

## THE SHARP SWORD OF RESIDENTIAL PROPERTY DISCLOSURES

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Remember caveat emptor? Forget it when it comes to residential property in Oklahoma. The Oklahoma Residential Property Condition Disclosure Act states that a seller of residential property located in this state shall deliver to the purchaser of such real property a written property disclosure statement which shall include an identification of items and improvements included in the sale of the property and whether such items or improvements are in normal working order. 60 O.S. §§ 833:

"A. A seller of property located in this state shall deliver, or cause to be delivered, to the purchaser of such property one of the following:

1. A written property disclaimer statement on a form established by rule by the Oklahoma Real Estate Commission which states that the seller:

a. has never occupied the property and makes no disclosures concerning the condition of the property, and

b. has no actual knowledge of any defect; or

2. A written property condition disclosure statement on a form established by rule by the Oklahoma Real Estate Commission which shall include the information set forth in subsection B of this section.

Failure on the part of the seller to accurately and fully disclose all such problems and defects can come to light when a problem later arises. The buyer may then file an action for violation of the Oklahoma Residential Property Condition Disclosure Act. Often, the buyer will name not only the sellers, but will also sue the realtors<sup>[1]</sup> (listing and selling), real estate agency, home inspectors, and any others involved in the sale of the home as defendants. The causes of action against the sellers and the real estate agents are exclusively limited to the Disclosure Act violations. The causes of action against others may be brought in common law fraud, negligence and other potential allegations. The buyer will usually request both actual and punitive damages. When pleading this type of case, many litigants allege the seller "negligently" failed to disclose, in an attempt to persuade the Defendant's insurer to defend.

In order to gain a clearer understanding of an action brought under the Disclosure Act, the following sets forth the duties of the parties involved in the real estate transaction.

### I. BUYER'S DUTY

A real estate broker is involved in most transactions in Oklahoma. However, buyers must be aware that a "seller" of residential real estate is defined in the Act as a person transferring an interest in property who is represented by a real estate licensee, or who receives a written request for a disclosure from the buyer. See 60 O.S. §832(2).

Buyers need to be aware that a seller who has not retained a real estate broker need not provide a disclosure statement to the buyer, unless the buyer first makes a written request for the statement, 60

O.S. §832(2)(b). Otherwise, in this circumstance, the Act will likely not apply, and the seller may be protected from liability for transferring defective property. Yet, even if a seller delivers the appropriate statement to a buyer, circumstances may arise where defects are discovered after completing the statement. In such a situation, the statement would not provide an accurate disclosure of the property's condition, and a buyer would need to have information regarding any subsequently discovered defects.

If the buyer has a real estate broker, the buyer's real estate broker has the duty "to obtain and make available" to the buyer the seller's disclosure statement, along with any amendments the seller makes, 60 O.S. §836(B). Therefore, if the seller does not have a broker, but the buyer does, then the buyer's broker must still obtain the disclosure statement from the seller. This requirement illustrates the importance of having a broker represent a buyer because a seller who has not retained a broker is not required to deliver a statement unless the buyer first requests it.

## II. SELLER'S DUTY

### A. RATIONALE

Oklahoma has limited the old common law rights and recoveries by enacting legislation imposing affirmative duties on sellers of used residential properties. These duties require sellers to disclose to buyers of used residential property certain defects that are known to the sellers at the time of the sale, 60 O.S. 831, et. seq. It is important to understand the dwelling types that are implicated by the Residential Property Condition Disclosure. Oklahoma law requires a seller of residential property with one or two dwelling units(eg. a home or duplex) to deliver, or cause to be delivered, disclosure statements to buyers.

A specific example of limiting common law rights is the doctrine of "caveat emptor." Residential disclosure requirements remove some of the hardships on buyers because under this doctrine a seller is not generally required to disclose the home's condition or any defects thereto. The common law burden was on the buyer to investigate and discover defects in the property, *Gutelius v. Sisemore*, 1961 OK 243, 365 P.2d 732 .

The doctrine of "caveat emptor" was applied by Oklahoma courts when three circumstances were met:

- (1) Buyer must have had the opportunity to inspect the property prior to sale, *Wyrick v. Campbell*, 1918 OK 1, 170 P. 267, 67 Okla. 240;
- (2) Prior to sale, both buyer and seller must have had access to information regarding the property's condition, *McDaniel v. Quinn*, 1957 OK 23, 307 P.2d 127, et seq., and
- (3) The buyer must have been able to ascertain with "reasonable diligence" the property's condition before purchasing the residence, *Onstott v. Osborne*, 1966 OK 3, 417 P.2d 291, 294.

The statutory implementation of disclosure requirements alleviates some of the hardships faced by buyers in used residential property. One of the biggest concerns buyers faced was the lack of, and inferior, knowledge they possessed when compared to the seller.

The implementation of Oklahoma's property disclosure statutes directly results from legislative campaign efforts by the Oklahoma Association of Realtors, implementing the National Association of Realtors' national campaign for such protections. See National Association of Realtors, Property Condition Disclosure 3, 13-21 (1993). Oklahoma's Residential Property Disclosure Act was implemented and put into effect on July 1, 1995, Residential Property Condition Disclosure Act, 1994 Okla. Sess. Laws 620, 625.

## B. SELLER DEFINED

Sellers of used residential properties are now required to make certain disclosures, so it is important to first define -- who is a seller. A "seller" means one or more persons who are attempting to transfer a possessory interest in property and who are either: (a) represented by a real estate licensee; or (b) not represented by a real estate licensee but receive a written request from the purchaser to deliver or cause to be delivered a disclaimer or disclosure statements, 60 O.S. § 832. In other words: a Seller does not have to disclose, under the Act, if not represented by a realtor, unless a written request by the potential buyer is made.

## C. DISCLAIM OR DISCLOSE?

The Seller is required to present certain statements to a buyer of used residential property. A Seller is required to complete either a "property disclaimer statement" or a "property condition disclosure statement," 60 O.S. § 833(A)(1) and 60 O.S. § 833(A)(2). If the seller is unaware of any defects to the property and has never lived in the home, then he may use a disclaimer statement, 60 O.S. §833 (A)(1).

On the other hand, a disclosure statement is used when the Seller has ever lived in the home or knows that specific property defects exist, or 60 O.S. § 833(B)(1)(a-j). The Act authorized the Oklahoma Real Estate Commission (OREC) to draft the actual disclaimer and property disclosure forms and amend the forms when "necessary and appropriate," 60 O.S. §833(D).

Specifically, a disclaimer presented by a seller must inform the buyer that: (1) the Seller has never occupied the property and makes no disclosures concerning the conditions of the property, and (2) has no actual knowledge of any defect, 60 O.S. §833(A)(1)(a-b). Thus, a Seller must not have occupied the residence and have no knowledge of any defects to such property if presenting a disclaimer.

A Seller should deliver the disclaimer statement to the purchaser as soon as practicable, and it shall be delivered before acceptance of an offer to purchase, 60 O.S. § 834(A). However, if the disclaimer statement is delivered to the purchaser after an offer to purchase has been made, the offer to purchase shall be accepted ONLY after the purchaser has acknowledged receipt of the disclaimer statement and confirmed the offer to purchase, 60 O.S. §834(B). Disclaimer statements prepared by the OREC require completion of the disclaimer form to be not more than 180 days prior to the date the form is delivered to or received by the purchaser, 60 O.S. §833(C). If a Seller becomes aware of a defect after delivery of a disclaimer statement to a purchaser but before accepting an offer to purchase, the Seller must complete and deliver a Residential Property Condition Disclosure Statement to a purchaser.

#### D. ITEMS REQUIRED TO BE DISCLOSED

If Sellers are not eligible to provide disclaimer statements, then a disclosure statement is required to be completed, 60 O.S. §833(C). Similar to the disclaimer statement, the Act authorizes the OREC to draft the actual disclosure form that the seller must use, 60 O.S. §833(D).

The Act provides required basics to be included in the disclosure statements provided by OREC. A Seller must identify "items and improvements" included in the sale and indicate whether those items and improvements are in "normal working order," 60 O.S. §833(B)(1). The OREC Residential Property Disclosure Statement Form also contains items that are not specified in the Act, but this is allowed as the Act grants discretion to OREC in making adjustments and amendments as is necessary and appropriate, 60 O.S. §833(D).

The Seller must indicate whether he has "actual knowledge" of defects or other information relating to the following, 60 O.S. §833(B)(1)(a-j):

- a. Water and sewer systems, including the source of household water, water treatment systems, sprinkler systems, occurrence of water in the heating and air conditioning ducts, water seepage or leakage, drainage or grading problems and flood zone status
- b. Structural systems, including the roof, walls, floors, foundation and any basement
- c. Plumbing, electrical, heating and air conditioning systems
- d. Infestation or damage of wood-destroying organisms
- e. Major fire or tornado damage
- f. Land use matters
- g. Existence of hazardous or regulated materials and other conditions having an environmental impact
- h. Existence of prior manufacturing of methamphetamine
- i. Any other defects known to the seller, and
- j. Other matters the OREC deems appropriate.

Unlike many jurisdictions, Oklahoma's Act does not limit the information the Commission's form may include. This provides OREC with considerable latitude in determining additional items for disclosure. The OREC disclosure form goes beyond physical conditions and states of the property, and requires information be disclosed to the buyer regarding easements, homeowner associations, and zoning violations, See OREC's website at [to view the Residential Property Condition Disclosure Statement](#). Note that the OREC has changed the form several times since its inception. It started out as one page; it is now three pages in length.

Some states' disclosure acts require disclosure of anything that would diminish the property value. For example, California's disclosure statute requires the disclosure of certain neighborhood problems, Cal. Civ. Code § 1102.6. Sellers of residential property were found liable for not disclosing neighborhood nuisances to buyers, *Alexander v. McKnight*, 9 Cal. Rptr. 2d at 456. The California court, in *Alexander*, examined the state's disclosure statute which expressly included "neighborhood noise problems," and determined that buyers normally do not discover neighborhood nuisance when examining a residence, *Id.*

Oklahoma's Act does not require seller to provide notice of any neighborhood noises. The Oklahoma Act provides that the disclosure statement must be "based on actual knowledge of the seller regarding certain physical conditions of the property," 60 O.S. §832(10). Thus, courts will not impose a duty on sellers to disclose mere nuisances based simply on the language of the statute. However, the authority of the Act does give OREC the right to make the disclosure form more effective by requiring non-physical disclosures to be made, although currently the only non-physical disclosure requirements deal with easements and homeowner's associations.

Furthermore, Oklahoma's Act requires specific notices be made by the seller to the buyer. The first required notice is the notice to the buyer that the disclosure goes to only the seller's actual knowledge of the property and does not contain representations of the seller's real estate broker, 60 O.S. §834 (B)(2)(a). The disclosure is in no way a part of the sales contract, and this notice is also required to be made by the seller, 60 O.S. §834(B)(2)(b). The buyer is to be notified that the disclosure statement does have extreme limitations and, for this reason, the Act requires that the disclosure statement must state that it does not constitute an express or implied warranty of any kind and is not "a substitute for any inspections or warranties the purchaser may wish to obtain." It should be noted that the disclosure statement is not only limited in function, but the recovery for a violation is also limited, see 60 O.S. §837(F).

Defects which arise or are discovered subsequent to the disclosure statement's presentation are also required to be disclosed by a seller. A seller may not remain silent if the seller discovers a defect after delivering the appropriate disclosure or disclaimer statement. 60 O.S. §834(C). Even though a seller may have never occupied the residence, once the seller learns of a defect, the seller must disclose that knowledge. Similarly, if a seller becomes aware of a defect after delivering the original disclosure statement, then the seller must complete an amended disclosure statement, *Id.*

Repairs or improvements to the property are not specifically required by the Act to be disclosed by the seller. However, this is another area that the OREC has deemed necessary. The disclosure form asks if the seller is "aware of any alterations or repairs having been made to correct defects or problems." This question helps protect a buyer by ensuring that a seller will disclose his knowledge of past defects, even if he believes that the defects no longer exist because they have been repaired. This implementation to the form results from a case arising out of Washington, where property was composed of defective and rotted wood and the seller removed and repaired the problem. However, the sellers were unaware that there was still rotten wood within the home even after the repairs. The buyers were out of luck as the Washington court held there was no duty on the seller's part to disclose, *Hughes v. Stusser*, 1996 WA

150, 415 P.2d 89, 68 Wash.2d 707. OREC has offered protection to buyers of homes by requiring sellers to disclose any additions, alterations, or repairs to the property.

Imposing a duty upon sellers to disclose known repairs is beneficial for a buyer as it assures that a buyer is alert to the property's past and present condition. In turn, this enables buyers to better assess the quality and nature of the property, through the knowledge of the history of repair work.

#### E. DELIVERY OF DISCLOSURE / DISCLAIMER

The seller also has obligations relating to delivery of the disclosure statement to the buyer prior to an acceptance of an offer to purchase said residential property, 60 O.S. §834(A). The Act encourages the seller to deliver the appropriate statements as soon as is practicable. Where delivery requirements differ slightly is when the seller is either represented by a broker or is not. If the seller is represented by a real estate broker, the seller is required to deliver a statement to the buyer pursuant to 60 O.S. §832(2)(a).

If the seller is NOT represented or has not retained a real estate broker, then the seller is not obligated to deliver a statement unless the buyer first makes a written request for the statement, 60 O.S. §832(2)(b).

A seller is to deliver said disclosure or disclaimer statements prior to the buyer making an offer to purchase the residence. If a seller delivers either statement after the buyer makes an offer, then the seller may accept the offer only after the buyer has acknowledged receipt of the statement and confirmed his offer, 60 O.S. §834(b). The rationale behind this requirement is establishing a sufficient safeguard for a buyer because the buyer is protected from having a seller accept his offer without first disclosing any defects.

#### F. LIABILITY OF SELLER

A seller is not liable for a defect once it has been disclosed in the disclosure statement. The seller shall not be liable for a defect or other condition in the property if the existence of the defect or other condition in the property was disclosed in the statement, or any amendment delivered to the purchaser before acceptance of the offer to purchase. 60 O.S. §835(A).

Undisclosed defects may exist. A seller, however, is not liable for the following undisclosed defects:

Any erroneous, inaccurate or omitted information supplied to the purchaser as a disclosure required by the Act if:

"1. The error, inaccuracy or omission results from an approximation of information by the seller, provided:

- a. accurate information was unknown to the seller at the time the disclosure was made,
  - b. the approximation was clearly identified as such and was reasonable and based on the best information available to the seller, and
  - c. the approximation was not used to circumvent the disclosure requirements of this act;
2. The error, inaccuracy or omission was not within the actual knowledge of the seller; or
  3. The disclosure was based on information provided by public agencies and the seller reasonably believed the information to be correct, 60 O.S. §835(B)(1-3).

The Act does not demand that a seller inspect the property in order to discover unknown defects, therefore the seller's liability is substantially limited for delivering an inaccurate disclosure statement. Intentional misrepresentation regarding the condition of the property raises liability issues as to the seller. Upon finding that a seller has knowingly falsified the disclosure statement, an Oklahoma court could find the seller liable for violating the Act, 60 O.S. §837.

Negligent misrepresentation is also a factor to consider relating to property disclosure. In addressing the issue of negligent nondisclosure, the Supreme Court of Wyoming determined that "nondisclosure of information cannot support a claim for misrepresentation," *Richey v. Patrick*, 904 P.2d 708, 802 (Wyo. 1995). The court went further and stated however, that a seller could be liable for negligent nondisclosure if the seller is under a duty "to exercise reasonable care to disclose the matter in question," *Id.* In order to ensure that a seller diligently completes the disclosure statement, Oklahoma courts would likely impose upon a seller the duty to exercise reasonable care in disclosing information. A reasonable care standard safeguards a buyer's reliance on the accuracy of the seller's statement.

### III. REALTOR'S DUTY

A real estate broker or licensee also has specific duties outlined in Oklahoma's Condition Disclosure Act. A seller's real estate broker is required to obtain the disclaimer statement or the disclosure statement from the seller as well as any amendments the seller makes, 60 O.S. §836(A). Thereafter, the seller's broker has the duty "to make such statement available" to potential buyers prior to the seller accepting a buyer's offer to purchase, *Id.*

A real estate licensee representing a buyer also has the duty "to obtain and make available" to the buyer the seller's statements, along with any amendments the seller makes, *Id.* at 836(B).

Oklahoma real estate licensees have a duty to disclose any defects to the buyer that they know exist but which are not stated in the seller's statements, or amendments, 60 O.S. §836(C). However, the Act does

not require a real estate licensee to independently inspect the property or verify the "accuracy or completeness" of any disclaimer statement, disclosure statement, or amendment, 60 O.S. §836(E). This means that a real estate licensee does not necessarily have a duty to ensure that a seller's disclosure statements are correct unless the real estate licensee has actual knowledge of defects that are omitted from or mistakenly listed within the disclosure.

An unusual case being handled by our office involves a plaintiff who purchased a home from a bank which had come into possession of the house after the previous owner went into bankruptcy. The bank sold the home to new owners, who lived in the house for several years. In a strange twist of events, the prior bankrupt owner of the house happened to be a real estate agent, and when the new owners decided to sell, they listed the property with him. The house was then subsequently sold to the plaintiff. The plaintiff alleges the septic system was defective and filed suit against the bank, the sellers, and the real estate agent. Plaintiff claimed that all defendants knew of the problems with the septic system and failed to disclose the defect. Plaintiff also sued the individual who inspected the septic system, and the installer of the septic system. The plaintiff alleged failure to disclose, and: breach of warranty of habitability; fraud; negligent inspection; negligent services; and nuisance; and prayed for both actual and punitive damages. The realtor filed a motion for partial summary judgment, and all causes of action were dismissed except the alleged violation of the Act.

#### IV. REMEDIES AGAINST SELLER AND REALTOR

##### A. BUYER CLAIMS

Under the Oklahoma Act, a buyer may base a claim against a seller on two grounds. First, damages may be sought if a seller does not provide a buyer with either a disclaimer statement or a disclosure statement before the seller accepts the buyer's offer to purchase, 60 O.S. §837(A)(1). Second, a buyer may recover if the seller does not disclose a defect which the seller had actual knowledge before the sale. 60 O.S. §837(A)(2). However, the Act limits a buyer's remedy to "actual damages". 60 O.S. §837(B). The Act provides that "the 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." Actual damages will likely constitute the cost of repairs, not the difference in the value between the house as represented and the house as delivered. The Act also provides that court costs and reasonable attorney fees will be awarded to the prevailing party, 60 O.S. §837(D).

Furthermore, the Act determines that the "transfer of a possessory interest in (the residence) may not be invalidated solely because of the failure of any person to comply with (the Act)," 60 O.S. §837(E). Thus, the Act prohibits a buyer from rescinding the sales contract due to a breach of the Act by the seller or real estate broker.

Further limitations on recovery have been placed on potential buyers who have withdrawn from a potential purchase of a home. In *Green v. Braly Investments*, 1998 Ok Civ App 121, 963 P.2d 26, 69 O.B.J. 3266, a court denied earnest money relief to potential buyers. Buyers who sought return of earnest money paid toward property they never purchased were not entitled to relief under the Residential

Property Condition Disclosure Act, *Id.* The court further stated that under the Act, damage was limited to damage actions for costs of repairing defects to purchased property existing as of the date of acceptance of the offer.

The Act requires any action to be brought within two years after the date of transfer of the property. 60 O.S. § 837(C). Traditionally, buyers have been able to sue sellers for fraud. 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.

However, the statute of limitations for an action for fraud is two years upon the buyer's discovery of the fraud. See 12 O.S. § 95. See also, *Baker v. Massey*, 1977 OK 170, 569 P.2d 987, 991. Thus, the Act offers less protection for a buyer because the statute of limitations begins to run upon the date of transfer of the property and not upon a buyer's subsequent discovery of inaccurate information.

Now, however, remedies appear to be limited further due to the Oklahoma Supreme Court's recent decision regarding *Rogers v. Meiser*, 2003 OK 6; 68 P.3d 967, and the Oklahoma Legislature's reaction to such ruling.

#### B. ANALYSIS OF HB 1319

The Amendments to 60 O.S. § 837, applied in HB 1319, were implemented to prevent claims of common law fraud and the award of punitive damages in cases of misrepresentation on property disclosure or disclaimer statements. The amending language was taken directly from the recent Oklahoma Supreme Court decision that reversed a previous Oklahoma District Court opinion granting a vendor's motion to dismiss any liability theory and remedy asserted by a petitioner not under the Residential Property Condition Disclosure Act (RPCDA).

The precise language used in amending the bill derived from the Oklahoma Supreme Court opinion in *Rogers*. Here, the Supreme Court held that "the language of the RPCDA could not be interpreted to supplant or abrogate any common law actual fraud claim based on alleged misrepresentations concerning material defects in residential real property" (Emphasis added). The court reasoned that the RPCDA language was ambiguous and inconclusive regarding an intent to abrogate or supplant all common law claims and remedies. As such, the court concluded that the legislature did not intend to prevent common law fraud claims based upon misrepresentation in property disclosure statements.

Prior to this case, it was known through statute (60 O.S. § 837(B)) that punitive damage awards were precluded under claims brought under RPCDA. However, there were certain circumstances which allowed recoverable punitive damages in common law actual fraud cases under 23 O.S. §§ 9.1. It was stated in *Rogers*, that a common law claim for actual fraud in a residential real estate transaction could meet the requirements of the provisions of 23 O.S. § 9.1, and allow recovery of punitive damages.

Following the amendment, it appears undeniable that RPCDA prevents any remedy relating to real property disclosure misrepresentation other than that listed in the Act, which is actual damages (as well

as attorney fees). The Supreme Court issued the Rogers opinion on February 4, 2003. On February 26, 2003, the Oklahoma House of Representatives passed HB 1319 amending RPCDA to read, in pertinent part:

B. The sole and exclusive civil remedy at common law or otherwise for a failure under subsection A of this section by the seller or the real estate licensee shall be an action for actual damages, including the cost of repairing the defect, suffered by the purchaser as a result of a defect existing in the property as of the date of acceptance by the seller of an offer to purchase and shall not include the remedy of exemplary damages.

F. This act applies to, regulates and determines rights, duties, obligations and remedies at common law or otherwise of the seller, the real estate licensee and the purchaser with respect to disclosure of defects in property and supplants and abrogates all common law liability, rights, duties, obligations and remedies therefore. (Emphasis added).

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. Interpreting the language used by the legislature, they are limiting a claimant's ability to receive punitive damages regarding actual fraud cases within property disclosure actions.

This is not a clarifying amendment. When an amendment is passed intending to remove doubt concerning the legislative intent of a previous statute, it is considered a clarifying amendment, *Magnolia Pipe Line Co. v. Oklahoma Tax Comm'n*, 1946 OK 113, 167 P.2d 884, 196 Okla. 633 . Clarifying amendments have been ruled to have retroactive effects. If an earlier legislative enactment is unclear in some respect and a later enactment attempts to remove the ambiguity, the amendatory statute constitutes a "clarifying enactment" that is to be given retrospective force, *Polymer Fabricating, Inc. v. Employers Workers' Compensation Association*, 1998 OK 113, 980 P.2d 109, OBJ 4068.

In determining whether a statute is clarifying, the court in *Magnolia*, stated by amending a statute the legislature may intend to either (a) change a law, or (b) clarify ambiguous law. The precise intent is ascertained by looking to the circumstances that surround the change in the statute. If the earlier statute definitely expressed an intent or had been judicially interpreted, the legislature's amendment is presumed to have changed an existing law, but if the meaning of the earlier statute was in doubt, or where uncertainty as to the law's meaning did exist, a presumption arises that the amendment was designed to more clearly express the legislative intent that was left indefinite by the earlier text, *Id.*

Applying HB 1319 and the factors addressed in *Magnolia*, an argument should be made that the bill is not a clarifying amendment. (1) The Oklahoma Supreme Court judicially interpreted 60 O.S. §§ 837, (2) the Supreme Court held it to be a statute that did not intend to replace all previously recognized common law theories or remedies, *Rogers v. Meiser*, 2003 WL 223413. Following this final interpretation, the Oklahoma Legislature passed HB 1319 to address the legal interpretation in *Rogers*, thus changing the law. According to *Magnolia*, if a statute has been judicially interpreted a subsequent

amendment changes the existing law, and therefore is not a clarifying amendment and as such not a retroactively applied amendment. The Oklahoma Legislature made an intervening change in the law.

House Bill 1319 is an amendment in response to an Oklahoma Supreme Court decision. When a subsequent Congress amends a law in response to the Supreme Court's interpretation, it does not revive the original enacting Congress' interpretation of statute which existed before the Supreme Court's interpretation, but rather the result of such "restoration" efforts is newly created law, and as with any newly enacted legislation, Congress must state clearly its intentions with regard to retroactivity, *DeVargas v. Mason & Hanger-Silas Mason Co., Inc.*, 1990 10CIR 337, 911 F.2d 1377.

Courts have long recognized that it is within the power of the Legislature to modify or abolish an old right under common law as long as no vested right is disturbed, *Loyal Order of Moose, Lodge 1785 v. Cavaness*, 1977 OK 70, 563 P.2d 143. Recognizing there is not a vested right at issue under HB 1319, and further recognizing that the Legislature can abolish this common law right, the focus is whether or not this abrogation has a retroactive effect. The amended statute is to go into effect on November 1, 2003. The general rule of statute application is that statutes are to be passed prospectively, meaning they are to be construed as having effect to specified issues only after the effective date. However, the exception to this general rule is that remedial or procedural statutes can operate retrospectively when they do not effect substantial rights. If a statute affects only a remedy and not a substantive right, it will apply retroactively, *World Pub. Co. v. White*, 32 P.3d 835. A procedural change has been defined as one that affects the remedy only, and not the right, *Walls v. American Tobacco Co.*, 2000 OK 66, 11 P.3d 626, 71 OBJ 2361. The new statute affects available remedies and prevents a common law action of fraud. The abrogation of punitive damages is a limitation on remedies and therefore would be considered merely procedural and would allow retroactive application. The determining question is whether the abrogation of a common law claim of fraud is a substantive right of an individual, or whether a statutory decrease in damage limitations are changes in substantive rights, thus preventing the retroactive application of the statute.

"Substantive rights" are those existing for their own sake and constituting the normal legal order of society, that is, rights of life, liberty, property and reputation. Statutory increases in damage limitations are changes in substantive rights and not mere remedial changes, *Sudbury v. Deterding*, 2001 Ok 10, 19 P.3d 856, 72 OBJ 365. In *Sudbury*, the Oklahoma Supreme Court addressed an amendment to a statute which affected the liability of a defendant by increasing the amount of damages that could be imposed upon him. The court's reason included (1) that the amendment altered the liability of a defendant by increasing potential damages, and (2) nothing in the new statute showed legislative intent for retroactive application, *Sudbury*, at 860. Unlike the facts in *Sudbury*, HB 1311 decreases the amount of potential damages that could be imposed on a defendant. In *Thomas v. Cumberland Operating Company*, the Oklahoma Supreme Court held a statute enacted permitting damages nonexistent at common law and non-recoverable under previous case law would not allow claims brought prior to the effective date of the statute. The Court stated any amendments "imposing, removing or changing a monetary limitation on recovery for personal injuries or death are generally held to be prospective only," *Thomas* at 976. House Bill 1319 changes a monetary limitation.

In *Welch v. Armer*, 1989 OK 117, 776 P.2d 847, 60 OBJ 1618, a statute under review was amended after the accident which gave rise to a particular claim. The Oklahoma Supreme Court refused to apply the amendment retroactively, and held the amendatory statute did not clarify and existing law, but rather altered it. The amendment, was labeled a substantive change which altered the rights of the party.

Absent legislative intent to the contrary, statutes are deemed to be applied prospectively only, *Carswell v. Oklahoma State University*, 2003 Ok Civ App 3, 62 P.3d 786. And it has been determined if there is any doubt a statute should be applied retroactively, it should be construed against such effect, *Multiple Inj. Trust Fund v. Pullium*, 2001 OK 115, 37 P.3d 899, 72 OBJ 3695. In absence of clear congressional intent to apply law retroactively, a Court of Appeals applies the appropriate Supreme Court precedent setting forth presumptions governing retroactive application of newly enacted legislation, *DeVargas v. Mason & Hanger-Silas Mason Co., Inc.*, 1990 10CIR 337, 911 F.2d 1377. Newly enacted statutes are presumed to have prospective application when congressional intent is unclear, *Id.* Nothing in the language used in HB 1319, either plainly states an intention the new statute shall operate retrospectively, or by necessary implication requires such construction.

However, when the Oklahoma Supreme Court addressed the plaintiff's claim in *Meiser*, it was stated that the plaintiffs presented "but a single cause of action based on one set of facts; they do not assert multiple causes of action," *Rogers v. Meiser*, 2003 OK 6, 68 P.3d 967. "Only a single cause of action can be predicated on the same set of facts, but different remedies and theories of liability may be pressed in support of each claim alleged," *Fleet v. Sanguine, Ltd.*, 1993 OK 66, 854 P.2d 892, et seq. 64 OBJ 1847. "When a claim for damages arises from one occurrence or transaction, it affords the plaintiff but a single cause of action *Id.*, f.n. 48, 854 P.2d 892. The plaintiffs in the case at bar are seeking various remedies for their single cause of action relating to violations of the RPCDA.

The Oklahoma Legislature has acted, and in HB 1319 it has abolished a cause of action which previously existed in common law. As previously mentioned the purpose of HB 1319 is to limit damages a plaintiff can recover for violations of 60 O.S. §837(b). The amendment was intended to limit available remedies, affecting merely procedural aspects of a claim. This amendment will become effective November 1, 2003, and will have retrospective implications. As such, any claims for relief seeking any remedy other than that provided for in HB 1319 prior to or following the amendment's effective date should be denied. The general rule of statute application is that statutes are to be passed prospectively; however, the exception to this rule is that procedural statutes can operate retrospectively when they do not effect substantial rights, *World Pub. Co. v. White*, 32 P.3d 835. A procedural change is one that affects the remedy only, *Walls v. American Tobacco Co.*, 2000 OK 66, 11 P.3d 626, 71 OBJ 2361.

The enactment by the Oklahoma Legislature is to serve as a directive to the trial court. In *Benson v. Blair*, 1973 OK 102, 515 P.2d 1363, the court stated an enactment which is in the nature of "a directive to the trial court" has been deemed a "mode of procedure" subject to retrospective application. No substantive right has been affected through this amendment. Buyers are not denied access to the courts, their remedies for the harm they have suffered has been procedurally limited by the Oklahoma Legislature. An Oklahoma Appellate Court, in *Triple D. Excavation v. Edwards*, 2003 Ok Civ App 38, 70 P.3d 884, determined changes through an amendment that did not impose additional liability for

damages nor did the changes enlarge or diminish any affective duties or responsibilities of the controlled party affect a substantial right. House Bill 1319 has not imposed additional liability, but has in effect reduced damage liability, without affecting or imposing anymore duties on a buyer or seller regarding the RPCDA.

House Bill 1319 passed by the Oklahoma Legislature limits claims brought by a purchaser for a vendor's failure to disclose property defects to actual damages, whether a claim was filed prior to, or subsequent to the effective date. The statute should apply limiting damages to those specifically mentioned and allowed.

### C. DAMAGES

The exclusive remedy for a buyer, pursuant to the Act, is one for "actual damages, including the cost of repairing the defect", 60 O.S. §837(B). Additionally, the prevailing party is entitled to court costs and reasonable attorney fees, 60 O.S. §837(D).

There are different calculations for damages depending upon the extent of the harm to the property. In *Ellison v. Walker*, 1955 OK 86, 281 P.2d 931, the Supreme Court of Oklahoma held that the measure of damages to real property which are of a temporary character is the reasonable cost of repairing the damage or restoring the property to its former condition, where . . . the cost of restoration is less than the fair value of the property before and after the injury and the building can be restored to substantially the condition it was prior to the injury. The primary remedy for temporary damage to property is the cost of repairing the residence instead of the depreciation of the property's market value resulting from the defect.

In other situations, undisclosed defects may cause permanent damage to the residence. Damage is permanent if the property cannot be substantially restored to its condition prior to suffering the damage. In *Keck v. Bruster*, 1962 OK 35, 368 P.2d 1003, the Supreme Court of Oklahoma 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." Therefore, where the damage to the residence is deemed to be permanent and cannot be repaired, the actual damages will be the diminished value of the property, see *Keck*, supra, at 1005 (citing *Thomas*, supra, at 651).

### •V. CONCLUSION

As you can see, the law of caveat emptor has been severely diminished in the State of Oklahoma. The ORPCDA has created a sharp sword for buyers of residential properties to use when defects are found in their homes. Sellers and realtors should take due note and beware.

The term "realtor" is used in this article in the generic sense, and is intended to include the statutory term, "real estate licensee".