Seller Beware of PA's Disclosure Law

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The latin maxim "*caveat emptor",* or "Buyer Beware*",* was long the standard for the purchase of real estate. This was mostly true in Pennsylvania until the passage in 2000 of the "Real Estate Seller Disclosure Law, 68 Pa. C.S.A. Section 7301, *et. seq*., also known by the acronym RESDL.

Today, it is critically important for both buyers and sellers of real estate in Pennsylvania to know who has to disclose, what has to be disclosed, when disclosures must be made, and for buyers, what they can do if the seller failed to disclose material defects in the property to the buyer. If sellers don't understand and abide by the requirements of RESDL, they can be liable to suit by buyers for the actual losses which the buyers suffer as a result of the sellers' failure to properly disclose.

As I write this article, I am either representing buyers in bringing RESDL actions or sellers in defending them on a wide range of different disclosure claims. Disputes include a cracked and settling foundation, bowing walls, failed sump pumps, leaking basements, broken, root snarled and improperly graded sewer lines. Other actions involve leaking roofs, mold, termites and cat urine.

Every one of these actions involves buyers who have discovered major and expensive problems with their new homes, and who went back and read the disclosures provided to them by the sellers at the time of the purchase and sale. The disclosures avoid, evade or directly contradict the information buyers have reason to believe was available to sellers at the time sellers filled out the disclosures, or between the time the disclosures were completed and the time the buyers made their offer or closed on the purchase of the property in question.

Defenses raised by sellers include that they suffered from senility and could no longer remember the problems they suffered with their property, claims that real estate agents told them to lie on disclosures, and claims that the problems must have arisen after closing.

To understand RESDL, we have to start with which transactions are covered by the law. Under section 7302 of the law, it is applicable to all transfers of residential real estate, with limited exceptions. The exceptions include transfers by a fiduciary in the course of administering an estate, guardianship, conservatorship or trust. This means that when you buy

property from the estate of someone who has passed away, the executor or administrator of the estate does not have to give you a disclosure.
Guardians, conservators and trustees of ordinary trusts would likewise not be required to complete a seller disclosure form.
But don't think that by using a land trust as the buyer of your properties, you can get around the disclosure of material defects of which you are aware. The purpose of the law is to require disclosure, not to avoid it, and land trusts are considered business entities rather than ordinary trusts, so the odds are against someone who tries to conceal defects by hiding behind the title of trustee.
Conversely, while there is no exception to the requirement of a seller disclosure in section 7302 for banks and REO companies after they obtain a property through foreclosure, as a practical matter, their disclosures are generally useless because they don't know anything about the properties which they acquire that way.
Under section 7303 of RESDL, sellers must disclose to the buyer "any material defects with the property known to the seller". That language has been interpreted not to require disclosures of issues which, although they may affect value are not defects in the structure of the home. For example, the existence of a group home next door was not required by the court to be disclosed. Colaizzi v. Beck, 895 A.2d 36 (PA Super 2006). Likewise, claims of haunting, or information that a crime occurred in the house or a sexual predator lives in the neighborhood may affect the value or perceived value of a property, but would not be defects in the structure of the home, and arguably not the subject of seller disclosure under RESDL.
The standards for disclosure are further modified in different ways by sections 7306 to 7309 of the law. Section 7306 provides that if an item of information required to be disclosed by a seller is unknown or not available to the seller, the seller can disclose based on the best information then available to the seller.
Section 7307, however, imposes an ongoing duty on the seller between the date the disclosure is made and the date of closing to notify the buyer if any act, occurrence or agreement makes the disclosures given inaccurate. In addition, while section 7308 of RESDL indicates that a seller is not required to undertake an investigation or inquiry into the condition of the property to complete the disclosures, he or she is nevertheless barred from making any representation which the seller or seller's agent knows "or has reason to know are false, deceptive or misleading".

Finally, section 7309 attempts to clarify that a seller will not be liable to a buyer for errors, inaccuracies or omissions in the disclosure if seller did not have knowledge of the same, if the seller had a reasonable belief that the defect or other matter not disclosed had been corrected, or the seller relied on information provided to the seller by a public official, home inspector or contractor, and the information was within that person's jurisdiction or occupational knowledge.

The RESDL requires that sellers of residential real estate complete all applicable items on a Seller Disclosure Form, and that they sign and date the form, and deliver it to the buyer prior to the signing of an agreement of transfer or sale. Under section 7305, delivery can be by handing a copy, mail, certified mail or facsimile to either the buyer or the buyer's real estate agent. While there is a place on the form for a buyer to sign off acknowledging receipt, and that is certainly a good idea, it is not required by the law

Section 7311 provides that a seller who willfully or negligently fails to comply with the disclosure law shall be liable to the buyer for the actual damages suffered by the buyer as a result of the violation. Significantly, the law does not make sellers responsible for buyers' attorneys' fees in bringing an RESDL action, and this reduces the number of small claims on which suit is filed. Attorneys' fees may be available under other types of claims, such as a claim for violation of the Consumer Protection Law, which are often attached as additional counts in RESDL cases, in an attempt to make buyers whole. Usually, however, courts recognize that the gravamen of the buyer's action is under this law, and are reluctant to award fees on other counts in the complaint.

Also under Section 7311, the buyer must bring the seller disclosure action within two years of the date of the closing or settlement, regardless of when the buyer found out the disclosure was untrue. Despite the two year statute, we recommend that most actions against sellers where buyers had a home inspection be filed within the shorter one year statute for claims against home inspectors, because the actions are often joined. Filing suit too late against a home inspector often results in the dismissal of the buyer's action against the home inspector, and the seller's defense being that they didn't know about the problem, but the home inspector should have found it. Having the home inspector involved in the case is not always easy, however. While the home inspector presumably has more knowledge and experience in identification of material defects in homes, the inspector's investigation

is limited by law to what he can see or observe during the inspection without any invasive or destructive effort. Sellers can, and often do have knowledge of the symptoms of a problem, such as the occasional backing up of a defective or damaged sewer line, which would not be apparent to the most skilled inspector. And home inspectors often try to limit their liability in their contracts to the amount of their fee, and threaten a buyer who joins them in a lawsuit with a counterclaim for the home inspector's costs to defend the suit. Although courts are unlikely to uphold the limitation language in the contract, and even less likely to award the home inspectors their attorneys' fees, these positions by home inspectors do cause many buyers reluctance in joining them as defendants in the lawsuit. And the inspector should not be presumed to be able to identify every defect. Intentionally deceptive sellers can cover water or moisture problems with paint, mold problems with paint or cleaning before inspection, or odor problems with chemical treatment before a home inspection. Sellers can also intentionally or accidentally prevent access to home inspectors to areas where problems are apparent as simply as by stacking boxes over the area while getting ready to move. Almost every home inspection report has a section noting that certain areas were not able to be inspected, or that evaluation of basement water infiltration was made more difficult by the recent painting of basement walls. These issues do create viable defenses for home inspectors.

Before the enactment of RESDL, real estate agents and brokers were almost guaranteed to be parties to lawsuits involving claimed non-disclosure by sellers to buyers of hidden defects in real estate. By requiring sellers themselves to fill out and sign a written disclosure to be given to the buyer, the law has reduced the role of agents as intermediaries, and eliminated the previously common scenario where the sellers claim they told their agent about a problem, the buyers claim their agent did not tell them about the problem, and a lawsuit revolves around who said what, with all parties, buyers, sellers and agents pointing fingers at each other.

Section 7310 of the law has substantially reduced the liability of agents and brokers even further. It provides that real estate agents are not liable for violation of the law unless they have either actual knowledge of the material defect not diclosed, or actual knowledge of a misrepresentation concerning the defect. From a buyer's perspective, I generally don't include the agents as defendants in RESDL litigation unless the agent lived next door and should have known about the flooding in the neighborhood, for example, or

took care of the house for sellers who had already moved, and actually supervised the concealment of the mold, water problem or smell during that time period.

Even in those types of cases, I have often not been able to hold agents liable, because the buyers and their witnesses cannot prove the agent's actual knowledge to the satisfaction of the court. We can prove the agent knew their house next door had a wet basement, but not that the agent knew the house being sold also had a wet basement. We can prove the agent let the waterproofing company into the house to give an estimate, and later let the painter in to paint over the problem with rubber based paint, but can't prove the agent was aware of the ten or twelve thousand dollar estimate the sellers received from the waterproofing company before the sellers elected to spend a few hundred dollars on paint instead.

Real estate agents have not been able to avoid RESDL litigation as much as might be expected by the language of Section 7310, however. In many cases, after I have filed suit against the sellers, they file a complaint to join the listing agent, claiming that the agent gave them advice on how to fill out the disclosure, and told them to omit disclosure of the very problem which resulted in the buyers' lawsuit against the sellers. Often, these allegations by sellers against their agents strain credibility, since the agent is likely to earn the same commission on the sale of the house whether the seller has paid to repair a problem or concealed it. Additionally, the agent's commission on the sale is less than the risk of being liable for the repairs later, and the seller disclosure is usually filled out when the property is listed, before any buyer is at the door and closing within reach. Agents do end up along for the ride this way in many RESDL cases, and incur substantial legal fees for defense, even if they are rarely found liable.

A seller's defenses to a claim of non-disclosure are substantially more limited under Section 7309 of the law than the above discussed defenses of a real estate agent or home inspector. First, a seller can claim no liability because the seller has no knowledge of the error, inaccuracy or omission in the disclosure. I advise buyers who are investigating a seller disclosure claim to talk to neighbors about whether the defect buyers have discovered had been an issue for the sellers. Neighbors will often volunteer that they saw the plumbers' electricians' or other trade trucks coming to the property before the sale, or even that the sellers admitted the problem to the neighbors. Especially for plumbers and HVAC contractors, they have a habit of leaving stickers on water heaters and furnaces, and can be called to

ask whether they serviced the defect claimed or identified it to the sellers before the sale.

I have had widows successfully defend seller disclosure actions claiming that they were unaware of problems which their deceased husbands covered up before their death, and there is caselaw in Pennsylvania that a wife who relied on her husbands' completion of a seller disclosure, and who had no knowledge herself of the defect, was not liable under the law. Growall v. Maietta, 931 A.2d 667 (PA Super. 2007). That decision could create a problem for buyers in collecting on a judgment they receive, because jointly held assets of the husband and wife would not be reachable on a judgment solely against the husband.

Currently, I have a case where the seller is elderly, and her lawyer claims that senility caused her not to remember the long time defect in the sewer line from the house when she filled out the disclosure, despite the fact that she had paid plumbers on several occasions to clear her sewer line, and they had recommended replacement of the line years before the sale. The plumber's receipts were certainly available to the seller to refresh her recollection, as was the plumber available to call. Although an elderly woman is a sympathetic defendant, a case pursued with civility and patience can still result in a settlement or court decision in favor of a buyer.

Another defense available to sellers is that they reasonably believed the material defect or other item not disclosed had been corrected. The challenge to sellers making this defense, however, is that the seller disclosure form specifically asks whether sellers had problems with specific systems, and some questions ask about "past or present" problems, making it hard to explain good faith lack of mention of a problem, even if seller believes it was repaired.

Finally, sellers can rely on providing their own home inspector's, contractor's or other expert's report to buyers in lieu of reporting their own knowledge, if the subject of the report is within the expert's competence, and sellers relied on it. This is rare, but sellers sometimes try to use this defense to claim they relied on the buyer's home inspection report. The problem with that argument is one of timing. Buyers don't usually get home inspections until after they have a signed agreement of sale, and sellers have to give a disclosure before there is a signed agreement of sale.

So, what can real estate investors do to reduce the risk having a claim under RESDL, or of being sued under the law? First, be very familiar with the actual disclosure form, which you can pull online

at:http://www.parealtor.org/content/upload/AssetMgmt/Standard%20Forms/PDFs/SPD.pdf Know who has to give a disclosure and when it is to be given. Get disclosures before you make an offer on a property. If you get a home inspection, give the disclosure to the home inspector and ask him or her to review it before and during their inspection. Review the disclosure yourself, and ask sellers for more information anywhere there is a yes answer, or to complete the form anywhere there is a blank.

Next, keep the disclosure form you received when you bought a property, and refer to it when you sell the property. For items which occurred before you bought, giving the same information which you received can be a very effective defense, more so if you did not live in the property or owned it for a short time. And err on the side of over disclosing any work you had done. I've never seen a seller disclosure case based on a seller disclosing too much! If one buyer is scared away, that could have been a sale followed by a lawsuit later. Another buyer will come along, without the higher risk of being sued.

Finally, if you are a buyer and you have an expensive problem with the house within two years of closing, which appears to have been long term or concealed, go back to the disclosure statement you received. You may have a claim. If you think you do, review it with a lawyer before you go forward. Doing the right things in the right order can make a world of difference to your success. If you are a seller and are contacted about such a claim, get your own lawyer right away. You may have more of a problem than you realize.

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