

Seller's Disclosure: The What, When, and Why of Disclosing

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Introduction

- **Property condition is often an issue between Sellers and Buyers in the transfer of real property.**
- **Sellers typically want to transfer property “as is,” without warranties and with no obligation for repairs.**
- **Buyers have an interest in acquiring property in the best possible condition for the price, and receiving full disclosure of defects and needed repairs.**

Disclosure in Residential Transactions

- **TREC promulgates a Seller's Disclosure of Property Condition form for use in residential real estate transactions.**
- **Completed by the Seller and attached to the One to Four Family Residential Contract.**
- **TAR's form has a few additional questions and information – updated from time to time based on information reported to it involving disputes, questions, and cases.**
- **Must be given on or before the effective date of the contract.**

Disclosure in Residential Transactions

- **Content of the form tracks Section 5.008 of the Texas Property Code.**
- **5.008(a) A seller of residential real property comprising not more than one dwelling unit located in this state shall give to the purchaser of the property a written notice as prescribed by this section or a written notice substantially similar to the notice prescribed by this section which contains, at a minimum, all of the items in the notice prescribed this section.**
- **Applies to single family homes, townhomes, and condominiums.**

Purpose of Disclosure in Residential Transactions

- **Makes clear what appliances, equipment, and features exist on the property;**
- **Whether or not these items are in working condition; whether the seller knows of any defects or malfunctions in critical systems;**
- **If certain conditions like termite treatment, previous fires, or flooding have occurred;**
- **The need for repairs; and**
- **The existence of unpermitted additions, unpaid HOA fees, violations of deed restrictions, lawsuits, or any conditions that “materially affect the health or safety of an individual.”**

Knowledge

- **Disclosure must be completed to the “best of seller’s belief and knowledge as of the date the notice is completed and signed by the Seller.” Tex. Prop. Code Section 5.008(d).**
- **If information is unknown to Seller, Seller shall state that fact on the Disclosure.**

Top Ten Things You Should Know About Seller's Disclosure

1. Form to Use

TREC Seller's Disclosure of Property Condition form is a copy of the statutory minimum information set out in the Texas Property Code.

TAR's Seller's Disclosure Notice, contains additional provisions to increase the information provided to buyers.

The additional information is designed to reduce risk and exposure for sellers and as an information source for buyers.

2. Exemptions to the Obligation

The seller's disclosure notice statute contains 11 narrow exemptions.

The most common of these exemptions apply to: (a) a builder of a new home, (b) a trustee or executor of an estate, and (c) the lender after foreclosing on a property.

2. Exemptions to the Obligation

Keep in mind, however, even though these types of sellers are not required to provide a disclosure notice, they still must disclose any known material defects.

A material defect is a specific issue with a system or component of a residential property that may have a significant, adverse impact on the value of the property, or that poses an unreasonable risk to people.

For example, a lender who knows about a cracked foundation in a property that the lender acquired through foreclosure must disclose the defect to any buyer who purchases the property from the lender. The means of disclosure is not mandated.

3. Duplex

A seller's disclosure is not required on a Duplex, however, to reduce any potential risk and/or litigation, the owner of a duplex may decide to provide the notice for each side of the duplex.

Remember, disclose, disclose, disclose!

4. Lease

The statutory requirement to provide the notice does not apply to any lease transaction, no matter the duration of the lease period.

5. Death

Texas falls closely in line with the majority of states by recognizing that a seller or agent has no duty to disclose deaths that occurred because of natural causes, suicide, or an accident that was unrelated to the condition of the property.

Any known murders must be disclosed, as they are considered facts material to a real estate transaction.

The Texas statute also requires disclosure of deaths that were caused by a condition existing on the property, even if the condition was subsequently remedied. This provision was intended to inform buyers about deaths resulting from structural defects or other dangers inherent to a property.

6. Inspection Reports

The seller and broker have a duty to disclose any known material defects. Possession of a prior inspection report may be evidence of the seller's or broker's knowledge of a known defect.

The Courts of Appeals are split on whether there is a duty to disclose the actual report. We suggest that the broker or seller provide the prior inspection report to avoid allegations of nondisclosure or mischaracterization of a purported defect.

6. Inspection Reports

Further, the TAR Seller's Disclosure Notice asks the seller to list and attach copies of previous inspection reports performed in the last four years.

The notice cautions the buyer against relying on previous reports as a reflection of the current condition of property and suggests that the buyer employ an inspector of the buyer's choice.

7. Repairs

Once an item is repaired, it is no longer defective, and disclosure of repaired items is not required except as noted in the seller's disclosure notice (namely, previous fires, previous flooding, previous foundation repairs, previous structural repairs, and previous termite treatment and repairs).

Again, remember, we suggest conveying all information regarding previous inspections to a purchaser including the previous inspection report and any invoices showing that repairs were made.

Why? Because, the potential for liability under the Deceptive Trade Practices Act (DTPA), Statutory Fraud, and Common Law Fraud is high.

8. A Seller's Refusal to "Open" an Inspection Report

A broker or seller who receives an inspection report is charged with knowledge of the information in the report even if the broker or seller does not open the report.

A buyer and/or Agent cannot require the Seller to read the report.

They can and should, however, negotiate for any repairs found in the inspection report during the buyer's option period.

If the buyer is not satisfied with the information in the inspection report or cannot get the seller to agree to requested repairs, the buyer can exercise his right to terminate the contract.

9. Commercial Transactions

TAR has a Commercial Property Condition Statement that is an optional attachment to its standard commercial contracts.

It is much broader in scope and addresses additional issues such as wetlands, underground storage tanks, and toxic waste.

We recommend that a buyer should require that the seller provide it.

10. Relocation Companies

If the relocation company is the Seller, it must complete and deliver the seller's disclosure notice.

Generally, most relocation companies act more in the role of an asset manager and are under no obligation to provide the disclosure.

However, most relocation companies provide a packet of disclosure documents, which includes a Seller's disclosure prepared by the transferring employee and inspection report.

Commonly Asked Questions



Does the Seller's disclosure notice create any representations or warranties by the Seller?

- **NO! Disclosure states in capital letters at the top that it is not a warranty.**
- **The questions on the form ask the Seller if the Seller is aware of any defect, malfunction, or detrimental condition.**
- **Seller is either aware or not – statement of awareness does not equate to a representation that a particular item is or is not in need of repair.**

If the notice is not delivered timely and is given less than 7 days before closing does the Buyer have any right to rescind or delay the transaction?

- **Intent of Legislation – Buyer has no right to rescind the transaction after closing for failing to receive the notice.**
- **Buyer may elect to terminate at any time before closing.**
- **Contract may give the Buyer the right to extend closing.**

May a Buyer waive the 7-day period to terminate for failing to receive the notice or for failing to timely receive the notice?

- **Intent of Legislation – Buyer may waive the 7-day period after the Buyer receives the notice.**

If the Seller delivers the notice but mistakenly overlooks an item or omits an item, is the Seller in compliance with Section 5.008?

- **Seller's Obligation – complete disclosure to best of their knowledge.**
- **Courts to determine materiality of any omissions to determine if there had been compliance.**
- **If notice is timely provided but a material item is omitted, Buyer may still exercise contractual, common law, or other statutory remedies for failing to disclose a material defect or condition.**

Noteworthy Cases

- ***Pfieffer v. Ebby Halliday Real Estate*, 747 S.W.2d 887 (Tex. App. – Dallas 1988, no writ). Repairs correct defects, not prove continued known existence. Common knowledge of neighborhood conditions or conditions in the area or previous repairs does not establish knowledge of an actual or continued defect.**
- ***Kessler v. Fanning*, 953 S.W. 2d 515 (Tex. App. – Fort Worth 1997, no writ). Seller answered “no” to questions related to improper drainage. Seller acknowledged to Buyer that he knew about the drainage problems. Seller has a duty to know whether an affirmative statement is true.**

Noteworthy Cases

- ***Robbins v. Capozzi*, 100 S.W.3d 18 (Tex. App. – Tyler 2002, no writ). Buyer received notice that garage was in “working condition” and had “no known defects.” After closing, Buyer discovered she could not maneuver her car into the garage. No duty to disclose material facts that would be discoverable by a Buyer in the exercise of ordinary care.**

Ongoing Duty to Disclose

- **Seller's Disclosure form does not, per se, impose an ongoing duty to disclose matters that may come to the Seller's attention after the form has been signed and delivered to the Buyer.**
- **Not wise for a Seller to withhold material information that was subsequently discovered - too many other statutory avenues for an aggrieved Buyer to pursue.**

Broker Liability

- **Seller's responsibility to accurately complete the Seller's Disclosure.**
- **Seller's Broker does not ordinarily become liable for the Seller's wrongdoing in this regard.**
- **Broker only has a duty to come forward only if he had any reason to believe that the Seller's disclosures were false or inaccurate, and the only way he could be held liable for the Seller's statement in the notice is if it were shown to be untrue.**

DTPA

- **Failure to disclose material conditions and defects is a violation of the DTPA, Section 17.46(a).**
- **DTPA applies to real estate transactions; real estate is a “good” within the meaning of the DTPA.**
- **If Seller fails to disclose a material item, the Seller’s actions may be found “unconscionable” and treble damages, attorney’s fees, and court costs are imposed.**

DTPA

- For this cause of action Plaintiff (Buyer) must prove that:
- (1) Seller or agent failed to disclose information concerning the property;
- (2) the information was known at the time of the transaction;
- (3) the Seller or agent intended to induce the Buyer into the transaction by withholding information; and
- (4) the Buyer would not have entered into the transaction if the information had been disclosed.

O'Hearn v. Hogard, 841 S.W.2d 135 (Tex. App. – Hous. [14th Dist.] 1992, no writ.)

Statutory Fraud

- **Texas Business & Commerce Code Section 27.01 (the Statutory Fraud Act) is another potential pitfall for Sellers who fail to make full disclosure.**
- **A misrepresentation may consist of the concealment or nondisclosure of a material fact when there is a duty to disclose.**
- **The duty to disclose arises when one party knows that the other party is ignorant of the true facts and does not have an equal opportunity to discover the truth.**
- **A fact is material if it would likely affect the conduct of a reasonable person concerning the transaction in question.**

Common Law Fraud

- **The existence of the Statutory Fraud Act does not preclude a Buyer from filing suit on the grounds of common law fraud as well.**
- **In other words, the two causes of action can be pursued side-by-side.**

Additional Liability for Real Estate Licensees

- **Agents and brokers who are also Sellers need to be especially concerned about the consequences of failing to make full disclosure.**
- **Real Estate License Act (“RELA”) expressly prohibits any conduct by a licensed Texas real estate salesperson or broker that constitutes dishonest dealing, bad faith, or untrustworthiness.**
- **A violation occurs if the licensee, when selling, buying, trading, or renting real property in his own name, engaged in misrepresentation or dishonest or fraudulent action.**

“As Is” Transactions

- **“As is” clauses are held to be valid in certain narrow circumstances.**
- **Two things to be upheld: the specific wording of the “as is” clause and whether or not the Buyer obtained an inspection.**
- **Courts look at the totality of the circumstances.**
- **Generally speaking, “as is” transactions as a means of avoiding Seller disclosure are problematic at best and should be avoided.**
- **The best advice to a Seller is to “disclose, disclose, disclose.”**

The End

Let us at Tiago Title Help You!

**Please contact us with any
questions.**