



Disclosure, Material Facts, the Residential Property Disclosure Statement, and the Due Diligence Fee

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QUESTION: Do all material facts have to be disclosed on the Residential Property Disclosure Statement? If the seller fails to disclose a material fact or makes a misrepresentation about a property, can a buyer get their Due Diligence Fee back?

ANSWER: No and yes, respectively. As to the first question, a seller ordinarily is not required to disclose facts about their property. However, as the Court of Appeals recently restated in [Cummings v. Carroll](#), a seller must disclose *material* facts when such facts are only known to the seller and not within the diligent attention, observation, and judgment of the buyer. In other words, if there is a material latent defect on the property only known to the seller, and the buyer cannot discover the defect through reasonable diligence, the seller has a mandatory duty to disclose.

[The Residential Property Disclosure Act](#) provides that the seller can choose to answer yes or no and explain what they know on the RPDS, or they can check no representation. However, some questions on the RPDS directly ask the seller to make a disclosure about material facts that the seller must disclose. Agents should make sure that their sellers know that they have a legal duty to disclose any required material facts, and that the best place to do so is on the RPDS. If a broker becomes aware that the seller is not making a required disclosure on the RPDS, the broker should inform their client that they must make the disclosure for them pursuant to the License Law.

As to the second question, if a buyer goes under contract, and it is later revealed that the seller failed to disclose a material fact or made a misrepresentation that the buyer reasonably relied upon, then the buyer could have several legal claims. The claims would vary case to case, but if successful, the buyer could be entitled to damages. Such damages could be the amount necessary to place the buyer back in the same position they would have been had the offer not been made in the first place. That amount would at least include the Due Diligence Fee. Some claims available to the buyer could award substantially more damages, plus an award of attorney's fees.

If it is discovered during a transaction that a required material fact was not disclosed or that a misrepresentation was made by the seller, it is important that both listing agents and buyer agents advise their clients to seek legal counsel. The buyer and seller may eventually agree to terminate the contract and part ways just by a return of the Due Diligence Fee. However, that resolution is a legal matter and not real estate brokerage. Recommending counsel is therefore necessary, even if a client chooses to proceed without it.

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