

“FAILURE TO DISCLOSE”  
THE GAME OF HIDE AND SEEK IN RESIDENTIAL REAL ESTATE  
TRANSACTIONS

Traditionally, litigation involving residential real estate falls into three categories. The first category involves what is loosely referred to as “Failure to Disclose” litigation. This occurs when a home buyer discovers a defect within the home after settlement, and feels that the Seller was less than honest about the condition of the home when it was sold. The second type of litigation involves the breach of an agreement of sale for residential property. Typically this takes place when one party to an agreement of sale fails to perform their obligations under the agreement of sale, usually involving a failure to complete settlement, sometimes caused by allegations of “failure to disclose”. The third type of litigation involves title issues, such as when a landowner has the quality of their title called into question by a third party. This last type of litigation is typically handled by the title insurance companies.

Litigation involving a breach of the agreement of sale for residential property usually involves the allegation that one party has not performed an obligation under the agreement of sale or that the seller failed to disclose the true condition of the property. The standard agreement of sale for use in a real estate transaction is the Pennsylvania Association of Realtors (PAR) form, which is silent on what remedies a buyer has if the seller defaults on the agreement of sale, prior to settlement, for failing to disclose defects with the property. The agreement of sale is also silent as to what happens if the seller completes settlement and is charged with failing to disclose. Therefore, the remedies the buyer has are only limited by common law, that is, the law that has evolved from common practices and usages as enforced by judgments and decrees of the courts.

If the buyer finds out about the non-disclosure prior to settlement, at common law, the buyer may still enforce the agreement of sale by filing an equitable action for specific performance. A suit for specific performance asks the court to use its equitable power to require the seller to deliver title to the property as represented by the seller. The court will grant the relief based on the notion that real estate is deemed to be unique, and that no amount of money will compensate the buyer for the failure of the seller to complete settlement. The buyer may ask the court for restitution damages in the equity suit, presumably the costs to correct the non-disclosed condition. As an alternative, the buyer can always file suit against the seller terminating the agreement of sale and sue for damages incurred as a result of the seller’s failure to disclose. Damages may include incidental losses and other out-of-pocket expenses. Usually one of the most common losses suffered by a buyer is the loss of an interest rate, which buyer may have locked in and which may have been lost by the delay of a settlement. Traditionally, courts have not allowed buyers to recover the benefit of the bargain on lost interest rates, since the courts feel it is too speculative. This is true even when the lost monies can be calculated with precision when the suit comes to trial years later.

The doctrine of caveat emptor holds that the buyer should beware as to the condition and viability of his or her purchase. The agreement of sale puts the buyer on notice to complete inspections of the property to be purchased and make an informed decision as to whether to buy a subject property. Even where a buyer includes inspection contingencies in an agreement of sale, coupled with the merger doctrine, caveat emptor's general effect is to preclude the buyer from complaining about a defect or unacceptable condition discovered after taking title to the property. Under the merger doctrine, the terms of a written agreement of sale are said to be "merged" into the deed, upon the signature and delivery of a deed at settlement. In merging with the deed, all duties, rights and obligations of the seller under the agreement of sale are thereby extinguished. Combining the doctrines of merger and caveat emptor leaves the buyer with little redress for defects discovered after settlement. In recognition of the harsh "merger" rule, courts recognized several exceptions. One exception having importance for buyers is that independent covenants, duties, obligations or provisions arising under the agreement of sale not intended to be incorporated within the title provisions of the deed do not merge with the deed at settlement. Also extending the survival of collateral duties of an agreement of sale, Pennsylvania courts recognize the survival of a builder's duty to construct a dwelling house reasonable fit for the purpose for which it is required, that is for human dwelling. This is called the "implied warranty of habitability" and has even been extended to remote purchasers.

In cases of fraud, the courts have provided relief to buyers under causes of action for (i) affirmative concealment of a known defect ("concealment"), (ii) knowing misrepresentation of a defect or condition ("fraudulent misrepresentation"), (iii) failure to disclose a known defect in the presence of a duty to do so ("failure to disclose"), (iv) innocent misrepresentation of a material defect ("innocent misrepresentation") and (v) negligent misrepresentation made by an individual owing a duty of care ("negligent misrepresentation"). Cases involving any level of fraud frequently come down to fact sensitive judicial decisions based on the parties' bargaining power, information and sophistication of the parties.

Other causes of action may be available to a buyer under the Real Estate Seller Disclosure Act for breach of that statute or the Unfair Trade Practices and Consumer Protection Law. Both of these statutes provide additional protection to a buyer beyond theories of negligence or fraud under common law.