



## Understanding The General Rules of Disclosure

### A. New Jersey

The duties owed by licensed real estate agents, such as the broker defendants, to their principals and other parties involved in a real estate transaction have been established by regulation (N.J.A.C. 11:5-6.4(b)).

N.J.A.C. 11:5-6.4(b) provides in pertinent part:

*(b) Every licensee shall make reasonable effort to ascertain all material information concerning the physical condition of every property* for which he or she accepts an agency or which he or she is retained to market as a transaction broker, and concerning the financial qualifications of every person for whom he or she submits an offer to his or her client or principal. Information about social conditions and psychological impairments as defined in (d) below is not considered to be information which concerns the physical condition of a property.

Under the regulation, a reasonable effort to ascertain all material information entails, at least, making inquiries of the seller about any physical conditions that may affect the property and conducting a visual inspection to determine if there are any readily observable physical conditions affecting it. N.J.A.C. 11:5-6.4(b)(1).

The regulation requires specifically that licensees disclose

*all information material to the physical condition of any property which they know[,] or which a reasonable effort to ascertain such information would have revealed[,] to their client or principal and when appropriate to any other party to a transaction.*

N.J.A.C. 11:5-6.4(c).

Information is considered material under the regulation if a reasonable person would attach importance to its existence or non-existence in deciding whether or how to proceed in the transaction, or if the licensee knows or has reason to know that the recipient of the information regards, or is likely to regard it as important in deciding whether or how to proceed, although a reasonable person would not so regard it.

N.J.A.C. 11:5-6.4(b)(2) (emphasis added).

The regulation, however, further provides that information about psychological impairments, defined by way of example as including, but not limited to, “a murder or suicide which occurred on a property, or a property purportedly being haunted,” is not “considered information which *affects the physical condition of a property.*”

N.J.A.C. 11:5-6.4(d) (emphasis added). Although licensees need not automatically disclose information regarding psychological impairments, upon receipt of an inquiry from a prospective purchaser or tenant about whether a particular property may be affected by a . . . psychological impairment, licensees shall provide whatever information they know about the . . . psychological impairments that might affect the property. N.J.A.C. 11:5-6.4(d)(3).

Brokers have similar responsibilities concerning disclosure issues. In addition to possible claims of common law fraud, realtors may also be subject to the New Jersey Consumer Fraud Act. *See* N.J.S.A. 56:8-1 *et seq.* Under the New Jersey CFA, a real estate broker representing a seller of a home previously occupied may be liable (in addition to affirmative acts of misrepresentation) for acts of non-disclosure of a defective condition if the condition was known to the broker, but not readily observable to the buyer. *See Strawn v. Canuso*, 140 N.J. 43, 58-59, 65 (1995). Note there is a statute addressing newly constructed residential property – N.J.S.A. 46:3C-1 *et seq.* In instances of non-disclosure, it must be shown that the broker knowingly concealed a material fact about the premises with the intention that the buyers would rely on the concealment. N.J.S.A. 56:8-2, *Leon v. Rite Aid Corp.*, 340 N.J. Super. 462, 469 (App. Div. 2001).

### **N.J.S.A. § 56:8-2. Fraud, etc., in connection with sale or advertisement of merchandise or real estate as unlawful practice**

The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in

connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice; provided, however, that nothing herein contained shall apply to the owner or publisher of newspapers, magazines, publications or printed matter wherein such advertisement appears, or to the owner or operator of a radio or television station which disseminates such advertisement when the owner, publisher, or operator has no knowledge of the intent, design or purpose of the advertiser.

## **B. New York**

New York law traditionally adheres to the doctrine of “caveat emptor” (or “as is”) in arm’s length property transactions. *See Meyers v. Rosen*, 69 AD3d 1095 (3d Dept 2010); *Klafehn v. Morrison*, 75 A.D.3d 808, 810 (3d Dept 2010). Nevertheless, the duties of a listing broker or seller’s agent, as well as the duty to disclose certain defects on a property are codified by New York’s Real Property Law statute.

The express duties of a listing broker or seller’s agent are set forth under NY CLS Real P § 466.

### **§ 466. Duty of an agent**

An agent representing a seller of residential real property as a listing broker shall have the duty to timely inform each seller represented by that agent of the seller’s obligations under this article..... If an agent performs the duties and obligations imposed upon him or her pursuant to this section, the agent shall have no further duties under this article and shall not be liable to any party for a violation of this article.

Further, as part of the seller's obligations, New York law requires the seller complete a "Property condition disclosure statement" pursuant to NY CLS Real P. § 462<sup>1</sup> which contains multiple inquiries seeking disclosure of known "defects." The Property condition disclosure statement provides as follows:

1. Except as is provided in section four hundred sixty-three of this article, *every seller of residential real property pursuant to a real estate purchase contract shall complete and sign a property condition disclosure statement* as prescribed by subdivision two of this section and cause it, or a copy thereof, to be delivered to a buyer or buyer's agent prior to the signing by the buyer of a binding contract of sale. A copy of the property condition disclosure statement containing the signatures of both seller and buyer shall be attached to the real estate purchase contract. Nothing contained in this article or this disclosure statement is intended to prevent the parties to a contract of sale from entering into agreements of any kind or nature with respect to

## C. Pennsylvania

The scope of a seller's duty to disclose under Pennsylvania law is governed by 68 Pa. C.S. § 7303.

§ 7303. Disclosure of material defects.

*Any seller who intends to transfer any interest in real property shall disclose to the buyer any material defects with the property known to the seller by completing all applicable items in a property disclosure statement which satisfies the requirements of section 7304 (relating to disclosure form).* A signed and

the physical condition of the property to be sold, including, but not limited to, agreements for the sale of real property "as is..."

Importantly, New York law asserts "it is not a material defect or fact relating to property offered for sale or lease, including residential property regardless of the number of units contained therein, that:

(a) an owner or occupant of the property is, or was at any time suspected to be, infected with human immunodeficiency virus or diagnosed with acquired immune deficiency syndrome or any other disease which has been determined by medical evidence to be highly unlikely to be transmitted through occupancy of a dwelling place; or

(b) the property is, or is suspected to have been, the site of a homicide, suicide or other death by accidental or natural causes, or any crime punishable as a felony.

N.Y. Real Prop. Law § 443-a

dated copy of the property disclosure statement shall be delivered to the buyer in accordance with section 7305 (relating to delivery of disclosure form) prior to the signing of an agreement of transfer by the seller and buyer with respect to the property. (emphasis added)

The statute defines "material defect" as:

A problem with a residential real property or any portion of it that would have *a significant adverse impact on the value of the property or that involves an unreasonable risk to people on the property.* The fact that a structural element, system or subsystem is near, at or

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<sup>1</sup> Note, there are several transfers exempted from the property condition disclosure statement requirement as provided under NY CLS Real P § 463.

beyond the end of the normal useful life of such a structural element, system or subsystem is not by itself a material defect.

68 Pa.C.S. § 7102 (emphasis added)

And the seller is required to complete a disclosure form by 68 Pa. C.S. § 7304.

Note that the Pennsylvania Supreme Court has interpreted “purely psychological stigmas” as being outside the scope of the definition of a “material defect.” *See Milliken v. Jacono*, 628 Pa. 62, 71 (2014) (the fact that a murder once occurred in a house falls into that category of homebuyer concerns best left to *caveat emptor*. If psychological defects must be disclosed then we are not far from requiring sellers to reveal that a next-door neighbor is loud and obnoxious, or on some days you can smell a nearby sewage plant, or that the house was built on an old Indian burial ground. Indeed, one could identify numerous psychological problems with any house. Sellers should only

be required to reveal material defects with the actual physical structure of the house, with legal impairments on the property, and with hazardous materials located there. To allow consideration of possible psychological defects opens a myriad of disclosures that sellers will need to reveal, and starts a descent down a very slippery slope”).

Importantly, agents of buyers or sellers are protected from liability unless the agent had actual knowledge of a material defect that was not disclosed, or actual knowledge of a misrepresentation relating to a material defect under § 7310.

§ 7310. Nonliability of agent.

An agent of a seller or a buyer shall not be liable for any violation of this chapter unless the agent had actual knowledge of a material defect that was not disclosed to the buyer or of a misrepresentation relating to a material defect.



## **The Disclosure Rules In Action**

### **New Jersey**

*Petrosino v. Ventrice*, No. A-0020-13T1, 2015 N.J. Super. Unpub. LEXIS 2070 (Super. Ct. App. Div. Aug. 27, 2015)

The Appellate Division opined that a duty was triggered to disclose the deaths of two young girls twelve years prior by a simple Buyer's inquiry as to the safety an elevator. The Appellate Court expressly rejected the argument that the children's death in the elevator represented only a "psychological impairment" to the property, despite the fact that the elevator had been replaced by the homeowner subsequent to the death of the children. The court stated that because the elevator was a major mechanical system within the property, the death of the children due to defective operation of the machine concerned the "physical condition of the property," and thus, "[i]t is simply impossible to imagine that a reasonable buyer would not attach importance to the existence of that fact."

### **Pennsylvania**

*Milliken v. Jacono*, 628 Pa. 62, 66, 103 A.3d 806, 808 (2014)

The Supreme Court of Pennsylvania concluded that sellers did not have to disclose

that a highly publicized murder/suicide took place at a property because it was not a "material defect." The sellers had acquired the property from the estate of the murderer and shortly thereafter listed the property without any reference to the property's gruesome past. The buyer, who lived in another state and was thus not aware of the murder/suicide, viewed the property listing, disclosure, and property history documents (but conducted not further research) and made an offer on the property which was accepted. Subsequently to the purchase, the buyer became aware of the murder/suicide and filed suit claiming the disclosure statement that referenced no defects on the property was a misrepresentation. The Supreme Court held that while "it is safe to assume all of the above are events a majority of the population would find disturbing, and a certain percentage of the population may not want to live in a house where any such event has occurred," the "occurrence of a tragic event inside a house does not affect the quality of the real estate, which is what [the] seller disclosure duties are intended to address." Therefore, the "purely psychological stigmas" were not material defects required to be disclosed.