

Should You Use and Sign Seller Disclosure Statements?

A Q&A with NJ Realtors® Chief Counsel Barry Goodman

Do seller disclosure statements provide more protection or create more liability? Do you need to sign a seller disclosure statement? Do you have to inspect the property if there is a seller disclosure statement? If you do not know the answers to these questions, it is important for you to understand what liability you have for treble damages under the Consumer Fraud Act (the “Act”) and how a seller disclosure statement can protect you.

The following questions and answers will hopefully help you understand these issues.

Q Let's start with the basics. What does the Consumer Fraud Act really provide?

A The Act includes a very broad phrase that makes it unlawful to use any “unconscionable commercial practices” concerning the advertising and sale or rental of real estate. Such practices include a knowing concealment of a material fact and an affirmative misrepresentation, even if it is made innocently.

A consumer who prevails under the Act is entitled to treble damages (three times the amount of any damages actually suffered by the consumer) and payment of all the consumer's attorneys' fees and costs.

Q I often include information in the MLS and other advertising from the seller. Are you saying that I might be liable if that information is wrong even though I had no idea that it was wrong?

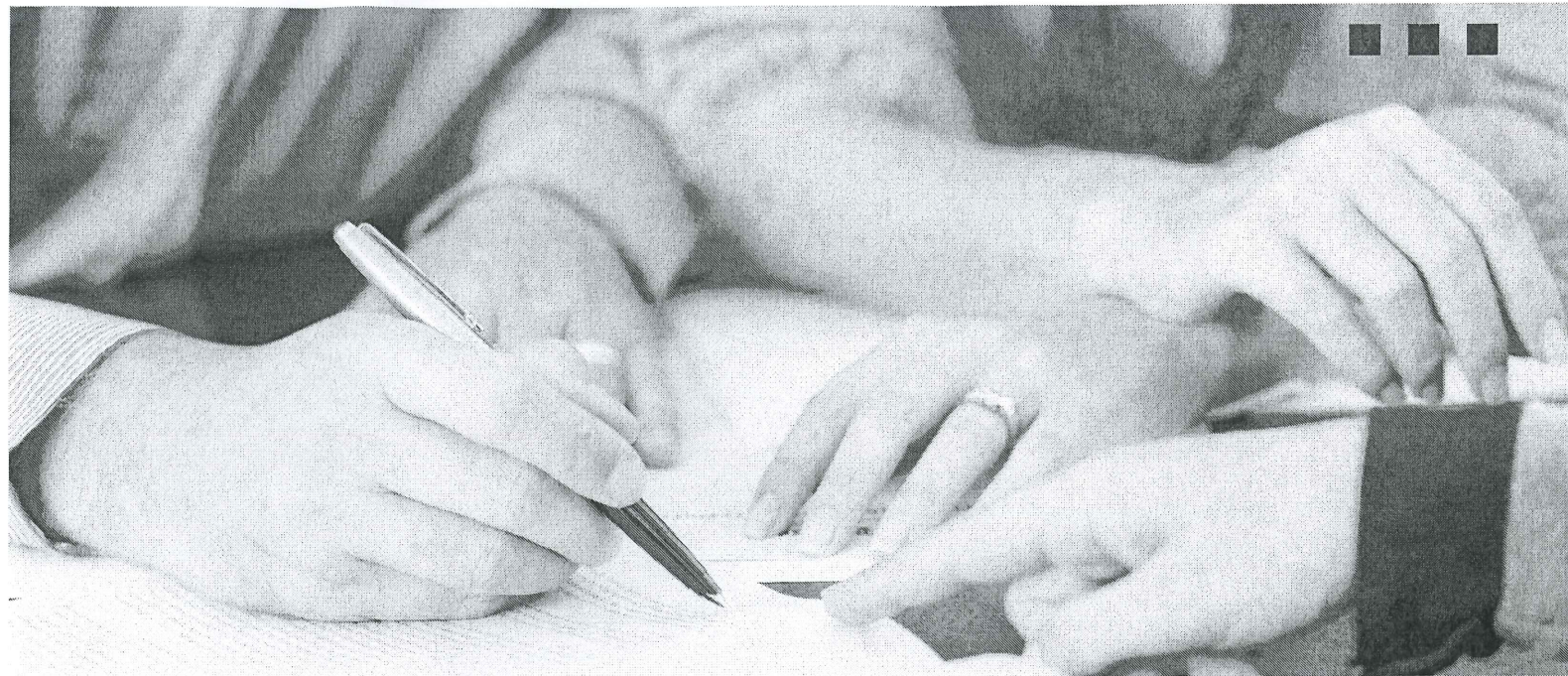
A Unfortunately, yes. The New Jersey Supreme Court significantly expanded the liability under the Act for real estate licensees in a case known as Gennari v. Weichert Co. In Gennari, the developer lied to the broker about the quality of material that would be used in the homes being built, the developer's experience, and the level of craftsmanship that would go into building the homes, among other things. When the buyers moved into their new homes, they discovered

these lies and sued the developer and broker. The Court held that a broker is liable under the Act for repeating misrepresentations of the seller, even if the broker has no knowledge that the representations are false or deceptive. As a result, the broker in Gennari was liable for treble damages and the buyers' attorneys' fees and costs.

Q If I am going to be liable for innocently repeating a seller's misrepresentation, why should I provide the seller's representations in a property disclosure statement that the buyer will have as proof of the misrepresentation if the buyer files a lawsuit against me?

A After the broad interpretation of the Act in the Gennari case, New Jersey Realtors® lobbied for an exception to the Act if a real estate licensee repeated a seller's misrepresentation without knowing it is false or misleading. As a result, the Act was amended to create an exception for real estate licensees in N.J.S.A. 56:8-19.1.

Under this exception, a real estate licensee is not liable for punitive damages, attorneys' fees or both for communicating any false, misleading or deceptive information provided by or on behalf of the seller if the licensee did not have actual knowledge the representation was false, misleading or deceptive, and also made a “reasonable and diligent inquiry” to ascertain if the information was false, misleading or deceptive.



Such an inquiry would have to include but would not be limited to disclosing information from (1) a report or representation by a person licensed or certified by New Jersey, (2) a report or representation by a governmental official or employee if the information is about a physical condition of the property that is likely to be within the knowledge of that person; or (3) the seller in an approved property condition disclosure statement, as long as the licensee (a) informed the buyer that the seller is the source of the information and (b) prior to making that communication to the buyer, “visually inspected the property with reasonable diligence to ascertain the accuracy of the information disclosed by the seller.”

As a result, although seller disclosure statements are not mandatory, they provide significant protection for you if they are properly used because you will not be liable for treble damages or the attorneys’ fees incurred by the consumer.

Q **Are you now telling me that I have to become an inspector by visually inspecting the property and am liable if I miss something?**

A No, not all. You are not responsible under the Act to perform an inspection the way a home inspector would. However, do not forget that the Real Estate Commission’s regulations place a duty on licensees to make a reasonable effort to ascertain all “material” information concerning

the physical condition of a property, including inquiries of the seller or seller’s agent and conducting a visual inspection of the property. Licensees have the duty to ascertain this information regardless of whether or not a seller disclosure statement is used.

Q **Is that why the seller disclosure statement includes an acknowledgment that the seller’s agent visually inspected the property?**

A That’s exactly right. All that seller’s agents are doing by signing is confirming that they did the “visual inspection” that the Real Estate Commission requires them to do.

Q **What happens if I don’t sign the seller disclosure statement?**

A This is a good question. Although there are no cases or other law on this issue, you would run the risk of a court ruling that you are not entitled to the exception for the treble damages and attorneys’ fees in Section 19.1 of the Act because you did not properly fill out the statement. Is it worth that risk?

In a final analysis, using seller disclosure statements therefore provides you with significant protections. You should not only have sellers fill them out but also sign them. ■