

## **WHAT AGENTS SHOULD KNOW WHEN NATURAL DISASTERS OR OTHER CASUALTY LOSSES OCCUR!**

By John Dolgetta, Esq.

Considering the devastation caused by Hurricane Harvey, Agents should be aware of what to do when a natural disaster or other casualty loss occurs. In New York City, Westchester, Putnam, Rockland, Orange and Dutchess Counties, Long Island and many of the surrounding areas, many (although not all) attorneys utilize the standard form contract of sale for real property prepared by the New York State Bar Association and the Committee on Real Property Law of the Bar of the City of New York (“Form Contract”) (*see* <http://bit.ly/2f1XXKm>). It is important to note that the Form Contract, as well as many other forms or real estate contracts used by attorneys and real estate agents alike, do not specifically address what happens in the event a catastrophic event major casualty loss.

### **The “Form Contract” and the General Obligations Law Section 5-1311**

The Form Contract specifically includes a disclaimer at the top of the first page which reads:

#### **NOTE: FIRE AND CASUALTY LOSSES AND CONDEMNATION**

This contract form does not provide for what happens in the event of fire, or other casualty loss or condemnation before the title closing. Unless different provision is made in this contract, Section 5-1311 of the General Obligations Law will apply. One part of that law makes a Purchaser responsible for fire and casualty loss upon taking possession of the Premises before the title closing.

Unless the parties or their attorneys include specific provisions dealing with what would happen in the event of a loss, many times the contract is silent on the issue and the law of the specific State in which the loss occurred would apply. In New York, Section 5-1311 of the General Obligations Law would apply in these instances. (*See General Obligations Law, Section 5-1311* at <http://bit.ly/2eJBftB>). Many states have also enacted similar legislation which is generally also referred to as “The Uniform Vendor and Purchaser Risk Act.”

Section 5-1311 specifically states that unless the contract of sale entered into between a purchaser and seller expressly provides to the contrary, the provisions of Section 5-1311 will apply. Subsection 5-1311(1)(a) provides that, as long as neither title or possession to the property has been transferred to the purchaser, “...if all or a material part thereof is destroyed without fault of the purchaser or..., the [seller] cannot enforce the contract, and the purchaser is entitled to recover any portion of the price that he has paid.” Therefore, if a major casualty loss occurs, a purchaser would be entitled to receive a refund of his or her Downpayment and other payments made to the seller toward the purchase price.

It is important to note that Section 5-1311(1)(b) specifically provides that once title or possession has been transferred to the purchaser, the risk of loss also passes to the purchaser. Therefore, if casualty loss occurs and it is not due to the fault of the seller, and the purchaser

occupies the property in advance of the closing, then the purchaser would be obligated to purchase the property and would be required to pay the full purchase price without any abatement. While it is not uncommon for a purchaser and seller to agree to a pre-Closing occupancy possession agreement, it is imperative that real estate agents and attorneys explain to their buyer clients, the risk of doing so, especially in light of the unknown and unexpected risks associated with a devastating event such as a hurricane, tornado, fire or other significant casualty loss. It is strongly recommended that a buyer avoid taking possession of the premises prior to the actual closing or transfer of title.

Aside from the obvious risks posed by the Section 5-1311, in the event a casualty loss does occur while the purchaser is in possession of the property, the insurance company may deny a claim due to the purchaser's early occupancy, and especially if done without its knowledge or consent. There are many significant risks associated with entering into a pre-Closing occupancy arrangement. The seller's insurance company should be made aware of arrangement and further the attorneys need to expressly provide for alternative remedies rather than rely on the Section 5-1311.

### **Important Issues in the Event of A Natural Disaster or Other Casualty Loss**

Katherine Johnson, General Counsel for the National Association of REALTORS® (“NAR”), in a recent article entitled “Transaction Guidance After Natural Disaster” ([see http://bit.ly/2x9wZLo](http://bit.ly/2x9wZLo)), highlighted important issues that real estate professionals and their clients should be aware of and should follow when a devastating event like Hurricane Harvey occurs. Unfortunately, while many believe that something like this will never happen to them, events like this remind us that they can strike at any time and in any place.

Ms. Johnson highlights five important areas of focus: (1) Clients; (2) Contracts; (3) Law; (4) Insurance; and (5) Lending. First, Ms. Johnson points out that real estate professionals should reach out to their clients immediately. When events like this occur there are many issues that are unknown and she recommends that one should not panic and should keep calm and also keep the client calm.

As indicated earlier, the contract is another important element of any transaction, especially in the event of a catastrophe. The parties should review and discuss the contract provisions with their attorneys prior to signing them and in the event the contract does not specifically provide for what to do, or what the particular remedies will be, then a review of the particular law of the state in which the property is located will be required. Agents should inform their clients that they need to discuss these issues with their legal counsel.

Another important issue that should be addressed is insurance. Clients should be informed to file a claim with the insurance company right away. Many times, insurance companies can deny a claim if not filed timely or if evidence of the damage and extent of the loss is not adequately documented. It is not uncommon for insurance companies to initially deny claims.

It is equally advised for clients to know whether or not they have flood insurance coverage in place. Many sellers, particularly if they have a residential mortgage on their property, will be required to maintain flood insurance as a condition of their loan. However, if a property is located in a flood zone and there is no mortgage on the property, many times a seller will not be aware that they are located in a flood zone and consequently will not have flood insurance in place. Real estate professionals should inform their clients about the benefits of flood insurance and that they should reach out to their insurance agents immediately. In certain instances, homes that may be affected by a catastrophic event, such as Hurricane Harvey, may not even be in a flood zone. Unfortunately, if there is no coverage in place a homeowner would be responsible for paying all rebuilding and other related costs utilizing his or her own personal funds. In some instances, notwithstanding there is no coverage, homeowners may be able to file a claim and obtain assistance from FEMA (*visit link: <http://bit.ly/2voLIS4>*).

In an article entitled “Settling Post-Catastrophe Insurance Claims: What Agents Should Know”, Bernice Ross provides extremely useful guidance on insurance related issues dealing with major casualty losses due to natural disasters. (*See <http://bit.ly/2xNdB3K>*). Ms. Ross stresses that one should not enter into the home too quickly, especially if there has been flooding. She points out that there could be exposure to serious health (i.e., bacteria and viruses) and physical risks (i.e., exposure to structural issues, downed electrical wires and electrocution).

Ms. Ross further points out that clients should take pictures of the home and all personal belongings prior to and immediately following an event. Homeowners should update these photos at least on an annual basis and should keep receipts for any new items that may have been purchased. It is also a good idea to prepare and maintain a detailed inventory of all personalty and maintain the copies of receipts, photos, etc. in an electronic format and stored on the “cloud” rather than a local hard drive on a laptop or desktop.

A further issue that the homeowner should be aware of is whether his or her homeowner’s insurance policy is paid on a “replacement value” or “cash value” basis. It is strongly recommended that “replacement value” coverage be obtained because the “cash value” option could require the homeowner to utilize significant personal funds to supplement the shortfall in insurance proceeds that will be paid if coverage is based on a “cash value.”

Lastly, Ms. Johnson points out that clients should be advised to contact their lenders immediately to determine what needs to be done in the event a catastrophic event occurs. Many times lenders will require the properties to be re-inspected before they will proceed with the financing for the transaction. When “Super Storm Sandy” struck the New York and New Jersey many transactions were delayed by several weeks and even months before the bank would allow the transaction to close. Many transactions were ultimately cancelled due to the extensive damage caused by the storm and the extensive delays.

### **REALTORS® Are Among the First to Aid**

Many REALTOR® firms, REALTOR® Associations, NAR, businesses and local agents step up and offer needed assistance in times of despair. (*See [Real Estate’s Big Players Respond to Hurricane Harvey](http://bit.ly/2wiV80q), Gill South, September 6, 2017 at <http://bit.ly/2wiV80q>*). It is important for

real estate professionals to assist their clients not only in good times but also in times of despair. Addressing many of the issues highlighted above at the initial engagement is critical and may help to avoid the anger and confusion caused by such a significant and catastrophic event. It will highlight issues that many clients may not be aware of and which may provide for direction before a catastrophic event or loss occurs.

Real estate agents and brokers, as fiduciaries, are equipped with a wealth of knowledge and are able to provide the necessary assistance and guidance to their clients. With such knowledge, informed decisions can be made that limit liability and anxiety and maximize the potential for a more positive experience for the clients, even under circumstances caused by such devastating events like Hurricane Harvey, Hurricane Katrina, Super Storm Sandy and many others.

\* \* \* \*

Legal Column author John Dolgetta, Esq. is the principal of the law firm of Dolgetta Law, PLLC which acquired the law practice of former Board Counsel, Edward I. Sumer. For information about Dolgetta Law, PLLC and John Dolgetta, Esq., please visit <http://www.dolgettalaw.com>.

The foregoing article is for informational purposes only and does not confer an attorney-client relationship.