THE COMPLETE GUIDE TO:

THE SOUTH CAROLINA RESIDENTIAL PROPERTY CONDITION DISCLOSURE STATEMENT

BY GARY PICKREN, ESQ.

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FORWARD

South Carolina requires a seller of residential property to disclose known defects, damages, and other issues to a potential buyer prior to entering into a contract for sale. While the form is required by law, it is often completed incorrectly or not at all. Sellers often claim an exemption to the law that does not exist.

As a member of the 2013-task force that drafted the current version of the South Carolina Residential Property Condition Disclosure Statement form, I have special insight about the construction of the form and can explain why certain provisions are included. Since this form's inception, however, there remain several misconceptions about the requirement to disclose. Sellers are often given incorrect advice from real estate agents and attorneys. I put this book together to guide and educate real estate agents and sellers about South Carolina disclosure law. It is my sincere hope after you read this guide, you will share it with others so everyone will understand what a seller must disclose about their residential property.

Finally, I would like to give special thanks to Byron King, Senior VP and General Counsel of the South Carolina Association of REALTORS®, for his help in compiling documents and information contained in this book. Byron and the South Carolina Association of REALTORS® are valuable sources of information. I also would like to thank Roderick Atkinson, Chief of Staff at Department of Labor, Licensing and Regulation. Rod is always quick to provide an answer or a document. LLR is lucky to have him on staff. Lastly, I want to thank Stephan Futeral, Esq. for helping to edit and to publish this book.

TABLE OF CONTENTS

1.
THE COMPLETE GUIDE TO THE SOUTH CAROLINA RESIDENTIAL PROPERTY CONDITION DISCLOSURE STATEMENT *(BY THE GUY WHO HELPED CREATE THE FORM)*

Caveat emptor or "buyer beware" is no longer the law in South Carolina when purchasing a residential property. Today, a seller of a residential one-to-four family dwelling is required to disclose certain defects, damages, and/or issues with the property. To enforce disclosure, the South Carolina Real Estate Commission, in compliance with state law, created and published a statewide form to be used by all residential property sellers. The form is known as the Residential Property Condition Disclosure Statement and is also commonly known as Seller Disclosure or Disclosure Statement. (In this book, I will often use the terms interchangeably.) In this book, we will examine when a seller is required or not required to provide the Seller Disclosure.

The Seller Disclosure law attempts to place both the buyer and the seller on equal footing by requiring the seller to disclose items the buyer may or may not be able to discover through a thorough investigation or inspection of the property. If the seller fails to disclose issues about the condition of the property to the buyer, the buyer may have a claim against the seller for repair of those damages.

Seller Disclosure should not be confused with a home warranty. The law only requires the seller to disclose certain problems of which the seller is actually aware. The seller is not required to disclose issues of which the seller is unaware as the law places the burden of discovery on the buyer. The buyer has the sole responsibility of obtaining inspections from licensed inspectors or other qualified professionals prior to completing the purchase of the property.

Moreover, the Seller Disclosure form was not designed to be an exhaustive overview of the property. The seller may not have knowledge of hidden defects which could impact the buyer. The seller may have knowledge of certain defects which do not require disclosure. For example, the seller would not be required to disclose whether or not someone smoked in the house which may be important to a buyer with extreme asthma. The seller may also have knowledge of certain defects in the property like allergens which do not affect the seller but may affect the buyer. Lastly, the seller is not required to disclose repaired items even though certain repaired items may be of interest to a buyer.

Seller Disclosure sufficiently lays most of the facts concerning a residential property in front of the buyer. However, because many issues with the property might not be required to be disclosed by the seller, it is important the buyer investigate the property and ask questions about issues not included on the Seller Disclosure. Even if the seller is not required to disclose an item on the Seller Disclosure

form, the seller may be required by law to answer questions about hidden defects or “material defects” (see Chapter 13). The seller must always answer questions truthfully and completely. Do not rely on the form as an end all, be all. It is not.

2.
A BRIEF HISTORY OF SELLER DISCLOSURE

For many years in South Carolina, a buyer purchased residential real estate at their own risk. While the seller was required to disclose hidden defects, many sellers did not disclose these issues. The buyer's real estate agent was taught to ask sellers if there was anything wrong with the house their client should know. The question was ineffective at uncovering defects because many sellers simply said, "No." When issues did arise post-closing, the buyer often filed claims or lawsuits against the seller and the real estate agent for failure to disclose the hidden defect.

In 2002, the South Carolina legislature narrowly passed the first state law related to residential property disclosure known as the Residential Property Condition Disclosure Statement Act. The law required a seller to either repair or disclose items that were broken, damaged, or in need of repair. The law became effective January 1, 2003. As a result of the law, the seller could no longer hide latent defects without consequences.

The law required each seller of a one-to-four family dwelling to complete the Seller Disclosure form. The South Carolina Real Estate Commission was tasked with creating the form which would be used by every seller unless exempt. In 2003, the first Seller Disclosure form was created and made available to all sellers of residential property sales.

The initial disclosure form was used from 2003 through 2013. A copy of this form can be found in the appendix of this book. The initial form was only four pages in length, including the instruction page. The form consisted of twenty-four questions over two pages, with the final page dedicated to signatures and a large, blank space to explain any "yes" answer.

The form asked the seller to apply the following question to all twenty-four items: "As seller of the property herein identified, do you have knowledge of any problem (malfunction or defect) with any of the following [twenty-four items]". Sellers were unsure if "problem" meant repaired items or current issues. Many of the questions were vague, broad, and open-ended. The form failed to provide any guidance on how it was to be properly completed.

During the early years of the initial form, few legal actions were initiated as a result of the seller's answers. I represented many large real estate agencies during this period. The advice to real estate companies was real estate agents do not get involved with the completing the form in any manner. Attorneys and agency management often joked about making sure not to leave finger prints on the form. Real estate agents were told to stick the form in the file and forget about it. Never get involved with completion of the form! Attorneys believed if the agent was not involved in completing the form, the agent was in the clear. After all, the law says the seller is solely responsible for completing the form and the buyer has the duty to inspect.

The biggest liability a real estate agent had in relation to the form was if the real estate agent helped the seller complete the form and it was claimed the seller's answers were the agent's answers. Not getting involved in completing the form seemed to be the proper advice for many years.

The form had mixed-results for many years. But over time, many sellers and real estate agents grew frustrated with the vague questions and lack of guidance.

Buyers and their lawyers claimed real estate agents had liability by alleging the real estate agents “knew or should have known” of the issues not properly disclosed on the Seller Disclosure form. It was easy to assert this position, because real estate agents claimed they did not look at a document related to the property. The seller argued the real estate agent did not want to know, and they were “turning a blind eye”. There was some truth to the argument.

There were agents who turned a blind eye since most brokerages instructed their agents not to get involved in Seller Disclosure. There was too much risk. For the most part, real estate agents were simply ignorant of the conditions because they were told to be. Real estate agents did not want to know issues with the house because they would have to disclose.

Prior to 2017, the real estate agent licensing law standard of knowledge for a real estate agent was whether the agent “knew or should have known.” This legal standard was problematic for the real estate agent because the law placed liability on the real estate agent not just when the agent had actual knowledge of an issue but also when the agent should have known of the issue. The law allowed the buyer to play “Monday morning quarterback.” It was not very difficult to convince a jury what the agent must have known or should have known based solely on the relationship of the real estate agent to the seller.

The reality of what the agent “knew or should have known” was often somewhere in between these two and having no clue. When an agent listed a house in January, it was unlikely the agent “knew or could have known” the air

conditioner would not perform properly at 98 degrees. However, this never stopped a Plaintiff Attorney from claiming they knew.

Claims continued to rise and Defense Attorneys started recognizing the liability that Seller Disclosure posed for real estate agents. As a result of the increased risks, Defense Attorneys advised real estate agents to be more proactive in explaining the form. Agents needed to review the answers with the seller and ensure all items were completed and answered correctly to the best of everyone's knowledge. If the seller refused to complete the form, real estate agents were advised to terminate the relationship over fear of potential litigation.

During this period, the Real Estate Commission also recognized the increased risks in the current form. A task force was formed by the Commission to draft a new version which would require the seller to disclose even more issues with the house.

In January 2013, a new five-page Seller Disclosure form was issued by the Real Estate Commission. Upon seeing this form, many of us in the real estate industry recognized the form missed the mark and created more liability for the seller and the real estate agent.

For example, the new Seller Disclosure form asked the seller, "during your ownership, or within the past five (5) years, if ownership exceeds five years, have there been any individual repairs in excess of $500.00 to any items in Questions 1-12?" This question was problematic for multiple reasons. First, most homeowners cannot remember minor repairs to their home over any timeframe. Plus, the amount was so low it encompassed essentially all repairs, projects, and improvements. The sellers also did not know if they were required to disclose multiple repairs that totaled $500 but

individually cost less than $500 each. Lastly, sellers did not know whether they must disclose an item covered by warranty which cost more than $500, but the seller only paid a small deductible.

Another problem with the form was the question the seller was asked to apply to each subsection had not been changed from the prior version. Sellers still did not know if they were required to disclose current issues, past issues or both. The new Seller Disclosure form seemed to create more questions than it answered. It certainly put the agent and the seller in the transaction at risk.

Several real estate agents and myself began speaking out about the increased risks using the new Seller Disclosure form. In January 2013, the Real Estate Commission requested that I present our concerns. For more than an hour, I went through each section of the new Seller Disclosure form and pointed out how certain questions created confusion and placed more liability on the seller and real estate agent. At the end, the Chairman said, “We need to fix this. You would be a great person to do so, and by the way, we have no money to pay you.” Oh, boy!

Over the next four weeks, several real estate agents from across South Carolina, multiple Real Estate Commissioners, the South Carolina Association of REALTORS®, and myself worked in the basement of the Labor Regulation and Licensing building to create the current Seller Disclosure form.

When the task force met for the first time, we took a “novel approach” to look at state law and to include what was actually required. In preparing the form, we discovered the law had not been completely followed in any of the previous formats.

After several weeks, the task force produced the Seller Disclosure form which has been used ever since March 2013. While not perfect, the most recent version of Seller Disclosure is an excellent tool for both buyers and sellers. Since its implementation, it has been revised three times due mainly to changes in the market and the rise of technology, like surveillance cameras for example. The form has stood the test of time.

Revisions Since Inception.

FIRST REVISION

The first revision to the Seller Disclosure form was finalized in June 2017. So, what exactly did the Commission revise in the document? Basically, nothing. Well not exactly nothing, but close to it. The revision merely added the word "adverse" to the term "material facts". On page one of the document, the phrase no longer reads "material facts" but rather reads "material adverse facts." This revision was due to the change in the licensing law.

The fact that the Seller Disclosure has not required an update over the past 3 years, I believe, is a testament to the hard work and quality of the document produced by the committee. I am proud to have served on the committee that corrected the previously flawed document issued by the Commission.

SECOND REVISION

I had the pleasure of attending a task force meeting lead by Real Estate Commissioner Janelle Mitchell. Commissioner Johnathan Stackhouse, Advice Counsel Gigi Lewis and Chief Administrator Rod Atkinson were also participants.

At the task force meeting, two revisions were offered to the Seller Disclosure Form. First, due to recent legislation, state law now requires the Seller Disclosure Form to include information pertaining to mandatory homeowner associations (HOAs). While the current addendum to the Seller Disclosure Form contains questions pertaining to HOAs, the form itself now will contain an HOA section.

Secondly, there has been an influx of issues relating to the historic designation of certain neighborhoods. The designations often limit use and ownership. For example, some historically designated neighborhoods prevent the replacement of windows. Buyers should be notified by the seller that the neighborhood has these types of restrictions. As such, a question pertaining to this issue will be found in Section V.

Assuming the full Commission approves the proposed changes, the revised Seller Disclosure document will be available for use in the near future.

THIRD AND FINAL REVISION

In late 2019, the Real Estate Commission approved another small change to the Seller Disclosure form dealing with issues of the 2015-floods.

Section V, number 25 was added to the Seller Disclosure form and asks the seller to disclose any “Federal Emergency Management Agency (FEMA) claims filed on the property.”

The purpose of the question was to notify the buyer of any flood claims of which the seller has knowledge.

PRO TIP: *The question concerning FEMA claims is not limited to the seller's ownership but rather to seller's knowledge.*

PROPOSED LEGISLATIVE CHANGE

A legislative bill has been proposed in the South Carolina House of Representatives which would require the seller to disclose operational or abandoned wells on the property. The seller would be required to provide a map drawn from available information showing the location of each well. The seller must also indicate whether each well is in use or abandoned and if the well is sealed or unsealed.

3.
ARE YOU REQUIRED TO COMPLETE THE SELLER DISCLOSURE FORM OR ARE YOU EXEMPT?

One of the most misunderstood, incorrectly explained, and wrongly applied laws involving real estate in South Carolina is the Residential Property Condition Disclosure Statement Act. In particular, who is required to provide the disclosure and who is exempt. Real estate agents and sellers often claim an exemption to the law, that does not exist. The amount of bad legal advice on this issue is astonishing.

Some of the most common incorrect claimed exemptions include:

- The seller never occupied the house.
- The house was “for sale by owner.”
- The property was an investment.
- A church or non-profit owned the property.
- The seller is a landlord.

None of these reasons are valid exemptions under the law, and all require the seller to complete the Seller Disclosure form.

This Chapter will help you understand when a seller must provide the form and when a seller is exempt.

Who is Required to Complete the Seller Disclosure Form?

South Carolina law requires a Seller Disclosure form be completed by the seller and given to the buyer prior to entering into a contract of sale. This includes transfers of residential real property consisting of at least one, but not more than four, dwellings units. These following transactions are applicable:

1. sale or exchange;
2. installment land sales contract; or
3. lease with an option to purchase contract.

South Carolina Code §27-50-20.

The law further states that except for exempt transactions, the seller shall furnish a buyer a written disclosure statement. The disclosure statement must be the form set forth by the Real Estate Commission. *South Carolina Code* §27-50-40.

The law applies to any single-family home, duplex, triplex, or quad-plex (legally known as one-in-four units). The law does not apply to vacant land, acreage, commercial, retail, or industrial property. This law also does not apply to any property consisting of five or more units, such as an apartment building.

Under the law, an “owner” is defined as any person having a recorded present or future interest in real estate who is identified in a real estate contract, but does not include the owner or holder of a mortgage, deed of trust, mechanic's or materialman's lien, or other lien or security interest in the real property. (For purposes of the book and for ease of understanding, I use the term Seller and Owner

interchangeably. Under the law, these terms are often not interchangeable.)

The Seller Disclosure is limited to the actual residential dwelling. The form does not address common elements or areas for which the seller has no direct and primary responsibility.

PRO TIP: *The requirement to provide the form prior to entering into a contract is one of the reasons a listing agent requires the form to be completed before the agent will list the house. "For Sale by Owners" should also complete the form prior to showing the home to a prospective buyer and should provide a copy of the form to each prospective buyer at the time of showing.*

Failure to provide the Seller Disclosure form to the buyer does not:

1. void the agreement;
2. create a defect in title; or
3. 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.

South Carolina Code §27-50-50.

If the seller fails or refuses to provide the form, the seller may have liability for damages caused by the omission. Also, a seller who knowingly violates or fails to perform any duty required by any provision of the law or who discloses any material information on the disclosure statement he knows to be false, incomplete, or misleading may be liable for actual damages proximately caused to the buyer, court costs and reasonable attorney fees. *South Carolina Code* §27-50-65.

Who is Exempt from Completing the Seller Disclosure?

The South Carolina Residential Property Condition Disclosure Statement Act sets forth the requirements for when the seller must complete the form as well as the fifteen times a seller is exempt. Certain types of transactions are exempt. If the seller falls into one of these exemptions, a seller disclosure is not required. *South Carolina Code* § 27-50-30.

The exemptions in paraphrased form include:

1. When a court order requires a transfer of title. An example would include a foreclosure sale, bankruptcy, receiver or eminent domain.

PRO TIP: *If the seller purchased the property from the lender who completed the foreclosure sale, the seller must complete the Seller Disclosure. The lender who sells the property received in the foreclosure sale does not have to provide the disclosure.*

2. A deed issued in lieu of foreclosure. A deed in lieu of foreclosure occurs when an owner transfers the property to the lender who is in the process of foreclosing the property. This owner is not required to provide the disclosure to the lender.

3. An individual serving as a fiduciary in the course of administration of an estate, guardianship, conservatorship or trust. A fiduciary is someone who is ethically and legally bound to act in the interest of another. For example, when an estate or a trust sells property, a fiduciary acts on its behalf. The personal representative of the estate or the trustee of the trust acts on behalf of the estate or trust and not in his own interest. Thus, a trustee of a trust, a personal

representative of an estate, or a guardian ad litem does not have to provide the disclosure form.

Pro Tip: I do not believe a Power of Attorney falls under this exemption unless the seller is incompetent. The fiduciary exemption was intended to exempt those fiduciaries who truly would be unable to provide any meaningful representations. I do not believe giving a power of attorney to a child, parent or spouse would exempt the seller from the law.

A person acting in a fiduciary position does not have to prepare a seller disclosure. This means, neither the personal representative of an estate nor a trustee of a trust has to prepare the disclosure. Please be careful not to confuse this position with that of an heir or devisee selling property. If the estate is the seller, then no disclosure is required. However, if someone received property from an estate and is now selling it in their individual name, the seller must do the disclosure even if they never lived in the property. A trustee likewise does not have to do a disclosure when selling trust property. However, I believe, if the trustee actually resides in the house then the trustee should do the disclosure.

Remember, these seller disclosure issues are very important to you. When a buyer takes action due to failure to disclose, the buyer most often names the seller and the real estate agent in the lawsuit. You need to protect yourself by knowing these rules and making sure that your client fully and honestly answers the questions. Do not be afraid to speak up if you feel the disclosure is inaccurate, incomplete or dishonest. You may be saving yourself a lot of problems later.

4. From one co-owner to another co-owner.

5. A deed to a spouse or family member that is in the lineal line of consanguinity. This means, a parent, or grandparent deeding to a child or grandchild, and vice-versa.

6. Between spouses resulting from a divorce decree or support order.

7. A tax deed. The county tax assessor does not have to provide a disclosure to the winning tax sale bidder. However, if the person taking title through a tax sale then sells the property to a third-party, the seller must complete the Seller Disclosure.

8. To or from the federal government. This exemption would include property sold through government agencies such as FANNIE MAE, FREDDIE MAC, HUD, VA, etc.

9. To the state government, its agencies, or departments. This includes sales by state housing or any county or city department.

10. The first sale of a house which has never been inhabited. This exemption applies to new construction which has never been occupied.

PRO TIP: *If the builder lived in or rented the house, the builder must complete the form. The fact the title never transferred to another person is irrelevant.*

11. Property sold at an auction.

12. Deed from a residential trust.

13. When the parties agree in writing that no disclosure statement will be completed. Simply stated, if the buyer and seller agree the seller will not provide a Seller Disclosure, one is not required. Item 13 allows the parties to agree among

themselves that no disclosure will be provided. The two most common times this agreement is used is (1) when property has been rehabilitated. Often, the builder sells the property with an agreement of no disclosure. And (2) when the sale is "For Sale by Owner (FSBO)" and the owner often requires the buyer to agree no disclosure will be given.

Pro Tip: *If a "FSBO" offers the property for sale with no disclosure, the parties must put this in writing. The contract is the best place for this agreement.*

14. Vacation time sharing plan.

15. Vacation multiple ownership.

Who is NOT Exempt from Completing the Seller Disclosure?

It is also important to further explore *who is not exempt from completing the Seller Disclosure*. In addition to the entities set forth in Chapter 3, these are some more commonly improperly claimed exemptions:

1. Companies, corporations, partnerships, etc. It does not matter how big or small the company is or how many transactions the company has conducted across the country, if a company owns a one-to-four residential dwelling, the seller must complete the Seller Disclosure.

2. Landlords. This is perhaps the most wrongfully claimed exemption. The landlord is required to complete the disclosure.

Pro Tip: *The seller is required to complete the form, not the tenant. The landlord may ask the tenant for help in completing the form, but liability ultimately lies with the seller.*

3. Owners who have never lived in the property. Not living in the property does not eliminate the duty to complete the disclosure. A non-occupying owner can and must answer the Seller Disclosure. I often hear sellers complain, "How could I know? I have never lived in the house." Remember, the law does not require the seller to disclose issues they do not know or perform an investigation to find issues. Rather, the form asks, "do you (seller) have knowledge of a problem or defect?" Just because the seller did not live in the house, does not mean the seller does not have knowledge of the issue or the inability to answer the question. Either the seller knows or does not know about the issue. Real estate agents should not allow seller-clients to plead ignorance and not to answer the questions they are required to complete. Doing so puts the real estate agent at risk of liability for non-disclosure.

4. Sold "As-Is". A property being sold "As-Is" is being sold with all defects and issues with the seller making no repairs. "As-Is," however, does not void the seller's responsibility to disclose known defects, problems, and issues with the property. While a buyer may be willing to purchase a property in its current condition, the buyer still has a right to know what they are purchasing.

5. Non-profits such as churches or other charities.

6. "For Sale by Owners."

7. Flippers or wholesalers. If a seller takes title, or has an equitable ownership in the property, (i.e., the right to purchase the property) he must complete the form, regardless how long the seller plans on holding title. Nothing in this law is intended to prevent the parties from entering into an agreement with respect to the physical condition of the property, including agreements for the sale of real

property "as is." Thus, the parties can agree to not provide the disclosure.

Real Estate Agent-Sales Contracts and Seller Disclosure Form

In South Carolina, real estate agents typically use one of three contracts. The contract used statewide is a form contract created by the South Carolina Association of REALTORS® (“SCR Contract”). Another form contract is used in the Midlands of South Carolina by the Central Carolina REALTORS® Association (“CCRA contract”). I proudly served on the committee which drafted the CCRA contract in 2008. The final contract is the form contract used by the Hilton Head Area Association of REALTORS® (“HHI contract”). The contract is used mainly in Bluffton and Hilton Head areas.

The SCR contract deals with Seller Disclosure in Paragraph 12 of the contract. The SCR contract contains two options for Seller Disclosure. The first option is the form was provided prior to execution of the contract. The contract restates the requirement to update the disclosure if it is rendered inaccurate, misleading, or incomplete by the occurrence of any event. The second option is the parties agree not to provide the disclosure.

The SCR Contact provision is as follows:

> *SC RESIDENTIAL PROPERTY CONDITION DISCLOSURE STATEMENT ("CDS") [check one]:*

Buyer and Seller agree that Seller has Delivered prior to this Contract, a CDS to Buyer, as required by SC Code of Laws Section 27-50-10 et seq. If after delivery, Seller discovers a CDS material inaccuracy or the CDS becomes materially inaccurate due to an occurrence or circumstance; the Seller shall promptly correct this inaccuracy (e.g. delivering a corrected CDS to the Buyer/making reasonable repairs prior to Closing). Buyer understands the CDS does not replace Inspections. Buyer understands and agrees the CDS contains only statements made by the Seller. Parties agree the Brokers have met requirements of SC Code 27-50-70 and Brokers are not responsible or liable for any information in the CDS. CDS is not a substitute for the Buyers and Inspectors inspecting the Property (related issues/ onsite/offsite) "Property issues" for all needs.

OR

Buyer and Seller agree that Seller will NOT complete nor provide a CDS to Buyer in accordance with SC Code of Law, as amended, Section 27-50-30, Paragraph (13). Buyers have sole responsibility to inspect Property Issues for all their needs.

The CCRA contract also provides the same two options for Seller Disclosure in paragraph 12.

PROPERTY CONDITION DISCLOSURE STATEMENT: (Select, initial and date only one of the options below)

A. Buyer and Seller agree that a Residential Property Condition Disclosure Statement, as required by S.C. Code, as amended, Section 27-50-10, et. seq., has been provided to Buyer by Seller prior to the final acceptance of this Contract. If Seller discovers, after his delivery of the Disclosure Statement to Buyer, any material inaccuracy in the Disclosure Statement or the Disclosure Statement is rendered inaccurate, misleading, incomplete or false in a material way by the occurrence of some event or circumstance, Seller will promptly make reasonable repairs needed to eliminate the deficiency and repair the damage caused by the occurrence or correct the inaccuracy by delivering a corrected disclosure statement to Buyer before closing. Buyer understands and agrees that Seller's Property Condition Disclosure Statement is not intended to replace inspections of the Property.

OR

B. Buyer and Seller agree that Seller will not complete nor provide a Residential Property Condition Disclosure Statement in accordance with S.C. Code, as amended, Section 27-50-30, Paragraphs (1-13).

The HHI contract contains one very short sentence about Seller Disclosure in paragraph 17 of the contract. The contract provision reads:

The Purchaser has (____) has not (____) reviewed a South Carolina Property Condition Disclosure Statement. Interestingly, the provision does not provide an option for the parties to agree not to provide the Disclosure nor does it address exemptions to the statute.

Presumably the parties could select that the purchaser has not reviewed the Disclosure but no explanation as to why would be provided. This may make the seller uneasy about selecting this option.

4.
WHAT DOES THE LAW REQUIRE TO BE DISCLOSED?

The Seller Disclosure form must include, but is not limited to, the following characteristics and conditions of the property:

(1) the water supply and sanitary sewage disposal system;

(2) the roof, chimneys, floors, foundation, basement, and other structural components and modifications of these structural components;

(3) the plumbing, electrical, heating, cooling, and other mechanical systems;

(4) present infestation of wood-destroying insects or organisms or past infestation, the damage from which has not been repaired;

(5) the zoning laws, restrictive covenants, building codes, and other land-use restrictions affecting the real property, any encroachment of the real property from or to adjacent real property, and notice from a governmental agency affecting this real property;

(6) presence of lead-based paint, asbestos, radon gas, methane gas, underground storage tank, hazardous material

or toxic material, buried or covered, and other environmental contamination;

(7) existence of a rental, rental management, vacation rental, or other lease contract in place on the property at the time of closing, and, if known, any outstanding charges owed by the tenant for gas, electric, water, sewerage, or garbage services provided to the property the tenant leases;

(8) existence of a meter conservation charge, as permitted by Section 58-37-50, that applies to electricity or natural gas service to the property; or

(9) whether the property is subject to governance of a homeowner's association, as provided in Chapter 30 of this title, which carries certain rights and obligations that may limit the use of his property and involve financial obligations.

South Carolina Code §27-50-40.

5.
UNDERSTANDING THE SELLER DISCLOSURE FORM

The Seller Disclosure's cover sheet contains valuable information about how to properly complete the form. The drafting committee felt it was important to provide guidance on how to properly complete the form since this was one of the biggest complaints with the previous forms.

The Cover Sheet

The coversheet addresses several important facts concerning Seller Disclosure. The first paragraph restates the requirement to complete the Seller Disclosure form prior to entering into a contract, unless the seller is otherwise exempt or waives the disclosure.

The second paragraph reminds the seller to answer the questions fully, honestly, and appropriately.

The third paragraph reminds the seller if they check "yes" for any question, then they must explain or describe the issue or attach a report from an engineer, contractor or expert. Additionally, if the seller knows there is a problem and the seller fails to make a disclosure, the seller may be liable for making an intentional or negligent misrepresentation. The

seller may be liable for actual damages, court costs, and attorney's fees.

The next paragraph reminds the seller if he checks "no," the seller is saying he has no actual knowledge of any problem. Again, the seller is not claiming or guaranteeing there is no problem nor is the seller giving a warranty. The seller is only saying he is not aware of an issue.

The fourth paragraph restates if the seller selects "no representation" the seller may still have a duty to disclose information which is known or should have been known. If the reader gets nothing else from this guide, it should be this: "no representation" is never a proper answer!

Paragraph five reminds the seller of the duty to update the disclosure. If new information is obtained and something changes which makes the seller's previous answer incorrect, inaccurate, or misleading, the seller must promptly correct the disclosure, correct, or repair the issue.

The next paragraph states the seller, not the real estate agent, remains solely responsible for completing and delivering the disclosure. However, the real estate agent must disclose materially adverse facts about the property. (See Chapter 13). The paragraph ends with a warning that failure to disclose known material information about the property may result in seller liability.

The final paragraph of the cover sheet states the seller must provide the completed form to the buyer prior to entering into a contract. Both parties should keep a signed copy of the disclosure.

The Question Box

The question box is very important to understand. The previous Seller Disclosure question to apply to each section was vague. The current form is more precise and asks the seller to apply the following question in the text box at the top of page 2 to questions 1 through 14 on the Disclosure Form.

The question is:

As owner, do you have any actual knowledge of any problem(s)* concerning? Problem is defined as including "present defects, malfunctions, damages, conditions or characteristics."

The task force spent considerable time crafting the language in the question box. The question clearly does not ask about prior issues or damages nor does it ask the seller to investigate issues. The question asks if the seller has actual knowledge of an issue or not. Because the question is so simple, there is absolutely no reason a seller cannot truthfully and completely answer the question. I think the committee did an excellent job drafting this artful language. There is no gray area. It is black and white.

SECTION I - WATER SUPPLY AND SANITARY SEWAGE DISPOSAL SYSTEM

This section, like all of the sections in the Seller Disclosure, mirrors the same language in the disclosure law. This section deals with any problems with the water supply, water quality, water pressure, or sanitary sewage disposal system. Additionally, the section asks the seller to provide the type of water supply, water disposal, and water pipes. If there are multiple types, the seller should check all the boxes that apply.

SECTION II - ROOF, CHIMNEY, FLOORS, FOUNDATION, BASEMENT, AND OTHER STRUCTURAL COMPONENTS AND MODIFICATIONS OF THESE STRUCTURAL COMPONENTS

This section deals with roof and gutter system damages. Questions also cover issues with the foundation, slab, floors, windows, fencing, and many other structural components. The seller should review each of the words in this section carefully and circle any items at issue.

At the end of the section, there are two additional questions. The seller must disclose the approximate year the current roof covering was installed and the year the structure was built. This question was added to eliminate the often-exaggerated marketing claim of a "new roof." Roof covering typically means shingles or tin roof.

The final question in this section asks the seller, during his ownership, to describe any roof leaks and repairs. This question was included because many sellers fix leaks but not the damage caused by any leaks. This allows the buyer the opportunity to inspect any issue and ensure the repair was properly made.

PRO TIP: *This is the only question in the disclosure which asks the seller to disclose an issue even if the matter has been repaired.*

SECTION III - PLUMBING, ELECTRICAL, HEATING, COOLING, AND OTHER MECHANICAL SYSTEMS

This section is straight forward. It contains seven questions about the condition of the plumbing, electrical,

heating, and cooling systems. It also includes a question about mechanical systems such as garage door openers, pumps, and filtration systems. The question concerning built-in systems includes fans, irrigation, pool, and outdoor lighting. The question regarding appliances includes the range, stove, dishwasher, and others similar kitchen appliances. "Similar" is not defined, but this would mean appliances that you intend to leave with the house and not personal items like alarm clocks and hair dryers. Any question that is answered "yes" must be further explained in Section X of the form. It is also advisable to circle the system with the issue. This way the buyer understands it is not all of the systems in the question but only the only item.

PRO TIP: *If the sale of the house does not include the refrigerator or washer and dryer, the seller could scratch out those appliances and write "not included". However, if the party's contract includes those items, the seller would be required to update the disclosure to include information pertaining to those appliances.*

Finally, the seller must describe the cooling system, heating system, and HVAC power as well as the approximate age of all HVAC systems.

SECTION IV - PRESENT OR PAST INFESTATION OF WOOD DESTROYING INSECTS OR ORGANISMS OR DRY ROT OR FUNGUS, THE DAMAGE FROM WHICH HAS NOT BEEN REPAIRED

This section asks about issues related to items typically shown on a termite report (CL-100). This section is clear the seller must disclose only damage which has not been repaired. However, as discussed in Chapter 10, sometimes disclosing a repaired issue may be in the best interest of the seller.

This section seeks information about any known present wood problems caused by termites, insects, wood destroying organisms, dry rot or fungus. This section also asks about any known present, i.e. not past, pest infestation. The seller is also asked to provide information on any termite coverage on the property in case the buyer would like to have the termite bond transferred as part of the contract.

SECTION V -THE ZONING LAWS, RESTRICTIVE COVENANTS, BUILDING CODES, AND OTHER LAND USE RESTRICTIONS AFFECTING THE REAL PROPERTY, ANY ENCROACHMENTS OF THE REAL PROPERTY FROM OR TO ADJACENT REAL PROPERTY, AND NOTICE FROM A GOVERNMENTAL AGENCY AFFECTING THIS REAL PROPERTY

This section is rather lengthy and contains multiple questions related to violations or variances of zoning laws, restrictive covenants, building codes, permits, or other land use restrictions affecting the property.

The items covered are:

- Easements (access, conservation, utility, other), party walls, shared private driveway, private roads, released mineral rights, or encroachments from or to adjacent property;
- Legal actions, claims, foreclosures, bankruptcies, tenancies, judgments, tax liens, other liens, insurance issues, or governmental actions that could affect title to the property;
- Room additions or structural changes to the property during ownership;
- Problems caused by fire, smoke, or water to the property during the seller's ownership;
- Drainage, soil stability, atmosphere, or underground problems affecting the property;

- Erosion or erosion control affecting the property;
- Flood hazards, wetlands, or flood hazard designations affecting the property;
- Flood insurance covering the property;
- Designation as a historic building, landmark, site or location within a local historic or other restrictive district, which may limit changes, improvements, or demolition of the property;
- Federal Emergency Management Agency (FEMA) claims filed on the property. The seller must list the dates of all claims of which the seller is aware; and
- The final part of this section asks about any green energy, recycling, sustainability or disability feature added to the property, and if there is a manufactured home on the property.

SECTION VI - BURIED, UNBURIED, OR COVERED PRESENCE OF THE FOLLOWING: LEAD BASED PAINT, LEAD HAZARDS, ASBESTOS, RADON GAS, METHANE GAS, STORAGE TANKS, HAZARDOUS MATERIALS, TOXIC MATERIALS, OR ENVIRONMENTAL CONTAMINATION

This section seeks information about known environmental issues. Included are common items such as lead-based paint and any abandoned or capped, buried oil storage tanks. It is advisable to circle the item with an issue and explain the issue on the line provided. Use Section X if more space is needed.

SECTION VII - EXISTENCE OF A RENTAL, RENTAL MANAGEMENT, VACATION RENTAL, OR OTHER LEASE CONTRACT ANTICIPATED TO BE IN PLACE ON THE PROPERTY AT THE TIME OF CLOSING

In this section, the seller must disclose any lease or rental agreement including all applicable terms of the lease. The seller must also disclose information about the management

company as well as any “problems with the tenant” including unpaid utilities. “Problems with the tenant” is not defined but would include unpaid or late paid rent and constant rule violations.

SECTION VIII - THE EXISTENCE OF A METER CONSERVATION CHARGE, AS PERMITTED BY SECTION 58-37-50 THAT APPLIES TO ELECTRICITY OR NATURAL GAS SERVICE TO THE PROPERTY

This is an interesting section. Although this question is required by law, it has never been asked in any other version of the Seller Disclosure. This item is rarely applicable. A “meter conservation charge" means a charge placed on a customer's account by which electricity providers and natural gas providers recover the costs, including financing costs, of energy efficiency and conservation measures. The seller’s utility bill should denote any charge for conservation measures.

SECTION IX - WHETHER THE PROPERTY IS SUBJECT TO GOVERNANCE OF A HOMEOWNERS ASSOCIATION WHICH CARRIES CERTAIN RIGHTS AND OBLIGATIONS THAT MAY LIMIT THE USE OF THIS PROPERTY AND INVOLVE FINANCIAL OBLIGATIONS

This section deals with homeowner associations. If the property is subject to a homeowner’s association, the seller must complete the addendum discussed in Chapter 6.

SECTION X - PLEASE USE THE SPACE BELOW FOR "YES" ANSWER EXPLANATIONS AND ATTACH ANY ADDITIONAL SHEETS OR RELEVANT DOCUMENTS AS NEEDED

The seller must use this section to explain any "yes" response on the form. It is advised to provide complete and full explanations and attach any supporting documentation.

Page 5 - The Final Page

This final page covers other issues that could affect the property which were not required by the statute. The first paragraph reminds the buyer of the obligation to do inspections, review all restrictions, and not to rely solely on the information provided by the seller. Next, the seller is required to check all the boxes about the property status that are applicable:

- Owner occupied
- Leased
- Bankruptcy
- Estate
- Short sale
- Foreclosure
- Vacant (How long vacant?)
- Other

Every one of these items could cause closing delays and may be important to a buyer who may need a quick closing.

The final section of this page asks the buyer to acknowledge the following which is designed to protect the seller:

- Receipt of a copy of this disclosure,

- Purchaser has examined disclosure,
- Purchaser had time and opportunity for legal counsel,
- This disclosure is not a warranty by the real estate licensees,
- This disclosure is not a substitute for obtaining inspections of on-site and off-site conditions,
- This disclosure is not a warranty by the owner,
- Representations are made by the owner and not by the owner's agents or subagents, and
- Purchasers have sole responsibility for obtaining inspection reports from licensed home inspectors, surveyors, engineers, or other qualified professionals.

6.
THE SELLER DISCLOSURE ADDENDUM

The addendum must be completed as part of Seller Disclosure if the property being sold is subject to a homeowner's association, a property owners' association, a condominium owners' association, a horizontal property regime, or similar organization and subject to covenants.

The first Section of the addendum requires the seller to disclose the association charges and the contact information for the association.

Next, the addendum asks eleven (11) specific questions. (Note: In the form "CCRBR" means covenants, conditions, restrictions, bylaws, or rules.) The paraphrased questions are:

1. Are there association charges or common area expenses?

2. Are there any association or CCRBR resale or rental restrictions? This question typically relates to age-restricted properties that provide the seller the right to repurchase the property.

3. Has the association levied any special assessments or similar charges? A special assessment is different from annual dues. The contract controls which party would be responsible for paying a special assessment.

4. Does the CCRBR or condominium master deed create guest or visitor restrictions? Restrictions that apply in this section may include overnight guests or parking requirements.

5. Does the CCRBR or condominium master deed create animal restrictions? This question typically relates to condominiums which have number and size maximum for pets.

6. Does the property include assigned parking spaces, lockers, garages, or carports?

7. Are keys, key fobs, or access codes required to access common or recreational areas?

8. Will any membership other than owner association transfer with the properties?

9. Are there any known common area problems?

10. Are property or common area structures subject to South Carolina Coastal Zone Management Act? The chief purpose of the South Carolina Coastal Zone Management Act is to “ensure the proper management of the natural, recreational, commercial and industrial resources of the State's coastal zone -resources of present and potential value to all citizens of the State.” The law is “designed to promote the economic and social improvements of the State’s citizen while protecting, and where possible, restoring or enhancing the rich variety of coastal resources.”

11. Is there a transfer fee levied to transfer the property? Some homeowner’s associations and property regimes charge transfer fees against one party when the property is sold. The fee is usually paid by the seller to the association. The responsible party and the mechanism for determining the

amount of the fee is set forth in the restrictive covenants or master deed.

7.
WHAT ARE ALLOWABLE ANSWERS ON THE SELLER DISCLOSURE FORM?

The Disclosure form must give the seller the option to indicate if the seller has actual knowledge of the specified characteristics or conditions, or the seller is making no representations as to any characteristic or condition.

The rights of the parties to a real estate contract in connection with conditions of the property of which the seller has no actual or constructive knowledge are not affected by this provision. In other words, the seller may answer as follows:

1. Yes;

2. No;

3. No representation.

Please, see the next chapter for a more detailed analysis regarding when the response “no representation” is appropriate. **Spoiler alert . . . “no representation” is never a proper answer.**

8.
"NO REPRESENTATION" - THE FALSE NEGATIVE

As I mentioned in Chapter 7, the law allows the seller to answer each question on the Seller Disclosure with either "no", "yes" or "no representation". When the state legislature debated Seller Disclosure there were a number of lawmakers who opposed the law. As a compromise, the "no representation" option was added. It is odd this answer option was included because it contradicts the plain language of the law that requires a seller to provide the buyer a Seller Disclosure and to answer the questions on the form truthfully. Therefore, if a seller answers "no representation" for one of the questions when the seller has knowledge, it is the same as not providing the required answer or giving a false statement.

While there are a multitude of reasons a seller should not use "no representation" as an answer, three main reasons listed below should convince any seller to avoid this response.

First, every other year the Real Estate Commission requires certified education instructors to attend a seminar on the new mandatory education class for real estate agents. In 2017, this seminar contained a section on the Seller Disclosure. During the seminar, the instructor asked when the use of "no representation" was appropriate. For over an hour, the attendees debated the appropriate use of "no representation." The attendees included real estate lawyers,

owners of real estate agencies, brokers, and owners of real estate schools. These attendees are arguably the most educated on the topic. During the session not one argument was ever advanced on using “no representation”.

Here is an example of one of the rejected reasons offered. Someone stated a landlord could use this answer because the landlord never lived in the house. That was met with laughter. Being a landlord does not exempt a seller from completing the form. First, a landlord tends to know more about the condition of the house than the average homeowner because tenants tend to complain about every minor issue in the house. Secondly, when a tenant vacates the property, the landlord closely inspects the property before returning the security deposit. Lastly, and most important, the Seller Disclosure asks if the seller has actual knowledge. If the landlord knows of a problem, he can answer yes. If he does not, he can correctly answer no. The law is simply asking if the seller has knowledge. It is not imposing a duty to investigate. Thus, to claim a landlord cannot truthfully answer whether he does or does not have actual knowledge is ludicrous.

While this was just one of many examples offered, the take away is there is never a reason a seller cannot truthfully answer the question.

Secondly, the seller has a duty to disclose certain material defects in the property; in particular those defects set forth in the law. When the seller selects “no representation” on an item when he has knowledge, he is failing to disclose a known defect which will likely result in a claim for failure to disclose. Since the question in the Seller Disclosure asks if the seller has “any knowledge of” a defect or condition. This is a simple “yes” or “no” question. You either know or do not know!

Lastly, I have seen an increase in the number of lawsuits against sellers for failure to disclose properly. If the seller truthfully discloses there is less likelihood of a claim. It is nonsense to think selecting “no representation” would shield you from a claim of failure to disclose. No representation is the same as not answering. Lawsuits are expensive and should be avoided at all costs.

If a real estate agent represents a seller who has selected “no representation,” the agent needs to tell the seller they may have legal liability by not answering the question, and they should consult a real estate attorney prior to making this selection. If the agent represents a buyer who has been presented a seller disclosure with “no representation” selected, the agent should have the buyer return it to the seller for a correct answer. The agent should remind the seller either they know or do not know if the item is defective or broken and “no representation” is an unacceptable answer.

When seeking legal counsel on completing the disclosure form, be sure to seek the advice of a real estate attorney who is knowledgeable about the form. Not every lawyer understands it. A non-real estate lawyer may look at the form and conclude it is proper to answer “no representation” solely because the Seller Disclosure offers the choice. But as should now be clearly evident, this is never a proper choice.

PRO TIP: *If a real estate agent represents a buyer and the seller provides a Seller Disclosure form with “no representation”, ask for a corrected form. If the seller refuses, ask why the seller cannot answer the question “yes” or “no.” It would be advisable not to purchase the property if the seller refuses to correct the answers.*

9.
DUTY TO UPDATE THE SELLER DISCLOSURE

Real estate agents and sellers often ask when does the Residential Property Condition Disclosure Statement need to be updated in a transaction? South Carolina law holds if the owner/seller discovers after delivering the disclosure statement, a material inaccuracy in the disclosure or some event or circumstance occurs causing the disclosure to be inaccurate the seller may either make reasonable repairs or correct the inaccuracy. A closing that cancels due to inspections or if something in the house breaks would certainly be an event or circumstance triggering the requirement to update.

If the Seller Disclosure becomes materially inaccurate for any reason during the sale of the house or if the contract fails to close and the Seller Disclosure is inaccurate, the seller has two options. First, the seller can update the Seller Disclosure so it is now truthful and accurate. Secondly, the seller can repair the item that is broken, defective or malfunction that was not previously listed on the Seller Disclosure. Repairing the item means fully correcting the issue and not simply stopping the damage from worsening.

If a transaction fails to close and the seller is not going to repair the deficient item, the seller needs to compare the inspection report to the Seller Disclosure. The seller then must update any items on the Seller Disclosure that is inaccurate. While it may be tempting to ignore the duty to

update, remember a buyer whose deal did not close, may be irate to learn the house was sold to someone else without the disclosure being updated. I have seen numerous cases where the original buyer or their agent told the new buyer the problems with the house. This often results in law suits and claims. It is hard to claim the seller did not know of an issue when an inspection report from a deal which fell through is presented. Also, do not forget the power of neighborhood gossip. A seller should expect the new buyer to be told all about the repair trucks that came to the property on the deal which fell through.

If the seller fails or refuses to update or repair, the inspection report could be used as evidence the seller knew of the issue and failed to comply with this statutory duty.

Pro Tip: *Be careful of repairs. Repairing an item and stopping the issue are two different things. For example, if the roof is leaking and you stop the leak, have you really repaired it? Perhaps, but did the seller replace any rotted or compromised wood? Remember, repaired means completely repaired. Nothing looks more like a cover-up than a half-done repair.*

10.
WHEN SHOULD THE SELLER DISCLOSE ITEMS THAT WERE REPAIRED?

The concept of disclosing items the seller may not be required to disclose is gaining steam in South Carolina. Remember, the law only requires the seller to disclose items currently defective. The law does not require the seller to disclose repaired items. While the law does not require disclosure of repaired items, it is often a great idea to disclose anyway. There is a delicate balance in disclosing every item that ever broke in the house, thus making marketing of the house difficult. However, certain high dollar or high concern items are often best disclosed. Disclosure may have a positive effect on selling the property.

The top four items buyers feel should be disclosed at all times are repairs made to:

1. HVAC (Heating and Air) system;

2. All termite issues

3. Water intrusion or leaks; and

4. Foundation matters.

While the law does not require these items to be disclosed unless there is a current issue, what harm is there in disclosing these matters? If the seller discloses the issue and

demonstrates the repairs were made properly, it eliminates any claim for non-disclosure later. It also shows the seller is honest and forthcoming.

Many years ago, I was an expert witness in a case concerning foundation piers. The seller made $50,000 worth of repairs to the foundation using structural piers. After the repairs, the house was more structurally sound than any house in the neighborhood. When the seller sold the house, they did not disclose the structural piers because by law, they were not required. Of course, the buyer learned of the piers from a neighbor and filed suit. During my deposition, the buyer's attorney asked me if the seller was required to disclose the piers. I correctly responded the law did not require the seller to disclose repaired items. The law is very clear. The case eventually settled with the seller giving money to the buyer. The cost of defending the lawsuit was becoming burdensome. The point is what would have happened had the seller disclosed the repair and the piers when the house was listed? Would it have hurt the seller's chance of selling the house? If marketed correctly, would it have not enhanced the value of the house? The house was certainly not going to have any foundation issues in the future.

One thing is for sure, had the seller disclosed the piers, the seller would not have been sued and would not have written the buyer a check for not disclosing, even though by law, it was not required. When filling out the disclosure consider disclosing big dollar items that have been repaired. The buyer will find out eventually anyway.

11.
GHOSTS, DISEASES & DEAD PEOPLE - IS YOUR PROPERTY STIGMATIZED?

A common question from real estate agents and sellers is: "Do you have to disclose someone died in the house? Does the manner of death matter?" *South Carolina Code* §40-57-180 answers these questions and others related to stigmatized properties. The law reads (paraphrased):

> *No cause of action may arise against an owner or real estate agent for failure to disclose:*
>
> *(1) property is, or was, occupied by someone infected with a virus or disease, which has been determined by medical evidence as being highly unlikely to be transmitted through occupancy;*
>
> *(2) the death of an occupant or the manner of the death;*

PRO TIP: *This includes death by violence or suicide in the house.*

> *(3) any off-site condition or hazard that does not directly impact the property; or*

PRO TIP: *This would include the existence of a trash dump, unless the trash dump pollutes the property.*

(4) any psychological impact that has no material impact on the physical condition of the property.

PRO TIP: *This included ghosts!!!*

Nothing precludes an action against an owner or agent who makes intentional misrepresentations in response to direct question from a buyer or prospective buyer with regard to psychological impacts, offsite conditions, or stigmas associated with the real estate.

While the portion of the law pertaining to responses to direct questions does not include questions about death, the use of the term "stigmas" in the phrasing does include the requirement to answer direct questions about death. The Real Estate Commission has long held an agent must disclose the death of an occupant if asked a direct question.

In the 2008 mandatory continuing education class for real estate agents, "Top 10 Ways to be Disciplined" the materials specifically stated you may not misrepresent the death of an occupant if directly asked. Therefore, the seller nor the agent has to disclose someone died in the house. It does not matter if the death was natural, by disease (as long as non-communicable), suicide, or murder. However, if a buyer or prospective buyer asks a direct question about a death in the house, the seller or agent may not make an intentional misrepresentation. This does not mean they have a duty to investigate, but you are required to answer honestly based on your knowledge.

Pro Tip: *The website www.diedinhouse.com is where you can find out if anyone has ever died in your house. It includes deaths by murder, suicide, accidental or natural.*

Lastly, be careful not disclosing items such as an off-site condition or a hazard that does not directly impact the

property. While the seller and agent have no duty to disclose off-site conditions not impacting the property, they do have a duty to disclose an off-site condition that does affect the property. They may need to consider items such as airports, garbage dumps, excessive road noise, and gun ranges as things to disclose, as these things could directly impact the property. Each matter needs to be looked at in relation to the property and the affect it has on the property.

12.
IS THE SELLER DISCLOSURE FORM A SHIELD OR A SWORD TO BE USED AGAINST THE REAL ESTATE AGENT?

Over the years, the South Carolina Real Estate Commission has claimed, through continuing education, that the South Carolina Property Condition Disclosure was a "liability defense shield." For the most part, this is hogwash. While the intent of the law may have been to reduce liability through disclosure, the reality is it does not. Buyers and Plaintiff attorneys constantly file claims against real estate agents for nondisclosure. I receive dozens of calls each year from agents, buyers, and sellers over these disputes. The seller claims, often without evidence, the real estate agent knew of the issue and concealed it.

Seller Disclosure was designed to require the seller to disclose all known hidden defects. But, some sellers continue not to disclose. When a buyer discovers an issue after closing, the buyer often alleges a real estate agent led the cover-up. Despite the lack of any evidence, the buyer claims the agent "should have known."

While it may be true, a seller cannot be held liable for failure to disclose an issue that the seller acknowledges on the form, Plaintiff Attorneys continue to bring actions claiming the information was incomplete, misleading, or deceptive.

The real estate agent can be dragged into the matter as the attorney looks for deep pockets or insurance policies to pay the claim.

Buyers and their attorneys hope the cost of litigation and the time commitment required to defend a claim will make settlement the only viable option for the agent. Do not be fooled into thinking this form is a shield. It is quite the opposite.

All real estate agents should look at the completed form carefully with their seller-client. The agent needs to make sure the seller's answers are complete and truthful. If the seller-client has not been completely honest in answering the Seller Disclosure form, the agent must meet with the seller-client again and encourage them to revise answers. If the seller-client refuses to change an answer the agent knows is misleading, incorrect, or deceptive, the agent should terminate the relationship with the seller immediately. The cost and time of a lawsuit will greatly outweigh any commission potentially earned.

13.
REAL ESTATE AGENTS' RISKS & LIABILITIES

The Seller Disclosure law requires the listing agent to notify the owner of the disclosure obligations as well as the liability for refusal to provide the disclosure or providing an inaccurate Seller Disclosure form.

The real estate licensee, whether acting as the listing agent or selling agent, is not liable to the buyer if:

(1) the owner provides the purchaser with a disclosure form that contains false, incomplete, or misleading information; and

(2) the real estate licensee did not know or have reasonable cause to suspect the information was false, incomplete, or misleading.

However, the law does not limit the obligation of the buyer to inspect the physical condition of the property and improvements. The real estate agent, whether acting as listing agent or selling agent, has no duty to inspect the onsite or offsite conditions of the property and any improvements.

SECTION 1 - SELLER DISCLOSURE VS. MATERIAL ADVERSE FACTS

When a seller, exempt from providing the South Carolina Seller Disclosure Form, learns of a latent (hidden) defect or damage in the house, does the seller now have a duty to disclose the defect or damage to a potential buyer? The short answer is, "Yes". Here is why.

As shown in Chapter 3, Section 2, several sellers are exempt from providing the Seller Disclosure. Once the seller meets the exemption, the seller remains exempt from providing the Seller Disclosure form even if information later acquired points to a defect or issue. However, the obligations of providing the Seller Disclosure is very different from the real estate agent's duty to disclose "material adverse facts." *South Carolina Code* §40-57-30(16).

"Material adverse facts" are defined as:

> *(i) significantly and adversely affecting the value of the real estate;*
>
> *(ii) significantly reducing the structural integrity of improvements to real estate; or*
>
> *(iii) presenting a significant health risk to occupants of the real estate.*

Under the law, a real estate agent must disclose to the buyer all material adverse facts concerning the transaction which are actually known to the agent. Therefore, while the seller may be exempt from providing the Seller Disclosure Form, once the listing agent learns of a latent (hidden) defect affecting the value, structure or health of the occupant, the listing agent must disclose the materially adverse fact to a potential buyer. A real estate agent cannot ignore this statutory duty even if directed to do so by the seller. The

agent must follow the law at all times or face possible punishment from the Real Estate Commission as well as civil liability. *South Carolina Code* §40-57-350(E)

SECTION 2 - THE REAL ESTATE AGENT'S DUTY TO INSURE A STATEMENT IS COMPLETED AND ACCURATE

A listing agent or any real estate agent operating for any party in a residential real estate transaction must inform, in writing, each owner covered by the listing agreement of the owner's obligations to complete the disclosure. If the listing agent performs this duty, he is not liable for the owner's refusal or failure to provide a prospective purchaser with a Seller Disclosure form. Obviously, the agent would only need to provide the writing if the seller refuses to provide the disclosure.

SECTION 3 - AGENT ACTUAL KNOWLEDGE VS. SHOULD HAVE KNOWN

Prior to January 2017, real estate agents could be sued when they "knew or should have known" of a hidden defect, misrepresentation, fraud, or incorrect statement. While few would argue against liability for actual knowledge, real estate agents often had to defend against the claim of "should have known." Playing "Monday morning quarterback" is always easier after the event. However, in real time, the situation may not have pointed in that direction.

In 2017, the real estate license law was amended and eliminated the "should have known" standard for real estate agents. Prior to 2017 the law read:

> *A licensee who represents a seller shall treat all prospective buyers honestly and may not knowingly give them false or misleading information about the condition of the property which is known to the licensee or, when acting in a reasonable manner, should have been known to the licensee.*

South Carolina Code §40-57-137(F).

In 2017, the language was replaced with:

> *A licensee shall treat all parties honestly and may not knowingly give them false or misleading information about the condition of the property which is known to the licensee. A licensee is not obligated to discover latent defects or to advise parties on matters outside the scope of the licensee's real estate expertise. Notwithstanding another provision of law, no cause of action may be brought against a licensee who has truthfully disclosed to a buyer a known material defect.*

South Carolina Code §40-57-350(G)(1).

The agent, real estate brokerage firm and the broker-in-charge are not liable to a party for providing the party with false or misleading information if the information was provided to the agent by the client or customer and the licensee did not know the information was false or incomplete. *South Carolina Code* §40-57-350(G)(3).

Finally, there may be no imputation of knowledge or information between and among the broker-in-charge, agents, and the clients. *South Carolina Code* §40-57-350(I)(9).

The new law eliminated the "should have known" standard. Actual knowledge is a much higher and harder standard to prove. At trial, the judge will instruct a jury of the plaintiff's burden of proving the higher standard. So, in a

legal sense, the real estate agent should have more protection and less liability.

However, as a practical matter this higher standard will not make a real estate agent immune to lawsuits. Instead of pleading the agent "knew or should have known," a Plaintiff's attorney will plead the agent knew and assert facts as proof of actual knowledge. Whether the agent knew or did not know of the assertion is a matter of fact; the court will rarely grant summary judgment, so ultimately the jury will decide if the agent knew. While the standard of proof is heightened, it is unlikely to reduce the number of lawsuits.

The disclosure law actually may contradict real estate agent law. Under the law, an agent has no liability if the seller gives false, misleading, or inaccurate information and the real estate agent did not know or did not have reasonable cause to suspect the information was false, incomplete, or misleading. This certainly sounds like a "should have known" standard.

14.
WHAT HAPPENS IF SELLER DOES NOT DISCLOSE, BUT BUYER DISCOVERS BEFORE CLOSING?

A common theme throughout this guide has been the fact the Seller Disclosure does not negate the buyer's responsibility to do inspections. The law is clear the disclosure does not replace good inspections and examinations. What happens if the seller failed to disclose an item, but the buyer discovers the omission prior to closing?

The South Carolina Court of Appeals answered this question in 2008. In the case *McLaughlin v Williams*, 665 S.E.2d 667 (S.C. Ct. App. 2008), the seller failed to answer questions on the disclosure concerning water intrusion in the crawlspace. During due diligence, the buyer had a home inspection and termite inspection which uncovered water issues in the crawl space. Despite finding the issues, the buyer closed anyway. Six weeks later, the buyer sued the seller for not disclosing the water intrusion issues.

The Court dismissed the action saying the buyer had no right to rely on the disclosure because the buyer's inspections showed there were undisclosed damages. The Court even said if the damage shown on the inspection was not in the exact location of the damage at issue, it would not matter because the buyer was on notice.

Since the buyer has information contradictory to the disclosure, the buyer's recourse was to cancel the closing. The buyer cannot learn of the information, close and then claim they relied on the false information and suffered damages as a result. Basically, the Court says you cannot rely on information you know to be wrong.

ABOUT THE AUTHOR

Gary Pickren has been a real estate attorney since 1995. In addition to performing over 30,000 real estate closings during his career, he has represented numerous real estate agencies throughout South Carolina and has defended real estate agents before the Real Estate Commission. He has won numerous awards including 2019 Attorney of the Year by

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