

Residential Property Condition Disclosure: Buyer Beware

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Course Objectives

1. List duties of a real estate licensee under the OK Residential Property Condition disclosure ACT (RPCD)
2. Identify nine transaction exemptions under the Act.
3. Explain the definition of 'defect' as used in the RPCD.
4. Examine two case studies.

The Oklahoma Residential Property Condition Disclosure Act

The Act is a modification of the doctrine of *caveat emptor*. It modifies the common law rights, duties and liabilities of the parties and the nature of their potential recoveries. 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 certain circumstances were met.

This Act:

1. Shifts some of the traditional risks for purchasers to the seller. Prior to this, unless the seller fraudulently concealed a defect, a seller had no affirmative duty to disclose the condition of or any defects in the property being sold. This left the burden on the purchaser to inspect the property and discover problems with the physical condition
2. By 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 at the cost of significant changes to the structure of the purchaser's legal remedies.
3. Imposes specific duties on sellers and real estate licensees
4. Limits the remedies of aggrieved purchaser.
5. Requires a "seller" of "property" to deliver, or cause to be delivered, the disclaimer or disclosure statements (statutory forms) to the purchaser.
6. The transactional burdens of buyer and seller, as well as financial risks, may depend in part on whether they are represented by a real estate licensee.

The seller and real estate licensees

1. Liability is limited under the Act.
2. Other parties, including home inspectors, may have liability under other, traditional causes of action, i.e. fraud, negligence and/or other potential causes of action.
3. The scope of the Act depends in part on whether a licensee is involved in the sale.

The buyer

1. Definition of 'seller' under the Act is limited.
2. No licensee involved = no requirement to provide disclosure.
 - a. Buyer must make a written request for the disclosure, or,
 - b. the Act will not apply to this seller and he may be insulated from liability for transferring defective property.
3. The Act limits the recovery available to the purchaser to "actual damages," including the cost of repair. Prior to the Act, the purchaser had other broader remedies under the law, such as fraud, etc.

Case 1: White vs Lim

In *White*, Steve R. White (purchaser) sued Heng Ly Lim (seller), along with Karla Yates and Action Real Estate, LLC, 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. The purchasers sought actual and punitive damages, and discovery as to the defendants' tax returns and other financial information. After some procedural sparring by the parties, the trial court certified the issue of punitive damages for appeal.

The basic issue on appeal was whether the Disclosure Act limits a purchaser's remedies for disclosure violations to actual damages under the Act, or alternatively allows separate claims to be asserted under common law or other statutes (e.g., for fraud and punitive damages). In arguing the latter, the purchasers relied on the Oklahoma Supreme Court's holding in a previous case allowing common law fraud claims as a supplement to the Disclosure Act on facts legally indistinguishable from those in *White*. But, HB 1319 intervened between these two cases and enacted amendments to the Disclosure Act limiting recovery to actual damages (and attorney fees).

The Supreme Court noted the obvious point that the Court's role is to give effect to the intention of the Legislature, 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." 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."

This one thing we know:

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."

Case 2: Carbajal v. Safary

In *Carbajal v. Safary*, a real estate licensee (Safary, represented Carbajal (the Purchaser in Carbajal's purchase of a home. The sales contract provided a 10-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. 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. 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. 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. 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. The Supreme Court concluded that “Safary did all that was required under (section) 836 by informing Carbajal that the report was ‘clean.’

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. This complied with the requirements of the Act sections 833 (required form of disclosure) and 836 (agent’s duty to disclose).

This one thing we know:

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.”

THE REPORT

This house appears to be in relatively good structural condition with evidence indicated by the minor defects of slight and minor foundation settlements. Minor slab deflections were indicated, particularly adjacent to the north wall and the east wall. This engineer did not consider these deflections as structurally significant.

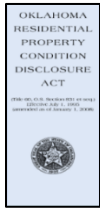
The exterior defects noted at the northwest corner are indicating minor foundation rotation but the patch on the masonry was apparently done some time ago, it appears to be relatively old. The crack has not re-opened (sic) and the movement does not appear to be an active foundation settlement problem. The interior defects associated with the slab deflection were relatively minor. No structural significance was attributed to any of these defects.

The slab deflection can be cosmetically corrected. It is possible to place a grout or mortar cap on top of the slab to level the slab around the perimeter, particularly along the north wall in the northeast and northwest bedrooms, and the southeast bedroom. Since there were no significant structural implications related to the slab deflection, the cap installation would simply be a cosmetic repair of this defects (sic).

It is neither a structural requirement nor a structural recommendation to cap the slab or to raise the elevation of the slab. Underpinning of the slab can also be installed to lift and level the slab.

However, the problem of underpinning would be that the slab is not constructed to support point loading that would be accomplish by underpinning. A void would likely be created under the slab, which would require under slab pressure grouting to completely fill the void and provide uniform support from the slab. This engineer does not recommend underpinning of the slab, particularly because there are no interior defects of structural significance attributed to the slab deflections.

The engineer, at the end of his report, listed the “Requirements” which state in their entirety: “There are no structural requirements at this residence.”



The Oklahoma real estate commission does not have jurisdiction over the residential property condition disclosure act but does have jurisdiction over a real estate licensee who fails to comply with this act. The real estate commission is responsible for developing and amending the disclosure and disclaimer forms and making such forms available. Any alleged dispute or violation of this act of a civil nature must be adjudicated in a court of proper jurisdiction. Further, if the violation involves a real estate licensee, individuals should contact the real estate commission.

THE RESIDENTIAL PROPERTY CONDITION DISCLOSURE ACT

Oklahoma statutes, title 60, sections 831-839 section 831, short title this act shall be known and may be cited as the “Residential Property Condition Disclosure Act.”

Section 832. Definitions as used in this act:

- 1) “Offer to purchase” means an offer to purchase property made by a purchaser pursuant to a written contract;
- 2) “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 statement or disclosure statement as such terms are defined in paragraphs 11 and 12 of this section:
- 3) “Purchaser” means one or more persons who are attempting to acquire a possessory interest in property;
- 4) “Real estate licensee” means a person licensed under the Oklahoma real estate license code;
- 5) “Transfer” means a sale or conveyance, exchange or option to purchase by written

instrument of a possessory interest in property for consideration;

- 6) “Person” means an individual, corporation, limited liability company, partnership, association, trust or other legal entity or any combination thereof;
- 7) “Contract” means a real estate purchase contract for the sale, conveyance or exchange of property, option to purchase property, or a lease with an option to purchase property;
- 8) “Property” means residential real property improved with not less than one nor more than two dwelling units;
- 9) “Defect” means a condition, malfunction or problem that would have a materially adverse effect on the monetary value of the property, or that would impair the health or safety of future occupants of the property;
- 10) “Disclosure” means a written declaration required by this act based on actual knowledge of the seller regarding certain physical conditions of the property. a disclosure for purposes of this act is not a warranty, implied or express, of any kind;
- 11) “Disclaimer statement” means the statement described in paragraph 1 of subsection a of section 3 of this act; and
- 12) “Disclosure statement” means the statement described in paragraph 2 of subsection a of section 3 of this act.

Section 833. Disclaimer and Disclosure Statements

- 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.
- B.** 1. The disclosure statement shall include an identification of items and improvements which are included in the sale of the property and whether such items or improvements are in normal working order. the disclosures required shall also include a statement of whether the seller has actual knowledge of defects or information in relation to the following:
- 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) other defects known to the seller and
 - j) other matters the Oklahoma Real Estate Commission deems appropriate.
- 2) The disclosure statement shall include the following notices to the purchaser in bold and conspicuous type:
- a. "the information and statements contained in this disclosure statement are declarations and representations of the seller and are not the representations of the real estate licensee.",
 - b. "the information contained in this disclosure statement is not intended to be a part of any contract between the purchaser and the seller.", and
 - c. "the declarations and information contained in this disclosure statement are not warranties, express or implied of any kind, and are not a substitute for any inspections or warranties the purchaser may wish to obtain.
- C.** Either the disclaimer statement either the disclaimer statement or the disclosure statement required by this section must be completed, signed and dated by the seller. the date of completion on either statement may not be more than one hundred eighty (180) days prior to the date of receipt for the statement by the purchaser.
- D.** The Oklahoma Real Estate Commission shall develop by rule the forms for the residential property condition disclaimer and the residential property condition disclosure statement. after development of the initial forms, the Oklahoma Real Estate Commission may amend by rule the forms as is necessary and appropriate. Such forms shall be made available upon request irrespective of whether the person requesting a disclaimer or disclosure form is represented by a real estate licensee.

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Section 834. Delivery of Statements

- A.** A seller should deliver either the disclaimer statement or disclosure statement to the purchaser as soon as practicable, but in any event, it shall be delivered before acceptance of an offer to purchase.
- B.** If the disclaimer statement or disclosure 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 or disclosure statement and confirmed the offer to purchase.
- C.** If the seller becomes aware of a defect after delivery to the purchaser of either a disclaimer statement or a disclosure statement, then the seller shall promptly deliver to the purchaser either a disclosure statement or an amended disclosure statement which discloses the newly discovered defect. The disclosure statement or any amendment shall be in writing and shall be signed and dated by the seller. However, if the required document 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 required document and confirmed the offer to purchase.
- D.** The purchaser shall acknowledge in writing receipt of the disclaimer statement or the disclosure statement and any amendment to the disclosure statement. The purchaser shall sign and date any acknowledgement. Such acknowledgement should accompany the offer to purchase the property. If the purchaser confirms the offer to purchase, such confirmation shall be in writing, shall be signed and dated by the purchaser and shall be promptly delivered to the seller.

Section 835. Limitation of Seller's Liability

- A.** 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 disclosure statement or any amendment delivered to

the purchaser before acceptance of the offer to purchase.

- B.** The seller shall not be liable for any erroneous, inaccurate or omitted information supplied to the purchaser as a disclosure required by this act if:
 - 1) the error in accuracy or omission results from an approximation of information by the seller provided:
 - a) accurate information was unknown to the seller at time 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.
- C.** The delivery by a public agency of any information required to be disclosed by the seller of the property shall satisfy the requirements of this act as to the disclosures to which the information being furnished is applicable.

Section 836. Duties of Real Estate Licensee

- A.** A real estate licensee representing or assisting a seller has the duty to obtain from the seller a disclaimer statement or a disclosure statement and any amendment required by the residential property condition disclosure act and to make such statement available to potential purchasers prior to acceptance of an offer to purchase.
- B.** A real estate licensee representing or assisting a purchaser has the duty to obtain and make available to the purchaser a disclaimer statement or a disclosure statement and any amendment required by the residential property condition disclosure act prior to the acceptance of an offer to purchase.

C. A real estate licensee has the duty to disclose to the purchaser any defects in the property actually known to the licensee which are not included in the disclosure statement or any amendment.

D. A real estate licensee who has complied with the requirements of subsections A, B, and C, of this section, as applicable, shall have no further duties to the seller or the purchaser regarding any disclosures required under the residential property condition disclosure act.

A real estate licensee who has not complied with the requirements of subsections a, b and c of this section shall be subject to disciplinary action by the Oklahoma real estate commission as set forth in paragraph 6 of section 858-208 of title 59 of the Oklahoma statutes.

E. real estate licensee has no duty to the seller or the purchaser to conduct an independent inspection of the property and has no duty to independently verify the accuracy or completeness of any statement made by the seller in the disclaimer statement or the disclosure statement and any amendment.

Section 837. Remedies

A. The purchaser may recover in a civil action only in the event of any of the following:

- 1) The failure of the seller to provide to the purchaser a disclaimer statement or a disclosure statement and any amendment prior to acceptance of an offer to purchase;
- 2) The failure of the seller to disclose in the disclosure statement or any amendment provided to the purchaser a defect which was actually known to the seller prior to acceptance of an offer to purchase; or

3) The failure of the real estate licensee to disclose to the purchaser any defects in the property actually known to the real estate licensee prior to acceptance of an offer to purchase and which were not included in the disclosure statement or any amendment provided to the purchaser.

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.

C. Any action brought under this act shall be commenced within two (2) years after the date of transfer of real property subject to this act.

D. In any civil action brought under this act, the prevailing party shall be allowed court costs and a reasonable attorney fee to be set by the court and to be collected as costs.

E. A transfer of a possessory interest in property subject to this act may not be invalidated solely because of the failure of any person to comply with this act.

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.

Section 838, Exemptions from Application of Act

A. this act does not apply to:

- 1) transfers pursuant to court order, including, but not limited to, transfers pursuant to a writ of execution, transfers by eminent domain and transfers pursuant to an order for partition;
- 2) transfers to a mortgagee by a mortgagor or successor in interest who is in default, transfers by any foreclosure sale after default in an obligation secured by a mortgage, transfers by a mortgagee's sale under a power of sale after default in an obligation secured by any instrument containing a power of sale, or transfers by a mortgagee who has acquired the real property at a sale conducted pursuant to a power of sale or a sale pursuant to a decree of foreclosure or has acquired the real property by deed in lieu of foreclosure;
- 3) transfers by a fiduciary who is not an owner occupant of the subject property in the course of the administration of a decedent's estate, guardianship, conservatorship or trust;
- 4) transfers from one co-owner to one or more other co-owners;
- 5) transfers made to a spouse, or to the person or persons in the lineal line of consanguinity of one or more of the owners;
- 6) transfers between spouses resulting from a decree of dissolution of marriage or a decree of legal separation or from a property settlement agreement incidental to such a decree;
- 7) transfers made pursuant to mergers and from a subsidiary to a parent or the reverse;
- 8) transfers or exchanges to or from any governmental entity; or
- 9) transfers of a newly constructed, previously unoccupied dwelling.

B. Nothing in this act shall be construed to alter or change the requirements of section 858-513 of title 59 of the Oklahoma statutes, regarding psychologically impacted real estate. section 839, notices and acknowledgements any notices or acknowledgements required under this act need not be sworn to, verified or acknowledged.

Section 839, Notices and Acknowledgements

Any notices or acknowledgements required under this act need not be sworn to, verified or acknowledged.

