

RESIDENTIAL REAL ESTATE SALES:

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What Does a Seller Have to Disclose?

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If you have ever sold a house, then you have most likely completed a Seller's Property Disclosure form. Colorado courts have concluded that sellers are in a superior position to know the condition of a house and therefore have a duty to disclose defects in the house, which is typically accomplished through a seller's property disclosure form. Carelessly completing a seller's property disclosure form can lead to expensive and stressful lawsuits.

So what can you do to decrease your risk of being sued? These rules can help:

1. Disclose Disclose Disclose – Always bear on the side of disclosure. Remember that time ten years ago you left the garden hose on and it flooded the basement? Disclose it. If you don't disclose it then in the event the basement floods again many years later the new owner may find evidence of the prior water damage in the wood behind the drywall and (with their attorney) develop an elaborate theory on how you knew water intrusion was a problem and therefore should have to pay an exorbitant amount for repairs to the property and pay for the buyer's attorney fees. Proper disclosure would likely cut off this litigation immediately. Disclose, Disclose, Disclose.
2. Read the Seller's Property Disclosure Form Carefully – It often asks you whether conditions "now exist *or have they ever existed.*" Assume you had a termite problem twenty years ago, which was promptly resolved. If the termites return after the sale, the new owner may have a claim against you for failing to disclose the historical termite problem and may seek to force you to pay for the buyer's overstated costs of having the termites exterminated, the termite damage repaired, and pay for the buyer's attorney fees. Small mistakes can lead to expensive lawsuits – take your time and read the form carefully.
3. "Do Not Know" may be your best Option - The seller's property disclosure has three options to choose from: (a) Yes; (b) No; (c) Do Not Know; unless you are 100% certain, "Do Not Know" is often the best option. Let's say you have a swamp cooler but you haven't connected it for a year, it might be best to mark "Do Not Know" instead of "Yes" in the category that asks if it is in working condition. If you mark "Yes" and it does not operate, the buyer might bring a claim against you seeking to force you pay for the purchase and installation of a new swamp cooler. If you aren't certain, "Do Not Know" is likely the way to go.
4. Disclose all Property Inspection Reports you Receive – If you have possession of a prior potential purchaser's property inspection report, provide it to any subsequent potential purchaser, regardless of whether they ask for it. Although it is not firmly settled whether a seller has a *duty* to disclose property inspection reports received from a prior potential purchaser, not doing so may lead to the seller being sued for non-disclosure.

5. Your Homeowners Insurance *Might* Provide Coverage, But Don't Count On It – In the event you are sued for non-disclosure, it is possible your homeowner's insurance will not cover the claim. If your homeowner's insurance does cover the claim it might be very limited coverage. Often time's homeowners insurance will not provide coverage because policies typically exclude coverage for breach of contract claims. Even if your insurer does provide "coverage" there may be several scenarios that result in you having to write a check. For example, the insurer may pay for your attorney fees, but not indemnify you in case damages are awarded against you. Therefore, read your policy closely to evaluate what you are covered for and determine whether you need additional coverage. Insist your insurance broker walks through the policy with you and provides clear explanations of what is covered and what is not covered in your policy.

One way or another, whether in money or time and stress, you will end up paying if you are sued. That's why it's important to do everything you can to avoid being sued. In this seller's market you stand to lose little by liberal disclosure - the cost and hassle of having to find another buyer are far smaller than the cost and hassle of litigation. Further, in most instances, the buyer won't care if there is some evidence of prior issues with your house. You may need to negotiate a little on the price, fix the damage, or simply pass on this buyer and wait for the next offer.

Sometimes lawsuits are unavoidable, an irrational buyer who can afford an attorney can wreak havoc. However, the tools above can help you avoid being sued and make sure the sale of your home is the last you hear from the buyer.

Note to Real Estate Brokers: Real Estate Brokers are often sued, along with the seller, in non-disclosure cases. Therefore many of the tips above apply to Brokers as well. Particularly, disclose, disclose, disclose. Always bear on the side of disclosure – do whatever you can to avoid your risk of being sued. Even if you win at trial, you still have your name dragged through the mud in a public record, and have the time and expense of litigation (your coverage is unlikely to cover all potential costs - such as attorney fees awarded against you and regulatory actions). Of course you need to be thoroughly familiar and compliant with your legal duties, as set forth in the Listing Contract and C.R.S. §12-61-801, *et. seq.*