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AS-IS Contracts UNDERSTAND YOUR DISCLOSURE DUTIES

[AS IS] CONTRACTS

Understand Your Disclosure Duties

To avoid potential litigation, it is important to pay careful attention to the rules governing as-is contracts.

BY ROBERT GARCIA, ESQ.

Many sellers think using an as-is sales contract will ensure their transaction closes quickly and smoothly—and who doesn't want that? With this type of contract, it is important to understand and observe the duties binding both the sellers and you as a real estate professional. Failure to do so may subject you to liability years after closing. To avoid costly attorney's fees, the stress that comes with being sued and the potential damage to your professional reputation, keep these rules in mind when handling as-is transactions.

Sellers may opt for the as-is sales contract because they believe that doing so relieves them of their duty to disclose known defects. For many, the as-is contract is equivalent to "take it or leave it; buyer beware." However, in Johnson v. Davis, the Florida Supreme Court expanded consumer protection and held that sellers have a duty to disclose material facts that are not readily observable and are not known to the buyer. This duty applies regardless of whether the property is sold as-is. For example, if the sellers are aware of a leak that is not currently active, they have a duty to disclose it to the potential buyer. The sellers' failure to do so could subject them to liability.

The duty set forth in Johnson v. Davis also extends to you. However, as an agent for the sellers, your knowledge of a property is usually limited to what the seller communicates.

CONSEQUENCES OF FAILING TO DISCLOSE.

In the legal world, if buyers decide to file a lawsuit for failure to disclose, they will typically sue both the sellers and the sellers' real estate professional. In those situations, a conflict of interest may arise between the two, with the sellers claiming they informed their real estate professional about the defect, but the real estate professional failed to disclose the defect to the buyer. Or they may say the real estate professional told them they didn't have to disclose the defect. In either scenario, the buyer's theory to the court will be the same; the sellers and the real estate professional failed to disclose the defect in order to push the sale through and earn a profit. This theory is simple, believable and one to which a jury can relate. To avoid such litigation, there are things you can do.

1. USE A SELLER'S DISCLOSURE FORM.

Real estate professionals should always have their customers execute a seller's disclosure form. While the form is not required under Florida law, it helps sellers satisfy their legal duty to disclose. Real estate professionals should also inform their customers that the duty to disclose is not limited to those areas set forth in the form but extends to any defect of which they are aware. The form is merely a tool to assist in the disclosure, and providing additional information is always better than excluding information. Also, when dealing with condominium or homeowners' associations, real estate professionals should always instruct buyers to contact the association's property manager and/or board of directors because these individuals may have additional information of which the sellers are unaware.

While it may be impractical to maintain every document, you should maintain the following key documents at a minimum:

- Fully executed sales contract
- Seller disclosure forms
- Inspection reports
- All communications with any party regarding the condition of the property.

2. KEEP DISCLOSURE TIMELY.

Real estate professionals should have their customers update and date the seller disclosure form on a routine basis when applicable. This protects both the sellers and the real estate professional by showing that at the time the parties entered into a contract, the buyer was given the most up-to-date information. For example, let's say the sellers execute the disclosure form but the property sits on the market for a significant amount of time. During that time, it suffers damage, and the sellers forget to disclose the new damage. If the new defect is not noted on an updated disclosure form and is not readily observable, the sellers and the real estate professional may find themselves in the midst of a lawsuit. Routine updating of the seller disclosure form as needed prevents this from happening.

3. MAINTAIN ACCURATE RECORDS.

Always maintain accurate, detailed records regarding all transactions. Should a lawsuit arise, your file will be critical in your defense because documentation is usually more persuasive to a jury than a self-serving testimony months or years after a transaction. With the development of email and text messages, you may find yourself with hundreds or even thousands of communications related to a single transaction. While it may be impractical to maintain everything, you should maintain the following key documents at a minimum:

- Fully executed sales contract
- Seller disclosure forms
- Inspection reports
- All communications with any party regarding the condition of the property

Before finalizing a contract, you should confirm in writing that the sellers disclosed all known defects of the property, and that you did not persuade them to withhold any information. A document such as this can help prevent sellers from arguing that their real estate professional instructed them not to disclose a known defect.

While there is no single precautionary measure one can take to avoid being sued, these steps will help you defend against claims of negligence and fraud. Should a buyer proceed with litigation, these steps, in conjunction with the as-is sales contract, will make it a question of fact for the court to decide whether the buyer's claims are reasonable. #

Robert Garcia, Esq., is a shareholder in the Orlando office of Marshall Dennehey Warner Coleman & Goggin. A member of the firm's Professional Liability Department, Garcia focuses his practice on the defense of real estate professionals, landowners, general contractors, subcontractors, homeowner and condominium associations, employers, and other professionals in courts throughout the State of Florida and various administrative and governmental agencies.