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Beware of signing disclosure forms

Difficult queries beyond scope of most homeowners

Statement dredges up increase in problems, disputes

One of the most controversial forms used in the real estate field today is the Seller Property Information Statement (SPIS) distributed to its members by the Ontario Real Estate Association (OREA). Similar forms are in use in other jurisdictions across the continent.

The OREA form lists 47 questions to be answered in writing by the sellers of each home. At present, the forms are not mandatory in Ontario, and in my experience they have been a gold mine for litigation lawyers creating more problems and disputes than they were intended to avoid.

Sellers who are presented with these forms by listing agents are invited to answer and be responsible for questions which are well beyond the knowledge of the average homeowner.

Some of the questions, for example, are:

- Are there any encroachments, registered easements or rights-of-way?
- Does the survey show the current location of all buildings, improvements, easements and rights-of-way?
- Does the subject property comply with the zoning?
- If not, is it legal non-conforming?
- Will the sale of the property be subject to GST?
- Is the property under the jurisdiction of any Conservation Authority?
- What is under the carpeting?
- Are you aware of any moisture and/or water problems?
- Is there any lead or galvanized metal plumbing on the property?

Sellers are also asked whether they are aware of any structural problems, non-compliance with the Ontario Fire Code, insect damage, and problems with the air conditioning, plumbing or heating systems.

They are asked whether the wiring is copper, aluminum or knob and tube.

In my experience, it is difficult to answer most of these questions accurately, since many require technical or legal knowledge.

The 2003 New Brunswick decision in the case of Hansen and King v. Seely is a prime example of a seller being sued, not because the house was defective, but because she signed a property disclosure statement.

Relying on the SPIS, the buyers agreed to purchase the property in January, 2000. The owner had bought the property in 1986. She installed a sump pump and repaired a basement wall crack to repair a moisture problem, and for the next 13 years never experienced any dampness in the basement.

A year after closing, water and silt entered the basement. At that point, the seller advised the buyers that there was a sump pump buried outside the house to divert surface water away from the basement walls.

That fact was never mentioned in the disclosure statement, and there was no question in the SPIS form about the existence of a sump pump. The agent (who was aware of the existence of the pump) never told the buyers about it either.

The buyers had to spend more than $11,000 to repair the water problems and sued the former owner. At trial in the local small claims court, the buyers were awarded the maximum $6,000 damages that the court had jurisdiction to award.

Despite the fact that the buyers had a home inspection, the court said that the previous owner had misrepresented the condition of the property, even though her basement had been dry for more than 13 years.

The judge in the case said, "In my opinion, a purchaser of real estate should not have to go behind and second guess the answers to the questions contained in a Property Disclosure Statement.

"It is the vendor's duty to answer the questions honestly and to disclose. It is, after all, a Disclosure Statement."

A leaky basement was also the subject of a representation in the disclosure statement of the 2002 Ontario decision in Swayze v. Robertson. The sellers correctly stated they were not experiencing water problems, but also indicated, incorrectly, that there was no history of cracks or water in the basement.

Despite a home inspection revealing repairs would be required to the basement walls, the purchasers closed and later sued for $12,572 plus costs. The new owners were successful both at trial and on appeal, based on false statements made orally and in the SPIS.

A New Brunswick case, decided in January, 2006, dealt with a property disclosure statement that incorrectly stated that the septic system had been installed 10

years earlier.

Two years after closing, the new owners, Christopher and Diane Boreland, experienced problems with the septic tank and had to replace it at a cost of $8,000. It turned out that the tank was made of timbers or railway ties, and was probably more than 50 years old. In addition, there was no septic bed at all, and the tank overflowed into a nearby ditch.

The new owners sued the seller, Walter Gilmore, who explained the misrepresentation by saying that the tank had been "upgraded" 10 years earlier. The trial judge found that "the Plaintiffs have established fraud by the Defendant," and awarded them $8,000, plus interest and full legal costs.

The law in this area is that except for hidden defects which make the property dangerous or unfit to live in, sellers do not have to disclose hidden defects in a house.

In general, the rule is caveat emptor buyer beware. That's why purchasers use home inspectors.

Signing a disclosure statement is completely voluntary. I always tell sellers never to sign one, but if they do they should always get the number of a litigation lawyer. A good one. Chances are they're going to need it.

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