

Seller's Property Condition Disclosure Law:

What You Need To Know

By: Nick E. Kremydas, ESQ.

BACKGROUND

In 1996, the leadership of the South Carolina Association of REALTORS® (SCAR) first put the idea of mandating a Residential Property Condition Disclosure Form (Disclosure Form) on the table. After a series of focus groups, discussion forums, and an intense grassroots lobbying effort, the form will be law and mandatory on January 1, 2003. You can download a copy of the new law from the [SCAR](http://screaltors.com) website: screaltors.com.

THE FORM

The South Carolina Real Estate Commission (Commission) is charged under the law with creating the form that sellers will be required to use. The Commission assembled a task force of REALTORS®, Commissioners, and Educators from across the state to accomplish this task. The new form was presented at the 2002 SCAR Annual Convention in Hilton Head Island. The form is available on our website: <http://screaltors.com>.

THE PROCESS

All residential (commercial is exempt) properties (1-4 units) are subject to the new law. That is, when a residential property is sold in SC after Jan. 1 2003, the seller will be required to complete a Disclosure Form. **New construction** is exempt under the law.

There are a few **exemptions**. The law does not apply to the following transfers of property:

- (1) pursuant to court order including transfers in administration of an estate, pursuant to a writ of execution, by foreclosure sale, by a trustee in bankruptcy, by a receiver, by eminent domain, and resulting from a decree for specific performance;
- (2) to a mortgagee from the mortgagor or his successor in interest in a mortgage if the indebtedness is in default, by a trustee pursuant to a deed of trust or to a mortgagee pursuant to a mortgage if the indebtedness is in default, by a trustee under a mortgagee pursuant to a foreclosure sale, or by a mortgagee who has acquired the real property at a sale conducted pursuant to a judgment and order of foreclosure;
- (3) by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust;
- (4) from one or more co-owners solely to one or more other co-owners;
- (5) made solely to a spouse or a person or persons in the lineal line of consanguinity of one or more transferors;
- (6) between spouses resulting from a divorce decree or support order or marital property distribution order;
- (7) made by virtue of the record owner's failure to pay federal, state, or local taxes;
- (8) to or from the federal government;
- (9) to the State, its agencies and departments, and its political subdivisions including school districts;
- (10) new construction;
- (11) real property sold at public auction;
- (12) to a residential trust; and
- (13) between parties when both parties agree in writing not to complete a disclosure statement.

QUESTIONS ABOUT THE PROCESS

The new law requires a Disclosure Form to be presented prior to a sales agreement being signed by both parties (ratified). The following Q&A attempts to address the most commonly asked questions.

When should I start using the form?

You may begin using the form immediately and suggest that at least you familiarize yourself and your company with the form.

What about my existing listings after January 1, 2003? Will I need to get the new form signed in addition to any other disclosure form that the seller provided at the time of the listing?

You should have the new form in your file for every listing that does not close before January 1, 2003.

Who should complete the form?

The seller should always complete form. A REALTOR® should **NEVER** complete or write on any item on behalf of the seller. The seller and seller alone has the legal obligation to complete form.

What is the REALTORS® duty under the new law?

A REALTOR® is required only to disclose to seller clients the seller's obligation to complete the form. §27-50-70, South Carolina Code of Laws, as amended. If a REALTOR® representing a buyer in a transaction with a for-sale-by-owner (FSBO), that buyer's agent has the same obligation to tell the seller of their obligation to complete the form. NOTE: The SCAR Listing Agreement, Buyer Agency Agreement and Sales Agreement will be modified with language to satisfy the Agent's responsibility under the new law.

NOTE: A REALTOR® that has complied with their duty under the law cannot be held liable for a seller's refusal or failure to provide a buyer with a disclosure statement.

When should a REALTOR® get a form from the seller?

SCAR recommends that the listing agents get a completed form from their clients at time of listing. Buyer Agents should request a form prior to submitting an offer on behalf of the buyer. Although the law allows you to wait until just prior to the sales agreement being ratified, it would be in the best interest of all parties involved to have the form presented as early as possible.

What if the seller never lived in the property?

You'll find many situations where the seller for many different reasons will have no first-hand knowledge of the property (inheritance, vacation home, etc.) The seller in these types of transactions has 2 options under the law:

1. The seller can ask that the sales contract contain a provision that the parties agree not to have a form for that transaction; or
2. The seller can check "No Representation" in response to the questions on the form.

Make sure to advise the seller to seek legal counsel about which option would be best for them.

What if a seller refuses to complete the form?

There will be times that a REALTOR® will be faced with a seller that refuses to complete the form. A listing agent in this situation should do the following:

- (1) make a note on a blank form indicating the seller's refusal to complete the form and keep a copy in your transaction file.
- (2) Suggest to seller that they seek legal counsel to explain potential liability issues for failure to comply with the state law.

A buyer's agent faced with a seller that refuses to complete a form should:

- (a) explain to buyer that seller has refused to present a form. This should be an immediate red flag for the buyer. The buyer's agent should recommend a complete inspection of the property.
- (b) Avoid clauses in any offer that parties agree to not use a form. A buyer's agent that allows this clause to be inserted may limit the buyer's future claim against seller for disclosure defaults.

What are the penalties for failing to comply with the law?

If a seller fails to provide a buyer with the form prior to the parties both signing the sales agreement, the seller may be subject to:

- actual damages proximately caused to the purchaser
- court costs

The court may also award reasonable attorney fees incurred by the prevailing party. Failure to provide the disclosure form to the purchaser does not:

- void the agreement;
- create a defect in title; or
- present a valid reason to delay or otherwise interfere with the closing of a real estate transaction by a party including a closing attorney or lender.

QUESTIONS ABOUT THE FORM

There are 3 possible answers to the questions on the form: "YES", "NO" and "NO REPRESENTATION". What does each answer mean and what are the implications for the seller?

- "Yes" is self-explanatory. If your seller checks "Yes" for any question, the seller must explain the problem or attach a descriptive report from an engineer, contractor, pest control operator or other expert or public agency. If the seller attaches a report, the seller will not be liable for any inaccurate or incomplete information contained in the report as long as the seller was not grossly negligent in obtaining or transmitting the information.
- "No" is also self-explanatory. If your seller checks "No" for any question, the seller is stating that the seller has no actual knowledge of any problem. If the seller checks "No" and the seller knows there is a problem, the seller may be liable for making an intentional misrepresentation.
- "No representation" is similar to "pleading the fifth." If your seller checks "No Representation" for any question, the seller is stating that the seller is making no representation regarding the conditions or characteristics of the property, but the seller may have a duty to disclose even if the seller knows or should have known of them. Advise your seller to consult with an attorney to determine any potential liability your seller may have for checking this answer. A seller cannot hide behind this answer to avoid disclosing known defects.
- If your seller checks "Yes" or "No" for any question and subsequently something happens to the property to render the seller's statement incorrect or inaccurate, the seller must promptly provide the purchaser a corrected statement or the seller may correct the problem.

My seller is out of town and called me with his answers to the questions on the form. Can I complete the form for the seller?

NO -The form should be completed by the seller in their own handwriting with their signature at the bottom.

NOTE: A REALTOR® should never complete the form for a seller.

CONCLUSION

In the real estate industry, full disclosure of a property's condition is advantageous to both buyers and sellers. Buyers have advance knowledge of any potential problems, and sellers can help protect themselves from any post-settlement lawsuits. Full property condition disclosure provides sellers with a competitive edge because they are offering as much information as possible on their home, and that is very appealing to prospective buyers.

Regardless of state law, under the Code of Ethics of the NATIONAL ASSOCIATION OF REALTORS®, members are obligated to disclose all known material facts.

NOTE: A REALTOR®, whether acting as the listing agent or selling agent, is not liable to a buyer if: (1) the seller provides the buyer with a disclosure form that contains false, incomplete, or misleading information; and (2) the REALTOR® did not know or have reason to know the information was false, incomplete, or misleading.

If a buyer decides to file a lawsuit in a transaction that includes disclosure forms, a broker, sales associate, or seller will likely spend less time, money, and energy on legal defense.

At present, mandatory property condition disclosure is the law in at least 33 states: Alaska, Arizona, California, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Michigan, Mississippi, Nebraska, Nevada, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, and Wisconsin. A posting of each state's real estate regulations can be viewed at <http://www.arello.org> by clicking on Rules and Laws.

I am sure that many other issues and questions will arise over the next few months so please do not hesitate to contact me (nick@screaltors.org) with any questions that you may have.

Nick E. Kremydas, Esq.
Vice President and General Counsel
South Carolina Association of REALTORS®
800-233-6381
803-798-6650 fax