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Home truths aren't always so simple

Disclosure statements may promote lawsuits

Best to steer clear even if there's nothing to hide Although seller property disclosure statements are mandatory in some American states, they remain voluntary in Ontario and elsewhere in Canada. Whether they should become compulsory here is a subject of considerable debate in the real estate field.

Ohio stands in sharp contrast to Ontario. It has required a simplified disclosure statement for some years, but as of Jan. 1, the state introduced an expanded and extensive disclosure form. The new mandatory disclosure form was lengthened from two pages to four pages, and now includes questions about mould, leaky pipes, historical designation, flood risk and smoke damage.

A task force of Ohio real estate professionals said the expanded requirements would minimize litigation by making sure buyers know as much as possible about the house prior to the purchase. On the other hand, I think they might promote litigation.

Do we want or need mandatory disclosure statements in Ontario?

In December, Hamilton lawyer Lawrence Bremner presented a paper to the local law association on the seller's property disclosure statement. (The paper is online at <http://www.aaron.ca>). Bremner practises real estate law with Gowling Lafleur Henderson in Hamilton.

The Ontario Real Estate Association distributes a recommended form to its member agents, and although many of them would like to see it become mandatory, its use is still controversial and not widely accepted in Ontario.

In his paper, Bremner outlines a number of the principal objections to the disclosure statement. The form, he says, is an obvious attempt to protect agents from liability for misrepresentation. It clearly says that the broker/sales agents are not responsible for the contents.

Bremner originally opposed disclosure statements on this point, but has since changed his mind. He now feels nobody knows the property better than the vendors, and vendors often conceal defects from their agents.

Disclosure statements can still be criticized because they require vendors to disclose more information than some lawyers consider appropriate including the existence of work orders, environmental issues, local levies or conservation authority jurisdiction over the house.

Traditionally, sellers are only required to disclose known latent (hidden) defects that make the property unfit to live in or dangerous. There is no duty to disclose defects that affect only the value of the property.

Another objection to disclosure statements is that as currently drafted by the real estate association, they require vendors to answer questions a layperson might not understand or be able to answer. These include questions about non-owner rights in the property, consent to severance, encroachments, zoning, restrictive covenants and GST.

I suppose there are two real questions about disclosure statements: Will they avoid or promote litigation, and will they encourage or discourage real estate sales?

Some interesting cases about disclosure statements have come out of Ontario courts in the last couple of years, and are discussed in Bremner's paper.

In *Swayze vs. Robertson*, the vendors had experienced a leaky basement but took steps to correct the problem. Before they sold the house, they signed a disclosure statement saying they were not experiencing water problems. They also indicated, incorrectly, that there was no history of cracks or water in the basement.

The purchasers had a home inspection done and even though the report stated that foundation repairs would be required to stop water leakage, they closed the transaction without objection.

After closing, the purchasers sued for the cost of repairs to the basement and were awarded a total of \$12,572 plus costs at trial. The vendors appealed to a three-judge panel of the Divisional Court in 2002, and lost again. The appeal court agreed with the trial judge that the purchasers were induced to complete the transaction by the vendors' false oral and written statements.

The purchasers' house inspection was superficial and qualified, and did not disclose the full extent of the home's defects. As a result, the court said the inspection did not prevent the vendors from having to pay damages for misrepresentation.

Bremner has three recommendations for parties involved in real estate transactions:

- Signing a disclosure statement is voluntary, and vendors should resist doing it even though their refusal might arouse suspicion in the minds of the agents and buyers.
- Buyers should get a copy of the disclosure statement and attach it to the offer. If purchasers obtain a home inspection, they might not be able to rely on the disclosure statement despite the *Swayze* case.
- When completing disclosure statements, if the vendors do not understand a question or know an answer, they should indicate "unknown," ask for professional help in answering, or add qualifications where appropriate.