



DIVISION OF REAL ESTATE NEWSLETTER

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RICHARD F. CELESTE
GOVERNOR, STATE OF OHIO

LINDA K. PAGE
DIRECTOR OF COMMERCE

MARGARET J. RITENOUR
SUPERINTENDENT OF REAL ESTATE

Superintendent's Column

Duties In Disclosing Defects Explained

By Margaret J. Ritenour, Superintendent

The largest number of complaints received by the Division of Real Estate involve allegations that a real estate licensee misrepresented the condition of the property or failed to disclose a defective condition. Increasing civil litigation in this area makes the question of the real estate agent's duties to disclose defects an issue of concern to the real estate industry. In this article, I would like to discuss Ohio law with respect to this issue and to highlight a few recent cases decided by the Ohio Real Estate Commission.

Patent vs. Latent Defects

Under Ohio law, the question of whether a real estate agent has a duty to disclose a defective condition depends upon whether the defect is latent or patent. A patent defect is one that can be easily observed by a purchaser upon a reasonable inspection. For example, a patent defect would be missing boards on the porch leading to the home's entry way. A latent defect, on the other hand, is one that a buyer could not readily discover or observe from inspecting the property. An example of a latent defect would be touring a home during the summer and not realizing the furnace is non-operational.

Last year, in the case of *Layman vs. Binns* the Ohio Supreme Court upheld the traditional view that there is no duty to disclose readily observable patent defects (in that case, steel I-beams used to support a bowing basement wall). In its decision, the court upheld the legal doctrine of **caveat emptor**, or "let the buyer beware". Under this doctrine, the buyer has a duty to notice and to inquire about such observable conditions and the real estate agent has no duty to point out the condition.

The rule of **caveat emptor**, however, does not apply to latent defects. Instead, real estate agents have an affirmative duty to disclose any latent defect or condition regarding the property to the purchaser. This disclosure must be made voluntarily, and an inquiry by the buyer about a specific condition or aspect of the property is not necessary to trigger this duty to disclose.

The Ohio Real Estate Commission has found real estate licensees to have violated real estate license law for failing to disclose the existence of latent defects. Of special interest have been several recent cases in which

the Commission has found licensees to have committed violations for failing to disclose unfavorable inspection reports, even though a favorable report was subsequently obtained. The Commission has also held that a licensee has a duty to disclose a defective condition, despite the seller's plans to correct the problem before closing.

In these cases, the Ohio Real Estate Commission has taken the position that the negative reports and information were material facts that must be disclosed to the buyer before a contract to purchase was entered into. The test of whether information is material, and thus must be disclosed, is if the information could effect the person's decision to purchase the property or the terms on which it is purchased. If the information concerns a latent defect which the purchasers would not discover on their own and it is material, it must be disclosed to the purchaser **before** he/she enters into a contract to purchase.

Misrepresentations Regarding Property

Besides making the required disclosure, the real estate agent also has a duty to make sure that information and statements made regarding the condition of the property are accurate and complete. Under Ohio Revised Code Section 4735.18(A)(1), a real estate licensee who knowingly makes a false statement is subject to disciplinary action by the Ohio Real Estate Commission. Even in situations where it cannot be established that the real estate agent knew the statement was false, or had an intent to deceive, the Commission has, in certain cases, found

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ATTENTION BROKERS!

**Are you forwarding
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New Rule Amends Experience Needed For Broker's License

The Ohio Real Estate Commission has amended Ohio Administrative Code Section 1301:5-3-04 to modify the method of computing the 20 transactions an applicant must complete in order to be seated for the broker's examination.

The formula to calculate the transactions is provided below:

- acting as the listing agent in the sale of property = 1/2 transaction
- acting as the selling agent in the sale of property = 1/2 transaction
- acting as the listing agent in the lease of commercial or industrial real estate of at least one year = 1/2 transaction
- acting as the procuring agent in the lease of commercial or industrial real estate of at least one year = 1/2 transaction
- acting as the listing and/or procuring agent in a residential lease of at least one year = 1/4 transaction

Further, if leases constitute more than 16 of the required transactions, the sales associate must have three years of full-time property management experience.

The Commission has also amended Section 1301:5-7-03 to include the categories of brokerage office management and real estate calculators or computers as subjects acceptable for continuing education credit. The Commission felt that these subject areas can contribute to a licensee's knowledge of real estate resulting in

improved licensee service.

The Commission further amended this section to permit the Superintendent to suspend or revoke the approval of any instructor and/or offering entity who fails to comply with the continuing education provisions.

Additionally, the Commission made minor changes to several other rules. These amended rules are summarized below:

- Placed a ceiling of \$1,500 on the fee charged a real estate brokerage changing its business name (OAC 1301:5-1-09)
- Updated the Division of Real Estate's address (OAC 1301:5-1-12)
- Added language to the fair housing statement that must be displayed in the broker's office to include the terms handicap, ancestry, and familial status as protected classes in the sale or lease of real estate (OAC 1301:5-5-01)
- Exempted foreign real estate transactions and the sale of cemetery lots and interment rights from the agency disclosure requirement (OAC 1301:5-5-05)

These rules will become effective on June 1, 1989. Copies of the amended rules can be obtained by writing:

Ohio Department of Commerce
Division of Real Estate
77 S. High St.
20th Floor
Columbus, OH 43266-0547

Superintendent's Column (continued from page 1)

licensees to have engaged in either misconduct or gross negligence. Such a finding is usually predicated upon evidence that the real estate agent failed to exercise reasonable care to verify that the information provided was accurate.

It should be pointed out that this duty to make accurate statements applies to information given regarding patent defects as well as latent ones. Thus, if a buyer asks a real

estate agent for further information regarding the cause, extent, or cost to repair a condition they observe, the real estate agent can be subject to disciplinary action if he/she provides false or misleading information, even if it is a patent condition.

The following are examples of the types of false or inaccurate statements made by licensees which the Ohio Real Estate Commission has found to constitute violations of license law:

- Stating that the furnace was new when it was not.
- Misstating that the home warranty plan offered was for 14 months rather than 12 months.
- Assuring the purchasers that the property had a well and septic system without verifying this to be true.
- Incorrectly stating on a listing sheet that the property had aluminum siding.
- Representing the acreage of property to be larger than it was.
- Providing false information with respect to the school district in which the property was located.

Summary

The area of disclosure and misrepresentations can be very difficult for licensees. To avoid violations of license law and civil litigation on these issues, the following steps are recommended:

- When listing property, carefully review all aspects of the property's condition with the seller. Make sure you explain to the sellers their legal obligation to disclose all latent defects to potential purchasers. Specific

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STATE OF OHIO
DIVISION OF REAL ESTATE
DEPARTMENT OF COMMERCE
77 S. HIGH STREET, COLUMBUS, OHIO
43266-0547
614/466-4100
800/344-4100

RICHARD F. CELESTE, Governor, State of Ohio
LINDA K. PAGE, Director
MARGARET J. RITENOUR, Superintendent

The Ohio Real Estate Commission

ARTHUR C. CHURCH, President
PAUL J. EVERSON
EDWARD J. KIZER
MARCELLUS H. SMITH
LOIS YEAGER

Dennis Ginty, Newsletter Editor

Disciplinary Actions

Here is a summary of recent Commission activities and decisions pursuant to Section 4735.03(E) of the Ohio Revised Code.

The Commission has taken the following action with regard to these licensees:

REVOCATIONS

DANA E. BARNHOUSE, sales associate, Zanesville, Ohio, had his sales license revoked for violating Section 4735.18(A)(6) of the Ohio Revised Code. This revocation became effective February 21, 1989. Barnhouse converted funds which had been maintained in his broker's trust account for his own purposes.

DOUGLAS BURNS, sales associate, Worthington, Ohio, had his sales license revoked for violating Ohio Revised Code Section 4735.18(A), (A)(6) and (A)(9) as it incorporates Section 4735.13. This revocation became effective February 21, 1989. Burns was convicted on five separate counts of theft in violation of Ohio Revised Code Section 2913.02 in the Franklin County Court of Common Pleas. Burns failed to notify the Superintendent of the Ohio Division of Real Estate within 15 days of his convictions. Also, Burns collected money from a tenant which represented a rental payment for a property Burns managed through his broker. Thereafter, Burns used a portion of the funds to pay himself money allegedly owed to him by his broker. Furthermore, Burns issued a check payable to the owners of the subject property which was returned by the bank for insufficient funds.

SUSPENSIONS

ANTHONY DARIANO, broker, Tiffin, Ohio, has his broker's license suspended for 30 days for violating Sections 4735.18(A)(6), (A)(26) and (A)(34) of the Ohio Revised Code. However, due to mitigating circumstances, imposition of the suspension was waived by the Commission. Dariano permitted an individual to act in the capacity of a real estate sales associate at a time when this person was not licensed. Also, Dariano failed to assure that rental payments collected in connection with his brokerage's

management of a property were deposited into a special or trust bank account. Furthermore, a debit was made from a checking account Dariano maintained in connection with his management of the subject property. Dariano failed to assure that the property was properly managed by not accounting for the debit in a timely fashion or taking any action to determine whether the debit was proper.

STEPHEN A. DROTAR, broker, Lima, Ohio, had his broker's license suspended for 30 days for violating Sections 4735.18(A)(6) and (A)(30) of the Ohio Revised Code. This suspension began on March 24, 1989. Drotar received a commission for the sale of a property and then failed to pay a real estate sales associate his earned share of the commission.

GEORGE P. PERSIANO, sales associate, Lyndhurst, Ohio, had his sales license suspended for 30 days for violating Ohio Revised Code Sections 4735.18(A)(20) and (A)(9) as it incorporates Section 4735.21. This suspension began on April 14, 1989. Persiano leased a property to a tenant without the knowledge and consent of the owner. Furthermore, Persiano collected a security deposit and rental payment from the tenant for the subject property without the consent of and not in the name of the real estate broker with whom he was licensed.

JAMES E. WILLIAMS, broker, Cincinnati, Ohio, had his broker's license suspended for 30 days for violating Section 4735.18(A)(6) and (A)(34) of the Ohio Revised Code. This suspension shall commence upon reinstatement of Williams' broker's license. After he returned a salesperson's license to the Division of Real Estate, Williams permitted that individual to act in the capacity of a real estate sales associate when this person was not licensed.

RECOVERY FUND ACTION

FRANK A. WELLS, Cuyahoga Falls, Ohio, had his real estate license automatically suspended pursuant to Section 4735.12(E) of the Ohio Revised Code. This suspension was a result of a payment of \$13,000.00 made from the Real Estate Recovery Fund.

Licensee Who Owns Property Must Identify Self In Ads

Real estate licensees who advertise to sell, lease or exchange any real estate that they personally own must identify themselves in the advertisement by name and must identify themselves as a real estate licensee, according to Ohio Revised Code Section 4735.16(B). The name of the brokerage should **only** be included in the ad if the property is actually listed or being offered for sale or lease through the real estate company with whom the licensee is associated. Otherwise, it should not be included.

An example of proper identification by a salesperson advertising his property for lease would be "John Smith, owner/agent". In this example, John Smith would only include the name of his broker in the advertisement if the

lease of the property was being handled through his real estate broker.

An example of a correct identification by a broker offering property she owned for sale would be "Jane Jones, owner/broker". If the property was listed by her real estate brokerage, the name of her brokerage would have to be included. In that situation the ad would read "Bay Village Realty, Inc., Jane Jones, broker/owner".

It should be noted that the identification required by Section 4735.16(B) applies to all forms of advertisements for the sale, lease or exchange of real estate owned by licensees. This includes yard signs as well as newspaper ads or flyers.

areas that should be covered with a seller include the condition of the furnace, the plumbing, electrical systems, appliances, roof, air conditioning, structural soundness, septic/sewer/well system, the water supply, dryness of the basement, etc.

- To the extent possible, verify information that is provided by the seller. Examples of such information that should be checked by a licensee include the lot size, room sizes, school district, zoning, the age of the house, easements, acreage, lake rights, taxes, utility costs, etc. This should be done **before** this information is included on the MLS listing sheet or in advertisements.
- If you don't have personal knowledge of something or have not verified it, do not offer your opinion or guess as to the correct answer. Either check with the seller, attempt to find the answer from independent sources, or tell the buyer where to find the information. If the answer you are giving is based upon information the seller has provided, make sure to qualify any statements you make as being based on information the seller gave you.
- Always err on the side of caution when deciding whether to disclose a condition or defect in the property. It is always better to "over" disclose, even if you think it might be a patent defect. This practice will not only avoid problems for you, but for your sellers as well, since they also have the potential for exposure to liability for failing to disclose a latent defect.
- If a purchaser seems concerned about a feature of the property, or a problem they notice, point out to them that they can have an inspection performed. If the purchaser wants such an inspection, make sure you write it as a contingency in their offer to purchase.

- Finally, make sure the disclosure is given before the offer to purchase is made. Again, this should include all negative inspection reports, regardless of whether the inspection is done in conjunction with another contract. Such disclosure should also be made even if other positive reports have been received or the seller plans to repair the problem before closing. Again, the buyer should be given all information that may effect his/her decision to purchase or how they structure their offer.

Upcoming Test Dates

The following are the tentatively scheduled dates for the real estate sales, brokers and foreign real estate sales examinations for the upcoming months:

SALES COLUMBUS/CLEVELAND		BROKERS COLUMBUS
June 14	22	5, 12, 19, 26
July 12	20	24
August 2	17	21
Sept. 6	21	18

(Additional exams may be added if warranted)

FOREIGN REAL ESTATE SALES

June 13	27
July 11	25
August 8	22

The foreign real estate sales examination is given only *in Columbus*. Because of the small number of applicants for the foreign real estate dealer examination, these exams are scheduled on an individual basis as the applications are received.

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Department of Commerce
Division of Real Estate
77 S. High Street
Columbus, Ohio 43266-0547

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