



Oregon's Seller Property Disclosure Statement – *Is it a Contract?*

Introduction. I recently was scanning one of the Oregon State Bar's List-Serves, and saw a lawyer refer to a misstatement in the Seller's Property Disclosure Statement ("Disclosure Statement") as a "breach of contract". I did not check back to see if any of his or her peers commented on the query, so cannot say what the consensus of my fellow-lawyers is on the issue.

But I, for one, believe that the Disclosure Statement is not a contract, and a misstatement by the seller - intentional, reckless, or inadvertent – is not actionable as a breach of contract.

Background of Disclosure Law. Oregon's seller property disclosure law is contained in ORS 105.462 to 105.490. It was enacted by the 1993 Legislature. While it has gone through several iterations, its main purpose is two-fold: (1) Inform buyers of seller's knowledge about the condition of their property; and (2) Give buyers the absolute right to "revoke" their offer of purchase within five business days following delivery of the Disclosure Statement.

The Disclosure Statement contains an extensive list of questions about the seller's property. Most, but not all questions, can be answered "[]Yes []No [] Unknown".

Promises vs. Representations. The Oregon State Bar's publication on contract law, states: "According to Restatement (Second) of Contracts §1 (1981), a contract means 'a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.'"¹

Are the answers in the Disclosure Statement "promises"? No. They are "best knowledge" representations made by the seller at the time of completion and delivery of the form. That is, the answers represent what the seller believes to be true. Seller is not making a promise of the accuracy of the answers – only a representation that "this is what I believe". This means that if the seller is wrong - even though he or she believed the answer to be right – there is no "breach of contract". In fact, the wrong answer is not actionable at all.

Other Legal Actions. If not a breach of contract, what type of legal action would a buyer have? None, if the answer is the result of an honest mistake. However, if the seller knows, or reasonably suspects (i.e. their answer is made recklessly), that their answer is incorrect, a buyer may have a claim for intentional/reckless misrepresentation, i.e. fraud.

¹ Contract Law in Oregon (2003 rev. with 2008 supp.) Chapter 6, Elements of a Contract, §6.2.



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For example, say a seller answered “No” to the question: “Are there any encroachments, boundary agreements, boundary disputes or recent boundary changes?” After closing, the new buyer has a survey and it is discovered that the neighbor’s land encroaches onto his or her land. Buyer likely has no claim against seller, assuming there is no evidence showing that buyer knew or had reason to believe there was an encroachment.

Another example: Seller answers “No” to the question: “Has the roof leaked?” After closing, it turns out that there was a leak in the attic that the inspector missed, and the seller knew nothing about. Same result; seller is not liable for fraud or misrepresentation.

In order for a buyer to prevail against a seller in these cases, he or she would have to have “clear and convincing” evidence pointing to the fact that seller had information about a possible encroachment or roof leak, that would lead a reasonable person to believe it should have been disclosed. That is why I (and many others) encourage sellers to subscribe to the principle “*If in doubt, disclose it.*” Or to put a finer point on the issue: “*If you were the buyer, would you have wanted to know the undisclosed information?*” Remember, sellers rarely, if ever, get into trouble with their buyers for disclosing too much information.

Listed below are the relevant provisions in the Seller Property Disclosure Statement, Oregon Revised Statutes, and the OREF Residential Sale Agreement, that are relevant to the above discussion, and seller and buyer duties in general. (Text that is bold and in all-caps below are contained in the form or law; text in italics and underscored are mine.)

PROVISIONS IN THE DISCLOSURE STATEMENT:

- **(NOT A WARRANTY)** (ORS 105.465)
- DISCLOSURES, IF ANY, CONTAINED IN THIS FORM ARE PROVIDED BY THE SELLER ON THE BASIS OF SELLER'S ACTUAL KNOWLEDGE OF THE PROPERTY AT THE TIME OF DISCLOSURE.
- BUYER IS ADVISED TO OBTAIN AND PAY FOR THE SERVICES OF A QUALIFIED SPECIALIST TO INSPECT THE PROPERTY ON BUYER'S BEHALF
- The following are representations made by the seller are not the representations of any *** real estate licensee engaged by the seller or the buyer.
- The foregoing answers and attached explanations (if any) are complete and correct *to the best of my/our knowledge* and I/we have received a copy of this disclosure statement. I/we authorize



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my/our agents to deliver a copy of this disclosure statement to all prospective buyers of the property or their agents.

- *As buyer(s), I/we acknowledge the duty to pay diligent attention to any material defects* that are known to me/us or can be known by me/us by utilizing diligent attention and observation.
- DISCLOSURES, IF ANY, CONTAINED IN THIS FORM ARE PROVIDED BY THE SELLER ON THE BASIS OF SELLER'S ACTUAL KNOWLEDGE OF THE PROPERTY AT THE TIME OF DISCLOSURE.

APPLICABLE STATUTES:

ORS 105.480(1). The representations contained in a seller's property disclosure statement and in any amendment to the disclosure statement are the representations of the seller only. The representations of the seller are not representations of: (b) A real estate licensee engaged by the seller or buyer.

ORS 105.490. ORS [105.462](#) to [105.490](#), 696.301 and [696.870](#) do not directly, indirectly or by implication limit or alter any preexisting common law or statutory right or remedy including actions for fraud, negligence or equitable relief.

OREF RESIDENTIAL SALE AGREEMENT:

PROPERTY DISCLOSURE LAW: Buyer and Seller acknowledge that unless this transaction is otherwise exempted, Oregon law provides that Buyer has a right to revoke Buyer's offer by Seller's Property Disclosure Statement ("the Statement"), or (b) at any time before Closing (as defined in the Oregon Administrative Rules) if Buyer does not receive the Statement from Seller before Closing. Buyer may waive the right of revocation only in writing. Seller authorizes Seller's Agent's Firm to receive Buyer's notice of revocation, if any, on Seller's behalf.

"AS-IS": Except for Seller's express written agreements and written representations contained herein, and Seller's Property Disclosure, if any, Buyer is purchasing the Property "AS-IS," in its present condition and with all defects apparent or not apparent. ***

Conclusion. Having a suspicion that their seller concealed relevant information is not good enough for a buyer's recovery. To put it another way, saying about the sellers: "They must have known" is a normal human reaction, but without reliable and unbiased third-party proof, it generally isn't enough to establish fraud. Seller foreknowledge must be proven, not surmised.



Interestingly, it is not unusual for buyers to learn about their seller's nondisclosures for the first time, when they begin talking to neighbors and find out, for example, that the seller complained often about persistent moisture problems in the basement.

Another source of information is from repair persons who are called to the new buyer's home, only to learn that they had been called out there to fix the problem on multiple occasions in the past.

The take-away for sellers is to disclose, disclose, disclose. For buyers it is to trust, but verify. The best examples are follow-up questions. If the seller reported a leak that had been repaired, buyer should find out when it was repaired; by whom; what was done; and was there an invoice or description of the work? Should the work be re-inspected today? A seller's answers are not a substitute for their buyer's due diligence.