions” in the Seller’s Disclosure Statement requires sellers to disclose if there “has . . . been evidence of water” in the basement or crawlspace. This inquiry has been interpreted by the Court of Appeals as requiring disclosure if there has been evidence of water in the basement at any time while the sellers have occupied the

residence. *Pena*, supra. The wording of this question in the Seller's Disclosure Statement should be compared with the disclosure required for a roof, *i.e.*, "does it presently leak?"

I. Sellers were found not to have violated the SDA in a situation where they did not disclose certain defects known by them at the time they purchased the property for which they had been provided with a credit against the purchase price; received a report indicating defects in the structure of the residence; and obtained a bid from a contractor to correct the defects. *Westrick v Jeglic*, docket number 291470, 2010 WL 2793556 (July 2010). The jury believed the sellers' testimony that the sellers had not attached great significance to the earlier report of structural defects; had lived in the home for a couple of years with no problems; and, when filling out the Seller's Disclosure Statement, had attached no significance to the earlier report and bid. The Court of Appeals affirmed. This case is relevant to the issue of whether a seller should amend a Seller's Disclosure Statement when an inspection report is received in connection with a prior offer and the inspection report reveals changes to the "structural/mechanical/appliance systems" of the property. A seller in good faith may believe that the conditions detected by the inspector are not as described by the inspector. Remember, however, that the case will turn on whether the jury finds the sellers' testimony to be credible.

J. A Seller's Disclosure Statement should always be filled out by the seller and not the REALTOR®. An obvious exception is where a seller requires physical assistance in filling out the Seller's Disclosure Statement. In that situation, it is still preferable for the seller to receive the assistance of a family member or trusted friend in filling out the form.

AGENCY DISCLOSURE

REALTORS® have been required to comply with Michigan's Agency Disclosure Law for almost 20 years. The purpose of the Agency Disclosure Law was, in part, to address complaints by consumer advocates that members of the public had no idea who was representing them when they were selling or purchasing a home. MAR obtained enactment of the agency disclosure law to both address the concerns of consumer advocates and to protect REALTORS® from complaints from buyers after the fact that they had been misled as to whom the selling REALTOR® represented in the transaction.

The Agency Disclosure Law has spawned very little litigation. Upon its enactment almost 20 years ago, there was grave concern expressed by real estate commentators that the time of delivery of the Notice of Agency Disclosure (the "Notice") would be a major problem. The statute provides that the Notice must be delivered "... before the disclosure by the potential buyer or seller to the licensee of any confidential information specific to that potential buyer or seller." The commentators came up with numerous hypothetical scenarios whereby it would not be possible for a REALTOR® to physically deliver the Notice prior to a buyer or seller disclosing confidential information. Fortunately, to date none of these hypothetical scenarios have panned out. We are unaware of any case in which the time of delivery of the Notice has been an issue.

While there has been very little case law involving the agency disclosure law, it appears to have proven beneficial to REALTORS® in at least three different situations.

First, REALTORS® continue to engage in buyer representation without the benefit of a buyer's agency agreement. Claims have been asserted by sellers that a cooperating REALTOR® has failed to disclose material facts about the buyers to the sellers or to the listing REALTOR®. For example, sellers have claimed that the cooperating REALTOR® had a duty to tell the sellers

that the buyers had indicated they may not be able to obtain financing for the transaction. In almost all instances, the cooperating REALTOR® has made appropriate agency disclosure indicating he or she represents the buyer (despite the absence of a buyer agency agreement), and can demonstrate that all parties were aware that he or she was representing the buyers, as set forth in the Notice.

Second, courts have found that agency disclosure by a listing REALTOR® protects the listing REALTOR® from claims asserted by buyers in certain situations. In the typical case, a listing REALTOR® receives offers from more than one unrepresented buyer (*i.e.*, the listing REALTOR® is working with several buyers as customers). The offers are then submitted by the listing REALTOR® to the seller with a recommendation by the listing REALTOR® that the seller accept one of the offers for reasons specific to the seller.

When the second, losing buyer, finds out that the seller accepted the offer based upon the listing REALTOR®'s recommendation, the losing buyer has tried to sue the listing REALTOR® contending that he or she breached a fiduciary duty owed to that buyer. In these instances, the listing REALTOR® prevailed based upon the fact that he or she made the appropriate agency disclosure to all buyers indicating that he or she was representing the seller. This same type of scenario has occurred with respect to the order in which the listing REALTOR® submits offers to the seller and similar scenarios.

Finally, the use of the Notice has proven extremely effective when buyers have contended that they did not consent to a dual agency arrangement. The Court of Appeals in *Clancy Realtors v Rubick*, docket number 276309 and 276310, 2008 WL 4958793 (Nov. 2008) and *Vanhellemont v Gleason*, docket number 286350, 2009 WL 3049582 (Sept. 2009) found that the delivery of a Notice to the buyers from the listing REALTOR® indicating that the listing

REALTOR® was acting as a dual agent was effective to limit the duties owed by the listing REALTOR® to both the seller and the buyer. If REALTORS® find themselves in the situation where they are in the middle of a transaction and have become dual agents, they are advised to make certain they provide agency disclosure to both the seller and can demonstrate that there was informed consent.