

# CHAPTER 02

## SELLER'S DISCLOSURE

### Learning Objectives

After this chapter, you will be able to

- Identify the statutory changes to the Seller's Disclosure Notice and know when the new form will be required to be used.
- Describe a negative outcome of a real estate transaction if a seller does not complete the Seller's Disclosure Notice and attach all relevant documents.
- Identify the best practice to perform to avoid a potential lawsuit claiming failure to disclose a material defect after the seller receives an inspection report for the property.



### Statutory Changes

The Legislature made changes to the law regulating the Seller's Disclosure Notice regarding flooding, including whether the seller's property is located wholly or partly in a 500-year floodplain and whether the seller has ever filed a claim for flood damage (HB 3815 and SB 339, 86th Texas Legislative Session, effective Sept. 1, 2019). The Commission has updated the Seller's Disclosure Notice (OP-H) to reflect the changes.

See Appendix A for the revised Seller's Disclosure Notice (OP-H) effective September 1, 2019.

### Selecting the Seller's Disclosure Notice

Exercise caution for your brokerage and your sellers when selecting which seller's disclosure notice to

provide for the seller to fill out. The TREC Seller's Disclosure Notice is the minimum required by law and mirrors the provision in the Property Code. Other types of seller's disclosure notices exist in some marketplaces within the state of Texas; those are created and provided to members of certain local or state trade associations. When using a seller's disclosure notice that requires other forms to be attached, such as an "on site sewer facility" disclosure for a property with a septic system, be certain that the seller understands the risks involved if they fail to disclose all the information required by the additional document, and actually attach the additional document.

Regardless of what notice a seller selects to use, remember that a seller is in violation of the Deceptive

Trade Practices Act if the seller withholds material information concerning the property in an effort to induce the buyer to buy the house.

### Aflalo v. Harris - A Civil Case in Dallas County

Aflalo sued Harris for breach of contract, alleging Harris untimely terminated a contract. Harris (buyer) entered into a One to Four Family Contract with Aflalo (Seller) for \$1,450,000 with \$10,000 in earnest money, executed on November 20, 2015, with closing scheduled for December 18, 2015.

The contract provided for the seller to provide a seller's disclosure notice within 3 days of the effective date. On November 20th, the seller provided the trade association seller's disclosure document to the buyer and answered "yes" my property is in a floodway. In addition, the seller wrote in "I have flood insurance, my lender told me it was recently added to a flood area". The seller did not provide an additional document with more information regarding the flood area that the seller's disclosure notice used required.

On November 24th (one day after the 3 day period), the buyer's agent requested this missing attachment form from the seller's agent. The seller did not respond.

On the day before closing, Harris gave notice they were terminating the contract. The seller relisted his property and made a demand to Harris to perform according to the contract.

Three weeks later, Aflalo sued Harris for breach of contract seeking specific performance. The seller said he timely provided the seller's disclosure notice and the buyer could have backed out timely, however waited until the day before closing. Harris filed a counter claim for declaratory judgment saying Aflalo failed to provide the notice since the additional document required by the seller's disclosure document used by Aflalo was not provided.

Following a bench trial, the court awarded Harris \$140,000 in attorney fees. Aflalo appealed. The appellate court reversed the trial court decision in favor of Aflalo. Harris has appealed to the Texas Supreme Court.

Note: the seller has sued the listing broker and that case is on hold while this case is put forward.

As of June 2019, this case is ongoing.

## Inspection Reports: Sellers and Future Buyers

**What if a seller receives an inspection report? Must they disclose it to future buyers?**

What happens if a seller receives a copy of a recent inspection report? Must they share it with a future buyer? The scenario is not uncommon. The seller lists their home. A buyer submits a contract with an option period. The seller accepts. During the option period, an inspection is conducted. The inspection reveals something unacceptable to the buyer, who subsequently backs out. The buyer's agent sends the inspection report to the seller's agent as an explanation. If a seller's agent receives a copy, **the agent must give it to the seller, as it is material information related to the transaction.** As such, must it be shared with future buyers as part of the seller's disclosure?

It's been said: "disclose, disclose, disclose." Texas Property Code §5.008 outlines how. The statute, which is intended to be a minimum requirement, does not specifically require inclusion of copies of recent inspection reports. TREC has an approved Seller's Disclosure Notice that mirrors the language of the statute and does not require recent inspection reports to be included. Many trade organizations have their own seller's disclosure notices, some with added provisions intended to reduce risk for a seller, including a directive to list any written inspection reports received within the past four years and to attach copies. Some brokerages also have their own recommended forms.

So must the seller share a copy of the inspection report? No. HOWEVER, they must disclose all knowledge of the condition of the property. Property Code §5.008 requires that the notice be completed to the best of the seller's belief and knowledge as of the date the notice signed by the seller. While the statute does not require the seller to update any disclosure once an inspection is received, the seller should do so to ensure that any future buyer is made aware of newly revealed conditions. TREC's Canons of Professional Ethics and Conduct require "a real estate broker or sales agent ...to exercise integrity in the discharge of the license holder's responsibilities, including employment of prudence and caution so as to avoid misrepresentation, in any wise, by acts of commission or omission." One could easily argue that by not advising a client to update the Seller's Disclosure Notice, a license holder is omitting material facts the buyer has a right to know. As such, the seller should be instructed to update the Seller's Disclosure Notice for any future buyer to include all that was learned from the inspection report.

A best practice to avoid a potential lawsuit claiming failure to disclose a material defect against both the seller and the broker, is to include a copy of the prior inspection report with the Seller's Disclosure Notice and provide both by attachment in the Multiple Listing Service entry or other advertising platform. If the seller repairs or corrects any of the items on the inspection report, include invoices, receipts, and any warranties with the Seller's Disclosure Notice, as well.

## **When is a Seller's Disclosure Notice NOT required?**

Disclosing defects of a property is required in all real estate transactions. Doing so using the Seller's Disclosure Notice, however, is only required when transferring residential real property with only one dwelling unit except:

1. pursuant to a court order or foreclosure sale;
2. by a trustee in bankruptcy;
3. to a mortgagee by a mortgagor or successor in interest, or to a beneficiary of a deed of trust by a trustor or successor in interest;
4. by a mortgagee or a beneficiary under a deed of trust who has acquired the real property at a sale conducted pursuant to a power of sale under a deed of trust or a sale pursuant to a court ordered foreclosure or has acquired the real property by a deed in lieu of foreclosure;
5. by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust;
6. from one co-owner to one or more other co-owners;
7. made to a spouse or to a person or persons in the lineal line of consanguinity (kinship) of one or more of the transferors;
8. between spouses resulting from a decree of dissolution of marriage or a decree of legal separation or from a property settlement agreement incidental to such a decree;
9. to or from any governmental entity;
10. of a new residence of not more than one dwelling unit which has not previously been occupied for residential purposes; or
11. of real property where the value of any dwelling does not exceed five percent of the value of the property.

Texas Property Code §5.008(e)