

PROS AND CONS OF A SELLER OBTAINING A HOME INSPECTION PRE-LISTING

Purchasers of residential property routinely will obtain a third-party home inspection report. However, sellers and listing agents have called us asking about the propriety of the *seller* obtaining a home inspection report.

The information herein is not intended to offer legal or financial advice. Please consult with Mr. Stavros or another appropriate professional for specific and/or more information. The information below provides varying degrees of perspective and may vary with market conditions. While some are legal points, many of the guidelines are marketing or practical points.

Pros of Obtaining an Inspection Before the Seller Puts a Home on the Market

1. It tends to avoid the situation of the seller having to negotiate repairs 30 days or so into the escrow (when the seller may have purchased another property) and therefore is in the weakest negotiating position. This can be less of a problem with a market turnaround often giving rise to multiple offers.
2. Before accepting an offer, the seller is in a stronger negotiating position. Before a contract is entered into is the time for the seller to let the buyer know what the seller will fix and will not fix. Once the seller accepts an offer and is then subsequently presented with the buyer's "wish list" of repairs or replacements, the seller is then in a weaker position to negotiate.
3. By getting the inspection up front, the seller may choose with whom to have the repairs done. Often a handyman can be used for much or some of the corrective work. Once the parties are into the escrow, contractors will typically be required and will cost more.
4. Often, the real estate contract calls for "like material" to be used when replacing damaged materials. If the seller has to replace any materials after the purchase offer, he will have to replace with the same type and quality of materials. Before the contract is entered into, the seller can choose less expensive materials.
5. By having the inspection done up front, the number of surprises or latent problems are reduced, both to the buyer and the seller. Less surprises means less opportunity for disagreement and therefore less likelihood that the transaction will fall apart.
6. By making repairs or appropriate replacements up front, the home will show better and will draw a better price.
7. Dollar limits are often put in a seller's counter-offer when the seller has no idea what a buyer's inspection will turn up. Further, the seller wants to limit how much he will pay out for repairs. However, a dollar limit in a counter-offer *may* telegraph a certain message to the buyer which results in the buyer being suspicious. The buyer is often led to believe that the seller knows something that he is not telling. This may well cause the buyer to obtain more specialized inspections and negotiate harder.

8. By the seller obtaining an inspection up front, it shows good faith in carrying out the seller's disclosure requirements. The seller's effort communicates to the buyer that the seller is willing to disclose something rather than hiding information, thereby paving the way for smoother and more agreeable negotiations.

9. A seller or an agent will not be liable for "any error, inaccuracy or information if it was not within his personal knowledge, was based on information *provided by a public agency or licensed expert*, and ordinary care was exercised in obtaining and transmitting the information." [CCP §1102.4(a)]. However, see item 9, *infra*.

Cons of Obtaining an Inspection Before the Seller Puts a Home on the Market

1. The listing agent could unwittingly open himself up to liability *by interpreting the findings* of the home inspection to his principal. Where the listing agent helps the seller "figure out" what the findings mean in the inspection report (e.g., what is major vs. minor), the listing agent may have opened himself up to a potential breach of fiduciary duty claim by the seller.

2. Not necessarily every seller "has to sell." Some sellers of property, being less motivated, may only wish to sell without obligating themselves to repair any items (e.g., in a pro-seller market or with an "as-is" sale).

3. Let's say after he obtains a pre-listing inspection, the seller replaced something in his home with less expensive materials or has a handyman do the work in a "temporary fix" manner. You may have a disgruntled buyer on your hands after closing who will pursue a claim against the seller and/or both agents involved in the transaction.

4. The belief that by simply obtaining an inspection up front will somehow fulfill a seller's duties could be a comfortable trap for the seller. It may falsely minimize or dilute his true legal disclosure requirements (*i.e.*, the Transfer Disclosure Statement, matters of actual knowledge, *etc.*)

5. The obtaining of an up-front inspection by the seller raises the seller's level of awareness and thus a component of "standard of care" as to the listing agent for that particular house.

6. Where the seller has obtained an inspection report up front, and the buyer goes away (e.g., does not obtain financing), the seller is *stuck with the knowledge* he now has regarding problems with his house. The door has already been opened. When another buyer comes down the road, the seller cannot unwind the knowledge he has already acquired about some defect or problem with the house.

7. Even if a seller gets an inspection report before a contract is entered into, a buyer could still come in with a "wish list" of repairs, so the seller may not necessarily be in a stronger negotiating position.

8. Short of a statute requiring abatement or retrofitting, a seller is not obligated to repair items revealed in the inspection report. A seller can sell "as-is." Short of illegality, parties are free to contract as they please.

9. Where information is provided by a "public agency or licensed expert" to the buyer which becomes inaccurate because of a *subsequent* act, event or agreement, the inaccuracy is not a violation of the required

disclosure. But there *may be a duty* to give an amendment to the disclosure statement in which case the buyer's rescission will date from the delivery of the amendment. See Civil Code sections 1102.3, 1102.5, 1102.7 and 1102.9. For example, where the seller after obtaining an up-front inspection hires a handyman who uses inferior materials and does the work in an incomplete manner or implements a mere temporary fix – the listing or selling agent, given certain circumstances, could well be liable to the buyer for *negligent misrepresentation*. Good faith is specifically required by Civil Code section 1102.7.

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