

Damage & Destruction

Two words that can have a very detrimental effect on a real estate contract

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The current CBR/CBA contract deals with two different types of damage. First, there is the damage that occurred prior to the contract being signed, pre-existing damage. Then there is the damage that occurs after the contract is signed but prior to closing. Section 4 of the contract is designed to discover and address the damage that occurred prior to the contract being signed. Section 9 is for damage that occurs after the contract is signed but prior to closing.

The Supreme Court of Ohio upheld the doctrine of caveat emptor in *Layman v. Binns* (1988), 35 Ohio St.3d 176, let the buyer beware. In that case the Court stated at page 177, "The doctrine of caveat emptor is one of long standing. Since problems of varying degree are to be found in most dwellings and buildings, the doctrine performs a function in the real estate marketplace. Without the doctrine nearly every sale would invite litigation instituted by a disappointed buyer... A duty falls upon the purchaser to make inquiry and examination."

The Court stated on page 178 of the decision, "To make the doctrine operate fairly, courts have established certain conditions upon the rule's application. We summarize and adopt these conditions as follows: (1) the defect must be open to observation or discoverable on reasonable inspection, (2) the purchaser must

have an unimpeded opportunity to examine the property and (3) the vendor may not engage in fraud."

If the property has existing damage, the buyer has a duty to discover the damage. For example, if the contract is signed in November of 2003 and there was hail damage to the siding from the April 2003 hailstorm, the appropriate avenue for the buyer is through the procedures in Section 4, not Section 9.

Section 13 of the CBR/CBA Real Estate Purchase Contract states, "At the time the Seller delivers possession, the premises will be in the same condition as the date of acceptance of this contract, except as provided in paragraph 9, and normal wear and tear excepted." If the siding had hail damage on the date of acceptance, the seller's only duty is to deliver the premise in the same condition. However, the buyer could discover the damage and request a remedy through Section 4 and negotiate.

Likewise, if there is a fire in the house after the contract is signed but prior to closing, Section 9 of the contract would apply. Section 9 provides the requirements of the seller who discovers that the property was damaged or destroyed, and also the options for the buyer. The seller bears the risk of loss prior to closing. If the property is substantially damaged or destroyed the seller is required to contact the buyer, whereby the buyer has certain options available. The question that has come up is what qualifies as "...substantially damaged or destroyed."

The Tenth District Court of Appeals in Franklin County Ohio decided a case in 1982 that dealt with the standard contract then in use which contained the same phrase as we have today, "substantially damaged or destroyed." *Drake v. Burch* (1982) 82AP-19, 82AP-56, is a case where the sellers removed the shrubbery prior to closing without the consent of the buyers. The buyers chose to rescind the contract. The Court stated, "...the word 'property' is used in a broader sense in the clause and separately refers to each integral part of the real estate. This follows because various features of the real estate, such as landscaping, may have a decided effect both on the desirability and the market value of property. Neither the contract, nor the common law, requires the defendants to accept the property without the shrubbery or to accept the REALTOR®'s offer of a payment in money."

When damaged property is discovered it is critical to know how to address it and which part of the contract applies. Remember that time is of the essence.