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Sellers are expected to know more than they think

By Curtis Seltzer
Landthink contributor
(This is the nineteenth in a series of articles about issues that sellers and buyers face when negotiating a purchase-offer contract.)

What do you know you know, and how do you know you know it? How do you confirm what you think you know? Philosophers who work in the field of epistemology wrestle with these questions every day. On weekends, they take on Randy Orton.

Most of us understand the difference between knowing a fact and believing in our opinions. Belief can be based on facts or simply based on itself—and often belief combines the two. Facts, we think, are more reliable than belief because they are established through analytical reasoning, physical observation, testing and the like.

One of the first things I learned in epistemology is that I could not always trust the conventional ways to establish facts, hence knowledge. If I said, I saw it, the professor would introduce the idea of mirage; then the imperfect reliability of eyewitness testimony in murder cases, even from the victim; and, finally, sub-atomic physics where we can't see the specks that we know/believe are there. If I said, I measured it, the professor would talk about the inherent inaccuracies of measuring, particularly the smallest somethings and the largest—like the universe. If I said, I know it because I used any of my other senses to verify it, additional contrary examples would be introduced that questioned my ability to rely on any information available to me. Belief was dismissed as unreliable, but so to was "fact-based" knowledge. So how did I know anything? Maybe, the answer is that I don't, but just have to make certain assumptions to function every day.

In real estate, buyers can ask sellers in their purchase-offer contract to provide information about their property to "the best of the seller's knowledge and belief," or words to that effect. It's better to say knowledge and belief, because as epistemologists argue, knowledge is so iffy. Adding in belief can't hurt.

Such a buyer is simply trying to find out what the seller knows (used in the broadest sense) about a particular item, or the property itself. A buyer may, of course, push this search for information into the realm of asking that the seller warranty an item or condition to the buyer. That puts an epistemological monkey on the seller's back: How does the seller know what he thinks he knows?

Sellers may either tell the truth as they understand it to a buyer, or not, when asked for information. When a buyer insists that a seller provide a warranty, the seller may refuse,

in which case the buyer is suspicious, or agree, in which case the seller has an incentive to tell the truth because he has agreed to be on the hook.
State disclosure statements are not warranties from seller to buyer about anything included on the disclosure form, unless there is specific language providing for it. A seller who completes the required disclosure document is simply putting in writing what he understands conditions or facts to be to the "best of the Seller's current actual knowledge" on the contract date. Some states specifically exclude disclosure documents from the contract between buyer and seller.

Disclosure requirements vary from state to state, but many require a seller to disclose matters "of which he has knowledge" related to any dangerous condition or material defect (defined broadly as something important and bad) or material latent defects (important, but not readily visible or understandable). Brokers are also subject to disclosure requirements about similar matters of which they have knowledge.

A "defect" is generally taken to mean a condition that would: 1) negatively and significantly impact the value of a property, or 2) limit the buyer's possession or use of it, or 3) impair the health or safety of future occupants, or 4) if not repaired, removed or replaced would adversely affect the normal life or functioning of the item or the property itself.

So how does law define knowledge when philosophy questions the idea of knowing anything? What is current actual knowledge?

Actual knowledge in the law means that the seller has direct and clear awareness of a fact or condition. It is also interpreted to mean that a seller has awareness of such information as would cause a reasonable person to make further inquiry about a fact or condition. A seller has actual knowledge of a hole in the dining room floor, because he stepped through it. If the seller suspects there is a hole in the floor under a piece of loose plywood that's covered by a rug, most courts would find that he still had actual knowledge even if he never investigated.

Constructive knowledge takes this idea of what a seller is reasonably expected to know a step further. Most courts, I think, would say that the law presumes a seller has constructive knowledge of a condition if he can be reasonably expected to know of it or such knowledge is obtainable by the seller using reasonable means, or that the seller would possess such knowledge using reasonable diligence and ordinary care. In other words, the seller doesn't need to know factually about the hole in the floor as long as the presumption exists that in the circumstances it's fair to have expected him to know about it.

The third concept pertaining to knowledge is willful blindness. This covers a seller who engages in a deliberate failure to make a reasonable inquiry into a condition despite suspicion or an awareness that there's a high probability of the hole in the floor. A seller won't be free of liability if he never steps on the plywood so that he won't know for sure that it covers a hole.

Both buyers and sellers should understand that the law treads where philosophers dare not go. The law believes that sellers can and should have knowledge of defects in their properties. I always hope that I will hear of a material-latent-defect case where the seller argues that he is innocent, because epistemology shows that no one is capable of knowing anything for sure.

Now you know, or don't.