

AMENDED DISCLOSURES UNDER THE REVISED PRDS AND CAR CONTRACTS

Civil Code §1102, the PRDS contract, and the CAR contract all state that the impact of providing an amended TDS after a contract is accepted is the same; the buyer has three (3) days after delivery in person or five (5) days after delivery by mail to terminate the contract.

Civil Code §1102 does not state whether the right to terminate starts after the seller makes his/her disclosures or whether one or both brokers need to have done so as well. The statute also doesn't require any supplemental disclosure and therefore does not address the relationship of an SSC or SPQ to this issue. The two contracts treat these issues differently. These differences start with the definition of those disclosures that the seller is required to provide.

PRDS uses the term "Disclosure Documents" and it includes the TDS and SSC. CAR uses the term "Statutory Disclosures" but it includes only the TDS. (Please note that both contracts include within their definition the NHDS and lead disclosures but that this article only discusses these issues in relationship to the TDS, SSC and SPQ.)

Both contracts provide that the required disclosure(s) must be "fully completed". Under the PRDS contract this applies to both the TDS and SSC while under the CAR contract it applies only to the TDS and not the SPQ. In addition, under PRDS both the listing and selling brokers must complete their section of the TDS while only the listing agent must do so to meet the definition under the CAR contract.

An amended TDS (and SSC if the PRDS contract is being used) may be required where the disclosure is provided after acceptance and is not "fully completed" as that term is defined in each contract. This could occur where the seller has not answered all questions and/or has not signed the disclosure. This could also occur where the seller has provided an incomplete response to a question. Finally, this could occur where the applicable agent has not completed and signed their section of the TDS.

The contracts also treat the issue differently when the disclosure(s) is provided prior to acceptance. Under PRDS, when the disclosure documents are provided prior to acceptance, the buyer affirms that he/she has already "received, read and signed" a "fully completed" TDS and SSC. This language may enable a seller to argue that the buyer has waived any deficiency in the TDS or SSC. The outcome will depend on the facts and circumstances including how material the omitted information is to the transaction. The outcome of this issue may also turn on whether or not the omission gives rise to common law rescission rights on the part of the buyer.

There is no comparable language in the CAR contract and thus, contractual language to support a seller's claim of waiver. This is because the CAR contract does not anticipate the TDS being provided to a buyer prior to acceptance.

The two contracts also take a different approach where there is a material inaccuracy in the disclosures. The CAR contract contains a contractual obligation to provide an amended

disclosure where the seller or listing broker, prior to the close of escrow, becomes aware of “a material inaccuracy in [the] disclosures” unless the “material inaccuracy” is one which the “buyer is otherwise aware, or which are disclosed in reports provided to or obtained by the buyer or ordered and paid for by the buyer.” Whether this contractual obligation exists is going to depend on the facts and circumstances regarding the materiality of the purported inaccurate disclosure, whether the buyer is aware of it based on, for example, an oral disclosure or because the inaccuracy is visually apparent, or whether any report identifies the inaccuracy.

The PRDS contract does not contain any specific contractual obligation on the part of the seller or listing broker to amend the TDS or SSC. Depending on the facts and circumstances, there still may be a common law obligation to do so based on the requirement that a disclosure be truthful, accurate, and complete.

In this geographic area, this issue often involves the following circumstances. A seller identifies an inaccuracy in the TDS or SSC. If the listing agent provides an amended TDS or SSC the right of termination is clear. If communicated orally or in an email, the issue is whether this communication is intended to provide termination rights, does so on the basis of the language that is used, or is provided only to put the buyer on notice of the inaccuracy but without addressing the issue of any termination right. Upon receipt of such information, it is a good practice for the buyer and buyer’s agent to clarify these issues with the seller and listing agent so that the intent of the parties is understood and potential misunderstandings avoided. The words that are used in transmitting this information, responding to it, as well as other facts and circumstances will also have an impact on these issues. The foregoing analysis applies to the current version of the PRDS contract.

Another issue that sometimes arises is whether a selling agent can amend a disclosure document or their section of the TDS to create a right of rescission in the buyer. This is expressly prohibited by the CAR contract and the Civil Code. To the extent that PRDS tracks the Civil Code the same limitation would also apply. One rationale for this outcome is that this prevents a selling agent from creating a right of rescission in the buyer at any time.