

**From the desk of John Poletes B.A.S.,
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Welcome home: You have been waiting in anticipation for your closing date tomorrow. You cannot fall asleep; your move is the last day of the month, and a Friday before the Canada Day long weekend. All your friends are ready to help with the move and with the weekend long backyard barbeque party that is to follow. This is going to be the best weekend ever. You fall asleep to the sound of falling rain.

When you arrive with your moving truck, you spy a tree leaning on the side of the house. To your horror, during yesterday's thunderstorm the large maple tree at the side of the house split in half. One of the larger branches grazed the side of the house. Parts of the newer roof and parts of maintenance free aluminum eavestrough have been ripped off. There is also damage to the patio steps. You call your lawyer, but it is 7 o'clock already and understandably there is no answer.
HELP!!

What to do now? You may think that the vendor is responsible to pay for the damage, but according to common law, if anything happens to the estate between the time of sale and the time of completion of the purchase, you, the purchaser assume the risk and will be responsible for the loss. Once the Agreement of Purchase and Sale is signed and a deposit is made, the seller is considered a trustee for the purchaser. The seller is to use reasonable care to ensure the property remains in the same condition as when the Agreement was signed. In this case, since the tree-falling was nobody's fault but Mother Nature's, there is no issue of care on the part of the seller, who did not cause the damage.

Can you rely on your insurance to protect you...unfortunately not, because it takes effect only on the closing date. Will the vendor's insurance cover the damage? Again no, because the insurance contract is made solely between the seller and the

insurance company, and you do not have a claim against the seller for the insurance money.

There is hope though; the Agreement of Purchase and Sale may protect you if the words "property remains at the risk of the vendor/seller" are included. This is contained in the insurance clause (usually clause number 14 of the OREA and TREB standard form) which places the seller at risk until the closing date. This means the seller shall hold all insurance policies in trust for the purchaser in the event of substantial damage. If this insurance clause is included the purchaser can 1) take the proceeds of the insurance and complete the purchase or 2) terminate the Purchase and Sale Agreement altogether and have all deposits returned.

So remember, as a new purchaser, you will bear any loss if the property is damaged through no fault of the vendor. You will not be covered under the seller's insurance unless there is an insurance clause in the Agreement of Purchase and Sale.

If you are worried about the condition of the house on closing or you are in doubt about any aspect of your Agreement of Purchase and Sale talk to your lawyer.

For more information about this or any other real estate law related topics please do not hesitate to contact John Poletes at 416-482-1902, or e-mail him at john.poletes@bellnet.ca