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Warranty Worries ©

It is another sunny day, and you are enjoying the great indoors in your maintenance free condo with the Saturday paper and a pot of coffee. Over a year has passed since you sold your place in Kingston and moved to your brand new Toronto condo. You have enjoyed every minute of it. You got top dollar for your old place in Kingston. At the time you had 3 offers, and the people who had the best offer had no conditions, not even one for a home inspection.

As you sort through your mail you spot an envelope from the people who bought your old home. Thinking it is a Christmas card, you open it only to realize they are not sending you season's greetings, but a bill for $10,000.00 for repairs to the foundation and weeping tile bed of their house.

Accompanying the bill is a letter stating that they have tried to contact you on numerous occasions, and since you were not reachable they repaired the basement that you warranted not to leak. Furthermore, and without prejudice to their legal rights, they demand that you immediately reimburse them, or they will be launching a civil action for rescission of the contract and damages.

In shock, you fax your lawyer a copy of the agreement. Panic sets in. Is it possible that they have such rights over a year after the agreement has been completed?

Generally, the agreement of purchase and sale seeks to exclude any warranties or representations, unless included in the agreement in writing. Clause 25 of the agreement stipulates this, but you do recall your offer did contain a warranty which stated that "to the best of your knowledge" the basement dry and not prone to flooding. Your offer also included a provision that the basement would be dry up to the time of closing, and that the warranty would not merge on closing. You must admit that you had a dehumidifier in the basement which you "put away" before listing the house, and when you were moving one of the boxes stored in the basement it was a "little soggy". Could this dampness result in a $10K bill!

Warranties that are qualified by "to the best of your knowledge and belief" are called flush out warranties. They are not as strict or absolute as an unqualified warranty. They are intended to flush out and bring potential concerns into the open. If you know of a problem, you cannot give this warranty. But what if the problem appears before closing and it comes to your attention. Do you tell the purchaser?

Courts have interpreted these clauses by evaluating if the representation could be considered reasonably fair and truthful to the defendant's knowledge and belief. The fact that you removed a dehumidifier before showing the house, and had a soggy box on moving is a problem.

Before granting a warranty, consider that you may be called to pay for repairs or damages some years later. The common law provides that all warranties merge on closing, but when the agreement specifically states that it shall not merge, the warranty survives and you continue to be responsible. Even if there is no mention of merger in the agreement, a court may interpret that the warranty was by implication intended to survive closing.

If you want finality to your real estate transaction, do not give warranties. Give the purchasers an opportunity to satisfy themselves with a home inspection condition after agreeing on the price, or an inspection before making an offer.

If you give a warranty, you may be called to account for it. If it is a truthful, fair and reasonable statement, you probably will not be responsible, but it is possible you may have to pay monetary damages, or in extreme circumstances, the court may find that there has been a negligent misrepresentation, in which case the equitable remedy of rescission may be granted. This means you would have to give the money back and take back the property. If in doubt, do not hesitate to call your lawyer before you make a deal.

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