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By Judon Fambrough

The following scenario is based on a real transaction. Use your knowledge as a real estate practitioner, especially your knowledge of the Real Estate Commission's promulgated contract forms, to predict the outcome.

The buyer contracts for the purchase of a home using the standard promulgated form. The buyer has the house inspected 30 days before closing. All required repairs are completed within two weeks of the inspection. Before closing, the buyer conducts a final walk-through and discovers the air conditioner no longer works. It broke after the inspection but before the final repairs were made.

The buyer demands the seller fix it as a condition for closing. The seller counters that all contractual obligations have been met. Who is correct?

Without knowing more, the seller is right. Paragraph 10 of the promulgated contracts provides, "Seller shall deliver possession of the Property to Buyer on (date) in its *present or required repaired condition*, ordinary wear and tear excepted." The wording appears to place the buyer in an "either-or" position. Does the buyer want the property in its present condition or in its repaired condition? The wording does not allow the buyer to accept the property in *its present condition with any required repairs*.

By having the property inspected and requesting repairs, the buyer elects to

take the property in its repaired condition, not its condition at the time of the contract.

A different result occurs if the air conditioner fails after the repairs were made and before closing. The contract states that the seller will deliver the property in its repaired condition. In this scenario, the air conditioner was working in its repaired condition, so it should still be functioning when the buyer closes on the house.

A final resolution of the question is not possible without knowing what caused the air conditioner to fail. The contract provides that the buyer assumes the risk of any malfunctions caused by ordinary wear and tear. After the repairs have been made, the seller assumes the risk of any failures not caused by wear and tear.

But exactly what is ordinary wear and tear?

Section 92.100(4) of the Texas Property Code contains the only statutory definition of the phrase as it relates to real (in this case rental) property. The phrase means "... deterioration that results from the intended use of a dwelling, including breakage or malfunction due to age or deteriorated condition, but the term does not include deterioration that results from negligence, carelessness, accident, or abuse of the premises, equipment, or chattels by the tenant, by a member of the tenant's household, or by a guest or invitee of the tenant." ♦

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