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2014 Revisions to the TDS

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April 1, 2014

Effective July 1, 2014, the Transfer Disclosure Statement (TDS) has been amended to require the property seller to disclose to a transferee specified claims for damages that have been made by the seller against the builder of the property.

The new language is contained in Question #16 of Section 2(c) of the TDS. The language requires the seller to disclose, among other things, "claims for damages by the seller pursuant to Section 910 or 914 threatening to or affecting this real property, claims for breach of warranty pursuant to Section 900 threatening to or affecting this real property, or claims for breach of an enhanced protection agreement pursuant to Section 903 threatening to or affecting this real property, including any lawsuits or claims for damages pursuant to Section 910 or 914 alleging a defect or deficiency in this real property or 'common areas.'"

To understand the significance of these changes, a little history is in order, starting with Senate Bill 800. SB 800 was passed in 2002, with an effective date of January 1, 2003. SB 800 set up a mandatory procedure requiring a homeowner to present a written notice of claimed defects to a builder before that homeowner could file a lawsuit for those claims. A "builder" was defined as any entity or individual, including but not limited to a builder, developer, general contractor, contractor, or original seller who, at the time of the sale, was also in the business of selling residential units to the public. The law set minimum standards for, among other things, the design and construction of a residence or individual dwelling unit. The law also provided for a minimum one-year express limited warranty covering the fit and finish of the following building components: cabinets, mirrors, flooring, interior and exterior walls, countertops, paint

finishes, and trim. A builder could, but was not required to, offer greater protection or protection for longer periods than that set forth in the minimum one-year warranty covering fit-and-finish items.

The law required that this process begin with the homeowner submitting a written claim of the alleged violations to the builder. The law was set up to allow the builder to acknowledge receipt of the claim, conduct an inspection of the property and the claimed defects, and then be given the absolute right to repair the defects prior to a lawsuit being filed by the homeowner. If the builder failed to repair the defects or the homeowner was dissatisfied with the repairs, the homeowner could then proceed with a lawsuit.

The provisions of SB 800 were codified in California Civil Code §§ 895 *et seq.* The standards for residential construction are set forth in Civil Code §§ 895-897. The warranty covering fit-and-finish items is set forth in Civil Code §§ 900-907. Section 903 allows a builder to offer an enhanced protection agreement in place of the provisions setting forth the minimum standards for residential construction or the fit-and-finish warranty. Any such election must be in writing and signed by the parties no later than the date of close of escrow. If the builder elects to provide an enhanced protection agreement, the builder must provide to the homeowner, prior to close of escrow, a complete copy of the provisions of Civil Code § 895 *et seq.* and advise the homeowner that the builder has opted out of the statutory scheme.

The pre-litigation procedure setting forth the notice requirements on the part of the homeowner, the response by the builder, the builder's election to repair, etc., is contained in Civil Code §§ 910-938. Civil Code § 901 specifically outlines the procedures required prior to filing an action for violation of the standards for residential construction. Section 914 states that the provisions of this law establish a non-adversarial procedure to address the types of defects covered by the law but also provide a builder with the option of relying on alternative non-adversarial procedures to resolve the same types of disputes, provided those are set forth and signed by the parties in their contract at the time the sales agreement is executed. If the builder and property owner agree to rely on the builder's alternative non-adversarial dispute procedure, then those agreements and procedures apply rather than the statute.

Even though Civil Code §§ 895 *et seq.* has been the law since January 1, 2003, many people still refer to it as Senate Bill 800. Given the new language in the TDS, it will be important for sellers and buyers to understand the following:

- The references in Question # 16 refer to those sections of Civil Code §§ 895 *et seq.* and are the types of claims that a property owner may have made against a builder for the sale of a new residence sold after January 1, 2003 and otherwise governed by the provisions of the statute;
- Question # 16 asks the seller to identify the claims that have been made pursuant to those sections of the statute;
- The TDS requires the seller to provide an explanation of any question that is answered in the affirmative. This section is in the same location as it has always been (just below the list of 16 questions in Section 2(c));
- The explanation section provides the seller with the opportunity to explain the status of any claims

(e.g., whether the builder has responded and/or elected to complete repairs, the nature and extent of those repairs, whether the builder made repairs to all of the conditions or claims made by the seller, whether only some of the conditions or claims were repaired, whether the builder paid the seller any money for any of the conditions or claims in lieu of repairs, whether the seller then completed any repairs (and, if so, who performed those repairs, their license status, permit status, etc.), whether any documentation exists regarding the foregoing (including photographs, invoices, reports, plans, permits, specifications, releases of liability, any enhanced builder warranties or alternative non-adversarial procedures other than those set forth in the statute, etc.);

- The TDS is a statutory, as distinguished from common-law, obligation. A seller is still required to disclose all facts materially affecting the value or desirability of the property;
- A seller or buyer who has any questions should be referred to a qualified real estate attorney. A seller or buyer might also be provided with C.A.R.'s Q&A regarding this statute for additional information.



Laurie and I had two very challenging real estate rights issues that we were advised were going to be difficult to prevail on. The RHRC team engaged with us and helped us understand our rights and prevailing position. RHRC were thoughtful advocates for us from the beginning to conclusion of our cases. We feel fortunate to know we will always be able to call on the firm in the future and that they are our legal counsel.

Albert "Rocky" and Laurie Pimental, President of Global Markets and Customers, Seagate Technology

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