**CASUALTY LOSS AND REAL ESTATE SALES**

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Hurricane Ian brought massive destruction to Southwest Florida. But, a hurricane is not the only destructive force affecting real estate. Houses burn down, pipes leak and sometimes even cars take out walls. How do these casualties affect a pending contract for sale?

The rule in Florida is inherited from common law and makes the buyer bear the risk of loss. Even if the house is completely washed away by a hurricane, the buyer remains obligated to purchase. The buyer risk of loss is based on the concept that the buyer gains an equitable interest in the property at time of contract. If there is insurance, the buyer also gets right to any insurance Hcovering the casualty loss. Even if the seller has no insurance, the buyer is bound to purchase and the seller bound to convey whatever remains.

The buyer does have an insurable interest, so the buyer could actually get insurance to cover the risk of loss from contract until closing. Who does that? Most buyers think the seller is responsible for taking care of property until the buyer gets the keys. That is only correct if the contract changes the rule. Good news for buyers is most real estate sale contracts include language which makes the seller bear the risk of casualty loss until closing.

The contract used most often for residential real estate sales in our area is a form created by the Legal Resources Committee of Naples Area Board of Realtors (NABOR). Let’s take a look at how that form addresses responsibility for condition of property between signing the contract and closing.

The NABOR contract specifically states that risk of loss remains with the seller for any loss or damage caused by fire, flood, extreme weather conditions or other casualty between effective date of the contract and earlier of closing or the date buyer takes possession. The contract also requires the seller to maintain all existing casualty, wind, hurricane and flood insurance.

The NABOR contract adds further clarity to a seller’s obligation. The contract requires the seller maintain the property in the condition it was in on the effective date of the contract through closing, ordinary wear and tear excepted. The form explains the seller’s maintenance obligation includes the structure, landscaping, systems and equipment, and all personal property that is part of the sale. If the property is a condominium or in a homeowners association, the seller’s obligation does not include any item for which the seller is not obligated to maintain under the association governing documents.

If the seller fails to maintain, repair and replace damaged components prior to closing, the contract mandates 200% of the estimated cost of any repair be escrowed. That provision makes it clear the escrow is not the seller’s only obligation but it does stand as security for repair. If the actual cost exceeds the escrow, the seller is on the hook for that as well.

Escrow required by the contract is almost always enough to make sure repairs get done and paid. But, the escrow does not force the seller to actually complete any repair and leaves the parties to address seller failure in that regard. Most sellers remain interested in completing repairs because they want to keep cost as low as possible and expect a refund of at least part of the escrow. If the seller fails, a buyer can proceed and look to the escrow for ultimate payment.

What could go wrong with the escrow? Buyers often want a specific company to make repairs. Neither the escrow nor any other provision of the contract gives the buyer control over who does repair work. Repairs are the seller’s responsibility and the seller gets to choose who makes the repairs. That makes some buyers very unhappy; but after all, the seller is paying.

A bigger problem with mandatory repair escrow is lenders. Most lenders will not allow any escrow between seller and buyer. Fear is the escrow is a disguised kickback. If the contract is not contingent on mortgage funding but a buyer needs a mortgage to close, the buyer may lose the deposit or more if the mandatory escrow ends mortgage availability.

The contract recognizes neither party likely planned to close a sale under which the seller is obligated to rebuild an entire structure. If the property is rendered uninhabitable or uninsurable, either party can cancel the contract and the buyer gets back any deposit. The only other limit on a seller’s liability is a 1% cap on landscape repair.

How much to escrow can be a subject for dispute. The contract provides a buyer gets to inspect the residence within 5 days after casualty to see if there is any damage, but that inspection is usually cursory and contractors are not present to provide estimated cost of repair. Even when estimates are available, there can be a big difference between a seller estimate and one obtained by a buyer. That alone can send the parties to court.

The buyer has no control over repairs and is really limited to inspection at time of walk through just before closing to make sure all is done. Since the contract also provides that invasive testing is not allowed. The buyer may not cut open walls for further inspection. Hence, the buyer may have to rely on seller using a licensed contractor and any government inspection as the buyer’s sole protection for hidden repairs.

All of the contractual terms are subject to change by agreement or cooperation between the parties. But willingness of a buyer or seller to cooperate varies. Nobody should enter a contract in the belief that any problem will be “worked out.” Buyers and sellers should expect each to abide strictly by contract terms and make sure those terms are acceptable.

Damage to property between contract and closing can be traumatic for both parties. Hurricane Ian reminds us the contract must address that possibility. Before signing a contract, a buyer should make sure the risk of loss remains with the seller and that provisions addressing damage are acceptable.

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