

The Sharp Sword of Residential Property Disclosures, Somewhat Dulled

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INTRODUCTION

One of your authors has previously noted that, when it comes to residential real property in Oklahoma and many other states, the traditional notion of caveat emptor (buyer beware) is somewhat obsolete, or at least has been significantly modified by statute.[1] For example, the Oklahoma Residential Property Condition Disclosure Act ("Disclosure Act")[2] requires a Seller of residential property to deliver to the Purchaser either a disclaimer or a written disclosure statement of items and improvements included in the sale of the property, and whether such items or improvements are in normal working order.[3]

If the Seller fails to accurately and fully disclaim or disclose such problems and defects, the Seller may have liability under the Disclosure Act.[4] Moreover, this liability may extend not only to the Seller, but also the real estate licensees (both the listing and selling agent) who handled the transaction, and their real estate sales agencies; other parties, including home inspectors involved in the sale of the home, may have liability under other, traditional causes of action.[5] The good news for the Seller and the real estate licensees is that their liability is limited under the Disclosure Act.[6] However, others may be liable based on traditional theories of common law fraud, negligence and/or other potential causes of action. A plaintiff may wish to allege that the seller "negligently" failed to make the required disclosures, in an attempt to avoid the statutory limits. However, as noted below, such claims are precluded by the Disclosure Act.[7]

This article discusses the rights, duties, and liabilities of the parties involved in a real estate sales transaction covered by the Disclosure Act, including the impact of 2003 and 2008 amendments to the Disclosure Act and two recent Oklahoma Supreme Court decisions clarifying the limits on a Purchaser's remedies.

BASIC RIGHTS AND DUTIES

The scope of the Disclosure Act depends in part on whether a real estate licensee is involved in a sale of residential real estate.[8] Purchasers who believe they are protected by the Disclosure Act should be aware that the term ASeller@ as defined in the Disclosure Act is limited to a person who is represented by a real estate licensee (i.e., an agent), or who receives a written request for a disclosure from the Purchaser.[9]

Thus, Purchasers should be aware that a seller who has not retained a real estate licensee is not required to provide a disclaimer or disclosure statement to the Purchaser, unless the Purchaser makes a written request for the statement.[10] Otherwise, the requirements of the Disclosure Act will not apply to the Seller, and the Seller may be insulated from liability under the Disclosure Act for transferring defective property.[11] From a Seller's perspective, a written request from the Purchaser will trigger the disclaimer or disclosure requirements, even if the Seller is not represented by a real estate licensee. An unrepresented Seller may not be well-prepared to respond to such a request. Another risk that Sellers

should be aware of is that, even if a Seller delivers the appropriate disclaimer or disclosure statement to the Purchaser, there is a further disclosure obligation if defects are discovered after completing the disclaimer or disclosure statement.[12] The Disclosure Act would not shield the Seller from liability for such defects. Thus, the Disclosure Act creates some subtle economic risks for parties on both sides of the transaction.

If the Purchaser is represented or "assisted" by a real estate licensee, the real estate licensee has a duty "to obtain and make available" to the Purchaser the Seller's disclaimer or disclosure statement, along with any amendments the Seller makes.[13] If the Seller does not have a licensee agent, but the Purchaser does, the Purchaser's agent must obtain the disclaimer or disclosure statement from the Seller. As noted, this may impose an unforeseen burden on a Seller who is not familiar with these issues. It also illustrates again the significance for the Purchaser of assistance or representation by a licensee, since a Seller who has not retained a real estate licensee is not required to deliver a disclosure or disclaimer statement unless the Purchaser requests it.[14] Thus, the transactional burdens of the Buyer and Seller, as well as their economic risks, may depend in part on whether either or both are represented by a real estate licensee.

THE DISCLOSURE ACT

Scope and Background

The Disclosure Act significantly modifies the common law rights, duties, and liabilities of the parties and the nature of their potential recoveries, by imposing specific duties on Sellers and real estate licensees and limiting the remedies of aggrieved Purchasers.[15] Thus, it is important to understand the scope of the Disclosure Act. Basically, the Disclosure Act requires a "Seller" of "Property" to deliver, or cause to be delivered, the disclaimer or disclosure statements noted above to the purchaser.[16] However, as usual, the devil is in the details. Section 832.2, essentially defines "Seller" to mean a person "attempting to transfer a possessory interest in property,"[17] who is either represented by a real estate licensee or receives a written request from the Purchaser.[18] "Property" is defined at section 832.8. as residential real property with one or two units.[19] Thus, the basic requirements[20] are triggered when a Seller who is represented by a real estate licensee - or who receives a written request - is attempting to sell real property with one or two residential units to a Purchaser.[21] If a transaction is within this scope, the parties' common law rights and duties are superseded by the Disclosure Act.[22]

Impact on Caveat Emptor

The consequence is a dramatic modification of the doctrine of caveat emptor, as well as limitations on the Seller's traditional remedies. The Disclosure Act shifts some of the traditional risks for Purchasers to the Seller because, under the common law, absent fraudulent concealment, a seller has no affirmative duty to disclose the condition of or any defects in the property being sold.[23] Thus, at common law the burden is on the purchaser to inspect the property and discover problems with the physical condition of the property.[24] Traditionally, the doctrine of caveat emptor has been applied by Oklahoma courts, to impose the burden of property inspection and the risk of defects on the purchaser, when three circumstances are met:

- the purchaser must have had an opportunity to inspect the property prior to sale;[25]
- prior to the sale, both the purchaser and seller must have had access to information regarding the property's condition;[26] and
- the purchaser must have been able to ascertain with "reasonable diligence" the property's condition before purchasing the property.[27]

By essentially shifting these burdens to the Seller, who is presumably more familiar with the property than the Purchaser, the Disclosure Act benefits the Purchaser by dramatically increasing the level of required disclosure, but (as noted below) at the cost of significant changes to the structure of the Purchaser's legal remedies.

Enactment of the Disclosure Act in 1994 came as the result of a legislative drive by the Oklahoma Association of Realtors, as part of the National Association of Realtors' national campaign to enact such protections in the states.[28] Oklahoma's Disclosure Act was implemented and became effective on July 1, 1995.[29]

Disclaimer by a Seller

A Seller covered by the Disclosure Act is required to present either a disclaimer or disclosure statement, as specified in section 833 of the Disclosure Act, to a Purchaser of the property, before a purchase contract is signed.[30] If the Seller has never lived in the property and is not aware of any defects, a disclaimer statement is sufficient.[31] However, if the Seller has lived in the property, or knows that specific property defects exist, a "written property condition disclosure statement" ("disclosure statement") must be provided.[32] The Disclosure Act directs the Oklahoma Real Estate Commission (OREC) to draft the form of the disclaimer and disclosure statements and to amend the forms as "necessary and appropriate." [33]

A disclaimer must state that: (1) the Seller has never occupied the property and makes no disclosures concerning the condition of the property; and (2) has no actual knowledge of any defect.[34]

The Seller must deliver the disclaimer statement to the Purchaser "as soon as practicable, but in any event...before acceptance of an offer to purchase." [35] If the disclaimer statement is delivered to the Purchaser after an "offer to purchase" has been made by the Purchaser, the offer to purchase can be accepted by the Seller only after the Purchaser "has acknowledged receipt of the disclaimer statement...and confirmed the offer to purchase." [36] The Disclosure Act and the disclaimer statement forms prepared by the OREC specify that a disclaimer may not be completed more than 180 days prior to the date the form is delivered to or received by the Purchaser, [37] and if the Seller becomes aware of a defect after delivery of the disclaimer statement to the Purchaser, the Seller must complete and deliver a disclosure statement to the Purchaser. [38]

Disclosure by a Seller

If the Seller is not eligible to provide only a disclaimer statement under section 833.A.1., a disclosure statement must be completed and provided to the Purchaser.[39] As with the format of the disclaimer statement, the Disclosure Act directs the OREC to provide a disclosure form for Sellers to use.[40] As noted below, the OREC has done so.

The Disclosure Act at section 833 requires certain basic information to be provided in the disclosure statement and this is reflected in the form provided by the OREC. For example, the Seller must identify the "items and improvements" included in the sale and indicate whether those items and improvements are in a normal working order.[41] The OREC also may include disclosure of items that are not specified in the Disclosure Act, as the Disclosure Act permits the OREC to make adjustments as "necessary and appropriate." [42]

Importantly, and unlike equivalent statutes in some other jurisdictions, the Oklahoma Disclosure Act does not limit the information the OREC may require on the disclosure statement. Thus, the OREC has the authority to require the disclosure of additional information. The OREC disclosure statement form goes beyond the physical condition of the property, to require the disclosure of information regarding legal issues such as easements, homeowner associations, and zoning violations.[43]

Some states' disclosure acts go beyond even this, e.g., to require disclosure of anything that would diminish the value of the property. As noted in a previous article, California's statute requires the disclosure of various "neighborhood" problems, including a neighborhood noise problems.[44] As a consequence, sellers of California residential property have been successfully sued for not disclosing neighborhood nuisances.[45]

In contrast, the Oklahoma Disclosure Act does not require a Seller to disclose any neighborhood issues.[46] Instead, it requires that the disclosure statement be based on actual knowledge of the seller regarding certain physical conditions of the property.[47] Thus, the Disclosure Act does not impose a duty on Sellers to disclose nuisances such as neighborhood noise. Although, as noted, the Disclosure Act authorizes the OREC to expand the required disclosures to include non-physical disclosures, currently the only non-physical disclosure requirements relate to legal issues such as easements and homeowner's associations.[48]

Other Notices

The Disclosure Act also requires that certain other disclosures be made by the Seller to the Purchaser, e.g., a notice that the disclosure statement extends only to the Seller's actual knowledge of the property, is not a representation of the Seller's real estate licensee, and that the disclosure statement is not a part of the sales contract.[49] Thus, the disclosures required under the Disclosure Act do not constitute an express or implied warranty and are not a substitute for any inspections or warranties the purchaser may wish to obtain.[50]

Subsequent Defects; Repairs

Defects which arise or are discovered by the Seller after a disclaimer or disclosure statement has been provided to the Purchaser must be disclosed in a new or amended disclosure statement.[51]

The Disclosure Act does not require the Seller to disclose previous repairs or corrected problems, unless a deficiency remains.[52] However, the OREC form requires this additional disclosure. Thus, the OREC disclosure form asks if the Seller is Aaware of any alterations or repairs having been made to correct defects or problems.@[53] This requires that a Seller disclose his or her knowledge of previously-corrected defects. As reported in a previous article, this language was added as a result of a case in the State of Washington, involving defective and rotted wood that had been removed and repaired by the Seller.[54] The sellers were unaware that problems remained despite the repairs. This case illustrates that traditional risks to a purchaser remain, under the doctrine of caveat emptor, despite enactment of the Disclosure Act. The Washington court held that there was no duty on the seller=s part to disclose the repairs.[55] The OREC responded to this case by requiring Sellers to disclose any previous additions, alterations, or repairs to the property. While this addresses the facts in the Washington case, it also illustrates the continuing risks for a Purchaser, e.g., where the Seller is unaware of defects or previous repairs.

Timing of the Disclosures

As previously noted, the Seller must deliver the required disclaimer or disclosure statement to the Purchaser as soon as practicable, but in any event prior to the Seller's acceptance of an "offer to purchase" the property.[56] However, the delivery requirements may differ slightly depending on whether the Seller is represented by a real estate licernsee. If the Seller is represented by a licensee, the Seller is required to deliver a statement to the Purchaser as noted above. However, if the Seller is not represented by a real estate licensee, the Seller is not required to provide a disclosure statement unless the Purchaser makes a written request.[57]

Thus, in the common situation where the Seller is represented by a real estate licensee, the Seller is required to deliver a disclaimer or disclosure statement prior to the Purchaser making an "offer to purchase" the property. If the Seller delivers either statement after the Purchaser makes an offer, the Seller may accept the offer only after the Purchaser has acknowledged receipt of the statement and confirmed the offer.[58] This protects the Purchaser against a Seller's acceptance of the offer prior to the Seller's disclosure of any defects.[59]

Buyer Remedies

The Seller is not liable for defects unknown to the Seller or disclosed in the disclosure statement, or any amendment delivered to the Purchaser before acceptance of the offer to purchase.[60]

Thus, the Purchaser remains at risk for defects unknown to the Seller, or known and disclosed by the Seller, as well as known, undisclosed risks if the Seller is or becomes insolvent. Moreover, a Seller is not liable for any erroneous, inaccurate or omitted information supplied to the Purchaser in the disclosure statement if:

- the error, inaccuracy or omission resulted from an approximation of information by the Seller, provided that:
- more accurate information was unknown to the Seller at the time the disclosure was made;
- the approximation in the disclosure statement was clearly identified as such, was reasonable, and was based on the best information available to the Seller; and
- the approximation was not used to circumvent the disclosure requirements of the Disclosure Act;
- the error, inaccuracy or omission was not within the actual knowledge of the Seller; or
- the disclosure was based on information provided by public agencies and the Seller reasonably believed the information to be correct.[61]

As under the common law, the Disclosure Act does not require that a Seller inspect the property in order to discover unknown defects; therefore, the Seller=s liability for delivering an inaccurate disclosure statement is limited.[62] Of course, the Seller would be liable for an intentional misrepresentation about the condition of the property.[63]

Negligent nondisclosure is a more difficult matter. The Disclosure Act provides liability only for a failure to disclose defects "actually known" to the Seller.[64] In addressing the issue of negligent nondisclosure, the Supreme Court of Wyoming considered the common law rule but then concluded that "nondisclosure of information [under the disclosure act] cannot support a [common law] claim for misrepresentation.@[65] The Court then qualified this by stating that a seller could be held liable for negligent nondisclosure if the seller is under a duty "to exercise reasonable care to disclose the matter in question.@[66] However, the impact of such reasoning in Oklahoma is unclear, as section 837.F. of the Disclosure Act states that the Act abrogates common law duties.

Nonetheless, despite section 837.F., it is possible that an Oklahoma court would impose upon the Seller a common law duty to exercise reasonable care in disclosing the information required under the Disclosure Act. This remains one of the few issues not clearly resolved under the Disclosure Act.

Duties of a Real Estate Licensee

In addition to the Purchaser and Seller, a real estate licensee is subject to specific duties provided in the Disclosure Act.[67] A Seller=s real estate licensee is charged with assuring that the required disclaimer or disclosure statement and any required amendments are delivered by the Seller to the Purchaser.[68] The licensee has a duty Ato make such statement available@ to the Purchaser prior to the Seller accepting a Purchaser=s offer to purchase.[69] A real estate licensee representing a Purchaser also has the duty Ato obtain and make available@ to the Purchaser the Seller=s disclaimer or disclosure statement, along with any amendments.[70]

Licensees also have a duty to disclose any defects that they actually know of but which are not indicated in the Seller=s disclosure statement or its amendments.[71] However, a real estate licensee has no duty

to independently inspect the property or verify the "accuracy or completeness" of the disclosure to the Purchaser and Seller, already resolved under the Disclosure Act. of any disclaimer or disclosure statement.[72] Thus, a licensee does not have a responsibility to ensure that a Seller's disclosure statements are correct, "unless the real estate agent or licensee has actual knowledge of defects that are omitted from or mistakenly listed within the disclosure." [73]

An unusual case handled by one of your authors involved a plaintiff who purchased a home from a bank which had acquired the property by foreclosure after the previous owner (the bank's customer) filed bankruptcy. The bank then sold the home to new owners, who had lived in the house for several years before deciding to sell. The prior bankrupt owner of the house was a real estate broker, and when the new owners decided to sell, they listed the property with his company. The house was then sold to the plaintiff (the Purchaser). The Purchaser alleged that the septic system was defective and filed suit against the bank, the Sellers, the real estate brokerage firm and the broker/former owner. The Purchaser claimed that all of the defendants knew of problems with the septic system and failed to disclose the defect. The Purchaser also sued the individual who inspected the septic system, and the installer of the septic system.[74]

The Purchaser alleged a failure to disclose under the Disclosure Act, but coupled this with common law claims of: breach of warranty of habitability; fraud; negligent inspection; negligent services; and nuisance; and sought both actual and punitive damages. The real estate licensees and brokerage firm moved for partial summary judgment, and all causes of action were dismissed except the alleged violation of the Disclosure Act.[75] These issues are covered by section 837.A, 837.B., and 837.F., and the court's decision in this case followed that law. But until 2009, as noted below, there was no direct Supreme Court precedent on the impact of the current text of the Disclosure Act as to this issue. As noted below, however, these issues have now been resolved by the Oklahoma Supreme Court, in an important 2009 decision.

REMEDIES AGAINST THE SELLER AND REAL ESTATE LICENSEE

Limitations on Purchaser Remedies

As noted in the previous article, a Purchaser may assert a claim against a Seller under the Disclosure Act on two grounds.[76] First, a Purchaser may seek damages if the Seller did not provide the Purchaser with either a disclaimer statement or a disclosure statement before accepting the Purchaser's offer to purchase.[77] Second, a Purchaser may seek damages if the Seller did not disclose a defect which was "actually known" to the Seller before the sale.[78] The Disclosure Act limits the recovery to "actual damages,"[79] including the cost of repair, and specifically states that "[t]he sole and exclusive civil remedy at common law or otherwise shall be an action for actual damages, including the cost of repairing the defect, . . . and shall not include the remedy of exemplary damages." [80] Additionally, the Disclosure Act states that court costs and reasonable attorney fees "shall" be awarded to the prevailing party.[81]

The Disclosure Act also states that the "transfer of a possessory interest in [the] property...may not be invalidated solely because of the failure of any person to comply with (the Disclosure Act)."[82] Thus, the Purchaser cannot rescind the sale due to a violation by the Seller or a real estate licensee.[83]

The Disclosure Act also limits the recovery for a Purchaser who cancels a potential purchase of a residence. In *Green v. Braly Investments*,[84] the court denied recovery of the Purchaser's deposit under a real estate sales contract on grounds that Purchasers are not entitled to such relief under the Disclosure Act.[85] The court concluded that the Disclosure Act limits recovery to damages for the cost of repairing defects to the property existing as of the date of acceptance of the offer.[86]

An action under the Disclosure Act must be brought within two years from the date of the property transfer, and this remedy "abrogates" all alternative common law rights and remedies.[87] Previously, at common law Purchasers were able to sue sellers for fraud.[88] However, the limitations period for an action in fraud is two years after the purchaser's discovery of the fraud.[89] Thus, the Disclosure Act both shortens the limitation period (because the limitations period begins to run upon the date of the property transfer and not upon the Purchaser's subsequent discovery of defects or inaccurate information) and supercedes the alternative contracts and tort law remedies.

In 2003, these issues were addressed by the Oklahoma Supreme Courts in *Rogers v. Meiser*.^[90] This case, and the Oklahoma legislature's immediate reaction, are described below.

HB 1319

In 2003, in HB 1319, the Oklahoma legislature enacted amendments to Disclosure Act section 837, to expressly limit the Purchaser's claims to those provided by the Disclosure Act and preclude claims of common law fraud and the award of punitive damages for misrepresentations by the Seller in a property disclaimer or disclosure statement required under the Disclosure Act. The language in HB 1319 was taken directly from the Oklahoma Supreme Court's decision in *Rogers*. That decision reversed a previous Oklahoma district court decision granting the Seller's motion to dismiss any common law liability theory asserted by the Purchaser.^[91]

In *Rogers*, the Oklahoma Supreme Court held that "[t]he language of the [Disclosure Act] [could not] be interpreted to...supplant/abrogate a common law actual fraud claim based on alleged misrepresentations concerning material defects in residential real property."^[92] The Court concluded that the Disclosure Act was ambiguous and inconclusive as regards any intent to abrogate common law theories and remedies.^[93] As a result, the Court held that the Disclosure Act did not preclude the Purchaser's assertion of common law fraud claims based upon misrepresentations in the property disclosure statement.^[94]

Prior to this case, it was widely believed that, by the terms of the Disclosure Act,^[95] punitive damages awards were precluded in actions brought under the Disclosure Act. However, there was some ambiguity due to other statutory provisions allowing the recovery of punitive damages in common law fraud cases.^[96] *Rogers* held that a common law claim for fraud in a residential real estate sales transaction could be brought under other law, thus allowing recovery of punitive damages.

This was firmly rejected in HB 1319, and thereafter it appeared clear that the legislature intended to abrogate the Rogers analysis, so that the Disclosure Act would prevent any remedy relating to residential real property disclosures other than those provided for in the Disclosure Act, which limits the recovery to actual damages (and attorney fees).[97]

As amended by HB 1319, the Disclosure Act specifically states that it "supplants and abrogates" alternative common law rights and remedies.[98] The term "supplant" is defined by the Merriam-Webster Dictionary to mean to supersede another, or to eradicate and supply a substitute for; the term "abrogate" is defined by Black's Law Dictionary as meaning to annul, repeal, or destroy; or to repeal a former law by legislative act, or by usage.[99] The plain meaning of the Disclosure Act after HB 1319 is to eliminate any right to punitive damages in cases relating to residential property disclosures. However, it took another Oklahoma Supreme Court decision to finally put this issue to rest.

White v. Lim[100]

In *White*, Steve and Nikki White (as Purchasers) sued the Lims (as Sellers), along with Karla Yates and her brokerage firm (as real estate licensees), alleging that the residential property they bought had severe termite damage which was not disclosed in the disclosure statement or related communications.[101] The Purchasers sought actual and punitive damages, and discovery as to the defendants' tax returns and other financial information.[102] After some procedural sparring by the parties, the trial court sustained the Purchaser's discovery motions and overruled the defendants' motions for summary judgment and a new trial, but certified the issue of punitive damages for appeal as an interlocutory order.[103]

The basic issue on appeal was whether the Disclosure Act limits a Purchaser's remedies for disclosure violations to actual damages under the Disclosure Act, or alternatively allows separate claims to be asserted under common law or other statutes (e.g., for fraud and punitive damages).[104] In arguing the latter, the Purchasers relied on the Oklahoma Supreme Court's holding in *Rogers*,[105] allowing common law fraud claims as a supplement to the Disclosure Act on facts legally indistinguishable from those in *White*. [106] But, of course, HB 1319 intervened between these two cases.[107] Thus, the issue in *White* was whether HB 1319 changed the result in a case based on these facts.

It is all too rare that a legal issue is presented, and answered, with such clarity as in *White*. The Supreme Court noted the obvious point that the Court's role is to give effect to the intention of the legislature as expressed in the language of the statute, and "if the Legislature amends a statute whose meaning has been judicially determined, we may presume that the legislature's intent was to alter the law." [108] In doing so in this case, the Court concluded, the legislature "utilized mandatory, clear and unmistakable language limiting the right of a purchaser to recover for failure to disclose known defects in residential property to those provided in the Disclosure Act." [109] The Court used similarly clear and unmistakable language indicating that the Disclosure Act displaces any common law or statutory alternative to the Disclosure Act remedies, i.e., it prohibits fraud claims and punitive damages and provides "the exclusive vehicle for recovery where misinformation is communicated in the sale of residential property...." [110]

Damages

There can no longer be any reasonable doubt that the exclusive remedy for a Purchaser, for disclosure violations governed by the Disclosure Act, is to recover Actual damages, including the cost of repairing the defect.[111] As noted, the prevailing party is entitled to court costs and reasonable attorney fees.[112] For purposes of Seller liability, this leaves only the question of how to calculate the damages. Traditionally, the method of calculating damages depends upon the nature of the harm to the property.[113] The basic choice is between the cost of repair and the diminution in value caused by the breach of duty. In *Ellison v. Walker*, [114] for example, the Oklahoma Supreme Court stated that the measure of damages to real property is the reasonable cost of repairing the damage or restoring the property to its former condition, where that cost is less than the diminution in value and the property can be restored to substantially the condition it was in prior to the injury. Thus, the normal measure of the remedy for repairable damage to real property is the cost of repairing the damage rather than the diminution in value resulting from the defect or damage.

Of course, it is possible that undisclosed defects may cause permanent damage to the property, i.e., damage that cannot be economically repaired, or "cannot be substantially restored to its condition prior to suffering the damage." [115] In *Keck v. Bruster*, [116] the Oklahoma Supreme Court determined that "where damages are of a permanent nature, the measure of damage is the difference between the actual value (of the property) immediately before and immediately after the damage is sustained." [117] In effect, for permanent damage to real property, the measure of damages is the resulting diminution in value. [118]

THE 2007 STATUTORY AMENDMENT

In 2007, Oklahoma enacted another revision to the Disclosure Act, at section 836.A. and B., inserting "or assisting" in the scope provision defining the duty of a real estate licensee to obtain a disclosure or disclaimer statement from a Seller. [119] For example, section 836.A. now reads in part as follows:

"A real estate licensee representing or assisting a seller has the duty to obtain from the seller a disclaimer statement or a disclosure statement...." [120]

As a result of this change, a real estate licensee has the duty to obtain and provide a disclaimer or disclosure statement, whether the licensee is representing or otherwise assisting the Seller or Purchaser. This apparently expands the scope of the Disclosure Act for real estate licensees, imposing duties under the Disclosure Act in scenarios where the licensee is providing services that fall short of a formal representation. [121] But see the discussion immediately below.

It appears that there may be a potential conflict between the 2007 amendments to section 836 and the role played by the definition of "Seller" in section 832.2., in that the latter requires representation by a real estate licensee and the former does not. Both sections purportedly implicate the scope of the Disclosure Act.

One possible interpretation is that section 836 effectively expands the definition of "Seller" at section 832.2., for purposes of section 836. Section 832.2 defines "Seller" as one who is represented by a real estate licensee or (if not) has received a written request from the Purchaser for a disclaimer or

disclosure statement pursuant to the Disclosure Act, essentially limiting the scope of the Act to such Sellers. However, under the 2007 amendment, a real estate licensee who is not representing a "Seller" as defined in section 832.2 may nonetheless have duties under the Disclosure Act, pursuant to section 836, thus expanding the scope to cover transactions involving sellers who are not within the definition of the term "Seller" in section 832.2. On the other hand, if the term "seller" as used in section 836 means "Seller," defined in section 832.2., as is apparently the case throughout the rest of the Disclosure Act, the 2007 amendment could be rendered essentially meaningless, as it would apply only to a transaction involving a "Seller," defined to mean one represented by a real estate licensee or who has already received a disclosure request from a Purchaser. In this case, despite the apparent intent, section 836 of the Disclosure Act would not apply to a real estate licensee assisting an unrepresented Seller.

THE CARBAJAL CASE

In *Carbajal v. Safary*,^[122] a real estate licensee (Safary) represented Carbajal (the Purchaser) in Carbajal's purchase of a home. The sales contract provided a ten-day inspection period for the Purchaser, but Carbajal chose not to obtain a structural inspection, instead relying on an oral description by Safary of a six-month old structural report provided by the Sellers.^[123] The Sellers had obtained this structural report and provided it to Safary (as agent for Carbajal). Safary orally advised Carbajal that the report was "clean" and did not indicate any structural defects.^[124] Carbajal did not receive a copy of the structural report until after the sale was closed. He subsequently discovered foundation cracks and alleged there were "profound structural and foundation problems" with the property, with estimated repair costs of \$70,000.^[125] Carbajal sued Safary, alleging violations of the Disclosure Act and seeking damages including these repair costs.

The trial court dismissed the complaint and the Oklahoma Court of Civil Appeals affirmed, on grounds that Carbajal had not provided any evidence that the licensee's disclosure duties were triggered or violated by the receipt of the six-month old engineer's report."^[126] The Oklahoma Supreme Court affirmed, noting that the six-month old structural report provided no indication of structural damage or defects, and there was no other evidence that Safary had any knowledge of such defects.^[127] The Supreme Court concluded that "Safary did all that was required under [section] 836 by informing Carbajal that the report was 'clean.'"^[128]

The Supreme Court's discussion of the Disclosure Act in *Carbajal* is concise and clear. The basis of the decision appears to be that the structural report indicated there were in fact no structural deficiencies, and this was the only information Safary had. Safary told Carbajal that the report was "clean", which was accurate, so he did not have a duty to disclose anything else.

Therefore, this complied with the requirements of Disclosure Act sections 833 (required form of disclosure) and 836 (agent's duty to disclose).

The Court's opinion in *Carbajal* approvingly quotes language from the court of appeals decision, noting that a real estate licensee's duty to disclose is limited to his or her actual knowledge of defects in the property, defined as a condition with a "materially adverse effect on the monetary value of the property."^[129] The Oklahoma Supreme Court agreed with the court of appeals that no such defects

were identified in the structural report, and therefore Safary violated no duty to disclose any such defects.[130]

CONCLUSION

The law of caveat emptor was significantly revised by enactment of the Disclosure Act in Oklahoma. The Disclosure Act has resulted in improved disclosure of known defects by Sellers and real estate licensees, and creates a sharp sword for Purchasers when undisclosed defects known to the Seller are subsequently found in their homes. This significantly reduces the procedural and substantive law burdens for Purchasers seeking to recover for such disclosure violations, as compared to the previous requirements for a common law fraud claim.

A compensating factor for Sellers is the Purchaser's loss of punitive damages as a possible recovery. While this loss likely affects a relatively small number of cases, it necessarily means a focus on (and limitation to) actual damages.[131] Together with the provision mandating an award of prevailing party attorney fees and costs,[132] this provides an incentive for the Seller to make a good faith effort at disclosure, and for both parties to settle on reasonable terms rather than engaging in extensive litigation over these issues. The legislature and Oklahoma Supreme Court have further clarified these issues. The result appears to be better disclosure, and the likelihood of a satisfactory, negotiated settlement when disclosure fails. But, as usual, pitfalls and some uncertainties remain for all parties. Purchasers, Sellers, and real estate licensees should take due note and be aware of this legal environment.

[1]. See Douglas J. Shelton & Brandon J. Shelton, Fair Disclosure of Defects in Residential Property, 77 O.B.A.J. 2453 (2006) ["Shelton & Shelton"]; and Douglas J. Shelton, The Sharp Sword of Residential Property Disclosures, 75 O.B.A.J. 1391 (2004) [hereinafter "Shelton"]. Portions of this article are indebted to these prior publications. Since those articles were published, the further developments as described here include two Oklahoma Supreme Court decisions and another statutory amendment.

[2]. 60 Okla. Stat. §§ 831 et seq. See, e.g., id. § 833 (disclosure and disclaimer requirements).

[3]. See id. § 833; Shelton & Shelton supra note 1. The terms "Seller" and "Purchaser" are defined in the Disclosure Act. See infra this text at notes 16-22

[4]. See infra this text at notes 60-66 (buyers' remedies); infra this text at notes 111-118 (measure of damages).

[5]. See Shelton, supra note 1. "Real estate licensee" is defined in the Disclosure Act at 60 Okla. Stat. § 832.4. As a person licensed under the Oklahoma Real Estate License Code, 59 Okla. Stat. §§ 858-101 et seq.

[6]. See 60 Okla. Stat. § 837 and infra this text at notes 76-130.

[7]. See sources cited *supra* at note 6.

[8]. See definition of "Seller" at 60 Okla. Stat. § 832.2.; Shelton, *supra* note 1; *infra* this text at notes 15-29.

[9]. See *supra* note 8. But see 60 Okla. Stat. § 836.; *infra* notes 11, and 122-130.

[10]. *Id.*

[11]. See 60 Okla. Stat. § 837 (remedies). On the other hand, there may be some doubt as to the applicability of the Disclosure Act in this circumstance. See 60 Okla. Stat. § 832.2. (defining "Seller," a key term regarding the scope of the Disclosure Act, in terms of representation by a licensee or receipt of a request from a Buyer). See also discussion below at notes 15-22. But see *infra* this text at notes 119-121 (scope for duties of licensee).

[12]. 60 Okla. Stat. § 834.C.

[13]. *Id.* ' 836.B. See *infra* this text at notes 119-121.

[14]. See *supra* notes 8-9; Shelton, *supra* note 1, at 1392.

[15]. See 60 Okla. Stat. § 837; authorities cited *supra* at note 1.

[16]. See *supra* this text at note 3.

[17]. Theoretically, this could include a rental transaction, e.g., the lease of a rent house or duplex unit. However, the remedies provisions of the Disclosure Act make such a claim unlikely, as actual damages would be limited to making the property habitable for the lessee.

[18]. See 60 Okla. Stat. § 832.2. See also *id.* § 832.3., defining "Purchaser" as one attempting to acquire a possessory interest in property. Compare *id.* § 832.6, discussed *infra* at notes 119-130 (scope and duties imposed on real estate licensees).

[19]. Thereby including single family homes and duplexes. While the Disclosure Act inherently has its primary impact in the context of "used" homes, the scope appears to include newly-constructed properties as well.

[20]. See 60 Okla. Stat. § 833; *supra* note 3.

[21]. See *id.* § 832.; Shelton & Shelton, *supra* note 1. But see *infra* notes 119-130 (scope and duties for real estate licensees).

[22]. See 60 Okla. Stat. §§ 833.-837.

[23]. See, e.g., *Sewak v. Lockhart*, 699 A. 2d. 755 (Superior Ct. Penn. 1997) (fraudulent concealment of structural damage constituting a hidden, latent defect); *Van Booven v. Small*, 938 S.W. 2d. 536 (Mo. 1997) (fraudulent concealment of fire damage); cf. *Smith v. Stanley*, 477 S.E. 2d. 618 (Ct. App. Ga. 1997)

(no fraudulent concealment when ordinary care in making an inspection would have revealed the defect); *Swinton v. Whitinsville Savings Bank*, 42 N.E. 2d 808 (Mass. 1942) (there is no fiduciary duty of disclosure in an arms-length transaction absent a tortious concealment).

[24]. See, e.g., *Gutelius v. Sisemore*, 1961 OK 243, 365 P.2d 732.

[25]. *Wyrick v. Campbell*, 1918 OK 1, 170 P. 267, 67 Okla. 240.

[26]. *McDaniel v. Quinn*, 1957 OK 23, 307 P.2d 127.

[27]. *Onstott v. Osborne*, 1966 OK 3, 417 P.2d 291, 294. See also *Shelton*, supra note 1, at 1393.

[28]. See National Association of Realtors, *Property Condition Disclosure* 3, 13-21 (1993); *Shelton*, supra note 1, at 1393; *Rogers v. Meiser*, 2003 OK 6, 68 P.3d 967, 975 (Okla. S. Ct.) (citing *Gatlin*, *Reforming Residential Real Estate Transactions: An Analysis of Oklahoma's Disclosure Statute*, 22 Okla. City Univ. L. Rev. 735, 744 (1997)).

[29]. Residential Property Condition Disclosure Act, 1994 Okla. Sess. Laws 620, 625. See *Shelton*, supra note 28.

[30]. See 60 Okla. Stat. § 833. See supra this text at note 3; *Shelton*, supra note 1, at 1393.

[31]. See 60 Okla. Stat. § 833.A.1.

[32]. *Id.* § 833.B.

[33]. *Id.* ' 833.D.

[34]. *Id.* ' 833.A.1.

[35]. 60 Okla. Stat. ' 834.A. "Offer to purchase" is defined at *id.* § 832.1., as a written contractual offer to purchase property.

[36]. *Id.* ' 834.B.

[37]. 60 Okla. Stat. ' 833.C.; *Shelton*, supra note 1, at 1393.

[38]. 60 Okla. Stat. § 834.C. If the offer to purchase has been made, it must be re-confirmed. *Id.*

[39]. *Id.* ' 833.C.

[40]. *Id.* ' 833.D.

[41]. *Id.* ' 833.B.1.; *Shelton*, supra note 1, at 1394.

[42]. 60 Okla. Stat. ' 833.D.

[43]. Shelton, *supra* note 1, at 1394, citing the OREC's website at <http://www.state.ok.us/~orec/news.html>. The OREC disclosure statement began as one page; it is now three pages in length.

[44]. Cal. Civ. Code ' 1102.6. See Shelton, *supra* note 1, at 1394.

[45]. *Alexander v. McKnight*, 9 Cal. Rptr. 2d 453, at 456. In *Alexander*, the court concluded that buyers normally do not discover a neighborhood nuisance when examining a residence.

[46]. See Shelton, *supra* note 1, at 1394.

[47]. 60 Okla. Stat. ' 832.10. But see *supra* note 43 (disclosure of legal issues).

[48]. See *supra* this text at note 43; Shelton, *supra* note 1, at 1394.

[49]. 60 Okla. Stat. ' 834.B.2.b.

[50]. 60 Okla. Stat. § 833.B.2.c.

[51]. See 60 Okla. Stat. ' 834.C.

[52]. See 60 Okla. Stat. § 833 (required disclosures); Shelton, *supra* note 1, at 1395.

[53]. Shelton, *supra* note 1, at 1395.

[54]. *Hughes v. Stusser*, 1996 WA 150, 415 P.2d 89, 68 Wash.2d 707; see Shelton, *supra* note 1, at 1395.

[55]. *Hughes*, 415 P.2d 89.

[56]. See 60 Okla. Stat. § 834.A.; *supra* this text and note 35; Shelton, *supra* note 1, at 1395.

[57]. See 60 Okla. Stat. ' 832.2.b.

[58]. See 60 Okla. Stat. ' 834.B.; Shelton, *supra* note 1, at 1395.

[59]. *Id.*

[60]. See 60 Okla. Stat. §' 833., 835.A.

[61]. *Id.* ' 835.B.

[62]. *Id.*; Shelton, *supra* note 1, at 1396.

[63]. See 60 Okla. Stat. ' 837.B.

[64]. *Id.* See also *supra* note 23 (common law standards).

[65]. *Richey v. Patrick*, 904 P.2d 708, 802 (Wyo. 1995). The latest Oklahoma caselaw is consistent on this point. See *infra* notes 100-110..

[66]. Richey, 904 P.2d at 802.

[67]. See 60 Okla. Stat. ' 836. This applies whether the licensee is representing or merely "assisting" the Seller. Id.

[68]. Id.

[69]. Id.

[70]. Id. § 836.B.

[71]. Id. ' 836.C.

[72]. Id. ' 836.E. See also discussion below at notes 119-130.

[73]. Shelton, supra note 1, at 1397. See also discussion below at notes 119-130.

[74]. These facts were previously recited, in Shelton, supra note 1, at 1397.

[75]. Id.

[76]. See Shelton, supra note 1, at 1397.

[77]. 60 Okla. Stat. ' 837.A.1., B.

[78]. Id. ' 837.A.2., B.

[79]. Id. ' 837.B.

[80]. Id. See also id. § 837.F.

[81]. Tit. 60 Okla. Stat. ' 837.D. Obviously, this cuts both ways.

[82]. Id. ' 837.E.

[83]. Id. See also Shelton, supra note 1, at 1397.

[84]. 1998 Ok Civ App 121, 963 P.2d 26, 69 OBJ 3266.

[85]. Id. See also Shelton, supra note 1, at 1397.

[86]. Id. See also 60 Okla. Stat. § 837.B.

[87]. See 60 Okla. Stat. ' 837.C., F.

[88]. See Gutelius v. Sisemore, 1961 OK 243, 365 P.2d 732; Finefrock v. Carney, 1953 OK 327, 263 P.2d 744, 747; Eckert v. Flair Agency, Inc., 1995 Ok Civ App 151, 909 P.2d 1201, 1204, 67 OBJ 430; Brown v. B & D Land Co., 1991 Ok Civ App 95, 823 P.2d 380, 381 63 OBJ 387. See also sources cited supra at note 23.

[89]. See Tit. 12 Okla. Stat. ' 95. See also Baker v. Massey, 1977 OK 170, 569 P.2d 987, 991.

[90]. 2003 OK 6, 68 P.3d 967.

[91]. Id. See also Shelton, supra note 1, at 1398.

[92]. Rogers, 68 P.3d at 969.

[93]. Id. at 978.

[94]. Id. See also Shelton, supra note 1, at 1398.

[95]. See 60 Okla. Stat. ' 837.B.

[96]. 23 Okla. Stat. § 9.1.

[97]. See supra this text and notes 76-89. The Supreme Court issued the Rogers opinion on February 4, 2003; on February 26, 2003, the Oklahoma House of Representatives passed HB 1319. See Shelton, supra note 1, at 1398.

[98]. 60 Okla. Stat. § 837.F.

[99]. See Shelton, supra note 1, at 1398.

[100]. 80 O.B.A.J. 2083 (S.Ct. Oct. 13, 2009); 2009 OK 79, 224 P.3d 679.

[101]. Id., 80 O.B.A.J. 2083-85.

[102]. Id.

[103]. Id., at 2085. This appeal followed. Id.

[104]. Id. at 2084.

[105]. 68 P.3d 967. See supra this text at notes 90-97.

[106]. See White, 80 O.B.A.J. at 2085.

[107]. Id.

[108]. Id. at 2086.

[109]. Id.

[110]. Id. The trial court's decision was reversed and remanded accordingly. Id.

[111]. 60 Okla. Stat. ' 837.B.

[112]. Id. ' 837.D.

[113]. See Shelton, *supra* note 1, at 1401.

[114]. 1955 OK 86, 281 P.2d 931.

[115]. See Shelton, *supra* note 1, 1401.

[116]. 1962 OK 35, 368 P.2d 1003.

[117]. Keck, 368 P.2d at 1005.

[118]. See Keck, 368 P.2d, at 1005 (citing Thomas, ___, at 651).

[119]. Laws 2007, c. 42, § 6 (eff. Jan. 1, 2008) (codified at Tit. 60 Okla. Stat. § 836.A. and B.).

[120]. *Id.* § 836.A. See also *id.* § 836.B. (similar obligation for a licensee representing or assisting a Purchaser).

[121]. Recall that the scope of the Disclosure Act is otherwise limited by the definition of "Seller" at *id.* § 832.2., in turn referencing representation by a real estate licensee (or a request from the Purchaser).

[122]. 80 O.B.A.J. 1474 (2009).

[123]. *Id.*

[124]. *Id.*

[125]. *Id.*

[126]. *Id.* at 1475.

[127]. *Id.* at 1476. The engineer's structural report concluded: "There are no structural requirements at this residence." *Id.*

[128]. *Id.* It can be noted here that 60 Okla. Stat. § 836.E. expressly provides that the real estate licensee has no duty to conduct an inspection or verify any statements or disclosures by the Seller.

[129]. Carbajal, 80 O.B.A.J. at 1476 (quoting the Oklahoma Court of Civil Appeals opinion in the case).

[130]. *Id.*

[131]. See 60 Okla. Stat. § 837.B.

[132]. *Id.* § 837.D.