

# REAL ESTATE AGENT'S EXPOSURE FOR INCOMPLETE PROPERTY DISCLOSURE

Bradley Damm, Esq.

Real estate professionals commonly assume the residential property disclosure is the sole responsibility of seller and not the seller's real estate broker. This misconception has resulted in allegations and claims against real estate brokers for negligence, breach of contract, misrepresentation, violation of the Colorado Consumer Protection Act, fraud based claims, and even civil theft. The focus of this article is simply on the violation of the statutory residential disclosure requirements of seller's agents.

## Why the Confusion

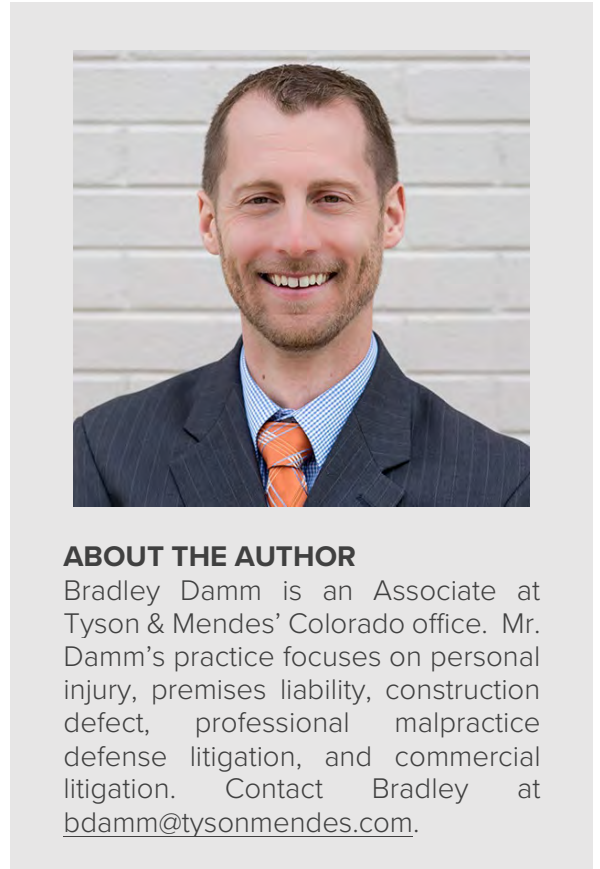
In Colorado, real estate brokers may complete standard and approved legal forms and give advice as to the legal effect of these forms.<sup>1</sup> One such form is the Seller's Property Disclosure (Residential).<sup>2</sup> The form states in bold capital letters at the top, **"THIS DISCLOSURE SHOULD BE COMPLETED BY SELLER, NOT BY BROKER."**<sup>3</sup> The instructions at the top of the form are specifically addressed to the seller, not the broker.<sup>4</sup> Finally, the form states near the bottom that the buyer understands the real estate brokers do not warrant or guarantee the information being disclosed by the seller.<sup>5</sup> Thus, almost all of the instructions on the Seller's Property Disclosure (Residential) form implies the disclosure of defects is the seller's sole responsibility.

## Real Estate Broker's Residential Disclosure Responsibilities

Despite the Seller's Property Disclosure (Residential) form being primarily directed at the seller, the seller's broker has disclosure responsibilities of his/her own. A seller's broker must disclose to "any prospective buyer or tenant all adverse material facts actually known by the broker."<sup>6</sup>

## Adverse Material Facts

Adverse material facts may include issues with the title, physical condition of the property, material defects, and environmental hazards.<sup>7</sup> Examples of adverse material facts that have been alleged in lawsuits



<sup>1</sup> *Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n*, 312 P.2d 998, 413-422 (Colo. 1957)

<sup>2</sup> Colorado Department of Regulatory Agencies, Division of Real Estate, <https://www.colorado.gov/pacific/dora/division-real-estate-contracts-and-forms>.

<sup>3</sup> *Id.* p. 1.

<sup>4</sup> *Id.* p. 1.

<sup>5</sup> *Id.* p. 8.

<sup>6</sup> C.R.S. § 12-10-404(3)(a).

<sup>7</sup> *Id.*

against seller's brokers include damage to the structural integrity of the foundation of the building,<sup>8</sup> a city's plan to acquire the property,<sup>9</sup> and grading, drainage, soil expansion, and toxic conditions of groundwater and soils.<sup>10</sup> Thus, in order to avoid a potential lawsuit after the sale of the property, these and other similar material facts must be provided to a potential buyer by the seller's agent, if known.

### Actual Knowledge by the Seller's Broker

The statute requires actual knowledge by the seller's broker.<sup>11</sup> Actual knowledge is real knowledge as opposed to presumed, constructive, or imputed knowledge.<sup>12</sup> Actual knowledge means a person's knowledge must be more than "potential, possible, virtual, conceivable, theoretical, hypothetical, or nominal."<sup>13</sup> Thus, a plaintiff cannot simply argue the broker should have or might have known of the material defect.<sup>14</sup> Because actual knowledge is often a disputed issue of material fact, a Court may be precluded from entering summary judgment in favor of the broker.<sup>15</sup> Therefore, actual knowledge will usually be determined by the trier of fact at trial.

### Takeaway

Seller's brokers in residential real estate must be aware of their own disclosure responsibilities. Failure to disclose material facts about residential property to a prospective buyer can result in costly litigation. Because "actual knowledge" is often a disputed material fact, the issue may not be resolved until trial. Even if the broker complied with his/her statutory obligations, he/she will still incur substantial defense costs before the issue is resolved. Thus, sellers and their brokers should err on the side of over disclosure about the residential property being sold.

<sup>8</sup> *Baumgarten v. Copping*, 15 P.3d 304, 306 (Colo. App. 2000); *Langlois v. Parr Eng. & Consulting, Inc.*, 2018WL3656604, \*2 (El Paso Cty. Dist. Ct. 2018).

<sup>9</sup> *City of Colo. Springs v. Andersen Mahon Enterprises, LLP*, 260 P.3d 29, 35 (Colo. App. 2010).

<sup>10</sup> *Bechthold v. Chateau Custom Builders, Inc.*, 2011WL7435149, \*1 (Arapahoe Cty. Dist. Ct. 2011).

<sup>11</sup> C.R.S. § 12-10-404(3)(a).

<sup>12</sup> *Intel Corp. Investment Policy Committee v. Sulyma*, 140 S.Ct. 768 (Colo. 2020) (citing Ballentine's Law Dictionary 24 (3d ed. 1969); Black's Law Dictionary 1043 (11<sup>th</sup> ed. 2019)).

<sup>13</sup> *Id.* (citing Black's Law Dictionary 53 (4<sup>th</sup> ed. 1951)).

<sup>14</sup> *Bechthold*, 2011WL7435149 (Arapahoe Cty. Dist. Ct. 2011).

<sup>15</sup> See *id.*

*Reproduced by Berkley Service Professionals  
with permission of the author.*



**Berkley**  
**Service Professionals**  
A Division of Berkley Managers Insurance Services, LLC  
| a Berkley Company