

What do I have to disclose about a property affected by Superstorm Sandy?

By Barry S. Goodman, Esq.

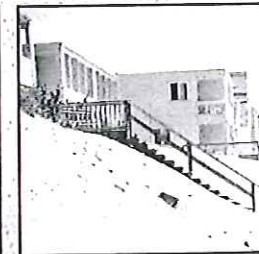
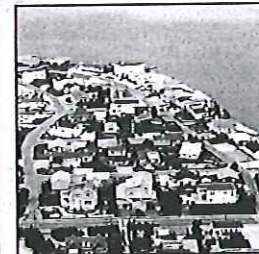
You have a listing to sell or lease a home that was affected by Superstorm Sandy. What do you have to disclose about any damage or possible damage resulting from the storm? What is the best way to disclose any information that you do provide? What duty do you have to determine if there has been any damage as a result of the storm? What is the potential liability if you pass along misinformation from the owner?

Superstorm Sandy may have been a catastrophic storm, but the laws that apply to your duties and liabilities have not changed. However, since applying them to Superstorm Sandy may present certain challenges, you must be aware of what your duties and responsibilities are and how they apply to Superstorm Sandy.

Sandy Damages



Summer 2013



The Applicable Laws

Let's start with the basics. The New Jersey Real Estate Commission (REC) requires every real estate licensee to make a "reasonable effort to ascertain all material information concerning the physical condition of every property for which he or she accepts an agency or which he or she is retained to market as a transaction broker." Such a reasonable effort must include not only asking the seller or seller's agent about any physical conditions that may affect the property but also a "reasonable inspection of the property to determine if there are any readily observable physical conditions affecting the property."

As a result, if you accept a listing to lease or sell property affected by Superstorm Sandy, you must ask the owner about any damage related to the storm and do a visual inspection of the property to determine, as best you can, if there was any damage to the property. Any physical damage to the property then must be disclosed to a potential buyer and, if applicable, a potential tenant.

Under the Consumer Fraud Act, if you make any misrepresentation to a buyer or tenant, including innocently passing along a misrepresentation by the owner, you may be liable for treble damages, attorneys' fees and costs. One way to limit that liability would be to use a Seller Property Condition Disclosure Statement (Disclosure Statement) in the manner set forth in Section 19.1 of the Consumer Fraud Act. Under Section 19.1, a real estate licensee is not liable for punitive damages, attorneys' fees or both for communicating any false, misleading or deceptive information provided by or on behalf of the seller if the following two conditions are met:

1. the licensee had no actual knowledge the representation was false, misleading or deceptive; and
2. the licensee made a "reasonable and diligent inquiry" to ascertain if the information was false, misleading or deceptive.

One way to satisfy the "reasonable and diligent inquiry" requirement is to use a Disclosure Statement in the form approved by the Division of Consumer Affairs, as long as the licensee informs the buyer that the seller is the source of the information and, prior to making that communication

to the buyer, the licensee "visually inspected the property with reasonable diligence to ascertain the accuracy of the information disclosed by the seller," which is the same standard as required by the Commission's regulations. Of course, the seller, not the licensee, must fill out the Disclosure Statement and the licensee should sign the Disclosure Statement confirming that the licensee has done the visual inspection that the licensee is required to do.

What should I disclose and how should I disclose it?

Although the questions about what should be disclosed and how to disclose it may be fact specific, there are certain general questions that routinely have been asked relating to Superstorm Sandy that easily can be answered based upon REC's regulations and the Consumer Fraud Act's requirements. The following questions and answers therefore will provide general guidelines concerning what should be disclosed and how to disclose it.

How do you answer the question, "Was the property involved in a flood?"

If the property was involved in a flood, or had other significant water damage from Superstorm Sandy, and the agent is aware of that fact, the answer to that question must be "yes." Under the REC's regulations, the agent must disclose "all information material to the physical condition of any property which they know or which a reasonable effort to ascertain would have revealed."

What duty does an agent have to know about storm-related issues? Should agents inquire about how high the water infiltrated the home, what repairs were done and what was done to repair the property, treat mold, etc.?

An agent must make a "reasonable effort to ascertain all material information concerning the physical condition of every property" that he or she accepts for listing as required by the REC's regulations. This includes an inquiry to the seller/landlord and a visual inspection for readily observable conditions. The agent therefore should ask the seller/landlord about these issues and conduct the required visual inspection.

Can you add questions to the listing agreement or seasonal application to get more information about damage or whether the property will be available for the summer season?

There is no prohibition against adding such questions. However, it is advisable for an agent to consult with his/her broker before adding such questions in order to ensure compliance with office policies.

Is there liability for a real estate licensee for passing along information gained from a seller/landlord about storm damage?

No, as long as the information is accurate. However, agents may be liable for failing to relay such information of which they are aware or for passing on misinformation, even if they did not know the information was wrong.

Can additional questions be added to the Disclosure Statement about storm damage, previous flood claims, etc.?

Yes, if, in the agent's opinion, it is appropriate to do so under the particular facts and circumstances of a transaction. However, it is advisable for an agent to consult his/her broker before adding such questions in order to assure compliance with office policies.

If a separate Disclosure Statement that was not approved by the Department of Community Affairs is used, is there liability for a real estate licensee?

The approved Disclosure Statement includes the minimum required disclosures to protect agents from liability for treble damages and attorneys' fees under the Consumer Fraud Act when it is properly used. The use of another form of disclosure would not provide that protection.

Should a disclaimer be included in the MLS that the property has suffered storm damage?

Such a disclaimer is not required. It is recommended that damage from Superstorm Sandy should be treated the same as any other damage to property that is being listed. It should be disclosed, preferably in a Disclosure Statement or at least in some other writing.

What if repairs have been completed by the seller/landlord?

All damage and repairs should be disclosed to a buyer/tenant by the seller/landlord and, to the extent known, by the listing agent in order to avoid any liability. Since some homes have sustained significant damage as a result of the storm and insurance has not covered all the repairs, not everything has been repaired in those homes and they often are being sold "as is." In this situation, what is the best approach?

The same disclosures should be made whether or not a property is being sold "as is." Failure to disclose or misrepresenting a material fact may be a basis for a buyer to void a contract and seek damages.

Are there any new regulations and other laws that an agent must follow when the agent deals with a property that was affected by Superstorm Sandy?

No. An agent should apply the same principles to any property affected by Superstorm Sandy that the agent would apply to any other property. For example, under the Commission's regulations, the agent must disclose all material information pertaining to the physical condition of the property just like they must for any other property, which must include the agent undertaking a visual inspection of the property and making inquiries of the seller/landlord about the physical condition of the property. All this information then must be disclosed to potential buyers/tenants in the same way it would be disclosed for any other property.

Although Superstorm Sandy presented unique challenges for the people of New Jersey, the duties and obligations of real estate licensees have not changed. Therefore, you must apply the REC's regulations and the rules applicable to the Consumer Fraud Act as you would in any other situation. If you do that, you will steer clear of any legal storm that otherwise would have been created by Superstorm Sandy. ■

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