

HOW FIXTURES, FITTINGS AND PERSONAL PROPERTY ARE TREATED UNDER THE REVISED PRDS AND C.A.R. CONTRACTS

Managing the expectations of a buyer and seller with respect to what items are included and excluded from a sale can be impacted by advertising, the MLS, visits to the property, oral statements, disclosures, unexpressed desires, whether the property is leased or otherwise subject to lien rights, and other factors. Ultimately, however, it is the language of the contract which determines what is or is not included in the sale.

Both contracts contain language cautioning the parties on this issue. The PRDS language contains one distinction on this issue that can be important. The cautionary language applies to not only written depictions and representations but also oral ones. There is no similar language in the C.A.R. contract.

The PRDS and C.A.R. contracts both continue to indicate that fixtures and fittings are included in the sale. Generally speaking, fixtures and fittings are items that are physically attached to the real estate. Both contracts continue to specify that certain items shall be deemed to be a fixture or a fitting. The language on the subject is similar for the most part but the following differences now exist based on the most recent revisions. PRDS uses the term “solar systems and equipment” while C.A.R. uses the term “solar power systems”. PRDS uses the term “fireplace inserts and attached fireplace equipment” while C.A.R. uses the term “fireplace inserts, gas logs and grates”. The C.A.R. contract now includes “water features and fountains”. There is no similar language in the PRDS contract.

Several years ago the PRDS contract created a chart for the buyer and seller to identify additional items that were to be included in the sale. This chart has been helpful in eliminating disputes about which appliances were to be included in the sale where there have been multiple appliances (e.g. refrigerators, stoves, washers and dryers) on the property and there were differences in the quality and condition of these appliances.

The revised C.A.R. contract has started to adopt this philosophy. It now contains a checkbox which allows the parties to identify if all stoves, refrigerators, and washers and dryers remain with the property or if any are to be specifically excluded from the sale. The C.A.R. contract does not identify any other personal property items (e.g. microwaves, wine coolers, trash compactors, etc.), that parties may want to include in the sale. These will have to be specifically identified and added to the contract.

The issue of leased or liened items is also a new subject that is taken up in both contracts. While solar systems have been the primary property feature that has prompted this focus, the issue may also arise with respect to propane tanks, water softeners, alarm systems, and possibly home automation systems.

Both contracts now require the seller to disclose to the buyer what is leased or liened and provide and deliver to the buyer copies of all documents related to these non-seller owned items. These are contractual obligations on the part of the seller and if not met, a Notice to Perform should be issued to the seller before the buyer can attempt to cancel the contract.

Both contracts now provide that the buyer's ability to qualify for and assume those lease agreements and otherwise be approved by the lease/lien holder is a contingency of the agreement. This contingency right is provided for in paragraph 14 of the C.A.R. contract. It is provided for in paragraph 8 of the PRDS contract. This contingency right exists under the PRDS contract even if the contract is otherwise a zero contingency contract.

The revised C.A.R. contract also now indicates that existing integrated phone and home automation systems, their necessary components, and applicable software, permissions, passwords, codes and access information are by default included in the sale unless a specific box is checked otherwise. The current PRDS contract does not specifically identify these types of systems in any preprinted language. These items can be addressed in the chart that addresses additional property to be included in the sale.

The revised C.A.R. contract now specifies that audio and video equipment is excluded from the sale if any such item is not itself attached to the property and also provides that brackets attached to walls, floors, or ceilings for any such component, furniture or item otherwise remain with the property unless a specific box is checked indicating that these brackets will be removed. If brackets are to be removed, the seller is contractually obligated to repair holes or other damage but is not required to paint the surface.

There was no change to the PRDS language on this subject. What is either included or excluded from the sale is identified by contractual language and supplemented by the personal property chart. The PRDS contract continues to provide that if mounting brackets are excluded from the sale the seller is contractually required to bring the affected surfaces as close to original condition as is reasonable and practicable.

The revised C.A.R. contract also addresses one other subject with regard to items that are excluded from the sale. It now provides that furniture or other items secured to the property for earthquake purposes are excluded unless otherwise specified. There is no comparable language in the PRDS contract. The PRDS contract requires that the seller identify any such item that is to be excluded. This will occur either in the specific section of the contract where excluded items are to be identified or as part of a counter offer.

One issue raised by this new language is how do the buyer and seller identify what furniture was secured for earthquake purposes as distinguished for some other purpose. This language also potentially reintroduces the seller's subjective intent as part of this issue.

Given that expectations regarding these issues are often set by marketing material, the MLS, and visits to the property it is probably a good practice for the seller to identify what they want to include and exclude from the sale before the property is marketed. On the other hand, buyers should be asked what they want included or excluded from the sale and a good practice is for this to take place before the offer is written so that any such issues can be addressed in the contract.