

Some Advice — on the House

A Primer on Real-estate Disclosures and After-sale Recourse

By DONNA L. WEXLER, Esq.

Buying a home is often one of the most exciting and stressful events in your life. There are many things to consider. Unless you are a do-it-yourselfer, purchasing the house for renovation, you want to purchase a house that is mechanically and structurally sound and free of defects.

As you begin the home-purchase process, you should keep in mind that 'caveat emptor' ('let the buyer beware') is how to approach this assignment. It is important for you as the buyer to express all of your concerns and ask the seller all questions that come to mind.

Remember, the seller is obligated to answer your questions truthfully; however, he or she has no obligation to disclose defects or issues that you could find out on your own with a little effort or due diligence.

It is very likely that the house you are interested in purchasing is listed with a real-estate agent. Keep in mind that the agent has no duty to inspect the house or property. An agent also has no liability for innocently passing information along to a buyer. Of course, real-estate agents may not knowingly make any substantial misrepresentations.

Many Massachusetts real-estate boards use 'seller's statement' forms to gather information from the seller about the property. These disclosure forms are often provided to the buyer for review prior to signing the purchase-and-sale agreement. The disclosure helps to stop the seller from concealing obvious defects not necessarily visible to the buyer.

However, a seller cannot dis-



close something of which he is unaware, and a seller cannot be expected to detail every blemish that exists in the house. It should be understood that if you are buying a 'used' house; it will not be perfect.

For that reason, it is important to hire an inspector and to participate in the inspection of the property. It is also recommended that you drive around the neighborhood where the house is located to make your own observations about the property and its location.

Since May 1, 2001, home inspectors have been required to be licensed by the Commonwealth of Massachusetts and to carry 'errors-and-omissions' insurance. Generally, the inspector observes the condition of the home and

other buildings on the property, identifies problems that require correction, and makes recommendations for upgrades and repairs.

An inspection is the key to attempting to detect defects, whether concealed or unknown by the seller. Failure to have an inspection can be very costly later.

After the inspection, the buyer may ask the seller to make repairs or to answer questions based on observations discovered from the inspection. Do not settle for non-responsiveness or information that sounds puffed up.

But remember, there is a chance that the seller may just not have the answers to your questions. They can't disclose what they don't know.

The law imposes an obligation on sellers of residences to disclose

information about the condition of the property only in certain circumstances. If a seller is asked specific questions about certain conditions of the property, he has a duty to reveal all material facts within his knowledge. Here are two often-asked questions.

What happens if you buy a house, and problems arise later? Is the seller liable?

Unless you can show misrepresentation or fraud on the part of the seller, it is difficult to hold him or her liable for any damages you suffer after the closing.

To sustain a claim of misrepresentation, you must show that the seller made a false statement of material fact and that a reasonable person would attach importance to it.

You must also prove that it was made to induce you to act. A seller cannot misrepresent facts to a buyer, so if you rely on that misrepresentation of facts, the seller may be liable to you.

To prevail on a fraud claim, the buyer (you) must show that:

- There was a misrepresentation of a material fact;
- The misrepresentation was intended to induce you to act on it;
- The misrepresentation was made with knowledge of its falsity;
- The misrepresentation was made with the intent that it be acted upon; and
- You have been damaged.

It is sometimes difficult for a buyer to believe that a seller did not know about the existence of problems subsequently suffered. How could the seller not know that the hot water wasn't sufficient or that there was a leak in

the bathroom? Often the seller did not know. But even if he did, if he was not asked about those items, and he did not make statements about them to you, he is not responsible for those issues after the closing!

What happens if you are buying a house from someone who has never lived in it?

There are times when a homeowner has passed away and his estate is selling the house. The executor or administrator of the estate may never have lived in the house, and is therefore unable to answer your questions about it. It is in fact likely that no one is

available who has lived in the house recently enough to have the ability to answer questions about its condition.

It is also very common to find a house on the market that is being sold by a bank that acquired the property after foreclosing on the homeowner's mortgage. It is probably safe to assume that no one from the bank has ever lived in the house and can answer questions. In addition, although the property is listed with a real-estate agent, that agent has probably never spoken to anyone who lived in the house, so you can't get information from the agent, either.

In any situation where you are buying from a seller who has not lived in the house, the inspection is even more important. Since there is no homeowner seller to question, you must obtain as much information about the house as possible from the inspection and your own due diligence.

Although the home-buying process can be stressful, owning your own home is a great accomplishment. There is no substitute for your participation in every aspect of the process, especially the inspection. Get to know everything you can about your house before you own it.

The more you know, the less likely you will have problems after you close.v

Donna L. Wexler is a shareholder with the law firm Bacon Wilson, P.C. and a member of its real-estate department. She handles all types of commercial and residential closings for buyers, sellers, and lenders. Her additional specialties include domestic relations, commercial loans, and landlord/tenant disputes; (413) 781-0560; dwexler@baconwilson.com