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Disclosure: It's seller beware

Very difficult for homeowners to answer questions

Litigation more likely if forms used during transaction

I stirred up a storm of controversy with my Title Page column about property disclosure forms two weeks ago.

In this space on Oct. 21, I discussed the Seller Property Information Statement (SPIS) in use by many real estate offices across Ontario and elsewhere. The form, used by the Ontario Real Estate Association, lists 47 questions to be answered in writing by the sellers of each home.

In my view, it's difficult for the average homeowner to answer many of these questions accurately because they require technical or legal knowledge.

If the form is used, my point was that it increases the possibility of litigation because the purchaser has the right to rely on disclosure being complete and accurate.

I concluded by saying that signing the form is voluntary and sellers should only sign them if they have access to a litigation lawyer because they will probably need his or her phone number.

I received many emails in response to my column, most of them from real estate agents, and most of them disagreeing with my views.

It turns out that although the forms are optional in the greater Toronto area, they are required in other areas of the province.

Glenn Burlington, from Re/Max Chay Realty in Barrie, pointed out that the SPIS form is compulsory for listings with his local real estate board.

"Far from controversial," he wrote, "(the SPIS) has in many ways improved the information flow between seller and buyer and has helped many of my clients (both sellers and buyers) avoid the grief accruing from lack of disclosure.

"In fact, I ... can state categorically that it has helped at least one of my sellers and has damaged none.

"To suggest that the seller avoid signing because of the obscure and poorly presented examples in your column would be a retrograde step, and would ignore all the positive aspects of disclosure under the guidance of a real estate professional."

Burlington and others pointed out the disclaimers at the bottom of the SPIS forms, stating that the answers given to the questions on the form are not warranties and are given for information only. "The inclusion of this information," he noted, "would have truly informed your readers rather than inflaming them."

The fact is that courts routinely tend to ignore disclaimers on the basis that the person reading the form didn't see them, or didn't understand them, or that the reader wasn't specifically warned not to rely on the answers.

Burlington added, "Your statement that latent defects do not have to be disclosed (unless 'dangerous') is destructive and may encourage the hiding of defects by sellers. To imply that a home inspector is hired to coax out latent defects (your 'caveat emptor' statement) is ludicrous."

In fact, I didn't make up that statement. It happens to be the law of Ontario, repeated in numerous court cases over the years.

As far back as 1960, professor (later Chief Justice) Bora Laskin wrote that the doctrine of "buyer beware" applies in property law, assuming there is no fraud, mistake or misrepresentation.

"A purchaser takes existing property as (he) finds it," wrote Laskin, "whether [the property] be dilapidated, bug-infested or otherwise uninhabitable" unless the purchaser protects himself by terms in the contract.

Carl Rabinowitz works with Burlington in the same Re/Max office in Barrie.

"In my opinion," he emailed me, "the Golden Rule says that anything that could cause a prospective buyer not to want to buy a property should be out in the open or it is a recipe for, at worst, litigation and, at best, dissatisfaction.

"Call me naive, but I believe in doing the right thing. The SPIS is a useful form for making disclosure but, like anything in the hands of people, it is not perfect. A real estate transaction is a complex arrangement between two parties with much at stake for both.

"If there is intent to deceive, or both parties are not attempting to come to a mutually satisfactory outcome, there can be problems with or without an SPIS. I think the use of an SPIS is a net increaser, as opposed to a net decreaser, of the odds of a satisfactory outcome."

Ray Ferris, of Royal LePage Brown Realty in southwestern Ontario, wrote, "While I agree that there are questions on the SPIS that are beyond the knowledge of the average homeowner, a competent realtor should advise a seller to respond 'unknown' to any questions they aren't absolutely certain of.

"My concern as a realtor is that if a SPIS is not completed and a defect is discovered after closing that the seller will simply say that they told their realtor of the existence of said problem. It becomes 'he says, she says.' With a completed SPIS, a realtor has (a) record of a seller's responses to these questions."

Leonard Thornbury has been a Re/Max agent in Lindsay for 20 years.

He wrote, "I agree that some of the questions (in the SPIS form) are complicated and perhaps not that important to the whole transaction and obviously do have legal implications to the seller At the same time, for the most part the seller knows the property better than anybody and has a legal obligation to disclose any hidden defects that go along with it.

"This form is a checklist that may help jog a seller's memory of some of these defects that may have a bearing on what a purchaser is willing to pay or whether he or she will even attempt to buy the property.

"It invariably helps bring up discussion between the realtor and seller about the seller's obligation in providing as much information as possible to the realtor in effectively marketing the property and ensuring the buyer is getting what he bargained for with the ultimate goal of both the buyer and seller being satisfied.

"I don't believe it was designed to put sellers at a disadvantage, but ultimately facilitate a transaction that tries to keep everyone out of court and everyone satisfied."

For me, the jury's still out on property disclosure statements. Sellers should always consult their lawyers before signing one.

