that a title insurer who is given a copy of such an affidavit must remove from the title insurance policy the standard exception for claims of persons in possession (see VI.C.10. on page 58).

h. Liens Or Encumbrances

Paragraph XI(a) of the FAR/Bar Contract under the "Disclosure" clause advises the buyer that the property may be subject to a special assessment lien and, if so, states who is to pay the amount(s).

The contract should include a provision that the seller will not execute any instrument before closing to encumber the property or otherwise affect the title. However, because there is a permissible statutory delay for filing construction liens for improvements to property, the seller should also sign an affidavit that there are no unrecorded liens for improvements made to the property within the last 90 days. The buyer thereby will be protected against construction liens not appearing in the official records book at closing but thereafter filed within the 90-day time frame provided by *F.S.* 713.08.

A title insurer in receipt of such an affidavit will have to remove the exception to the title policy regarding construction liens on the property. A typical contract clause providing that the seller must not encumber the property and requiring the seller to sign an affidavit stating that he or she has not done so is contained in Standard G of the FAR/Bar Contract. A typical affidavit of no liens is contained at IX.K. on page 116.

An attorney for the buyer who discovers that a notice of commencement or claim of lien has been filed on the property must review *F.S.* Chapter 713 regarding construction liens.

i. Property Defects

(1) In General

In all contracts for sale under Florida law, sellers face certain duties to disclose to buyers various matters regarding the property. A failure to disclose under statutory law will entitle the buyer to an action for breach of the contract for sale.

(2) Latent Defects

Sellers of residential property have a duty to disclose any facts known to them that materially affect the value of the property if those facts are not readily observable by buyers. *Johnson v. Davis*, 480 So.2d 625 (Fla. 1986). As stated in the Note at IV.H.2.g. on page 37, this duty applies as well to "as is" sales. *Johnson* and its progeny are addressed in Parker, *The Return of the Pink Panther or Johnson v. Davis, Redux*, 78 Fla. Bar J. 29 (June 2004), along with a discussion of how to distinguish residential from commercial properties when dealing with multi-family dwellings. See also *F.S.* 475.278(5)(a).

This duty to disclose may extend to the seller's broker as well as to nonlisting brokers and closing agents. See Morgan, *The Expansion of the Common Law Duty of Disclosure in Real Estate Transactions: It's Not Just For Sellers Anymore*, 68 Fla. Bar J. 28 (Feb. 1994), and cases cited therein.

The National Association of REALTORS Code of Ethics and Standards of Practice (Jan. 2008) provides that brokers have an affirmative obligation to disclose adverse factors that would be reasonably apparent to someone with their expertise. Standard of Practice 2-1. They also must avoid misrepresentation or concealment of pertinent facts. Article 2. See also *F.S.* 475.25(1)(b), 455.227(1)(a).

The duty may also extend to the seller's lawyer if the lawyer invites a nonclient to rely on the lawyer's opinion or other legal services or if the lawyer intentionally misrepresents a material fact. Generally, however, a seller's lawyer owes no duty to the buyer. *Adams v. Chenowith*, 349 So.2d 230 (Fla. 4th DCA 1977). See I.B.5. on page 6.

Examples of material facts include termite infestation and wood rot, a defective swimming pool, zoning and building code violations, an impending condemnation action, inferior subsoil conditions, roof leakage, and the undesirable physical location of the property. (See cases cited in *Johnson* and in the Morgan article. See also *Postregna v. Tanner*, 903 So.2d 219 (Fla. 2d DCA 2005), for a case involving the seller's failure to disclose the presence of mold and poor air quality caused by significant water damage.)

If the seller or seller's agent fails to disclose a material fact, the buyer has a cause of action for fraudulent nondisclosure. As noted in *Billian v. Mobil Corp.*, 710 So.2d 984 (Fla. 4th DCA 1998), materiality of a nondisclosure is not to be determined subjectively based on how it would affect the buyer's personal decision to purchase, but rather objectively, by focusing on the relationship between the undisclosed fact and the value of the property. Furthermore, as noted in *Billian* and *Spitale v. Smith*, 721 So.2d 341 (Fla. 2d DCA 1998), it does not matter whether the seller was merely forgetful in not disclosing the fact, or purposely being secretive or deceitful; either state of mind results in liability for nondisclosure as long as the fact materially affects the value of the property.

As noted in the Parker article, a nondisclosing seller may not defend a *Johnson* nondisclosure claim on the basis that a "reasonably diligent" inspection by the buyer would have disclosed the material defect. "The buyer's failure to hire a 'home inspector' or to perform his own 'ordinarily diligent' inspection cannot provide the seller a defense of contributory negligence if the defect is latent." Parker at 32. The buyer "has no duty to find a latent defect, but only one that is 'readily observable'." Parker at 30, citing *Billian*.

NOTE

The attorney should watch for cases that expand the seller's duty to disclose. example, disclosure arguably could apply to off-site factors such as nearby toxic w sites, planned highways, prisons, high tension wires, water pollution, or radioa contamination. Gibby, *Brokers Encouraged to Disclose Environmental Condi Materially Affecting the Value of Residential Property*, 69 Fla. Bar J. 52 (March 1 See also *Seller, Broker Sued for Not Disclosing Nearby Landfill*, Lawyer's Weekly L Issue 95-10 (May 8, 1995), citing *Strawn v. Canuso*, 638 A.2d 141 (N.J. Supe App.Div. 1994), *aff'd* 657 A.2d 420, and referring to the case as "the last nail ir coffin" for the rule of caveat emptor. The *Strawn* court held, nonetheless, that there no duty to disclose "transient social conditions" such as the changing nature of neighborhood, the presence of a group home, or the existence of a school in decline.

The disclosure requirement as set forth in *Johnson* is included i FAR/Bar Contract at Standard W.

(3) Stigmatized Property

In accordance with *F.S.* 689.25(1)(b), "[t]he fact that a property or was at any time suspected to have been, the site of a homi suicide, or death is not a material fact that must be disclosed in a estate transaction." Also, the fact that a previous occupant or o is HIV positive or has AIDS need not be disclosed. *F.S.* 689.2 Although not specifically addressed by the statute, there likely i duty to disclose a suspicion that the house is haunted. For mor stigmatized property, see Ben-Ezra & Perlin, *Stigma Buster Primer on Selling Haunted Houses and Other Stigmatized Prop* 19 Prob. & Prop. 59 (May/June 2005).

j. Misrepresentations And Fraud

In addition to liability for nondisclosure, the seller may be held liabl fraud, fraudulent misrepresentation, negligent misrepresentation, or fra lent concealment. The court in *Billian* (discussed above) explains differences between the nondisclosure standard under *Johnson* and fraudulent misrepresentation standard: "[I]n a fraudulent misrepresenta case, a plaintiff must prove that a defendant knew a statement was fal that the defendant made a statement knowing he was without knowled its truth or falsity; in addition, the plaintiff must demonstrate tha making a false statement, the defendant intended that another rely upo *Billian*, 710 So.2d at 988. In a case on misrepresentation, the Fl Supreme Court held that the buyers had established a cause of actio fraudulent misrepresentation when the developer told them that a ne parcel of land slated for construction of a school was to be a perma natural preserve. *M/I Schottenstein Homes, Inc. v. Azam*, 813 So.2 (Fla. 2002). The case addresses the reasonableness of the buyer's reli on the seller's misrepresentation when the matter is a part of the p record. See also Worsham, *Must Information in the Public Recor Disclosed to Buyers of Residential Real Property and May i Misrepresented?* 80 Fla. Bar J. 33 (March 2006). See also Caven *Renovating Azam: A Proposal for Rebuilding the Reliance Test in Estate Torts*, 79 Fla. Bar J. 8 (Dec. 2005).

e. Foreigners

A foreign person who buys or sells agricultural land is required to submit a report to the Secretary of Agriculture in accordance with the Agricultural Foreign Investment Disclosure Act, 7 *U.S.C.* §3501(a).

Furthermore, the Foreign Investment In Real Property Tax Act ("FIRPTA"), 26 *U.S.C.* §1445, requires the withholding of tax when foreigners dispose of U.S. real property interests. The FAR/Bar Contract at Paragraph XI(f) provides that the parties must comply with FIRPTA. Because a buyer can be held liable for a seller's failure to comply with the Act, buyers should ensure that the contract contains a clause or rider addressing this issue. Such a clause is contained in the comprehensive rider reproduced at IX.G. on page 85.

This item and related matters are sometimes overlooked until just before closing. As soon as you become involved in a transaction to which these statutes may apply, you should suggest to the foreign client that he or she consult with international tax professionals for inbound (purchases) and outbound (sales/dispositions) international tax planning.

f. VA/FHA

When the sale involves an FHA or VA insured mortgage, the clause contained in the comprehensive rider at IX.G. on page 85 must be attached to the contract.

g. "As Is" Status

As previously noted, the seller may choose to sell the residential premises in an "as is" condition. To do so, the seller can either enter into what is known as an "As Is" Contract, or include in the standard contract an "as is" clause. An "As Is" Contract For Sale And Purchase jointly devised by the Florida Association of REALTORS and The Florida Bar is included at IX.J. on page 111 to give the attorney a model for the terms that should be included in such a contract. The form for an "as is" clause is contained in the comprehensive rider reproduced at IX.G. on page 85.

If the property is sold in "as is" condition, this does not free the seller from liability for nondisclosure, only from the duty to repair. *Levy v. Creative Construction Services of Broward, Inc.*, 566 So.2d 347 (Fla. 3d DCA 1990). See also *Solorzano v. First Union Mortgage Corp.*, 896 So.2d 847 (Fla. 4th DCA 2005), and cases cited therein. For an in-depth article addressing "as is" clauses, see Grebe, *What is "As Is" in Florida?* 30 Stetson L. Rev. 875 (Winter 2001).

h. Comprehensive Rider

A comprehensive rider jointly prepared by The Florida Bar and the Florida Association of REALTORS is reproduced in IX.G. on page 85. As noted above, the document contains a condominium association disclosure, a VA/FHA clause, a homeowners' association disclosure, an "as is" clause, a "FIRPTA" clause, a lead-based paint disclosure, and a coastal construction control line clause. Additionally, the comprehensive rider contains the following: