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Seller Beware: Failure to Disclose During Home Sale Could Cost You

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As the housing market continues to surge, offers to purchase homes are made and accepted very quickly. However, even in a robust sellers' market, if you are selling your home it is still very important to understand your obligations and duties regarding disclosure of property defects. A failure to do so could result in having to defend a costly lawsuit brought by the buyers after they move in. As a result, if you are selling, it is very important to understand not only your disclosure obligations, but also the potential adverse legal ramifications for failing to make a required disclosure.

It has become increasingly common in recent years for buyers to move into a home, discover some issue regarding the condition of the home, and then sue the seller claiming that the seller either failed to disclose the issue or that they actively concealed it. Some of the most common alleged defects are those pertaining to water infiltration in the basement.

In Wisconsin, most residential home sellers are required to disclose defects of which they have notice or knowledge to potential buyers prior to the sale.^[1] A "defect" is "a condition that would have a significant adverse effect on the value of the property; that would significantly impair the health or safety of future occupants of the property; or that if not repaired, removed, or replaced would significantly shorten or adversely affect the expected normal life of the premises." See Wis. Stat. § 709.03. Examples of "defects" necessitating disclosure include structural and mechanical issues, such as water infiltration, as well as non-physical defects that can adversely affect the value of the property, such as easements, zoning or tax/assessment issues.

The vehicle by which sellers disclose defects is a form entitled Real Estate Condition Report ("Condition Report"). Recently, the Wisconsin legislature changed the manner in which such disclosures are made in the Condition Report. See Wis. Stat. § 703.09. Rather than the disclosures taking the form of affirmative statements by seller, the new form poses questions to the seller regarding potential defects, with the presumed purpose being to promote increased disclosures.

The key question for sellers is what is a required disclosure? Should you disclose as little as possible or everything that could potentially be considered a defect? When trying to answer these questions, sellers should be mindful of the fact that their real estate agents are not attorneys and that he or she may be motivated to finalize the sale as effortlessly as possible, rather than reducing their clients' potential liability to the buyers. For this reason, it is often useful to involve an attorney on the front-end of a sale in order to avoid the potential of being sued for failure to disclose a defect after the sale.

Additionally, in a seller's market such as the one in which Wisconsin currently finds itself, many sellers may be tempted to sell their homes "as-is," i.e. without providing a Condition Report. While selling "as is" may reduce the possibility of being sued, it does not remove all potential liability for the sellers. For example, selling a house "as-is" does not protect against a lawsuit alleging active concealment of a material defect, i.e. fraud. If you are considering selling your house "as-is," it is very important to know all the potential liability that selling "as-is" does not shield you from.

Failing to disclose or concealing a defect can lead to a variety of potential damages. First, buyers can sue for breach of contract and intentional misrepresentation and seek either rescission of the sale or the costs to repair the alleged defects. In addition, buyers almost universally bring a cause of action that offers the potential of



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recovering multiplied damages and recovery of their attorney's fees. For example, buyers will allege that the failure to disclose a defect constituted a theft by fraud, which, if proved at trial would allow them to recover triple damages (i.e. three times the amount of their actual damages), as well as their actual attorney's fees. Not only are the potential damages unnerving, but the cost of defending a home defect lawsuit can be staggering, as such cases often entail numerous depositions and the retention of expert witnesses. To make matters worse, it is very unlikely that the sellers' homeowners' insurance will cover the costs of defending such a lawsuit.

Finally, if after selling your home, you receive a demand letter from the buyers' attorney seeking damages relating to undisclosed defects or misrepresentations regarding the condition of the property, or if you are served with a summons and complaint, it is vitally important that you contact an attorney to assist with your response to these allegations. You do not want to discuss any of these issues with the buyers or the buyers' counsel, as anything you say can be used against you in a lawsuit.

[1] No disclosures need be made if the home has not been inhabited, or if the house is being sold by a personal representative, trustee, conservator or a fiduciary appointed by a court. See Wis. Stat. § 709.01(2).

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