It's a matter of writing

By James L. Goldsmith, Esq.

This story, like so many I write, comes from a recent Hotline call. The facts were interesting and somewhat unique, but the answer was one I have given hundreds if not thousands of times over the years.

The property in question had come under agreement only to have that agreement fail as a result of an inspectorôs findings. The original buyer had elected, and had performed, a handful of inspections including well, septic, boundary, wood infestation and a home/property inspection. The inspection reports revealed a number of problems that were not negotiated or addressed in corrective proposals; rather, the buyer immediately chose to exercise the option to terminate.

Eventually buyer #2 came along. Buyer #2ôs agent researched the MLS history and took note of the propertyôs previous status as ñpending.ò The common assumption is that when ñpendingò changes to ñactive,ò that there is a problem to be disclosed or investigated. Buyer #2ôs agent made that assumption and asked the listing agent to produce copies of inspection reports obtained by buyer #1. The agent for buyer #2 is absolutely positive that he asked for **all** reports from inspections obtained by buyer #1, and that the listing agent agreed to provide them.

Having the benefit of buyer #1ôs inspection reports, buyer #2 successfully negotiated an agreement of sale that took into account some of the reported problems. Buyer #2 had a few inspections of her own that were benign. Ultimately the transaction closed.

Several months after settlement the purchaser found a mud tube on a floor joist in the basement and decided to call a pest inspection company. When greeted at the home, the pest inspector said that he was familiar with the home and its problems as he had been to the property only a year previously! As it turns out, the property had a history of intermittent termite infestation that had left ñscars.ò The extent of damage to the structural integrity, if any, could not be known without some evasive diagnostics that the previous owner had not elected.

So, is this a simple case of failure to disclose where the seller is on the hook for reasonable remediation? It would seem so, but legal matters are rarely that simple. What if the seller moved out-of-state or out of the country? It is hard to get recourse from someone you canôt find. And while sellers usually can be found and even served with a suit, there are defenses.

One defense, a rather strong one, is found in the integration clause of the standard agreement that is entitled ñRepresentations.ò It says that the agreement contains the whole agreement between the seller and buyer and that there are no other additional terms, obligations or representations. The representation that the seller agent gave **all** prior inspection reports to the buyer is therefore not a representation that can be relied upon. In Pennsylvania one can successfully sue for misrepresentation only if the misrepresentation is one that the buyer relied on. How can the buyer claim to have relied on the representation that he received all prior inspection reports when the agreement of sale says that he relied on nothing that is not included in the contract? Further, the parol evidence rule in Pennsylvania provides that buyers cannot introduce evidence of oral

representations in the face of an integration clause such as that that appears in paragraph 25 of the standard agreement.

Certainly the buyer suffered a loss as a result of a misrepresentation at the hands of the seller or listing agent. Less obvious, however, is that buyer #2 also suffered a loss as a result of the failings of her buyer agent. Why didn't the agent for buyer #2 add a provision to the agreement of sale stating that seller represents that seller has provided buyer with reports from **all** inspections performed in connection with the proposed sale to buyer #1? In almost all transactions, sellers and listing agents make representations of conditions and other facts relating to the property. When those representations turn out to be false or only partially true, the ability for recourse may depend on whether those representations were part of the agreement. Yet, far too often the representations relied on are not included as provisions in the contract.

Representations on a seller's disclosure statement fall into a different category. Fraud or misrepresentation on the disclosure form may subject the seller to liability even though the seller disclosure form is not incorporated in the agreement. The reason is that Pennsylvania's seller disclosure law provides that a seller is liable for breaches of that law having to do with the extent and the nature of disclosures.

The integration clause of the Standard Agreement has been, with occasional modification, a part of the standard agreement for the 38 years I have been practicing law. And, over the years many articles and examples of the impact of this clause have appeared in trade magazines. Judging by the nature of our Hotline calls, however, the message has not been fully received.

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