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DISCLOSING STIGMA

By Judon Fambrough

Real estate professionals constantly have the responsibility of and liability for making proper disclosures when showing property. For the most part, disclosures relate to the condition of the property. But does the law require disclosures beyond the condition of the property, such as registered sex offenders living in the neighborhood or murders occurring on the premises? Review of statutes and case law yields some interesting conclusions.

Much, but not all, of the burden for making disclosures to sellers results from the addition of Section 5.008 to the Texas Property Code in 1994. The statute mandates that sellers complete the Seller's Disclosure Form or one similar to it with each sale. No such form exists for real estate professionals.

Does this statute require disclosures beyond the physical characteristics of the property? The language in Section 5.008 indicates that the answer is *no*. At the beginning of the form, the wording limits disclosures to "the seller's knowledge of the condition of the property as of the date signed by the seller." At the end of the form, the seller is asked to disclose "any conditions of the property that materially affect the physical health or safety of an individual." The form does not require the seller to disclose information beyond this.

In the late 1980s and early 1990s, a

controversy surfaced regarding the seller's and licensee's duty to disclose whether the previous or current occupants of a property had AIDS or if a murder or suicide occurred on the premises. Obviously, such facts went beyond the physical condition of the property.

The matter was settled, in part, in 1993 when Texas legislators amended Section 15E of the Texas Real Estate Licensing Act. The change mandates that a licensee has no duty to inquire, disclose or release information regarding:

- previous or current occupants having AIDS, HIV-related illness or HIV infection as defined by the Center for Disease Control of the U.S. Public Health Service or
- deaths that occurred on the property by natural causes, suicides or accidents unrelated to the condition of the property.

Although murders are not mentioned, the amendment appears to limit disclosures of deaths to those caused by the condition of the property. This parallels the requirements outlined in Section 5.008.

But how does the Texas Deceptive Trade Practices Act (DTPA) deal with the issue? Failure to disclose known information is a false, misleading or deceptive act if doing so is intended to induce the consumer into a transaction

the consumer would not have entered had the information been disclosed (Texas Business and Commerce Code, Section 17.46 [23]). The DTPA does not limit the information to the condition of the property.

Does this broaden the duty to disclose to include information beyond physical characteristics of the property? Must sellers and brokers disclose murders that have occurred on the premises, property stigmatizations such as hauntings or the presence of registered sex offenders residing in the neighborhood or in the apartment complex?

According to the National Association of Realtors, a property is stigmatized when it "has been psychologically impacted by an event, which occurred or was suspected to have occurred on the property, such event being one that has no physical impact of any kind." Stories of murders occurring on the property or rumors of a house being haunted fall into this category.

No Texas appellate cases decided at that time had addressed the issue. If such a case had arisen, the plaintiff may have encountered difficulty in recovering monetary damages.

To recover damages under the DTPA, the plaintiff must prove an economic loss, such as reduction in the property value, caused by the stigmatization. It may be difficult for an appraiser to ascertain the difference in property values with and without a stigma.

If no economic loss can be proven, the plaintiff may attempt recovery for mental pain and anguish. Texas case law currently does not allow recovery for mental pain and anguish unless it is:

- accompanied by a physical injury or
- inflicted knowingly or intentionally.

In a 1994 El Paso Court of Civil Appeals case, the buyers (plaintiffs) made an offer on a vacant house owned by the Veterans Administration (*Sanchez v. Guerrero*, 885 S.W. 2d 487). The offer was made through a real estate broker, Sanchez, and the deal closed on March 23, 1988.

The evening after the closing, the buyers watched a TV news program discussing a case of an individual charged with molesting several children. The alleged molestations occurred in the house the plaintiffs had just purchased.

Even though the person charged with the crime was acquitted, the plaintiffs sought to cancel the transaction. Eventually, they sued the broker under the

DTPA for failing to disclose the alleged molestations in the house. They claimed they would not have purchased the house had the information been disclosed.

At trial, the evidence showed that the buyers asked Sanchez several times about the previous owners. Each time, Sanchez responded that he did not know, but he would find out. After the broadcast, Sanchez admitted that he knew of the alleged molestations occurring in the house.

The jury found that Sanchez violated the DTPA for failing to disclose the information. Furthermore, because it had been a deliberate act, the jury awarded a recovery for mental pain and anguish. The award was upheld on appeal. The case never reached the Texas Supreme Court.

A recent federal law requires sex offenders to register with local police in the communities where they reside. Sellers and brokers wonder if they must disclose this fact when selling or renting property in that neighborhood.

One argument that could be made against having to make the disclosure is that the information is public record. It can be found on the Internet at http://www.openrecords.org/records/sexual_offenders/texas/. However, this argument was unsuccessfully raised in a 1988 case (*Ojeda de Toca v. Wise and Wise Dev., Inc.*, 748 S.W. 2d 449 [Tex 1988]).

In the case, the defendant sold a house to the plaintiff without telling her the house had been posted for demolition. Wise argued that because the notice was recorded in the deed records, it was not necessary to repeat the information to the buyer. The Texas Supreme Court disagreed and held Wise liable.

Where does this leave sellers and brokers? The answer will remain in doubt until Texas legislators resolve the issue. Section 5.008 of the Texas Property Code and the Real Estate Licensing Act appear to limit disclosures to the condition of the property. However, the

disclosures mandated by the DTPA are more expansive, as indicated by the Sanchez decision.

To avoid any controversy, the prudent course of action is to disclose the presence of a registered sex offender in the neighborhood. If the fact is not disclosed and litigation results, the buyers would have to prove that the seller or broker knew of this fact and deliberately withheld it to lure the buyer into the transaction. In this scenario, the plaintiff could recover mental pain and anguish. If the information was not deliberately withheld, the plaintiff's recovery would be limited to the amount of reduction in property value. ♣

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