LAW REVIEW

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PARTIAL DISCLOSURE INSUFFICIENT TO PROTECT SELLER

Sellers of residential properties in California are obligated, as we all know, to disclose to the would-be buyer "facts materially affecting the value or desirability of the property that are not known by or within the reach of the diligent observation of the buyer."

Once the essential facts are disclosed a seller need not provide details or elaborate. At least that was the law until last month.

Water Intrusion into Condo

Walter Samuelson was on the board of his condominium association. Flooding and water intrusion problems developed in the units and ultimately the association filed two lawsuits, one against the builder and one against the company that tried to fix the problem. Ultimately the water intrusion problems were fixed. Or so everyone thought.

TDS-14 Form

In preparation for selling, Samuelson filled out the California Association of Realtors Transfer Disclosure Statement, known as the TDS-14 form, checking the appropriate boxes that he was aware of "flooding and drainage problems." He checked "no" to the question about any lawsuits alleging defects in the

property or common areas—as the two lawsuits had been settled and dismissed years earlier. Oops.

Flooding

Of course you know what happened next. Samuelson sold to the Calemines (no relation to the poison oak medication) after which the lower portion of their condominium flooded--two years in a row. They then learned of the prior lawsuits. They sued.

The trial court found that Samuelson had checked the boxes appropriately and had therefore fully disclosed the prior water intrusion problems. Further, the Calemines had hired a home inspector who also fully disclosed the below-grade water intrusion.

Material Facts

The Calemines' suit alleged that a failure to disclose the two association lawsuits regarding water intrusion was a failure to disclose a material fact affecting the value and desirability of the property. Samuelson countered that he had disclosed all of the material facts and had no duty to elaborate.

As a real estate practitioner, I have to tell you it's not uncommon for sellers to minimally disclose a problem hoping not to scare away any would-be buyer.

Sometimes that works. Sometimes the courts find the seller adequately disclosed a defect or an issue and the buyer should have investigated further.

The Court of Appeal found for the Calemines, saying that Samuelson did not check the "any lawsuits?" box nor did he otherwise disclose the lawsuits, a material matter. Judgment for the buyers.

Take Home Lesson

The point here is that sellers and their agents need to work closely when filling out the TDS-14 form. Avoid the temptation to check boxes indicating that everything is fine. Over disclose. For example, if a leak in the roof has been fixed, disclose it, otherwise if it leaks again it will look like you hid that fact.

Because you have learned to live for years with a problem with the house or the property, that's no reason to not disclose it. (Is that enough double negatives?)

Also there is a lesson here for homeowner associations. When persistent problems develop in a subdivision, certainly where there are two lawsuits over flooding problems, prepare a notice package for buyers.

Editorial Comment

While I tend to agree that Samuelson should have disclosed the two lawsuits as a material matter any buyer would want to know, most of the time the duty to disclose does not include an obligation to elaborate. However, an understated, partial disclosure--hoping it will not alarm a would-be buyer--may get you in trouble as it did Samuelson.

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