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Exclusion clause—home inspector's limitation of liability unenforceable Home inspector's limited duty to a client

A prospective buyer who makes an offer subject to a home inspection may have an inflated expectation of the inspector's ability to discover deficiencies that, if known to the buyer, would lead him or her to abandon the purchase. Conversely, because of these expectations and the risky nature of their business, home inspectors attempt to contractually limit their liability.

These were the issues in a small claims action brought by a buyer who had signed a contract with a home inspection company in 1999 in which she acknowledged having read and understood the contents. A term of the contract was that the report to the buyer would be based upon the inspector's visual inspection of the accessible features of the property. The contract also contained two clauses excluding liability: one limited the liability of the company—for negligence or for any reason whatsoever—to the fee of \$256.80, paid for the inspection services and report; the other limited liability to a claim made within one year of the date of the report.

The buyer later complained there were 25 errors or omissions in the report she received. Only one complaint succeeded in court, that of a misrepresentation of the age of the furnace, because the inspector had negligently represented a 21-year-old furnace to be only eight years old. Since there was evidence that the life expectancy of furnaces in general was between ten and 25 years, the furnace would have to be replaced earlier than anticipated and the buyer was awarded \$1,170.

The home inspection company claimed the exclusion clauses prevented the buyer from recovering damages. The buyer had to overcome her acknowledgment that she had read and understood the contents of the contract. It was a two-page, badly formatted agreement of relatively small print, some of it in bold, without headings or paragraph numbers, which was difficult to read and understand.

Furthermore, the exclusion clauses had not been drawn to her attention. Their effect was to deprive the buyer of any remedy against the inspector's company, even if the inspector had been incompetent or reckless and the report valueless. The judge said it was unlikely she would have signed the contract if the limitations and their effect had been drawn to her attention, and he held them to be unenforceable.¹

What can a client expect for the relatively modest fee paid to the inspector? While an inspector has a general duty to adhere to or surpass the standard of care expected in the profession, some decisions recognize an inspector cannot be liable for a problem that is not readily apparent by a reasonable visual inspection. The judge in this case thought the purpose of the inspection was to advise of major deficiencies observed on a visual inspection which, if undiscovered, would have a significant financial impact on a buyer.

Another judge said, "The home inspection was not being used as an assurance of the structural integrity of this building. To do that for \$200 would be a fool's errand, in my view."

However, a higher standard of care does apply if the client asks a specific question. Then, the inspector must answer the question if it is within his or her competence and, if not, advise the client to consult an expert in that area.

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1 *Brownjohn v. Pillar to Post*, BCPC, Kelowna Registry, Reasons for Judgment, January 9, 2003.

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