#67 FOR IMMEDIATE RELEASE: January 16, 2010

Would a seller fib to a buyer?
By Curtis Seltzer

Buried on an inside page of Thursday's Wall Street Journal (January 14, 2010) was a headline that snagged my jaded eye: "What Home Sellers Don't Tell Buyers."

Reporter M. P. McQueen says that the tough market of the last few years has "…made buyers more wary…" of "fibbing by home sellers." Despite disclosure laws in more than 30 states, McQueen writes about a "gray area involving the disclosure of problems the seller may not know about…."

McQueen writes that the most common "misrepresentations" problems are: 1) disputes about property dimensions; 2) infestations, mold or radon in the residence; 3) flooding; 4) neighboring nuisances; and 5) planned projects that fail to deliver promised amenities, like a community pool.

I'm not sure that I know the difference between a fib and a lie (in its simplest form of telling a falsehood), or a fib, a lie and a failure to disclose a material defect in what a buyer is about to purchase, or a fib and a lie that deliberately distorts a property's assets or liabilities without exactly saying something that isn't true. These are not "gray areas," in my opinion, and I'm not generous enough to call them "fibs."

Buyers, of course, also have motive, opportunity and means to be equally fibby.

They often provide sellers with false information regarding their financial strength, need for seller financing and intentions for the property. These, too, can be misrepresentations or outright lies. The difference, I think, is that sellers deliver a "good" in the transaction that is not what the buyer thought he was purchasing whereas when, all is said and done, the buyer almost always gives the seller a lump-sum cash payment. The seller is getting 100 percent of what was agreed; the buyer may be getting something less.

The areas of seller "misrepresentations" in country real estate -- including lies, distortions, concealments, misdirections, silences, failures to disclose, white lies, crossed fingers and fibby-wibbys usually involve the following:

Acreage. The buyer needs to know the specific acreage that the seller claims to own and does own. The buyer can start by looking at the acreage number in the seller's deed. (A title search will have to confirm whether that number is accurate, which is a different story.) The buyer should have a surveyor run the deed's legal description through a mapper program to determine whether the "calls" generate the deed's acreage and whether the calls close, which indicates accuracy. Then the buyer should compare the deeded acreage with the boundaries in the field to make sure that all of what is deeded will in fact convey without disputes with neighbors. Tax-map acreages may or may not be accurate. The deeded acreage should be the same as shown on a survey and on a mapper program.

Access. A property that is accessed by a road that crosses the property of one or more parties is often embellished with seller-supplied legal opinions. The buyer should insist that such an easement (or right of way) be in writing, recorded and be of sufficient width that large trucks can use it. If the recorded easement contains restrictions, the buyer must be willing to live with them.

Roads into properties are often legally informal. A permission to use a road does not constitute a legal right, and it can be revoked at any time. If a seller says that he "owns" an access road by

"prescriptive easement" or "necessity," a buyer needs to understand that it will may take a court case to establish these claims and the buyer, now the new owner, may not win. Talk to a lawyer if that's what a seller says to you.

Nuisance and annoyance. Most sellers do not disclose issues with neighbors, such as unusual levels of noise, odors, behavior and night-time light. A new owner has the option of taking such an issue to court as a nuisance, but success is unlikely. More often, the new owner is dealing with an issue that is an annoyance, but not a nuisance. In either case, buyers need to ask about both.

Value of assets that the buyer cannot immediately and cheaply confirm. Minerals, merchantable timber, rental income from and rental demand for pasture or crop land, water rights and personal property to convey (farm equipment and materials) may be difficult to value, even with expert help. An inexperienced buyer often takes the seller's word for such values; often not such a good idea.

Problems that may not be manifest but are not seller-concealed. Floodplain, wetlands, navigable waterways and habitat for listed species constrain what a landowner can do with the property and can, in the case of floodplain, present a threat. Sellers should be asked to disclose what they know about such environmental issues.

It's easy for a buyer not to ask about strong episodic winds, earthquakes, forest-fire threats, diseases/pests in timber, tornados, chemical residues from past use (lead and arsenic ground contamination, for example), buried stuff, karst, ground instability, among others. Don't take the easy path.

Buyers lose nothing by including language in their purchase contracts that make the purchase contingent on the seller disclosing all material and latent defects in the property and conditions in and around the property that could negatively affect the buyer's use, possession and enjoyment of the property, including but not limited to, the following:

Make sure that the contract includes a warranties-to-survive-the-contract provision.

Get help with this language from your local lawyer.

Buyers are responsible for doing adequate due diligence. Sellers should be expected to be honest about what they say, don't say, what they know and what they should reasonably be expected to know. A fibby seller should be made aware that he risks blowing up a deal or a post-deal lawsuit.

If the seller tells you to go jump in his lake, ask him if it's stocked with killer guppies. Resistance to disclosure reveals a lot.

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