

The Whole Truth About Disclosure

In Md., Sellers Now Have Greater Obligation to Tell Buyers About Defects

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Saturday, October 1, 2005; F01

Maryland home sellers have to tell buyers a lot more of the truth beginning today.

Home sellers have had the upper hand in the hot housing market for several years. This spring, though, Maryland lawmakers decided that buyers were at a particularly big disadvantage when it came to figuring out the condition of properties.

Although sellers have long been obligated under civil law not to defraud buyers about what they know about their houses, sellers in Maryland, as in Virginia and most other states, have for years had the option to choose not to say anything about the condition or history of their house in real estate listings and contracts. That contrasts with the District, where sellers for years have had to disclose a long list of possible problems, and where that list has gotten even longer this year.

The idea that buyers must be told anything at all is a change from the days when the principle of "caveat emptor," or "let the buyer beware," reigned. But when states tweaked that concept in the 1990s to give sellers the opportunity to disclose, they still offered the choice of silence.

Given that choice, most sellers, particularly in the recent hot market, are choosing to opt out, or sign disclaimer forms, say real estate lawyers and agents, because that way they can sell for more money more easily.

Sellers often list houses "as is," meaning they won't make repairs if problems are found. In the recent past, they have gotten so many multiple bids that they have been able to turn down contracts with contingencies for home inspections.

As a result, say regulators, buyers frequently contend they didn't get a chance to investigate and were misled into a bad deal.

Under a law effective today, Maryland sellers are squarely under an obligation to reveal what they know about problems that may not be visible but that endanger life and limb. The law doesn't say that sellers have to investigate whether there are problems, pay for repairs or reveal everything about their house, but they must disclose latent, or hidden, defects that they're aware of that threaten health and safety and that a home buyer or inspector would not easily be able to detect.

"The motivation for the change was that . . . there seemed to be a gap in the existing disclosure act that allows a seller to say nothing even though there are conditions that could be dangerous," said Alvin Monshower Jr., general counsel to the Maryland

Association of Realtors, which proposed the legislation two years ago. "It seems not proper that you could know about a dangerous condition and not disclose it."

Monshower said the hot market made the change more urgent. "In our market for the past few years, the offers have been highly competitive, and more and more buyers are willing to waive a home inspection, and that's a concern. A home inspector might have found some of these things," he said.

It's a big step for Maryland, according to some state regulators and industry specialists, moving the state closer to the protections under District law.

It's a "sea change," said Elizabeth Trimble, counsel to the Maryland Department of Labor, Licensing and Regulation, which oversees the state Real Estate Commission. While real estate agents for years have had "an affirmative action to disclose all material information . . . that they know of or should know, up until now sellers have had no such affirmative action," she said. "It certainly is a shift in the kind of buyer-beware situation that has existed in the past."

The District since 1999 has required that home sellers answer a list of questions about the condition and operating history of certain systems in the home.

District residents can check off a box for each question that says "Unknown," if they don't know the history or current condition, but they can't lie about what they have seen or heard from previous owners, repair firms or those who have inspected the property, said Constance W. Maffin, chairman of the District Board of Real Estate. And if they do lie, and the agent knows differently, "the agent has an obligation to disclose or not take the listing," said Maffin.

The District this summer added new disclosure requirements because of buyer complaints, Maffin said.

Sellers now must declare if their properties are in historic districts, have been cited for a historic preservation violation or are subject to an easement, in which the owners agree to not make changes to their house or grounds in exchange for donating that control to a nonprofit or government group. The easement typically entitles the property owner to a tax deduction equal to the loss in the property's value from limiting development, usually about 10 to 18 percent of assessed value.

Buyers had complained to the District's Board of Real Estate and the historic preservation office that they weren't told about these legal arrangements and then found themselves unexpectedly slapped with fines for previous violations or barred from making renovations.

A case involving nationally known columnist and talk show pundit Margaret Carlson, a Georgetown resident, was pivotal in the District's changes, according to some who know the history of the District's new rules but refused to be quoted on the subject. Carlson

filed a lawsuit this spring in D.C. Superior Court alleging that she was not told about an easement on a house she bought in 2003.

Carlson's suit claimed she was unable to complete a planned renovation because of the easement's limits on changes to the facade. The suit claimed damages of about \$126,000 for the loss in value and for an allegedly undisclosed roof leak.

Carlson said this week that she couldn't comment on the suit. But the suit alleges that the previous owner and a settlement lawyer knew of the easement but did not disclose it, and that a plaque on the building "looks decorative" and "does not convey its legal significance of the degree to which a new owner will be bound forever not to alter the house."

Maffin, the real estate board chairman, also said she could not discuss the case. She said the new disclosure requirements came out of discussions with D.C. historic preservation officials and groups that deal with easements. "We thought if we had better disclosure rules and got people's attention, that people that buy in a historic district and do not have a clue what that means and start putting in vinyl windows, will understand what they're getting into."

Real estate agents who work in the historic districts are aware of all the rules, Maffin said, but those who come from other jurisdictions may not be. "This puts the responsibility back on the seller, and most of the sellers should know" if their house is in a historic area or under an easement, Maffin said.

While Maryland and the District are adding disclosure requirements this year, Virginia will continue to allow sellers to disclose or disclaim.

"It's almost universal that sellers in Virginia give a disclaimer because they don't want to give a disclosure unless they have to, and in this market they don't have to," said Alexandria lawyer James C. "Beau" Brincefield Jr.

In Virginia, "virtually every complaint by a purchaser after the sale is that they were defrauded," Brincefield said.

Concealing a hazard is grounds for an allegation of fraud and a court case, he said, but proving that a seller knew takes time and money. He said such cases are long shots because Virginia lawmakers and judges have a long history of relying on the traditional concept of caveat emptor. Under that philosophy, it is up to the buyer to investigate all circumstances.

If such a case were to be brought in Virginia, said Brincefield: "The judge would say: 'You did have the opportunity to read the contract and to have a home inspection, and you chose not to, is that not so?' "

The trend nationwide, however, is to add more disclosure, said Craig Cheatham, chief executive of the Association of Real Estate License Law Officials, a group representing state regulators of the real estate industry.

And he said sellers are squarely to blame: "You will not believe the things that sellers have done to cover up a defect."

Not only do they bamboozle buyers, he said, but they also try to trick their own selling agents.

Sellers sometimes invite agents in to see if they can spot a defect, Cheatham said. "Then, if the agent doesn't catch it, the seller just assumes that they don't have to disclose."

But the agents, Cheatham said, are not obligated to do their own inspections, only to use their judgment and their observation skills. "Real estate licensees really are not home inspectors, they are marketers," he said.

What's going on in Maryland and the District is consistent with a national move away from the centuries-old philosophy of caveat emptor, said Tom Miller, an expert on real estate law who serves as a special deputy attorney general in North Carolina and legal counsel to that state's Real Estate Commission.

Maryland's law "is another nail in the coffin for caveat emptor," Miller said. "The step that Maryland has taken is a pretty big one, and one more victory for the forces that say that the seller has an obligation to inform the buyer."

State legislatures have "nibbled away at caveat emptor" as the nature of real estate and home construction has changed, Miller said. In the 19th century, the buyer-beware philosophy worked because "buyers and sellers as classes of people were on an equal footing in evaluating property," he said. Most people lived on farms where the value of the property was in the land, not in the buildings, and where houses, barns or outbuildings had little that couldn't be seen.

"The latent defect in 1890 was a loose floorboard, that was about it," said Miller.

"Today, there are all kinds of defects which a diligent buyer under the law of caveat emptor can't reasonably be expected to discover without expert help, like a serious wiring problem or a terrible septic tank problem," he said. Concerns about toxic mold related to moisture and leaks are also driving buyers to sue sellers and real estate agents, he said, but "the jury is still out on whether a seller or an agent could be expected to know what's happening behind the walls."

The sponsor of Maryland's bill said he acted after hearing horror stories about deceptive sellers.

Republican state senator Larry E. Haines, a longtime real estate broker from Westminster, said one oft-cited story involved sellers who had been plagued with bees.

Though neither Haines nor others could recall the names of the sellers or buyers involved, leading to the possibility that the story could be apocryphal, Haines said the situation was laid out during a hearing two years ago. It has come up frequently in industry references as the legislation made its way to law.

During the summer or fall of 2002, Haines said, the homeowners hired an exterminator to spray the bees' nest, which was under a roof gable.

But they ignored the pest control company's warning that the swarm would persist unless the siding was removed and more pesticide applied.

Instead, they "put the house on the market in the winter, when the bees were dormant," Haines said. And instead of disclosing the problem, they signed the disclaimer form. Soon after the contract went to settlement the next March, "the bees became active, and they stung a baby," Haines said.

When the buyers called in a pest control company, the exterminator "said something like, 'Oh yeah, yeah, I know that house. I've been there a bunch of times,'" recounted Mark Feinroth, a lobbyist for the Maryland Association of Realtors.

Feinroth says he never heard that a baby was stung, only that children lived in the house.

While the real estate group says the case and others motivated them to seek more protections for clients, others say the real estate industry has backed disclosure laws over the years to shield itself.

"They're always trying to limit their liability," said Stephen Brobeck, executive director of the Consumer Federation of America. Brobeck said his organization supports disclosure and "strongly urges buyers to search for a competent, independent home inspector" rather than one recommended by an agent.

But he said his group also wants to make sure that sellers are not "held responsible for everything, whether they know about it or not. . . . It would be a horrific situation if the seller had no knowledge [about a problem] and three years later ends up being sued."

Lawyers say real estate agents are more frequently sued than sellers because they are easier to find.

Real estate expert Miller said agents became liable to disclose their knowledge of problems when real estate brokerages were created in the 1920s and 1930s. "People said caveat emptor is not a reasonable standard for someone who holds himself out as a professional."

In the 1980s and 1990s, "a crescendo" of states required property disclosure statements in some form, Miller said, "but most of the states allow for some sort of opt-out."

Miller and local real estate regulators say that complaints about misrepresentation in sales are rife. "If you were to talk to all 50 states and Canada and ask what's the number one complaint, we would raise a chorus that it is misrepresentation, a legal word, which means lie in the face of a duty to tell the truth," Miller said.

Gaithersburg settlement attorney James Savitz, meanwhile, said he finds it "amusing" that some sellers "go through all these contortions" to try to hide information. "In this market, many of the buyers would go ahead with the transaction anyway," just to get a house, he said.

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