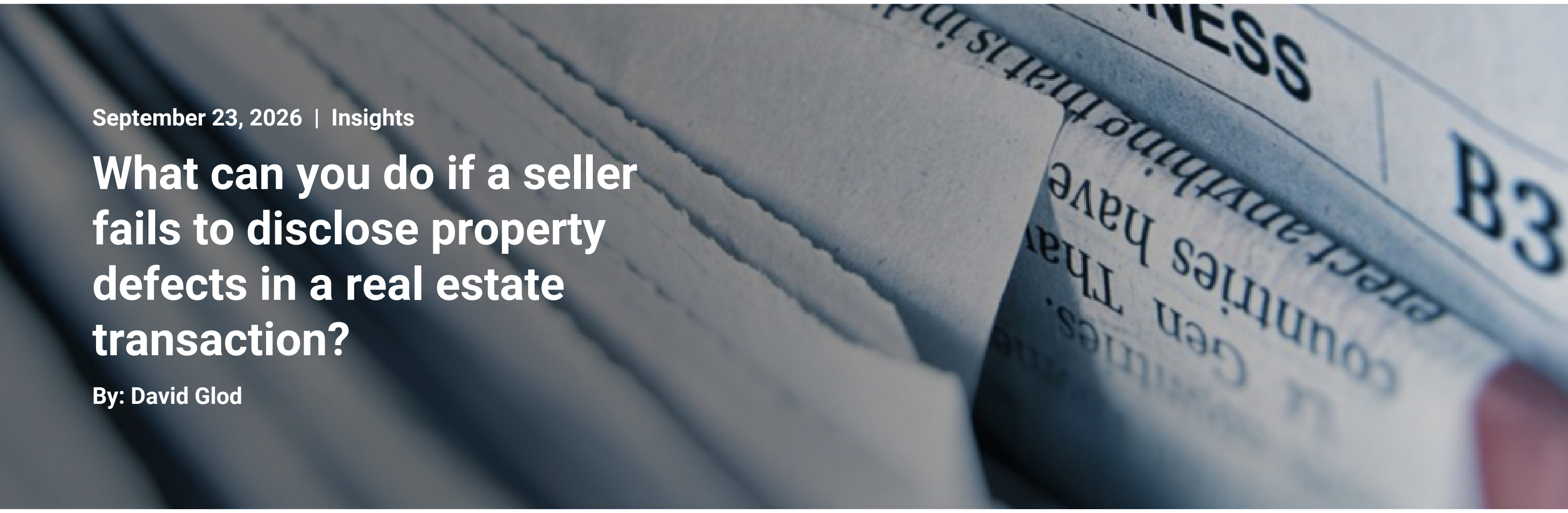

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What can you do if a seller fails to disclose property defects in a real estate transaction?

By: David Glod

You have just closed on a real estate purchase, whether it be a purchase of a home or a commercial property. After closing, you realize that there is a serious issue that was not disclosed or picked up in your property inspection. Maybe the issue is something that could not have been found during an inspection—for example, a deck was added without pulling permits, or faulty plumbing was walled over. What do you do?

Massachusetts generally follows a "buyer beware" approach, such that a seller of real estate is not required to affirmatively disclose known issues with the property. It is a buyer's obligation to perform diligence to assure themselves of what they are buying. However, if you or your broker have asked the right questions during the transaction, or if the transaction documents were well drafted, then there may be a basis for a claim.

When can a seller of real estate be liable for failure to disclose property defects?

A buyer's strongest and most straightforward claim exists where the buyer asked a specific question which would have uncovered the defect, which the seller answered falsely. Or, where the seller made an affirmative statement, marketing representation, or partial disclosure that was misleading given what the seller knew and did not say. These kinds of statements might be made in the property listing, or in the purchase and sale agreement. For example, many purchase and sale agreements include seller representations about permitting, code compliance, and the absence of title claims or litigation. If these types of explicit representations turn out to be false, then the seller can be held liable for misrepresentation and/or breach of contract (if the representation was made in a contract such as the purchase and sale agreement).

A seller can be liable for answering a question with a half-truth or fragmentary information that is misleading to the buyer—the law is that "half-truths may be as actionable as whole lies." By contrast, a claim resting purely on the seller's silence about a known defect, with no accompanying representation at all, is unlikely to succeed as common-law fraud, however unfair that silence may feel.

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In some cases, a seller can also be liable for intentionally concealing a known issue even without an explicit misrepresentation. For example, if the seller walls over a known problem area so that it is not visible during an inspection, that could constitute an affirmative act of concealment to support a claim. However, such claims are difficult because they generally require proof of the seller's intent.

Can a real estate broker be liable for hiding property defects?

Generally, a seller's broker is treated under the same framework as applies to sellers, such that bare nondisclosure is not enough, but half-truths and known misrepresentations are actionable. If you ask the seller's broker a specific question, the broker has a duty to disclose known facts and avoid half-truths, and can be directly liable for an incomplete, misleading, or false answer.

While the seller's broker is generally entitled to rely on the information they receive from their client, there is an important caveat. If the broker is on notice that the information they have been given might be unreliable, they may have a duty to investigate further or not repeat it. However, such claims are nuanced and highly dependent on the facts regarding what the broker knew or should have known.

Can a property inspector be liable for failing to discover property defects?

Home inspections are, by design and by statute, limited-scope, visual, non-invasive assessments. This means the threshold question in any inspector-liability claim is scope: did the alleged defect fall within what the inspection contract and the customary standard of practice for home inspectors required the inspector to examine? A defect that was concealed behind finished walls, buried underground, or otherwise not reasonably discoverable through a standard, non-invasive visual inspection is unlikely to support liability. By contrast, a defect that was visible, accessible, and within the ordinary scope of inspection, but that the inspector simply failed to notice, note, or flag, may form the basis of a claim.

Whether the claim is viable will depend in part on whether the issue is one that should have been found by a reasonably careful professional home inspector within the agreed scope of the home inspection. This can be a complex analysis likely requiring expert testimony. It may also be impacted by the inspection agreement, which often contain limitations on the scope of the inspector's services and/or liability. Those limitations, in turn, may or may not be enforceable.

Note that claims arising from a home inspection must generally be brought within two years of the date of the inspector's written report—a shorter deadline than may apply to other claims discussed in this article.

What remedies are available for failure to disclose property defects?

If a claim against the seller is successful, the buyer generally has a choice between two potential remedies: rescinding the transaction and getting their money back from the seller; or recovering damages in the amount of the diminished value of the property as a result of the defect. Claims against a broker or inspector, of course, are generally limited to money damages.

In certain transactions, there may also be a claim under the Massachusetts consumer protection statute, Chapter 93A, which prohibits “unfair or deceptive” acts in trade or commerce. However the isolated sale of a private home is not considered “trade or commerce,” so this is generally limited to claims against real estate professionals like brokers, developers, builder-vendors, or sellers who are otherwise acting in a business/commercial capacity—not against an ordinary homeowner selling a single personal residence. However where Chapter 93A is available, it is a powerful remedy, as it can include double or treble damages for willful or knowing violations, plus mandatory attorney’s fees.

Conclusion

If you have questions about the above issues, please contact David Glod at Rich May, P.C. Attorney Glod frequently represents parties to real estate transactions, including homeowners, builders, developers, and investors, in matters involving breach of purchase and sale agreements, failure to disclose property defects, boundary line disputes, and partnership disputes. Attorneys at Rich May can also assist with negotiating and closing commercial real estate transactions, and protecting your interests before a dispute arises.

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