Seller Disclosure – A Shocker

This information was originally presented at MAR's 2014 Achieve Conference, and is being offered here to make sure the word gets out to all REALTORS®. This year's MAR Legal Update includes a discussion of the Michigan Seller Disclosure Act ("SDA"). This topic was selected because this year marked the 20th year since the SDA was enacted.

The legal update handout on the topic is basically a celebration of the successful implementation and application of the SDA over the past 20 years. The SDA was designed to document disclosures by sellers as to what they know about the property they are selling in order to reduce the likelihood of lawsuits from buyers based on alleged misrepresentations. Despite repeated challenges, we were happy to report that the SDA had been properly interpreted and applied by the appellate courts on all of the following issues:

1. **The SDA did not create any new causes of action or claims against sellers or REALTORS®. The only remedy under the SDA for buyers is to terminate a binding purchase agreement if a seller's disclosure statement is not timely delivered or the seller has not otherwise complied with the SDA.**
2. **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 [seller]."**
3. **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. 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 as to changes in the "structural, mechanical, appliance systems."**
4. **Omitting information or providing false information in a seller's disclosure statement may be used as evidence of common law fraud, but in order to recover, buyers are required to demonstrate that they reasonably relied upon the misrepresentation.**

Over the last 20 years, a number of attempts have been made to persuade Michigan courts to permit buyers to sue sellers and REALTORS® for money damages under the SDA. MAR has always been successful in opposing such attempts. Thus, there was great shock when, in an unpublished decision released on November 5, 2013, the Court of Appeals at least arguably opened the door to claims for money damages against sellers and REALTORS® under the SDA. The case is Bowman v Greene, Court of Appeals No. 308282 (the "Bowman Case").

The Bowman Case involves an appeal from a jury verdict in amount of $483,195.18 against a real estate brokerage firm and an associate broker of that firm based on claims of fraudulent misrepresentation, silent fraud, negligent misrepresentation and violation of the SDA! In 2004, the Bowmans had purchased a condominium unit in a redeveloped 100-year-old factory building where chemicals had been previously dumped into the ground. These chemicals included industrial solvents that contained trichloroethylene ("TCE"), a carcinogen. According to the opinion of the Court of Appeals, in order to deal with the TCE levels, the developer of the condominium project had installed a vapor barrier over the affected ground area. The vapor barrier required the use of a blower and constant maintenance.

In 2001, the developer had hired an associate broker ("Associate Broker") with real estate brokerage firm ("Defendant Brokerage Firm") to market the condominium project. The Associate Broker prepared a marketing brochure which stated "the property has been addressed under current Michigan cleanup requirements through a grant from the [DEQ]."

In 2002, Kirk Van Horn purchased a condominium unit in the project. In 2004, Van Horn contracted with the Defendant Brokerage Firm and Associate Broker to resell his condominium unit. Prior to buying Van Horn's unit, the Bowmans met the Associate Broker and Van Horn at the unit and they agreed to have the Associate Broker serve as their agent as well. Mr. Bowman testified that while he was viewing the unit, he specifically asked the Associate Broker whether there were any "environmental issues" ongoing with the building itself. He further testified that the Associate Broker assured him that there were none. He also contended that Van Horn was present at the meeting and gave the same assurances. In addition, the Bowmans were provided with a seller's disclosure statement in which Van Horn indicated there were no "environmental problems" on the property.

The Bowmans agreed to purchase Van Horn's condominium unit for $360,000. Prior to the closing, the DEQ sent a letter to the Developer, the Associate Broker and all of the residents of the

by Gregory L. McClelland, Esq. MAR Legal Counsel, McClelland & Anderson, LLP

condominium project regarding both the status of the site and the marketing brochure that had been prepared by the Associate Broker. According to the Court of Appeals' opinion, in the letter, the DEQ advised that the land under the condominium project remained "highly contaminated with chlorinated solvents in the soil and groundwater, and metals in the near surface soils." The DEQ's letter also stated that the marketing brochure "does not represent the facts regarding the contamination and is misleading to the reader. The contamination has not been cleaned up." The Bowmans were not made aware of the DEQ letter.

The Bowmans learned about the contamination at the site approximately one year after buying Van Horn's condominium unit. In the meantime, the Developer declared bankruptcy and the condominium association became responsible for the costs associated with monitoring the pollution and maintaining the vapor barrier. The Court of Appeals' opinion indicates that at the time of trial, the City of South Haven was covering those costs, but there was no guaranty that the City of South Haven would continue to cover those costs in the future.

At trial, the Associate Broker testified that she had been present when the vapor barrier was installed at the site, and had reviewed documents from the Developer regarding the contamination of the site. The documents reviewed by the Associate Broker described the presence of TCE and other chemicals and heavy metals on the site. The Associate Broker testified she did not provide the documents to the Bowmans, but would have done so had they asked her. The Associate Broker further testified that she thought it was safe to live at the condominium unit based on the information she had received from the Developer and the City.

The Bowmans contended that the contamination made their condominium unit worthless. The jury found against the Associate Broker and Defendant Brokerage Firm and awarded the Bowmans $483,195.18 in damages. On appeal, the Court of Appeals first affirmed the trial court's decision against the Defendants on the fraud and negligent misrepresentation claims. Based on the facts asserted in the Court of Appeals Opinion, it is difficult to see how the Defendants' Broker, Firm and the Associate Broker could ever have avoided liability on these claims. The Court of Appeals then considered the claim made under the SDA.

As to the SDA claim, on appeal the Defendant Brokerage Firm and Associate Broker first contended that such claim was barred by the statute of limitations. The Court of Appeals found that there was no limitations period set forth in the SDA, and therefore applied the "catch all" six-year statute of limitations. (There is, of course, no limitations period set forth in the SDA because, as the Court of Appeals has previously held on numerous occasions, there is no claim for money damages based upon a violation of the SDA.)

The Court of Appeals next considered the Defendant Brokerage Firm's and Associate Broker's argument that the SDA only applied to the condominium unit and did not apply to the other portions of the condominium project which were contaminated. Focusing on the use of the word "property" within the SDA and the purposes of the seller's disclosure statement as set forth in the statement, the Court of Appeals held that the contaminated soil on the land where the condominium was situated should have been disclosed in the SDA. In other words, the Court of Appeals found that disclosure under the SDA was not simply limited to the condominium unit itself. The Court of Appeals concluded that the Defendant Brokerage Firm and Associate Broker "acted in concert" with the Seller, Van Horn, in the violation of the SDA by concealing the contamination through an inaccurate seller's disclosure statement.

It is unknown why the Defendant Brokerage Firm and Associate Broker did not raise the defense that there is no separate claim for money damages under the SDA based on the numerous prior Court of Appeals' opinions that stand for this proposition. While asserting such a defense would not have avoided the damages based on the fraud and negligent misrepresentation claims, presumably it would have defeated the claim for damages under the SDA. Further, since it appears that the Defendant Brokerage Firm and Associate Broker did not raise this defense at the trial court, an appeal to the Michigan Supreme Court would be fruitless.

The Bowman Case is an unpublished decision that is not binding on any other court, including the circuit courts. That being said, it is anticipated that the existence of the Bowman Case will now cause legal counsel for buyers to attempt to make claims against sellers and REALTORS® under the SDA. Some years ago, after MAR had obtained a favorable decision from the Michigan Supreme Court exempting REALTORS® from application of the Michigan Consumer Protection Act, there were still occasions where a REALTOR®'s counsel would fail to raise the defense. MAR addressed this problem by widely publicizing the existence of the exemption for REALTORS® under the MCPA and providing REALTORS®' counsel with an MCPA "survival kit." It would appear that as a result of the Bowman Case, a similar effort may be necessary to combat claims by buyers for money damages under the SDA. **MAR**

Michigan REALTORS® can stay informed of legal issues with updates through our Legal Lines.