

I CLAIM, YOU CLAIM, WE ALL CLAIM TO DISCLAIM

THERE ONCE WAS AN AGENT NAMED NO-BRAINER,
WHO IN HASTE FAILED TO DELIVER THE DISCLAIMER,
UNTIL AFTER IT WAS ACCEPTED,
LEAVING HER SELLER REJECTED,
WITH NO CHOICE IN THE SUIT BUT TO NAME HER.

ANON TALL LAWYER

Your man on the corner continues to hear grumbling about failure to get disclaimers and disclosures to buyers before contract acceptance.

Va. Code § 55-520 provides as follows:

A. The owner of ... shall deliver to the purchaser the written disclosures or disclaimer ... prior to the acceptance of a real estate purchase contract. ... The residential property disclaimer statement or residential property disclosure statement may be included in the real estate purchase contract, in an addendum thereto, or in a separate document.

B. If the disclosure or disclaimer ... is delivered to the purchaser after the acceptance of the real estate purchase contract, the purchaser's sole remedy shall be to terminate the real estate purchase contract at or prior to the earliest of (i) three days after delivery ... or (ii) five days after ... [mailing], or (iii) settlement ..., or (iv) occupancy ..., or (v) the execution ... of a written waiver ..., or (vi) [loan application with disclaimer termination language].

Legal Corner

So, in the haste to get an offer before the REIN electrons even begin their journey into cyber space, the buyer presents an offer without the disclaimer. Seller (after dutifully considering the other ten offers) signs and accepts buyer's offer. The disclaimer, with a smiley face Post-It™ note on it asking the selling agent to "please sign and return" is then sent to the buyer's agent, along with the executed contract. At closing, the buyer, mad over [insert your favorite buyer mad over a minor thing story here] says I am canceling pursuant to Va. Code § 55-520 and walks away. Whether the buyer can do so without penalty turns, of course, on how and whether the disclaimer was delivered, and the unabridged language of Va. Code § 55-520 is fairly clear regarding the possible outcomes so I will commend that your self-analysis. Ask yourself though whether as a listing agent you have done your job well – particularly in this market – if you have left a buyer with an out even if it is only for a few days and not until settlement.

Look, although I am but the (tall) oracle of judicial wisdom loitering on the agent corner, I recognize the practical problems here. I just think you can easily solve them. For example, it would be quite easy to scan the disclaimer, save it in Adobe pdf (or any other small file size format), and email it to any agent about to write an offer. Many of you have web sites – scan and post the disclaimer there for downloading. Note those options in agent remarks. Recall there is no statutory requirement for the disclaimer to be signed (and having dutifully read my previous articles you will know that a return email can be a signature in any event – right?) although the VREB prescribed form has a buyer signature line. You can fax it (and you can get an internet fax number that can be sent, received and accessed whether you or the recipient are at a fax or not). You can leave it at the property and require acknowledgement with any offer. I understand your Association – of which I am, ahem, Affiliate of the Year – plans to help solve this problem soon with a transactional platform, but until then you need to solve it.

You can see an example of such a posting at www.lytlelaw.com, where in the REALTORS® Overview page I have posted a link to a sample pdf disclaimer. Call or email me if you have any questions or comments.

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