

What "As-Is" . . . Is Not

By: **Kelly G. Richardson**

There is a legal myth circulating in the real estate industry, and this "urban legend" is as hard to get rid of as a persistent cold. The myth is that in an "as-is" sale, the Realtor® and seller do not have to bother with inspections and disclosure. As with most myths, it is not true. In fact, there is not even a kernel of truth behind this myth. There is only danger for the unwary real estate professional or seller.

NO PROTECTION FOR REALTOR

"As-is" or present condition" clauses have no effect upon the obligations of a real estate professional to conduct a reasonably diligent visual inspection of all accessible areas of a property and to disclose material facts (Civil Code 2079).

PROTECTION ONLY FOR SELLER

An "as-is" clause only protects the seller (not the listing agent) from contractual liability arising out of the condition of the property. In other words, the buyer who otherwise after escrow close would demand the seller to repair a leaky roof, claiming some sort of warranty, would normally be barred from this by an "as-is" clause.

PROTECTION NOT ABSOLUTE

However, the protection from an "as-is" clause is not absolute. A seller might still have tort liability for negligence or even fraud. If a seller had negligently built an addition, liability for negligence probably is not barred by the "as-is" clause. Moreover, the contractual "as-is" limitation does not affect the tort liability for fraud - the failure to disclose a known material fact, which, if known, would have affected a buyer's decision. Whether or not selling with an "as-is" clause, the seller must still disclose known facts which might be important to a buyer.

The seller's agent must still conduct the required inspection and must also disclose known material facts.

THE DANGER

The danger of this urban legend is that time and time again, real estate professionals and their clients are lulled into a false sense of security by the "as-is" clause. The problem is so prevalent that at the Legal Affairs Forum in Monterey a few years ago, legal staff from the California Association of Realtors (CAR) specifically requested we do what we can as legal practitioners to help stamp out this myth. If a real estate professional errs in this error, the result from a disgruntled buyer could be a claim for fraud and negligence.

THE MORAL

Do not let ANYTHING distract or deter you from doing your diligent inspection and from making a full WRITTEN disclosure.

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