

Why Are Seller Disclosure Statements Important for You, Buyers and Sellers?

Do you know why seller disclosure statements are important for you, buyers and sellers? Do they provide more protection or create more liability? What should you or a buyer do if sellers refuse to fill out a seller disclosure statement based upon the advice of their attorney?



These are very common questions that I receive on a continuous basis. If you do not know the answers to these questions, then it is important for you to understand what liability you might have for treble damages under New Jersey's Consumer Fraud Act (the "Act") and how a seller disclosure statement can protect you, buyers and sellers.

The following is a typical series of questions and my answers to help you understand these issues.

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? I know that I cannot lie to a buyer or seller, but what does the Consumer Fraud Act really provide?

A The Act covers much more than merely lying to buyers and sellers. It actually includes a very broad phrase that makes it unlawful to use any "unconscionable commercial practices" concerning the advertising or sale of merchandise or real estate. Such practices include a knowing concealment of a material fact and an affirmative misrepresentation.

The Act not only applies to real estate sales but also to rentals. As a result, real estate licensees can be liable under the Act to sellers, buyers, landlords and tenants.

A consumer who prevails under the Act is entitled to treble damages (three times the amount of any damages actually suffered by the consumer) and payment of all attorneys' fees and costs incurred by the consumer as a result of the wrongful conduct. The consumer is entitled to such damages even if the consumer never relied upon the misrepresentation.

? I often include information in the MLS or other advertising from the seller. Are you saying that I might be liable if that information proves to be wrong even though I had no idea that it was false?

A Unfortunately, yes. The New Jersey Supreme Court significantly expanded the potential liability under the Act for real estate licensees in a case known as *Gennari v. Weichert Co.* In *Gennari*, the developer lied to the broker about the quality of material that would be used in the homes being built, the developer's experience and the level of craftsmanship that would go into building the homes, among other things. When the buyers moved into their new homes, they discovered these lies and sued the developer and broker. The developer then filed for bankruptcy.

The Court held that a broker is liable under the Act for repeating misrepresentations of the seller even if the broker has no knowledge that the representation is false or deceptive. As a result, the broker was liable for treble damages, attorneys' fees and costs.

? If I am going to be liable for innocently repeating a seller's misrepresentation, why should I provide the seller's representations in a property disclosure statement that the buyer will have as proof of a seller's misrepresentation if the buyer files a lawsuit against me?

A After the broad interpretation of the Act by the Court in the *Gennari* case, NJAR® lobbied for an exception to the Act if a real estate licensee repeated a seller's misrepresentation without knowing it is false or misleading. As a result, the Legislature enacted N.J.S.A. 56:8-19.1, which created an exception for real estate licensees.

Under this exception, a real estate licensee is not liable for punitive damages, attorneys' fees or both for communicating any false, misleading or deceptive information provided by or on behalf of the seller if the following two conditions are met:

- (1) the licensee had no actual knowledge the representation was false, misleading or deceptive; and
- (2) the licensee made a "reasonable and diligent inquiry" to ascertain if the information was false, misleading or deceptive.

? So, if I didn't know it was false, I would still have to make a "reasonable and diligent inquiry" to find out if it was false? What does that mean?

A That's a good question. Section 19.1 specifically lays out what you have to do to satisfy your responsibility to make a "reasonable and diligent inquiry."

Your inquiry would have to include, but would not be limited to, disclosing information from one of the following three sources:

- (1) a report or representation by a person licensed or certified by New Jersey, including, but not limited to, an appraiser, home inspector, plumber or electrical contractor, about a particular physical condition pertaining to the real estate derived from an inspection of the real estate by that person;
- (2) a report or representation by a governmental official or employee if the information is about a physical condition of the property that is likely to be within the knowledge of that person; or

(3) the seller in a property condition disclosure statement form approved by the Division of Consumer Affairs, as long as the licensee (a) informed the buyer that the seller is the source of the information and (b) prior to making that communication to the buyer, "visually inspected the property with reasonable diligence to ascertain the accuracy of the information disclosed by the seller."

The approved disclosure form is available for members online on NJAR's website at www.njar.com/private/propsellerdisc2.shtml.

A licensee therefore no longer will be liable for punitive damages or attorneys' fees under the Act if the licensee had no knowledge the information was false, misleading or deceptive and the licensee made the required reasonable and diligent inquiry, including but not limited to relying upon a covered statement by a licensed or certified person, a government official or employee, or a seller in a disclosure statement as set forth above.

? I have no problem with a situation where I am relying on a report or representation from a licensed or certified person or government official or employee. However, are you now telling me that I have to become an inspector by visually inspecting the property and am liable if I miss something?

A No, not all. You are not responsible under the Act to perform an inspection the way a home inspector would. However, you should use the seller disclosure statement when you do a visual inspection of the property, which you would be required to do in any event under Real Estate Commission regulations.

More specifically, N.J.A.C. 11:5-6.4(b) places a duty on licensees to make a reasonable effort to ascertain all "material" information concerning the physical condition of a property, including inquiries of the seller or seller's agent and conducting a visual inspection of the property. Information is "material" if a reasonable person would attach importance to it in deciding whether or how to proceed with the transaction or if the licensee has reason to know it is important to the buyer. Licensees have the duty to ascertain this information regardless whether or not a seller disclosure statement is used.

If a seller uses a disclosure statement, the licensee similarly will have to visually inspect the property with reasonable diligence to ascertain the accuracy of the information the seller provided in the statement in order to limit the licensee's liability under the Act.

? I understand that, if the seller fills out the property condition disclosure statement and I do the visual inspection that is required, I no longer will be liable for treble damages or attorneys' fees. But why would the sellers want to put all of their representations concerning the condition of the property in writing?

A Even though the Consumer Fraud Act does not apply to sellers or buyers who are not in the business of selling or buying homes, sellers can be liable for fraud if they intentionally misrepresent the physical condition of the property. Such a misrepresentation could include whether or not there has ever been mold, the condition of the septic system, environmental problems and other issues that are covered in the seller disclosure statement.

One of the most common problems when a buyer files a lawsuit against a seller for fraud arises when the buyer recalls the seller saying one thing about the condition of the property and the seller is adamant that the seller never made that representation. Unless the representation is in writing, as it would be if there is a seller disclosure statement, a jury would have to decide whether the buyer or the seller is right (and we all know there is no way to predict who the jury will believe). As a result, any seller who honestly represents in a seller disclosure statement the condition of the property receives significant protection from a lawsuit by using the disclosure statement.

In fairness, the seller might make an innocent misrepresentation in the seller disclosure statement. If that were to happen, the seller would be in no worse position than if the seller had verbally made that misrepresentation (unless, of course, the seller is willing to commit perjury by lying about having made the misrepresentation). A seller who honestly fills out the seller disclosure statement therefore is in a better position than a seller who does not fill it out.

? Am I correct that you next are going to tell me why the buyer would want a written seller disclosure statement for the property?

A Of course. By having the seller's representations concerning the physical condition of the property in a seller disclosure statement, the buyer will know upfront before even placing an offer on the property what issues there are with the property. The buyer therefore can make an informed decision whether or not to make an offer for the property and, if so, for how much.

In addition, if the seller lies in the seller disclosure statement, the buyer will avoid the possibility of the seller denying that the seller ever verbally made a misrepresentation concerning the property.

? I have one final question. Although there are good reasons for using a seller disclosure statement, can I, as a buyer's agent or listing agent, require the seller to fill out the disclosure statement if the seller does not want to fill it out?

A The simple answer is no. Since seller disclosure statements are not mandatory in New Jersey, as they are in some other states, you cannot require that a seller fill out a disclosure statement if the seller refuses to do so. However, if it is your office policy that sellers fill out disclosure statements and a seller refuses to fill one out, you may want to reconsider taking that listing because it may very well be that the seller is hiding information that will result in a lawsuit in which you undoubtedly will be named as a defendant by the buyer. Similarly, if you are a buyer's agent, you certainly would want to protect your buyer by obtaining a seller disclosure statement before any offer is made. Your buyer may not even want to purchase a home if the seller refuses to provide a property condition disclosure statement.

In the final analysis, after weighing all of the responsibilities and liabilities involved, using seller disclosure statements therefore provide significant protections for you, buyers and sellers.

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