Details, details, details.

By James L. Goldsmith, Esquire

Pennsylvaniaôs law requiring sellers to complete property disclosure statements was intended to strike a balance between a buyerôs responsibility to determine that the property is an appropriate purchase and the sellerôs obligation to disclose material defects that would not be apparent to a buyer carefully assessing the readily assessable and visible areas. Ideally, the seller shouldnôt have to caution a buyer about what was there to be seen or learned by careful inspection (e.g., traffic jams that plague the neighborhood, that the school district is in a state of notorious decline, that the basement or attic are water stained, etc.). And sellers canôt disclose what is behind walls that have never been opened or what insidious problems are just beginning to develop in a septic system. The equilibrium is achieved when a seller discloses and a buyer discovers.

You obviously have a role in this equation. When it comes to helping the seller perform her disclosure duties, thereôs not too much a listing agent can do. Ultimately, you have to rely on your sellerôs honesty when it comes to revealing the history of a property and its known defects. From the experience of others weôve learned to have sellers reexamine what was disclosed to them at the time of their purchase and to reveal adverse findings from a recently performed home inspection. You encourage sellers to be candid, to search for repair invoices, and you listen carefully to assess their credibility and to ñencourageò disclosure where necessary. Seller agents are frequently sued when buyers perceive that sellers had not disclosed known material defects. My experience from handling many hundred cases of this nature is that listing agents prevail most often.

The buyerôs duty of discovery is a little more complicated and more difficult. Sellers tell what they know (by statute they have no obligation to search for problems) while buyers who seek to learn of the problems beyond those that sellers know of must uncover them by tests and inspections. What to test and inspect becomes complicated and expensive. Thus, the role of the buyer agent, who is advising buyers on their discovery obligations, is much more complicated. Buyer agents, too, are more frequently found liable when the discovery side of the equation fails to discover that which should have been discovered. Many times a buyer agent is liable because he/she was too involved. Let me illustrate by way of example.

Sellerôs home is within a homeowners association that collects fees and is responsible for the roofs of the townhomes that comprise the association. Seller was aware, though no longer remembers the source of his knowledge, that a design defect was responsible for needed construction to be performed on the roofs within the association at some future date. This information was passed along by a notation on the seller disclosure statement and a non-too-revealing discussion between the listing and buyer agents. The certificate of resale was not very revealing so the future of the roof and the unit ownerôs financial responsibility for the fix were still in question. The buyer agent knew enough to caution the buyer about proceeding in the face of potential unfunded liabilities. Further investigation was obviously needed and here is where the problems for buyer and our buyer agent take off.

Our buyer agent, out of the goodness of his heart and desire to help his buyer, sought answers. He began by calling the association and speaking to its secretary where he learned, generally, what the problem was with the roof system. He learned, also generally, about the fix that was to take place four or five months later and he explored the potential cost by contacting a roofer and describing what he had learned from the association. The contractor reassured our buyer agent of his familiarity with these types of issues and of the ñlow costò remediation available. He thought it was nothing to worry about.

The buyer agent passed this information onto the buyer who was most appreciative of his efforts. The appreciation was long forgotten seven months later when the buyer, now owner, received a $22,000 assessment for his share of the repairs!

I will tell you that the buyer agent is on the very short list of those who may be culpable for this $22,000 problem. As an aside, it might be argued that this is really not a $22,000 problem since the buyer was purchasing a property with a problem roof and now has a property with one in A+ condition (most of us would not take pleasure in consoling our buyer by telling him how much better off he is). Our question is, rather, did the buyer agent do wrong and, if so, how?

In law school we learned that the good samaritan on the beach had no duty to save the drowning victim. Waving goodbye as the failing swimmer raises two fingers will not get you a lawsuit no matter how morally reprehensible you find it. Our agent is not exactly a good samaritan. He is being paid for his role in guiding the buyer through the fairly complex process of home selection and discovery. Should he fail in his obligations, he is culpable for the damage directly resulting from that failure. But did he have a duty to explore this problem?

Our assessment begins with the buyer agentôs legal obligation to properly determine the buyerôs exposure to the expense of the anticipated roof repair. It may surprise some of you that there is a very strong argument that the buyer agent had no duty to solve the problem and was duty bound only to reveal the issue (done), explain the potential exposure (largely unknown but possibly involving significant money), the options (investigating/inspecting, terminating, etc.), or the benefits of consulting legal counsel (or appropriate experts for specialized guidance). Certainly the buyer agent should shepherd the buyer along this process, but I would not, especially with the benefit of hindsight, have encouraged the buyer agent to have found the answers or render an opinion on the potential exposure.

While our sunbather had no duty to attempt a rescue of the drowning swimmer, once she chooses to do so she opens herself to liability for a failed effort (yes, in many places, good samaritan laws will protect failed rescuers). While our buyer agent may have had no duty to determine what the roof repairs would entail and at what cost, once he undertook the responsibility to do so, he became liable for his performance. Why? Once the rescue begins, others will refrain from doing that which is being accomplished. The buyer now relies on the agent and not the other things that could have been done, but werenôt.

Applying logic, you might conclude that the moral of the story is to do as little as possible because that limits the opportunities for mistake. While that is a logical and reasonable conclusion, it wonôt get you as far as you think. Some duties you canôt avoid. The buyer agent

clearly had to underscore the little information revealed by the seller, to explain that the financial exposure was not defined (meaning it could be huge or not so huge), and to assure that the buyer was on a course that would reasonably conclude in termination or a knowing walk into whatever loomed.

It is too tempting to want to carry our buyersô burdens and protect them from things they may not see as potential liabilities. It leads buyer agents into undertaking tasks they have little or no experience with; it leads to good-faith efforts and unskilled execution. It is one thing to advise a client about valuation, trends and market availability, but a much different task to assess structural defects and their repair, or the obligations of owners under the declaration and legal documents of an association. Smart agents know what they donôt know as well as the limitations of their expertise!

Jim Goldsmith is an attorney with Caldwell & Kearns and serves as general counsel to PAR. A substantial portion of his practice is dedicated to providing advice and counsel to real estate licensees. He and his firm represent and defend real estate salespersons and brokers in civil lawsuits and licensing claims across the Commonwealth. Jim also defends REALTORS® in disciplinary hearings conducted by the Real Estate Commission. He routinely counsels employers on employee relations issues and is one of the voices of the PAR Legal Hotline. He may be reached at www.realcompliance.com.

08039-008/44220