Buyer Professional Inspection Reports – *Should Copies Be Turned Over To Sellers?*

The OREF Residential Sale Agreement provides at Section 10 (Licensed Professional Inspections) that: "Buyer shall promptly provide a copy of all reports to Seller only if requested by Seller**."**

This provision, or one very similar to it, has been in existence for many years, going back to the time when sellers didn't want to know the results of UST testing, and so declined to permit it be performed.[1] The reason they didn't want to know was that (a) if there was ground contamination they would likely lose their buyer, and (b) the owner would be automatically liable for the cleanup. As a result, the OREF Sale Agreement has since required that certain types of invasive tests first require seller consent, so the seller could decide, in advance, if they even wanted to have the test performed - since Oregon law does not require testing proactively to determine if there is a problem.[2]

Today, the issue remains whether the requirement that the buyer will share the inspection report "…only if requested by Seller" is still the best policy. A recent ***In My Opinion*** article in the PMAR E-News, by Gary Taylor ("The importance of Full and Total Disclosure"), opined that it was bad policy. He presented a fictionalized scenario in which the first inspection report identified faulty electrical wiring, but following the sale-fail, the seller did not request a copy of that report. The inspection conducted in the subsequent sale transaction of the same property missed the faulty wiring issue entirely. After closing, the home burned down and a child died, due to the faulty wiring. Although I have difficulty seeing how the seller could be held liable for not asking for the report,[3] as Gary's article suggests, the scenario is nevertheless chilling.

Based upon anecdotal reports – such as irate brokers complaining to me about buyer brokers either submitting entire reports with their request for seller repairs, or buyer brokers unilaterally sending over a buyer's report after a sale-fail, as a sort of "parting shot" – I believe the tide of opinion is diametrically *opposed* to turning over inspection reports, unless requested by sellers.

The rationale that sellers should not be sent unsolicited reports is based upon the opposite of Gary's policy. That is, his article assumes the *accuracy* of the first inspection report and the

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[1] Underground Storage Tank (UST). This involves testing the soil around the tank to determine the presence of heating oil that resulted either from a leak or spillage when the tank was filled.

[2] That is not the case if the tank is no longer in use at the time of sale. In such cases, Oregon law requires decommissioning. See: http://www.deq.state.or.us/lq/tanks/hot/buyingselling.htm

[3] Oregon law does not *require* sellers to ask, or buyers to share, an inspection report. If the seller did not know what was in the report, and the law does not require that he/she request it, how can a seller be held liable for the contents? The clause in the OREF Sale Agreement represents a compromise, of sorts, requiring that buyers share the report *if asked*. This is more than what would happen if the Sale Agreement said nothing. Historically, before the clause appeared, buyers routinely refused sellers' requests for a copy, saying they bought and paid for the report, and if the seller wanted it, he/she could pay for it. Gary's argument seems to be based upon the theory that since the OREF provision *invites* sellers to ask, it means they are *required* to ask. They are not.

inaccuracy of the second one. The brokerage community, however, believes that not all reports are created equal, and that some can be just plain wrong. This is based, undoubtedly, upon each broker's belief that the inspectors they use are the best of the best; that makes them cautious about relying upon the accuracy of other unknown inspectors' reports.

As we know, as soon as an unsolicited report arrives in a seller's or seller agent's inbox, the questions become: "*Am I legally charged with knowledge of the contents if I don't open this email? Am I going to have to turn it over to my new buyer, even if my own inspector doesn't agree with it? Am I going to have to attach it to the seller property disclosure form if there is a sale-fail?*"

It is this conundrum that raises the ire of sellers and listing brokers, since they believe that the OREF Sale Agreement text is clear on its face, and they do not like being placed in an impossible situation, with no clear answers, and uncertain legal liability.

For example, suppose the first report was patently wrong, and the second report was more thorough and correct. Now the seller, having both, is placed at risk of sabotaging their own sale by having to turn it over to the second buyer.[4]

In answer to a seller's question, or that of their listing agent *"What should I do?"* I maintain that the Sale Agreement is a contract, and this provision means nothing more or less than what it says. It does not require sellers to request a buyer's inspection reports, and it does not require buyers to unilaterally turn them over.

The policy of not turning over a report *unless requested* is not new; it has been Realtor® practice for several years. The reason it remains so today is because that is what the industry wants. If a change in the policy is demanded, I suggest brokers make their desires known to OREF. However, since most buyer agents also serve as seller agents, I suspect a large majority of the industry would not seek a change, or if they did, it would be to make the current clause even more forceful. So, until changed, I recommend that buyers and buyer agents should be respectful of the clause and the seller's contractual expectations. *~PCQ*

[4] In Gary's fictionalized scenario, where the attorney is questioning the seller, the dialogue suggests that Oregon law "requires" attaching a copy of an inspection report, if one was performed within the last three years. I respectfully disagree. I submit that the property disclosure question (albeit poorly drafted) is really asking if the seller has had an inspection (e.g. as a buyer), and if so, to attach that report. The inspection question No. 5(F) cannot reasonably be construed to *require* sellers to proactively obtain copies of buyer's inspection reports for sale fails, and then amend their disclosure form and attach it. Of course, if the seller did have a copy of a buyer's report from an earlier sale-fail, I believe it should be turned over. But the instruction in the disclosure statement permits the seller to attach the report *or provide an explanation*. I would have no difficulty in answering "Yes" to whether such an inspection had been done, but explaining that "The inspection was performed by a previous buyer's inspector. That transaction did not close, and Seller did not request a copy of the report."