
DISCLOSURE

Question: What is the statute of limitations on disclosure items under Form 17?

Answer: There is no private cause of action under the seller disclosure law. However, misrepresentations in or omissions from the Form 17 may give rise to a claim for fraud or fraudulent concealment under common law. The statute of limitations for fraud and fraudulent concealment claims is three years after "the discovery by the aggrieved party of the facts constituting the fraud." RCW 4.16.080(4).

Question: If a listing agent gives a seller disclosure statement to a buyer's agent before the purchase & sale agreement is written does the three day right of cancellation start when the selling agent receives it or when the buyer receives it?

Answer: The buyer's three-day right of rescission begins when the buyer receives a completed, signed and dated seller disclosure statement. Under the law, receipt by an agent no longer constitutes receipt by the principal. Imputed notice under the common law of agency was abolished by the agency statute. RCW 18.86.100.

However, *after* the purchase and sale agreement is entered into, receipt by the Selling Licensee constitutes receipt by the buyer because the contract imputes notice.

Question: Do the buyers have to give a reason for disapproving the seller disclosure statement? Can the buyers' notice of disapproval be faxed to the listing agent's home office?

Answer: First, the seller disclosure law itself does not require the buyers to have or state any reason for rescission of their offer. However, it is possible (and perhaps even likely) that a court would imply a requirement that the buyers have at least a good faith reason to rescind their offer. There is no appellate court case precedent on this issue yet (but, there probably will be!).

Second, the seller disclosure law requires that the buyers' written notice of disapproval be delivered to the seller within three business days after their receipt of the completed disclosure statement. The "Notices" provision in the P&SA probably applies to the buyers' notice of disapproval of the seller disclosure statement, but the provision does not specifically cover it. In either case, the buyers' notice of disapproval must be either delivered to the seller (under the statute) or received by the seller, listing agent or licensed office of the listing agent (under the P&SA). Fax transmission to the listing agent's home is effective only if and when it is actually received by the listing agent, since fax transmission to the listing agent's home is not an authorized method of delivery.

If the buyers used an unauthorized method of delivery, then they assumed the risk of the notice not being received timely. If the buyers' notice of disapproval was not timely received by the sellers, listing agent or licensed office of the listing agent, and if the sellers want to enforce their rights, they may be entitled to the buyers' earnest money.

Having said all that, the sellers must decide as a practical matter whether it is worth asserting their rights under the circumstances of the transaction. Advise the sellers to consult their attorney before taking any further action.

Question: An inspection report noted that the remaining useful life of the roof is approximately 5 years. The flyer for the house states "new roof". The listing says the roof is a "torch down" roof. The inspector says the roof is not a torch down roof, but something else. In their notice of disapproval of inspection, the buyers requested \$5,000.00 toward a future new roof. What are the buyers' rights in this situation?

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Answer: The buyers' recourse for the alleged misrepresentation is totally independent of the buyers' rights under the inspection contingency. The buyers cannot disapprove the inspection contingency on the basis of a misrepresentation, but only on the basis of items the inspector recommends be corrected. Whether the buyers have any recourse for the alleged misrepresentation depends on the whether (1) the sellers made a false statement of existing fact (i.e., is the roof not new), (2) the sellers were aware of the falsity of the representation, (3) the buyers were unaware of the falsity of the representation, (4) the buyers justifiably relied upon the representation, (5) the buyers suffered damages as a result of the misrepresentation, and (6) the buyers waived their rights after discovering the truth. If the buyers want to back out of the transaction, they must promptly notify the sellers of their objection. Otherwise, they may be deemed to have waived their rights. They may be able to recover damages for the benefit of the bargain, but it would not be an easy case, because of the difficulty in proving the above elements.

Question: Paragraph 3C of the Seller Disclosure Statement asks if the property is currently subject to a sewer capacity charge. What exactly is a sewer capacity charge?

Answer: To my knowledge, King County and a portion of south Snohomish County are the only areas affected by a sewage treatment capacity charge to date. See <http://dnr.metrokc.gov/WTD/capchrg/index.htm> for more information.

Question: Twice in the past month, different listing agents, when presented with an offer from our buyers, have come back with verbiage on a blank addendum stating that "before MAKING an offer to purchase a property built prior to 1978, buyer must receive, review and approve required lead based paint disclosures and pamphlets. Since the necessary disclosures were not provided PRIOR to making the offer, the seller must reject buyer's offer". I understand that NWMLS Form 22J must be given to every buyer of a house built prior to 1978, but is it required by law that the buyer MUST get it before putting pen to paper?

Answer: Yes, the disclosures must be made to the buyers before the buyers are bound by the agreement. However, the easiest way to comply with the regulation is to complete and attach to the buyers' offer the Form 22J assuming the sellers have no knowledge or information concerning lead-based paint. Then, if the disclosures are inaccurate, the sellers must correct them as part of a counteroffer.

Question: We have a sale pending on a vacant house. The seller went to the house a few days ago and discovered a small water spot in the basement. The buyer has already received and approved the Form 17, as well as accepted a cash credit in lieu of repairs recommended by the inspector. The listing agent has advised the seller to have the area checked out by a professional. If there is a problem and the seller has it corrected by the professional, what disclosure should be made to the buyer? Additionally, if no correction is needed, should the water spot be disclosed to the buyer?

Answer: Under the seller disclosure law, if new information is discovered or a change occurs while a sale is pending that would render the original disclosure statement incomplete or inaccurate, then the sellers must either take corrective action to restore the accuracy of the original disclosure or deliver to the buyers an amended disclosure statement disclosing the new information and giving the buyers a new three-day right of rescission. If the sellers correct the problem, then no disclosure is required. However, the sellers must have a "reasonable belief" that the problem has been corrected. It is difficult to imagine standing water in a basement this time of year where no corrective action is necessary, but I suppose someone could have spilled something or a washing machine overflowed.

Question: What is the statute of limitations on a Form 17 claim?

Answer: There is no statutory cause of action under the seller disclosure law. Claims based on misrepresentations in or omissions from the Form 17 are based on common law fraud or fraudulent concealment. The statute of limitation on fraud and fraudulent concealment claims is three years after the buyers discover or should have discovered all facts giving rise to their claim.

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Question: Is an agent legally required to verbally disclose the three-day rescission period to a buyer, or is it the buyers responsibility to read and discover their rescission right in the disclosure statement?

Answer: There is no requirement to orally inform the buyers of their right of rescission. The seller disclosure statement, which the buyers are deemed to have read, advises the buyers of their rescission rights.

Question: Our agent representing the buyer is writing a purchase and sale agreement contingent on financing. She will not be able to obtain financing without selling her condo. Because we represent the buyer, can he go ahead and make the offer for her that is not contingent on the sale of her condo?

Answer: The buyer can make her offer without a house sale contingency, if she is willing to assume the risk of not selling the condo in time to perform on the subject transaction. However, she should understand the financing contingency alone will not protect her, if the condo does not close in time and the only reason she cannot obtain financing is insufficient funds to close the sale.

If we believe the buyer cannot obtain financing without first selling her condo, then we must disclose that fact to the seller, even if the offer is not conditioned on the sale of the condo. RCW 18.86.030(1)(d) and .010(9).

Question: What is your opinion on the Vacant Land Disclosure Form?

Answer: A seller disclosure statement is not required on the sale of vacant land or lots. NWMLS Rules require the listing agent to make a best effort to obtain from the seller a completed vacant land disclosure statement (NWMLS Form 17c). However, since such disclosure statements more often hurt than help the seller, it is not in the sellers' best interests to complete them.

Question: If sellers install new siding over L-P siding, do they have to disclose that L-P siding is underneath?

Answer: That is a technical, rather than legal, question. Check with a home inspector to determine whether leaving the L-P siding in place may create complications in the future. I suspect the answer will depend on whether there is existing damage to the L-P siding. If so, the condition must be corrected or disclosed.

Question: Can a buyer get out of a transaction if the seller disclosure statement isn't completely fill out and they haven't waived their right to rescind? They received the form but took no action, until later in the transaction when they wanted out. There were a couple of questions not answered, and their lawyer says they could get out of the deal. Is that right?

Answer: The buyers probably can get out of the transaction if the seller disclosure statement was not complete, because the sellers failed to comply with the requirement to deliver a *completed*, signed and dated disclosure statement; therefore, the buyers' three-day right of cancellation never started to run and has not elapsed.

In the future, the listing agent should review seller disclosure statements for completeness and accuracy, to the best of the agent's knowledge, to avoid this pitfall.

Question: We have had two different agents "adamantly" request that the listing agents provide a "signed" Lead Based Paint Disclosure to them before they present the offer.

Most of our agents make it a part of the offer and have the seller sign it along with the rest of the purchase and sale agreement. Some of our agents have it signed with the listing agreement and hold it in the file until an offer is made.

Is the seller required to provide the form signed before the offer?

Answer: The rules require the form to be filled out before the offer is signed by the buyers -- the sellers can sign it when the offer is accepted or countered. The selling agent should complete the form assuming the sellers have no knowledge of any lead-based paint hazards or inspections. If the sellers have

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knowledge to the contrary, then it is the sellers' responsibility to correct the addendum as part of a counteroffer to the buyers.

Question: Prior to closing, the sellers hired a roofer to fix a roof leak near the chimney and believed that the problem was solved. Shortly after closing, the roof leaked in same area. Are the sellers responsible for making additional repairs?

Answer: No. The sellers' obligations to the purchasers cease when the sale closes, unless the sellers knew or had reason to know that the repair was not successful.

Question: Are the sellers required amend the seller disclosure statement to disclose defects identified in an inspection report?

Answer: The sellers are *not* required to deliver to the buyers an amended seller disclosure statement concerning items identified in inspection reports obtained by the buyers. However, the sellers are required to prepare a new seller disclosure statement reflecting the new information for any subsequent buyers. The fact that the inspection report was prepared for previous buyers does not affect the sellers' knowledge of the newly discovered conditions. In other words, it does not matter how the sellers learn of the new conditions. Once adverse material facts are discovered, the sellers must refute them, correct them or disclose them to subsequent buyers.

Question: Is a real estate broker or salesperson required to disclose to a prospective purchaser the fact that a registered sex offender lives in the immediate neighborhood of the subject property?

Answer: No. RCW 18.86.030(1)(d) provides that a licensee is required to "disclose all existing *material facts* known by the licensee and *not* apparent or *readily ascertainable to a party.*" RCW 18.86.010(9) provides that "[t]he fact or suspicion that the property, or any neighboring property, is or was the site of a murder, suicide or other death, rape or other sex crime, assault or other violent crime, robbery or burglary, illegal drug activity, gang-related activity, political or religious activity, or other act, occurrence, or use *not adversely affecting the physical condition of or title to the property is not a material fact.*" (emphasis added.) A registered sex offender in the neighborhood is readily ascertainable to the buyer and does not adversely affect the physical condition of or title to the property. Therefore, disclosure is not required. In addition, it is *very risky* to provide any information regarding sex offenders beyond suggesting that the buyers contact the local law enforcement agency, due to potential liability for defamation if a person is wrongfully identified as a sex offender.

Question: When purchasers elect to rescind an agreement based on the seller disclosure statement, are they entitled to a refund of "nonrefundable" earnest money and/or advances for extras, upgrades and/or changes?

Answer: The law is not clear on this issue. The seller disclosure law provides in part as follows:

"If the buyer elects to rescind the agreement, the buyer must deliver written notice of rescission to the seller within the three-business-day period, or as otherwise agreed to, and upon delivery of the written rescission notice *the buyer shall be entitled to immediate return of all deposits and other considerations less any agreed disbursements paid to the seller*, or to the seller's agent or an escrow agent for the seller's account, and the agreement for purchase and sale shall be void."

I think the intent of the drafters of this poorly worded statute was that "disbursements" refer to amounts advanced by the buyer for payments to third parties (e.g. permits, design fees, materials relating to extras, upgrades and changes), but the language is not specifically limited to such disbursements. My best guess is that a court would require the seller to refund the earnest money (even if characterized as "nonrefundable"), but would not require the seller to refund amounts previously disbursed to third parties with the buyers' agreement.

Question: We have a potential seller who has a lease/option to buy a house that he wants to list and sell. Is this legal and does the MLS require disclosure of the fact the seller does not actually own the property?

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Answer: Yes, the seller can either (1) sell the property subject to the exercise of the option and acquisition of title by the seller, or (2) assign the option, if not prohibited by the lease/option agreement. The assignment approach avoids double excise tax, but the buyer then knows how much the seller is making on the assignment and the optionor may hold the parties hostage. We must disclose in the MLS the type of sale involved.

Question: Do the buyers still have a right to rescind their offer if they received the seller disclosure statement more than three days before making the offer? How about where their agent previously received the disclosure statement?

Answer: In my opinion, the clock starts ticking when the buyers receive the seller disclosure statement, regardless of when the purchase and sale agreement is signed. However, this interpretation is not as clear as the Land Development Act, for example, which expressly covers the issue.

Under the new NWMLS purchase and sale agreement, receipt of the seller disclosure statement by the selling licensee constitutes receipt by the buyer under paragraph k of the General Terms. However, before the buyers have signed the offer, there is no basis to impute to the buyers receipt of the seller disclosure statement by the selling licensee. RCW 18.86.100.

Therefore, if the buyers *personally* receive the disclosure statement more than three business days before signing an offer, then they have no right to rescind their subsequent offer.

Question: If the remarks section of the listing states there is no Form 17, do the buyers have to sign the back page of Form 17 waiving their right to receive the Form 17? If they do not sign, are there any consequences?

Answer: It depends why there is no Form 17. If the property or the seller is exempt, then nothing is required from the buyers, because the law simply does not apply and the buyers have no rights to waive. However, if the transaction is subject to the seller disclosure law, but the seller fails to complete the Form 17, and if the buyers do not waive the right to receive the form, then the buyers can rescind their offer anytime prior to closing. If the buyers are willing to waive the right to receive a Form 17, then the buyers should sign the waiver on the last page of a blank form with only the address of the property filled-in.

Question: Are the legal description and CC&R's still required to be attached to the seller disclosure statement?

Answer: The legal description is no longer required (the law was amended in 1997), but the CC&R's are required. See question no. 1.J of the seller disclosure statement and the instructions.

Question: We have buyers who want to purchase a particular home where they personally know the sellers, and the buyers do not want the sellers to know that they are the buyers. How can they do this?

Answer: The buyers should have a friend or relative make the offer in the friend or relative's name as a "straw person", deleting the non-assignment clause from the purchase and sale agreement and limiting their liability to forfeiture of the earnest money, then assign their interest in the agreement to the intended buyers after the deal is negotiated. If the buyers do not want the sellers to know they are the real buyers before closing, rather than assign the purchase and sale agreement, the buyers could enter into a second, identical purchase and sale agreement with the straw person, then close the sales simultaneously through a double escrow.

Excise tax is not due on the second conveyance, if the prices are the same, the sales close simultaneously, and the straw person and buyers sign an affidavit stating that the straw person is taking title as nominee for the buyers. Advise the buyers to consult their attorney to be sure they comply with the excise tax exemption for nominees.

Question: In representing the Sellers, when I give the Sellers Property Disclose form to the Buyers to read and sign, what should I do if I have not gotten it back in a reasonable amount of time? What is the Sellers' recourse?

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Answer: There is no statutory requirement that the buyers acknowledge receipt of the seller disclosure statement. The three-day right of rescission begins when the buyers or their agent receive the disclosure statement. It is good practice to ask the buyers to acknowledge receipt to reduce proof problems, but it is not required. As a result, there is nothing the sellers should or can do if the buyers refuse to acknowledge receipt of the disclosure statement.

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