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Buyers Pay for the Mistakes of Inspector

By Benny L. Kass

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Q We recently bought an older house. We included a home inspection contingency in our sales contract and hired a home inspection company recommended by the real estate broker. The inspector found a couple of minor problems, which the seller fixed before settlement.

ADVERTISING However, less than two months after we closed on the house, we discovered a number of serious problems, such as termite damage, roof leaks and faulty electrical connections.

We presented these matters to the home inspector, but his response was that under the contract we signed, he was only obligated to return the money we paid for the inspection. Apparently, there is some kind of liability limitation language in his inspection contract.

We paid the inspector \$400; our damages are more than \$30,000. Is there anything we can do about this?

A There is something you can do about the situation, but only if you are prepared to be the plaintiff in a test court case.

Let's first explain a home inspection contingency. When you signed the contract to purchase your house, you included language to the effect that you had three business days to get an inspection of the property.

If within those three days, you were dissatisfied with the inspection (and you notified the seller in writing of your concerns), depending on the language in your contract, you could either cancel the contract entirely or give the seller three days to decide whether to fix all of the deficiencies in the house. If the seller refused to make any or all of the repairs, you then had three more days to decide whether to accept the house with the problems and go forward with your purchase, or cancel the contract.

Once your contract was signed, you contacted the home inspector

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recommended by your real estate agent. That inspector came to your house, inspected the property and then presented you with a written report. On the last page of the report, the following sentence was written, just above where you were supposed to sign your acceptance of the report: "Notwithstanding the provisions of any applicable statute, the sole and exclusive remedy available to the Client is damages in an amount not to exceed the fees actually paid by the Client for services, and all other remedies, statutory or otherwise, are hereby expressly waived by Client."

This language is referred to as an "exculpatory clause." Our legal system permits parties to enter into such contracts, subject to certain limitations. According to one court: "Maryland law is quite clear on the matter of exculpatory clauses. In the absence of legislation to the contrary . . . there is ordinarily no public policy which prevents the parties from contracting as they see it." (*Winterstein v. Wilcom*, 293 A.2d 821, 1972)

In a different case in 1988, Wilton Baker entered into a sales contract to buy a house, and he -- like you -- hired a home inspector. The inspection turned out to be faulty, in that the inspector failed to discover that the house's roof was defective. Baker sued the home inspection company. The inspection company admitted that it had made a mistake, and its only defense was that Baker had signed the exculpatory clause.

The Maryland Court of Special Appeals found for the inspection company and gave Baker a judgment for \$250 -- the amount he had paid for the home inspection. According to the court: "Our review of the record in the instant case leads us to conclude that the limitation of liability clause at issue was valid and enforceable in limiting [the company's] liability to the contract fee. . . . Clearly the home inspection contract was not the product of unfair bargaining power. Baker presented no evidence that he was unable to solicit the services of an alternative home inspection company if he was dissatisfied with the limitation of liability provision. Moreover, the home inspection services performed . . . do not fall within the realm of a public duty or concern the public interest." (*Baker v. Roy Haas Associates, Inc.*, 629 A.2d 1317, 1993).

In my opinion, this is just bad law. However, it has often been cited by other judges who have been faced with these same fact situations and these same exculpatory clauses.

Clearly, the judges in the Maryland Court of Special Appeals did not understand how a home inspection works. Let's look closely at the reality of the marketplace.

You sign a contract to purchase a house, and include a three-day home inspection contingency. You then hurry around to find a home inspector who can come to the house within these three days. In recent years, with the volume of real estate sales so high throughout the country, it has not been easy to find a qualified inspector in such a short time.

Finally, on the last day of the contingency, the inspector shows up, completes

the inspection and presents you with the report -- which includes the exculpatory clause.

What are you supposed to do? Find another home inspector? Keep in mind that you have only until midnight on that day to notify the seller of your concerns. Otherwise, the contract language specifically says that you have waived the inspection contingency and have to either go forward with the purchase or lose the money you put up when you signed the sales contract. Of course, you could ask the seller for an extension of the contingency, but he may not give you one.

The court in Baker did provide some guidance for future cases involving home inspectors.

One exception to the general rule that parties can freely enter into contracts that contain such clauses as "when one party is at such an obvious disadvantage in bargaining power that the effect of the contract is to put him at the mercy of the other's negligence." In such a situation, the Maryland court held that such language would then be void as against public policy.

How much evidence does a court need to hear to realize that home buyers -- faced with finding an inspector within such a short time -- are clearly at the mercy of the home inspector?

What can you do? You can sue the home inspector, and present the court with all the facts. Your argument would be simply that you were in a disadvantaged situation and did not have the right to freely bargain -- negotiate -- over the exculpatory clause. It was a situation of "take my inspection with that clause or find another inspector."

You can also try to convince the court that the conduct of the inspector was grossly negligent, but this would require you to prove that the conduct of the inspector indicated a wanton or reckless disregard for your rights. This is not an easy case to make.

However, for other potential home buyers, there are two lessons to be learned from this:

- When you contact an inspector, ask upfront if his contract contains such an exculpatory clause. It may be that you may find an inspector who wants your business and will agree either to remove the clause entirely or at least raise the limit of exposure above just the cost of the inspection.
- Find your own home inspector. Do not necessarily rely on the inspector recommended by the real estate broker. And real estate brokers should be careful not to recommend only one inspector but should instead give potential purchasers at least two names.

]In most parts of the country, there is usually more than one inspection company in the area where the property is located.

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