

Paragraph 13 Problems

Recently I conducted REIN contract training for a couple of different brokerage firms. In the process of discussing provisions and answering questions I learned there is disagreement among agents, brokers and firms (even between offices in the same firm) regarding the interpretation of an aspect of ¶ 13 of the REIN contract, the REIN Property Inspection Contingency Addendum (“PICA”), and the REIN Property Inspection Contingency Removal Addendum (“PICRA”).

I then decided to poll a varied assortment of brokers and agents to see if there was a consensus. Guess what? There is a rather even split on a question that will become more and more important in the changing market. After speaking with Rebecca, I thought I would bring this to your attention and tell you what I (and Rebecca) think. The issue is this:

May a seller avoid ¶ 13(D) obligations by using the PICRA to refuse to do them?

In order to follow me on this you will need to pull a REIN contract, a PICA, and a PICRA. Our issue is illustrated by the following example:

- REIN contract. ¶ 12 home inspection. PICA executed.
- Buyer performs home inspection.
- Home inspection identifies plumbing problem (assume problem is within ¶ 13(D) and within the cap).
- Buyer executes PICRA and requests seller to repair plumbing problem
- Seller declines to repair plumbing problem, no agreement is reached, and no party terminates the contract (*i.e.* the Buyer “accepts” the seller’s refusal)

So, under those facts is the Seller nonetheless obligated to fix the plumbing problem as a walk-through item under ¶ 13(D)?

Legal Corner

Let's start our analysis by observing that ¶ 13 requires four categories of repairs: A-Appraisal, B-Termite/Moisture, C-Well/Septic, and D-Walk-Through. We note that ¶ 13, in the first paragraph, expressly states that a seller remains responsible to repair (subject to the cap) A, B and C items even if they are "waived by Buyer" on the PICRA. By contrast, it does not say that the seller remains obligated to repair 13(D) items that are waived by the Buyer.

This exact same language appears in the PICA, at ¶ 2(b), and in the PICRA at ¶ (B). As a result, one might reasonably conclude – and many agents and brokers do conclude – that the intentional omission of ¶ 13(D) from this language implies that sellers are not obligated to repair waived 13(D) items. Essentially, this inference is the rule of construction referred to by Madison that many cited as a reason not to include a Bill of Rights.

In other words, because the contract and addenda say A through C items are not waived by a refusal to agree to fix them, then that must mean that D items can be, and are, waived if the seller does not agree to fix them. Clearly, that makes some sense and is consistent with general contract interpretation principles. While there is language in favor of that construction and logic behind it, I disagree with it for three reasons: First, I do not believe it is what the parties expect; Second, I do not believe it is what the authors' intended; and, Third, I do not believe it is the literal result. Let me explain:

I think the parties expect, when they sign the contract, that ¶ 13 items will have to be repaired (subject to the cap). So, why would the parties think that when a home inspection is performed, and the problem identified then as opposed to an earlier point -- when a PICRA is executed -- that the seller should be able then to say "no" contrary to what they already clearly agreed, and expected, to do?

But the shoe used to be on the other foot. Buyers were sending mixed signals to sellers (not listing but expecting things to be fixed), and the contract wasn't clear then. So, Rebecca – who served on the committee at that time – recalls that REIN addressed

© Brian D. Lytle, Esq., Lytle Law, P.C. www.lytlelaw.com Reprinted with permission of the author. This article was originally published in the *Realtor Update*, a publication of the Virginia Peninsula Association of Realtors® The law may have changed since this article was written and published so caution is advised.

Legal Corner

those problems by changing the language to its present form. The intent was to require the buyer to list the repairs the buyer wanted, to say that if those repairs were (A) through (C) items they couldn't be waived (so the loan could be obtained), and to give the seller the ability to agree to handle repairs, including 13(D) repairs, subject to the Cap, by rejecting them as part of the PICRA. There was no intent to permit a seller to escape responsibility for ¶ 13(D) items by refusing to do them if they were listed by the Buyer on the PICRA. They were to be waived only when the buyer failed to list them, not when the seller refused to fix them if listed.

The literal contractual reading for that result lies in the definition of "waiver" and "waived" and "waived items." The main contract, at ¶ 13(D) says "... Seller shall repair all non-working Walk-Through Items at Seller's expense **unless waived**" (emphasis added). Note that language does not appear in the body of 13(A), (B) or (C), which is consistent with the idea that those sections cannot be waived. The question then, is how does one "waive" 13(D) items?

The contract provides the only answer. The PICA, at ¶ 2(b) says a Buyer must list all items the buyer desires to be repaired that are identified in the inspection, and that if the Buyer does not include them they "shall be deemed waived..." In other words, an item is waived *only* when it is identified as a problem and then not listed as a repair item. Ergo, it is not waived when it is listed. And not having been waived, by its very terms paragraph 13(D) will survive as to such items because they were not *waived* and 13(D) requires waiver.

Can one argue that the buyer's acquiescence to the seller's PICRA refusal to repair the plumbing problem constitutes the requisite waiver? I think there is a basis for that argument in the language that appears in the PICA at ¶ 2(C)(i), which provides that "[a]ny Requested Repair Items listed on the Removal Addendum that Seller and Buyer *agree not to repair* are waived by Buyer ..." (emphasis added). While I think this is a very strong argument, in the final analysis I do not believe a *disagreement* regarding whether the seller remains obligated to fix the plumbing problem constitutes an

© Brian D. Lytle, Esq., Lytle Law, P.C. www.lytlelaw.com Reprinted with permission of the author. This article was originally published in the *Realtor Update*, a publication of the Virginia Peninsula Association of Realtors® The law may have changed since this article was written and published so caution is advised.

Legal Corner

“*agreement* not to repair” the plumbing problem. But again, this is very close and a court might rule the other way.

Our goal is to ensure that the contract is clear enough to avoid disputes and get the deal closed. So until this is resolved (I am hopeful in the next iteration of the contract) I think buyers and sellers should clarify the contract for their clients in order to avoid that dispute, and this should be done when the offer is written and accepted. I would be happy to help by providing some language to resolve the problem until the contract is fixed, but I think that request should come through your broker. You contact me at bdlytle@lytlelaw.com

© Brian D. Lytle, Esq., Lytle Law, P.C. www.lytlelaw.com Reprinted with permission of the author. This article was originally published in the *Realtor Update*, a publication of the Virginia Peninsula Association of Realtors® The law may have changed since this article was written and published so caution is advised.