

Are Seller Disclosure Statements Right for You?

by Barry S. Goodman, Esq., NJAR Legal Counsel

The seller lied to you and you've repeated the lie to the buyer. You had no idea it was a lie but now you are being sued by the buyer. To make matters worse, the seller denies ever lying to you.

Are you liable for innocently repeating the seller's misrepresentation? Would you have been better off having the seller's representation in a written disclosure statement? To answer these questions, you must understand what liability a real estate licensee has for treble damages under the Consumer Fraud Act (the "Act") and what you must do before you can rely upon a seller disclosure statement in order to be exempt from liability for such treble damages.

Applying the Consumer Fraud Act to Real Estate Licensees

It is unlawful under the Act to use any "unconscionable commercial practices" in connection with 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.

Treble Damages for Innocently Repeating a Seller's Misrepresentation

In a case known as *Gennari v. Weichert Co. REALTORS®*, the New Jersey Supreme Court significantly expanded the potential liability under the Act for real estate licensees. 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 and the broker was left defending the lawsuit, having been charged with consumer fraud violations for repeating the developer's misrepresentations.

The Court held that a broker is liable 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 under the Act.

Carving Out an Exception for Consumer Fraud Liability

In response to the *Gennari* decision, NJAR lobbied to create 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, N.J.S.A. 56:8-19.1 was enacted in 1999, creating an exception to the Act.

Under the exception, a real estate licensee is not liable for punitive damages, attorneys' fees or both under the Act 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.

The key issue for real estate licensees, therefore, is what constitutes a "reasonable and diligent inquiry." Section 19.1 specifically provides that communications by a licensee that will satisfy such an inquiry include but are

not limited to communications that disclose information from 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 Division of Consumer Affairs finally approved regulations regarding a seller disclosure statement form effective May 17, 2004. To be protected under the Act, the seller disclosure statement must be in the form and contain, at a minimum, the information as contained in the regulation (N.J.A.C. 13:45A-29.1). A copy of the form is available on the NJAR web site at www.njar.com, through the online forms at www.mbaiforms.net and via the Zipform product.

A licensee will no longer 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 governmental official or

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employee, or a seller in a disclosure statement as set forth above.

Additional Responsibility for Less Liability?

One question that arises if a licensee and seller decide to use a seller disclosure statement is whether or not it creates additional responsibility for the licensee, who would have to inspect the property with "reasonable diligence to ascertain the accuracy of the information disclosed by the seller." If so, is that responsibility worth being insulated from liability for treble damages and attorneys' fees under the Act for innocently conveying a seller's misrepresentation to a buyer? In making this decision, it should be noted that all real estate licensees already have certain obligations under New Jersey Real Estate Commission regulations to ascertain material information about a property.

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. Such a reasonable effort must include making 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 of whether or not a seller disclosure statement is used.

However, if a seller completes the seller disclosure statement form that the licensee relies upon, the licensee also will have to visually inspect the property with reasonable diligence to ascertain the accuracy of the information disclosed by the seller in the statement in order to limit the licensee's liability under the Act. What is "reasonable" likely will have to be determined based upon the circumstances of each situation.

Deciding to Use Seller Disclosure Statements

It is strongly recommended that each broker develop an office policy setting forth if agents in the office should use seller disclosure statements. Brokers will have to weigh the advantage of limiting liability under the Act against the responsibility that may have to be undertaken to fall within the exception. Also to be considered is the value of having the seller's representations concerning the property in writing so that, if there is a dispute later, the buyer cannot claim that the seller or the licensee lied to the buyer about a condition at the property.

Real estate licensees, therefore, now have the opportunity to significantly lessen their potential liability under the Act by using seller disclosure statements.

However, it is your decision whether or not you want to avail yourself of this opportunity to limit your liability. 🏠

Editor's note: In June legislation was signed into law allowing real estate licensees to rely on information from unlicensed home inspectors until December 30, 2005. Please see the article on page 8 for more information.



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A QUICK START GUIDE TO CREATING A CONTRACT USING NJAR'S ONLINE FORMS

1. Go to <https://www.mbaiforms.net>
2. Enter Credentials
E-mail: njar (you will be prompted to change to your e-mail address)
Password: NRDS #
3. Select Contract of Sale. Click OK.
4. Document Selection:
Select Real Estate Contract check box (General Information should already be selected) and click Go To Edit Control button;
Click General-Information edit button to input data
5. Fill Out Information (these are simply input screens that hold the data); Click Next.
6. Once contract screen is complete, click Finish.
Click Build Document button.
A random Adobe file is created (Ex. 263233227.pdf) Click on it to Open and Print. (Make sure you select legal size paper in your printer properties.)
You can also right click on it and Save Target As... to save locally (on your PC) and e-mail as an attachment.