

SELLING YOUR HOME -- TO TELL OR NOT TO TELL?

By Gary Kaleita

You've had your house on the market for three months and you've finally found a nice young couple who are going to make you an offer. They've looked over the house, but they didn't notice that spot where the roof started leaking after that tropical storm last year. Do you tell them?

If you don't, you can be liable for the cost of repairs, even if they don't notice the leak until after the closing. Although "buyer beware" used to be the rule, Florida law now requires that home sellers disclose all conditions which materially affect the value of the home and which are not readily observable by the buyer. What types of conditions materially affect the value of a home? Courts have said that if the condition would affect a reasonable buyer's decision to buy at the agreed upon price then it is material. Typical conditions include roof leaks, termite infestations, subsoil conditions, building code violations and swimming pool defects. The law applies equally to both homebuilders and private home sellers, but does not yet apply to the sellers of commercial buildings, on the theory that commercial buyers have more expertise and can be expected to protect themselves better during contract negotiations.

What if the seller puts a clause in the contract that disclaims any warranties about the condition of the house, or states that the buyer is acquiring the house "as-is?" Sorry, but Florida courts have decided that it is more important to protect buyers than uphold attempts by sellers to limit their liability for these kinds of conditions. What if the seller didn't know about a defect? If it's one that a reasonable owner should have known about, the seller can still be liable.

What are the buyer's remedies for an undisclosed defect that meets these requirements? Generally speaking, if the closing hasn't occurred yet, the buyer can terminate the contract and get his money back, or force the seller to pay for or perform the repairs. If the buyer doesn't discover the defect until after the closing, the buyer can sue the seller to recover the cost of repairs. What if the seller can't be located or has no money? That's just tough luck for the buyer, unless the seller used a real estate broker who knew or should have known about the defect. Florida courts have held that the disclosure requirement can apply to sellers and their brokers, as well as closing agents and contractors, although it will probably be more difficult to establish that a third party knew or should have known about the problem. Keep in mind, however, that a court will probably not look favorably on a buyer who just relies on the seller's duty to disclose defects, and makes no effort to inspect or investigate the condition of the home.

So far we've mentioned roof leaks and other conditions which most people would agree are both material and important to a buyer. What about conditions which aren't so clear? If there's any doubt, disclosure may be the best choice. The Florida legislature enacted a statute

providing that it's not necessary to disclose that a home has been occupied by a person having HIV or AIDS, but has otherwise left the courts to deal with the problem on a case-by-case basis. One court (not in Florida) decided that a seller's failure to disclose that the home had a reputation in the neighborhood for being a haunted house was sufficient grounds for the buyer to rescind the purchase contract, since it affected the value of the home. So beware of those strange creaks in the hallway at midnight . . . and make sure the neighbors don't find out!

Word Count: 623