REPRESENTATIONS, WARRANTIES AND "AS IS" DISCLAIMERS

Presented by:

WILLIAM H. LOCKE, JR.
Graves, Dougherty, Hearon & Moody

In House CLE
August, 2008

941071

TABLE OF CONTENTS

USEFUL MATERIALS

Annotations

8 A.L.R. 5th 312, *Construction and Effect of provision in Contract for Sale of Realty by Which Purchaser Agrees to Take property "As Is" or in Its Existing Condition*.

12 A.L.R. 5th 630, *Vendor's Obligation to Disclose to Purchaser of Land Presence of Contamination from Hazardous Substances or Wastes*.

24 A.L.R.3d 465, *Construction and Effect of Affirmative provision in Contract of Sale by Which Purchaser Agrees to Take Article "As Is," in the Condition in Which it Is, or Equivalent Term.*

73 A.L.R. 3rd 248, *Construction and Effect of UCC § 2-316(2) Providing that Implied Warranty Disclaimer Must be "Conspicuous".*

168 A.L.R. 389, Implied Warranty of Quality, Fitness, or Condition as Affected by Buyer's Inspection Of, or Opportunity to Inspect Goods.

160 A.L.R. 357, *Necessity of Buyer's Actual Knowledge of Disclaimer of Warranty of Personal Property*.

Encyclopedias, Books and Treatises

Mark S. Dennison, 59 AM. JUR. TRIALS 231 *Contractual Indemnifications and Releases from Environmental Liability* (Supp. 2008).

TOD I. ZUCKERMAN ET AL., ENVTL. LIABILITY ALLOCATION L. & PRAC. Ch. 9 *Allocation of Environmental Liability: A Reprise of Private Party Environmental Actions, and Contractual Allocation of Environmental Liabilities* § 9:14 The three distinct stages of transferring contaminated property; § 9:15 Practical considerations regarding environmental site assessments; § 9:16 Difficulties allocating liability between buyers and sellers—Why litigation often results after escrow has closed; § 9:17 Buying and selling: negotiating each party's rights and responsibilities regarding actual or possible contamination (Supp. 2008).

13 TEX. JUR. 3D *Consumer and Borrower Protection* § 255 Failure to disclose—Affirmative misrepresentations and failure to disclose distinguished (2004).

41 TEX. JUR. 3D *Fraud and Deceit* §§13 Materiality; 21 "Puffing", 33 "As is"; waiver of reliance (2007).

65 TEX. JUR. 3D *Sales* §§ 223 Implied Warranties—Exclusion; Waiver and 309 "As is" sales (2006).

3 CRAIG B. GLIDDEN AND GREGORY ABBOTT, TEX. PRAC. GUIDE BUS. & COM. LITIG. 112-117 Ch. 19 *Contract Rights and Liabilities* § 19.201 Enforcement of "as is" contracts; § 19.202 Enforcement of "as is" contracts—determination whether to give effect to "as is" provisions (Thompson/West Supp. 2008).

17 WILLISTON ON CONTRACTS Ch. 50 *Contracts for the Sale or Lease of Land – Caveat Emptor, Warranties and Representations* § 50:40 Particular representations—Environmental matters (Supp. 2008).

Journals

George Lefcoe, *Property Condition Disclosure Forms: How the Real Estate Industry Eased the Transition from Caveat Emptor to "Seller Tell All"*, 39 REAL PROP. PROB. & TR. J. 193 (2004).

Tod I. Zuckerman et al., *Representing Buyers, Sellers, and Lenders in Transferring Contaminated Property: A primer for Real Estate Practitioners, Part I*, 35 REAL PROP. PROB. & TR. J. 305 (2005); and *Part II* 36 REAL PROP. PROB. & TR. J. 37 (2001).

Seminars

Michael Baucum, *As-Is Update "Prudential 2008", in* STATE BAR OF TEXAS PROF. DEV. PROGRAM, ADVANCED REAL ESTATE LAW COURSE (2008).

Larry W. Nettles, *Drafting Environmental Clauses, in* STATE BAR OF TEXAS PROF. DEV. PROGRAM, ADVANCED REAL ESTATE DRAFTING COURSE (2007).

Anne Newton, *"As Is" Provisions in Commercial Leases, in* STATE BAR OF TEXAS PROF. DEV. PROGRAM, ADVANCED REAL ESTATE DRAFTING COURSE (2008).

and

William H. Locke, Jr., *Annotated Risk Management Provisions: Indemnity and Insurance (Focus on Texas Real Estate Forms Manual Retail Lease), in* STATE BAR OF TEXAS PROF. DEV. PROGRAM, ADVANCED REAL ESTATE DRAFTING COURSE (2007). Copy at GDHM Website at bio.

William H. Locke, Jr., *Allocating Extraordinary Risk in Leases: Indemnity/Insurance/Releases and Exculpations/Condemnation (Including a Review of the Risk Management Provisions of the Texas Real Estate Forms Manual Office Lease)*, in STATE BAR OF TEXAS PROF. DEV. PROGRAM, ADVANCED REAL ESTATE LAW COURSE (2006).

William H. Locke, Jr., *Fair Forms for Shifting Liability for Personal Injuries Between Landlords and Tenants and Owners and Contractors, in* STATE BAR OF TEXAS PROF. DEV. PROGRAM, ADVANCED REAL ESTATE DRAFTING COURSE (2004). Copy at GDHM Website at bio.

William H. Locke, Jr., *Risk Management for Landlords, Tenants and Contractors: Through Contractual Provisions for Indemnity, Additional Insureds, Waiver of Subrogation, Limitation, Exculpation and Release Vol. 1 "The Law" and Vol. 2 "The Forms", in* TEXAS COLLEGE FOR JUDICIAL STUDIES (2003). Copy at GDHM Website at bio.

William H. Locke, Jr. and Rick Triplett, *Field Guide for Due Diligence on Income Producing Properties, in* STATE BAR OF TEXAS PROF. DEV. PROGRAM, ADVANCED REAL ESTATE LAW COURSE (2000). Copy at GDHM Website at bio.

I. INTRODUCTION

A. Lay Understandings

"*Darling, I have always told you some version of the truth.*"[1] "*Caveat emptor.*"[2] "*Prove yourself to be brave, truthful and unselfish.*"[3] "*Silence is the virtue of fools.*"[4] "*Silence is golden.*"[5] "*Honesty is a good thing but it is not profitable to its possessor unless it is kept under control.*"[6] "*Honesty is the best policy; but he who is governed by that maxim is not an honest man.*"[7]

B. Competing Public Policies

Consumer protection.[8]

Freedom of contract.[9]

C. Contract Approaches

Risk shifting provisions are contained in all contracts. They are used in an attempt to assure the intended economic objectives of the "deal." The most common methods by which risk is shifted in a contract are by the use of representations and warranties, insurance covenants, express assumption of liabilities, indemnity,[10] exculpation,[11] release[12] and limitation of liability provisions.

Every provision of a contract is either restating the rule that would be supplied by the court in the absence of the provision or is expressly shifting a risk from one party to the other.

Each contracting party's risk-related goals are (1) to accept no more risk than it can reasonably bear or insure, and (2) to transfer the balance of the risk to the other party. The following factors are involved in the ultimate determination as to how much risk a party receives or transfers: (1) which party is in the best position to control the extent of the occurrence of the risk?; (2) does one party have specialized knowledge of the type of risks most likely to occur and how to prevent or identify them?; (3) custom and practice in the particular industry (for example, sellers to buyers; landlords to tenants; owners to contractors; contractors to subcontractors); (4) the bargaining strength of the respective parties; and (5) statutory and common law public policies.

II. REPRESENTATIONS, WARRANTIES AND COVENANTS

A. "Representations"

BLACK'S LAW DICTIONARY defines "representation" as

> A presentation of fact – either by words or by conduct – made to induce some to act, sep. to enter into a contract; esp., the manifestation to another that a fact, including a state of mind, exists [the buyer relied on the seller's representation that the roof did not leak.[13]

Representations are a means for the Buyer to gain information about the property. Representations can be a valuable supplement to a Buyer's investigation of the property, especially as to matters that are not readily ascertainable by a Buyer through normal investigations. Also, time constraints or other practical obstacles (such as evaluating the purchase of multiple properties) may dictate the use of representations and warranties as opposed to in-depth property inspections.

Representations and warranties are also a means of allocating risks between the parties as to matters occurring prior to the sale.

Prudence dictates that a buyer undertake its own investigation of the property as opposed to placing sole reliance upon a seller's representations and warranties.

B. "Warranty"

BLACK'S LAW DICTIONARY defines "warranty" as

> *Contracts*. An express or implied promise that something in furtherance of the contract is guaranteed by one of the contracting parties; esp., a seller's promise that the thing being sold is as represented or promised. A warranty differs from a representation in four principal ways: (1) a warranty is an essential part of a contract, while a representation is usu. only a collateral inducement, (2) an express warranty is usu. written on the face of the contract,

> while a representation may be written or oral, (3) a warranty is conclusively presumed to be material, while the burden is on the party claiming breach to shown that a representation is material, and (4) a warranty must be strictly complied with, while substantial truth is the only requirement for a representation.[14]

C. When a Representation Becomes a Warranty

The distinction between representations and warranties is many times unclear. The test as to whether a representation is a warranty or is a mere expression of an opinion turns on whether the seller asserts a fact of which the buyer was ignorant or merely expresses a judgment about something on which each might be expected to have an opinion.[15]

III. MISREPRESENTATION, FRAUD, FRAUDULENT INDUCEMENT, DECEPTIVE TRADE PRACTICES, AND NEGLIGENT MISREPRESENTATION

A. Misrepresentation

Of course, a seller will have liability for false representations.[16]

B. Fraud and Fraudulent Inducement

To recover on a fraud claim, a plaintiff is required to prove that: (1) the defendant made a material misrepresentation; (2) the representation was false; (3) when the representation was made, the defendant knew it was false or the statement was recklessly asserted without any knowledge of its truth; (4) the defendant made the false representation with the intent that it be acted on by the plaintiff; (5) the plaintiff acted in reliance on the misrepresentation; and (6) the plaintiff suffered injury as a result.[17] Fraud by non-disclosure is simply a subcategory of fraud, because, where a party has a duty to disclose, the non-disclosure may be as misleading as a positive misrepresentation of facts.[18]

In addition to common law fraud, Texas has a statutory cause of action for fraud in a real estate transaction. Under Texas Business and Commerce Code §27.01, a person that commits fraud in connection with a real estate transaction can be liable for damages, including attorneys' fees, expert fees and court costs.[19] As a general rule, these claims require evidence of intent, knowledge and injury *as a result of the conduct.* The allegations are most often levied against the developer, since the contractor is not likely to have made representations to the residence purchaser at all. In a condominium project, a difficulty a condominium association may have is that these claims are more personal to the unit owner and not "common" to two or more unit owners. Although not resolved by current Texas case law, defendant developers will argue that the condominium association lacks standing to assert these types of "personal" claims.

C. Deceptive Trade Practices

In 1967, Texas adopted the law known as the Texas Deceptive Trade Practices Act ("DTPA"). Tex. Bus. & Code §§ 17.41 *et seq.* The DTPA lists an number of unlawful practices (referred to as the "laundry list") and creates a cause of action for consumers to sue those employing such practices. For example, the DTPA prohibits any

> failure to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed.[20]

After the passage of the DTPA, plaintiffs found that they had new and additional causes of action for conduct alleged as a false, misleading or deceptive act under the DTPA's "laundry list" of prohibited acts. In the 1970's and 1980's the DTPA created an imbalance that impeded the reasonable resolution of disputes arising from defects in residential construction, remodeling or repair. An example of this is the *Brighton Homes* case where the plaintiff homeowners were successful in obtaining a judgment for 7 times the cost of the house. [21]

The DTPA has been held to be applicable to a seller's failure to disclose information even if the information was discoverable by the buyer (for example, failing to disclose a recorded lien is a DTPA violation).[22]

The DTPA is an attractive cause of action for a because it allows recovery of attorneys' fees. It also provides for mental anguish damages if the plaintiff shows the defendant(s) acted "*knowingly*" or "*intentionally*." Finally, a plaintiff who proves the defendant acted "knowingly" or "intentionally" is entitled to treble (3x) damages under the DTPA. A defendant commits an act "knowingly" if he acts with actual awareness of the falsity, deception or unfairness of the act. DTPA at § 17.45(9). Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness. A defendant acts "intentionally" if he acts with actual awareness of the falsity, deception or unfairness of the act, coupled with the specific intent that the consumer detrimentally rely on the falsity, deception or unfairness or in detrimental ignorance of the unfairness. Intention may be inferred from objective manifestations that indicate that the person acted intentionally or from facts showing that defendant acted with flagrant disregard of prudent and fair business practices to the extent that the defendant should be treated as having acted intentionally. DTPA at § 17.45(13).

The DTPA has been amended to limit application of the DTPA. Section 17.49(f) and (g) of the DTPA, as amended, provides that the DTPA does not apply to contracts in the following instances:

> (f) Nothing in the subchapter shall apply to a claim arising out of a written contract if: (1) the contract relates to a transaction, a project, or a set of transactions related to the same project involving total consideration by the consumer of more than $100,000; (2) in negotiating the contract the consumer is represented by legal counsel who is not directly or indirectly identified, suggested, or selected by the defendant or an agent of the defendant; and (3) and the contract does not involve the consumer's residence.
>
> (g) Nothing in this subchapter shall apply to a cause of action arising from a transaction, project, or a set of transactions relating to the same project, involving total consideration by the consumer of more than $500,000, other than a cause of action involving a consumer's residence (Author's Note: note that in this $500,000 exception, there is no requirement that the consumer be represented by legal counsel).

§17.42 of the DTPA, as amended, permits parties to waive the remedies of the DTPA in certain circumstances. A consumer may waive the DTPA if: the waiver is in writing and signed by the consumer; the consumer is not in a significantly disparate bargaining position; and the consumer is represented by legal counsel in seeking or acquiring the goods or services. The waiver is not effective if the consumer's counsel was directly or indirectly identified, suggested or selected by a defendant or an agent of the defendant. The waiver must be conspicuous and in bold-face type of at least 10 points in size. It also must be identified by the heading "Waiver of Consumer Rights", or similar language, and include language substantially the same as that provided in § 17.4(c)(3).

D. Negligent Misrepresentation

A cause of action for negligent misrepresentation requires a plaintiff to show that: (1) a representation was made by a defendant in the course of his business, or in a transaction in which he had a pecuniary interest; (2) the defendant supplied "false information" for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffered pecuniary loss by justifiably relying on the representation.[23] As with a fraud claim, a misrepresentation claim will be less successful against the contractor since it does not often communicate directly with a buyer.

IV. DUTY TO SPEAK

A. No Duty to Speak

1. Silence.

As a general rule, in an arms'-length commercial business transaction, failure to disclose information does not constitute fraud unless there is a duty to disclose the information. Mere silence in regard to a material fact, as to which there is no legal obligation to disclose, will not avoid a contract, although it operates as an injury to the party from whom it is concealed.[24]

2. No Actual Knowledge as to Issue.

Sellers have no duty to raise a subject with a buyer, absent actual knowledge of a material adverse condition regarding the subject.[25] Sellers have no liability for failure to disclose what one should have known, but did not.[26]

3. Reasonable to Assume that Other Party Knows Fact.

An exception to the imposition of a duty to speak may exist if the ignorant party never asked the seller about the condition and it is reasonable to assume that the ignorant party knew the non-disclosed fact.[27]

4. No Reliance and Immateriality.

Non-disclosure is not actionable, if no reliance was in fact placed on the non-disclosed fact.[28]

B. Duty to Speak

1. Confidential or Fiduciary Relationship.

As in many other jurisdictions, early Texas law was "buyer beware".[29] Sellers were under no duty to disclose information as to the property, unless there was a fiduciary relationship between the buyer and the seller. The historical rule in business transactions, absent other circumstances mentioned below, in order to find a duty to speak a confidential or fiduciary relationship must exist.[30]

2. Other Circumstances.

Silence may be equivalent to a false representation when the circumstances impose a duty to speak and the knowledgeable party deliberately remains silent.

a. When Other Party Does Not Have a Reasonable Opportunity to Discover a Material Fact

A knowledgeable party is under a duty to disclose material facts which would not be discoverable by the exercise of ordinary care and diligence on the part of the buyer, or which a reasonable investigation and inquiry would not uncover.[31]

b. When Knowledgeable Party has Knowledge That Other Party Is Ignorant of Fact

A duty to speak may be imposed under certain factual circumstances if the knowledgeable party also knows that the other party is ignorant of a material fact or has knowledge that the other party does not have an equal opportunity to discover the material fact.[32]

c. Partial Disclosure That Conveys a False Impression

Several courts of appeals have held that a general duty to disclose information may arise in an arms'-length business transaction when a party makes a *partial disclosure* that, although true, conveys a false impression.[33]

d. Subsequent Knowledge that Prior Statement is False or Misleading

A duty to disclose arises if a party knows, or should have known, its prior statement was false, or later learns that its prior statement was false.[34]

V. REAL ESTATE SALES CONTRACTS AND LEASES

A. Typical Contractual Provisions

1. "Free Look"

It is standard practice for there to be incorporated into a sales contract a so-called "free" look period or investigation or feasibility period. Usually, in such circumstances the buyer is given a period after execution of the contract to conduct an investigation of the property and to terminate the deal, if the buyer

determines that the property is "unsuitable". Such investigations can range from an inspection of the records of the seller to an in depth phase II environmental inspection of the property. In most such cases the buyer's determination of suitability or unsuitability is in its "sole discretion". In order to avoid characterization of the contract as illusory and unenforceable a discernable consideration ("Option Fee") should be paid by the buyer to the seller for this right.

Usually the "look" is not "free", as independent consideration is required to support the termination right. Stipulation of an Option Fee for this termination right may be more to protect the buyer from the seller walking out on the deal than *vice versa*. In essence, a free look is akin to an option. Usually, free looks are granted for a nominal sum whereas options are granted for a significant amount. Earnest money serves a different function. However, if the seller's sole remedy for a buyer's breach of the contract is loss of the earnest money, then the contract is in reality an option.[35]

2. Express Representations and Warranties

a. Typical Representations and Warranties

Representations and warranties given in the sale of property usually cover 3 areas: (1) the status and authority of the seller; (2) the status of the property; and (3) the operation and maintenance of the property.

One means of limiting the seller's exposure is to limit the scope of representations and warranties to matters under the control of, and that can be verified by, the seller.

b. Disclosure of Known Facts

The seller usually takes exception from representations and warranties for known facts and circumstances, such as matters disclosed in environmental reports in the possession of the seller and delivered or made available to the buyer. It is prudent for the seller to make a list or even a copy of all records delivered or made available to the buyer.

c. Knowledge Exceptions

Often the seller limits its representations by "to the extent of seller's knowledge" or "to the seller's best knowledge". Such limitations also are subject to question: (a) What does "knowledge" mean?; (b) Does knowledge mean actual knowledge, implied knowledge, or constructive knowledge?; (c) Can a person have knowledge through negligent or blind ignorance?; (d) Does the seller have a duty to find out facts?; and (e) Is suspicion knowledge?

Actual knowledge and negligent ignorance are the same. Actual knowledge includes not only that information of which a party has express knowledge, but also that which would have been gained from a reasonably diligently inquiry and exercise of the means of information at hand.[36]

If a knowledge exception is used, then the term "knowledge" should be defined. The definition should cover the following elements:

(1) Whose knowledge? (*e.g.,* does the term include the knowledge of the seller's employees, former employees, agents, affiliates, etc.?--if so, then what steps will be followed to assure the person making the representation that each of these parties has been contacted prior to making the representation "to the best of the seller's knowledge"?). In large companies it may be difficult to know what every employee knows.

(2) Is knowledge to be limited to actual knowledge? And if so, is reasonable inquiry of seller required or is blind ignorance permitted?

(3) Should the duty of inquiry be limited?

(4) Should the knowledge be limited to the current knowledge possessed at the time of execution of the contract?

(5) Is the seller under an obligation to notify the buyer of matters of which the seller becomes aware after giving the representation, or is the representation limited to the facts as they are known to exist as of giving of the representation?

Sometimes representations are couched in terms of "seller has received no notice" or "no

written notice". A person may have knowledge of a matter but may not have received notice from a third party.

Sometimes knowledge representations are qualified by a materiality standard. A materiality standard attempts to limit the seller's misrepresentations to having materially misstated a condition. The representation may be worded that seller represents that a particular condition exists "except to the extent that the same does not result in a material adverse effect". Like "knowledge", "materiality" should also be defined. This is most often accomplished by a reference to a dollar amount or percentage of tolerance.

Representations are sometimes qualified as to matters occurring during the seller's ownership--for example, as to environmental conditions.

3. Disclaimer of Representations and Warranties

Many times if a seller permits the buyer a "free look", the seller also insists upon selling the property "as is", that is without representations or warranties as to its condition. Even honest mistakes in making a representation can result in seller liability.

a. "As Is – Non-Reliance" Clause

The following is a typical "as is" clause in a commercial real estate sales transaction.

> As a material part of the consideration for this Agreement, Seller and Purchaser agree that Purchaser is taking the Property "AS IS" with any and all latent and patent defects and that there is no warranty by Seller that the property is fit for a particular purpose. Purchaser acknowledges that it is not relying upon any representation, statement or other assertion with respect to the Property condition, but is relying upon its examination of the Property. Purchaser takes the Property under the express understanding there are no express or implied warranties (except for limited warranties of title set forth in the closing documents). Provisions of this Section 15 shall survive the Closing.[37]

The following is a typical "as is" clause in a commercial leasing transaction.

> Tenant accepts the Premises "as is." *LANDLORD HAS NOT MADE AND DOES NOT MAKE ANY REPRESENTATIONS AS TO THE COMMERCIAL SUITABILITY, PHYSICAL CONDITION, LAYOUT, FOOTAGE, EXPENSES, OPERATION OR ANY OTHER MATTER AFFECTING OR RELATING TO THE PREMISES AND THIS AGREEMENT, EXCEPT AS HEREIN SPECIFICALLY SET FORTH OR REFERRED TO AND TENANT HEREBY EXPRESSLY ACKNOWLEDGES THAT NO SUCH REPRESENTATIONS HAVE BEEN MADE. LANDLORD MAKES NO OTHER WARRANTIES, EXPRESS OR IMPLIED, OF MERCHANTABILITY, MARKETABILITY, FITNESS OR SUITABILITY FOR A PARTICULAR PURPOSE OR OTHERWISE, EXCEPT AS SET FORTH HEREIN. ANY IMPLIED WARRANTIES ARE EXPRESSLY DISCLAIMED AND EXCLUDED. ...THE REPRESENTATIONS, WARRANTIES, COVENANTS, TERMS, CONDITIONS, AND WAIVERS SET FORTH IN THIS SECTION SHALL SURVIVE THE TERMINATION OF THE LEASE.*[38]

Other examples of "as is" clauses in standard form real estate documents are found in the TAR Commercial Contract – Improved Property (TAR 1801) attached as **Exhibit 2** to this paper (See paragraph 7A of the form)("Buyer accepts the Property in its present condition....")[39] and in the Real Estate Sales Contract contained in the *Texas Real Estate Forms Manual* Ch. 8 Form 8-1 attached hereto as **Exhibit 3** (See paragraph C of Exhibit B to the form).[40]

The following release language was held to overcome claims by the releasing party that it had been fraudulently induced by the fraudulent representations and non-disclosures of the released party:

> [The Swansons release all] causes of action of whatsoever nature, or any other legal theory arising out of the circumstances described above, from any and all liability damages of any kind known or unknown, whether in contract or tort.... [E]ach of us [the Swansons] expressly warrants and represents and does hereby state ... and represent ... that no promise or agreement which is not herein expressed has been made to him or her in executing this release, and that none of us is relying upon any statement or representation of any agent of the parties being released hereby. Each of us is relying on his or her own judgment and each has been represented by Hubert Johnson as legal counsel in this matter. The aforesaid legal counsel has read and explained to each of us the entire contents of this release in full, as well as the legal consequences of this Release ....

An "as is" clause is not the equivalent of an effective indemnity or release, but may be some evidence to be considered by the jury in apportioning negligence liability between the seller and purchaser of property for injuries caused by condition of the property.[41]

An "as is" disclaimer in a sales contract will not shield the seller from liability to the buyer for contributing towards environmental cleanup response costs under CERCLA.[42]

b. Merger Clause

Merger clauses seek to limit the scope of representations and warranties by a seller or a landlord to the written representations and warranties contained in the contract or lease. The following is a typical clause, which is found in the *Texas Real Estate Forms Manual* Real Estate Sales Contract, a copy of which is attached as **Exhibit 3** to this paper:

> Real Estate Sales Contract
>
> ...
>
> M. Miscellaneous Provisions
>
> 2. *Entire Contract.* This contract, together with its exhibits, and any Closing Documents delivered at closing constitute the entire agreement of the parties concerning the sale of the Property by Seller to Buyer. There are no oral representations, warranties, agreements, or promises pertaining to the sale of the Property by Seller to Buyer not incorporated in writing in this contract.
>
> Exhibit B
>
> ...
>
> 8. *No Other Representation.* Except as state above or in the notices, statements, and certificates set forth in Exhibit D, Seller makes no representation with respect to the Property.
>
> 9. *No Warranty.* Seller has made no warranty in connection with this contract.

c. Assumption of Environmental Liability and Indemnity Agreements

The allocation of environmental risks in a sales transaction through representations, warranties, and indemnities will generally result in a contractual assumption of liability. In cases where a condition is known to exist, a preferable method may be to provide for an express assumption of liability.[43] An environmental indemnity agreement may be employed to shift back to the seller a potential cleanup risk arising out of detected marginal contaminations below reportable levels, but significant enough to trigger agency action if the condition comes to the attention of the governmental agency.

B. Standard Forms Approaches

1. TREC and TAR Forms

The Texas Real Estate Commission ("TREC") has promulgated forms for use by Texas real estate licensees in the sale of residential, commercial unimproved and farm and ranch property. These forms are found on TREC's website. The Texas Association of Realtors ("TAR") also has published forms for use by its members in the sale or leasing of residential or commercial real property. Attached to this paper are extracts of portions of the following forms published by TREC or TAR: **Exhibit 1** TREC One to Four Family Residential Contract (Resale) and TAR Seller's Disclosure Notice; **Exhibit 2** TAR Commercial Contract – Improved Property (TAR 1801) 10-18-05 and TAR Commercial Property Condition Statement.

The TREC One to Four Family Residential Contract (Resale) utilizes a buyer inspection period (Paragraphs 7A and 23), a buyer option to terminate during the inspection period if buyer's inspections reveal unsatisfactory conditions, delivery by seller to buyer of a seller's disclosure notice in the form required by § 5.008 of the Texas Property Code, and an acknowledgement by buyer that it is accepting the Property in its "present condition" except for the completion by seller before closing of repairs specified in the contract.

The TAR Commercial Contract – Improved Property utilizes a similar framework: a buyer inspection during feasibility period (Paragraph C), a buyer option to terminate during the feasibility period (Paragraph 7B) with retention or payment to seller of an agreed sum ("independent consideration") (Paragraph 7B(1)), delivery by seller to buyer of a seller's disclosure notice (Commercial property Condition Statement), and an acknowledgement by buyer that it is accepting the Property in its "present condition" except for the completion by seller before closing of repairs specified in the contract (Paragraph 7A). This form does not contain any of the following risk assumption/risk transfer provisions: an "as is/nonreliance" clause; an environmental condition indemnity or release; or a DTPA waiver.

2. *Texas Real Estate Forms Manual*

The *Texas Real Estate Forms Manual* includes in Chapter 8 a form of Real Estate Sales Contract for use in the sale of real property, including the resale of a residence, commercial unimproved property and commercial improved property. An extract from this form and the *Manual's* commentary is attached to this paper as **Exhibit 3**.

The Real Estate Sales Contract also utilizes a similar framework as the TREC and TAR forms: a buyer inspection during an inspection period (Paragraph G2), a buyer option to terminate during the inspection period (Paragraph G3) with payment to seller of a nominal $100 as consideration for the right to so terminate the contract (Paragraph J1a), delivery during the inspection period by seller to buyer of a copy various records (Paragraph G1 and Exhibit C to the contract), and a series of representations as to Seller's authority, the pendency or threat of litigation, Seller's receipt of notice of violation of law; notice of nonrenewal or expiration licenses, permits, and approvals; notice of condemnation, zoning, or land-use proceedings affecting the property; notice of inquiries or notices by any governmental authority or third party with respect to the presence of hazardous materials on the property or the migration of hazardous materials from the property (Exhibit B to the contract).

The *Manual's* contract also contains the following provisions not contained in the TAR form: a disclaimer as to the existence of oral representations or promises (Paragraph M2); an acknowledgement that there is no special relationship between seller and buyer (Paragraph M11); a waiver of the application of the DTPA to the transaction (Paragraph M14); an "as is" clause (Exhibit B, Paragraph B); and an environmental condition and liability indemnity including if such condition or liability arose before closing, whether the condition is known or unknown, even if the condition or liability arose or arises under CERCLA, RCRA, the Texas Solid Waste Disposal Act, or the Texas Water Code, and even if the liability arises out of Sellers negligence, products liability or strict liability (Exhibit B, Paragraph C).

The *Manual's* "as is" clause does not contain an express disclaimer of buyer's right to rely upon parol statements and assurances by seller or its agents as to the condition or value of the property.

C. Enforceability of Disclaimers

1. "As Is" Clause Negates Reliance on Seller's or Agent's Representations Outside the Contract

As held in *Prudential Ins. Co. of America v. Jefferson Assoc., Ltd.*, 896 S.W.2d 156, 163 (Tex. 1995), agreeing to take property in its "as is" condition and subject to latent and patent defects, in a case where buyer acknowledges that it is not relying upon any representation of seller with regard to condition or fitness of property, negates an essential element for recovery against seller for misrepresentations, the element of reliance. Buyer in such cases assumes the risk that buyer's appraisal of bargain is correct.[44] The court in *Prudential* stated the question and answer as follows:

> We granted writ of error in this case to decide whether a buyer who agrees, freely and without fraudulent inducement, to purchase commercial real estate "as is" can recover damages from the seller when the property is later discovered not to be in as good a condition as the buyer believed it was when he inspected it before the sale. We hold he cannot.[45]

The following conditions for an effective as is sale (aka the "*Prudential* Rule"):

1. The seller must disclose all known defects. The "as is" clause will be unenforceable if the buyer is induced by knowing misrepresentation or concealment of a known fact.

2. The seller cannot obstruct the buyer's ability to inspect the property.[46]

3. The "as is" clause must be an important basis of the bargain. It cannot be an incidental provision or a part of the "boiler plate" of the contract.[47]

4. The buyer and seller must have relatively

equal bargaining positions, an arms-length transaction with a sophisticated buyer.[48]

2. Circumstances Where Not Enforceable.

Buyer is not bound by agreement to purchase something "as is" even though the buyer has contracted to purchase the property "as is" under the following circumstances:

a. Fraudulent Representations

Buyers are not bound to purchase property "as is" if the as is contract is induced by fraudulent representations.[49] "Puffing" or statements of opinion are not fraudulent misrepresentations, but statements of facts that the speaker knows or has reason to suspect to be incorrect can be a fraudulent representation if material to the transaction and relied upon by the recipient.[50] The court in *Prudential Ins. Co. of America v. Jefferson Associates, Ltd.* found that the statement by Prudential's on-site manger, to the buyer, Goldman, in response to his inquiry as to whether there were any building defects, that the building had "*no defects*" and that it had only "*one problem*," the concrete floor in the mechanical room, were neither material to Goldman nor fraudulent, although untrue as the building turned out to have extensive asbestos.[51]

b. Concealment

Buyers are not bound to purchase property "as is" where the as is contract is induced by concealment of information by Seller.[52] The supreme court in *Prudential Ins. Co. of America v. Jefferson Associates, Ltd.* found that the seller's on-site manager's mistakenly telling the buyer's inspector that she did not have the plans and specifications for the building but only had the "as-built" plans which she gave him was a concealment sufficient to set aside the "as is" contract. The court found that, assuming Prudential concealed the plans and specifications from the buyer, the plans and specifications did not note on their face that the building materials specified for the building contained asbestos.[53]

The following "as is" provision reviewed by the court in *Warehouse Associates Corporate Centre II, Inc. v. Celotex Corp.*[54] did not shield the seller of contaminated property from concealed information:

> OTHER THAN THE WARRANTIES OF TITLE CONTAINED IN THE DEED, PURCHASER ACKNOWLEDGES THAT SELLER HAS NOT MADE, DOES NOT MAKE AND SPECIFICALLY DISCLAIMS ANY REPRESENTATIONS, WARRANTIES, PROMISES, COVENANTS, AGREEMENTS OR GUARANTIES OF ANY KIND OR CHARACTER WHATSOEVER, WHETHER EXPRESS OR IMPLIED, ORAL OR WRITTEN, PAST, PRESENT OR FUTURE, OF, AS TO, CONCERNING OR WITH RESPECT TO (A) THE NATURE, QUALITY OR CONDITION OF THE PROPERTY, INCLUDING WITHOUT LIMITATION, THE WATER, SOIL AND GEOLOGY, (B) THE INCOME TO BE DERIVED FROM THE PROPERTY, (C) THE SUITABILITY OF THE PROPERTY FOR ANY AND ALL ACTIVITIES AND USES WHICH PURCHASE MAY CONDUCT THEREON, (D) THE COMPLIANCE OF OR BY THE PROPERTY OR ITS OPERATION WITH ANY LAWS, RULES, ORDINANCES OR REGULATIONS OF ANY APPLICABLE GOVERNMENTAL AUTHORITY OR BODY ... (E) THE HABITABILITY, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OF THE PROPERTY, OR (F) ANY OTHER MATTER WITH RESPECT TO THE PROPERTY, AND SPECIFICALLY THAT SELLER HAS NOT MADE, AND DOES NOT MAKE AND SPECIFICALLY DISCLAIMS ANY REPRESENTATIONS REGARDING SOLID WASTE, AS DEFINED BY THE U. S. ENVIRONMENTAL PROTECTION AGENCY REGULATIONS AT 40 C.F.R., PART 261, OR THE DISPOSAL OR EXISTENCE, IN OR ON THE PROPERTY, OF ANY HAZARDOUS SUBSTANCE, AS DEFINED BY THE COMPREHENSIVE ENVIRONMENTAL RESPONSE COMPENSATION ENVIRONMENTAL RESPONSE COMPENSATION AND LIABILITY ACT OF 1980, AS AMENDED, AND APPLICABLE STATE LAWS, AND REGULATIONS PROMULGATED THEREUNDER. PURCHASER FURTHER ACKNOWLEDGES AND AGREES THAT HAVING BEEN GIVEN THE OPPORTUNITY TO INSPECT THE PROPERTY, PURCHASER IS RELYING SOLELY ON ITS OWN INVESTIGATION OF THE PROPERTY AND NOT ON ANY INFORMATION PROVIDED OR TO BE PROVIDED BY THE SELLER. PURCHASER FURTHER ACKNOWLEDGES AND AGREES THAT ANY IN FORMATION [SIC] PROVIDED OR TO BE PROVIDED WITH RESPECT TO THE PROPERTY WA OBTAINED FROM A VARIETY OF SOURCES AND THAT SELLER HAS NOT MADE ANY INDEPENDENT INVESTIGATION OR VERIFICATION OF SUCH INFORMATION. PURCHASER FURTHER ACKNOWLEDGES AND AGREES THAT THE SALE OF THE PROPERTY AT CLOSING SHALL BE MADE ON AN "AS IS, WHERE IS" CONDITION AND BASIS "WITH ALL FAULTS[.]

c. Ability to Learn of Fact is Impaired by Seller's Conduct

Buyers are not bound to purchase property "as is" if the buyer is entitled to inspect condition of

what is being sold but is impaired by seller's conduct.[55]

d. Other Conditions Negating Effect of As Is Clause

Where the nature of transaction and totality of circumstances surrounding agreement are considered, such as whether clause is important part of basis of bargain rather than incidental or boilerplate provision and whether parties were not in relatively equal bargaining position, a court may decide not to give effect to the "as is" clause.[56]

FORMS

1. TREC Residential Sales Contract and TAR Seller's Disclosure Notice

PROMULGATED BY THE TEXAS REAL ESTATE COMMISSION (TREC)

ONE TO FOUR FAMILY RESIDENTIAL CONTRACT (RESALE)

...

7. PROPERTY CONDITION:

A. ACCESS, INSPECTIONS AND UTILITIES: Seller shall permit Buyer and Buyer's agents access to the Property at reasonable times. Buyer may have the Property inspected by inspectors selected by Buyer and licensed by TREC or otherwise permitted by law to make inspections. Seller at Seller's expense shall turn on existing utilities for inspections.

B. SELLER'S DISCLOSURE NOTICE PURSUANT TO §5.008, TEXAS PROPERTY CODE (Notice): (Check one box only)

❑ (1) Buyer has received the Notice.

❑ (2) Buyer has not received the Notice. Within _____ days after the effective date of this contract, Seller shall deliver the Notice to Buyer. If Buyer does not receive the Notice, Buyer may terminate this contract at any time prior to the closing and the earnest money will be refunded to Buyer. If Seller delivers the Notice, Buyer may terminate this contract for any reason within 7 days after Buyer receives the Notice or prior to the closing, whichever first occurs, and the earnest money will be refunded to Buyer.

❑ (3) The Seller is not required to furnish the notice under the Texas Property Code.

C. SELLER'S DISCLOSURE OF LEAD-BASED PAINT AND LEAD-BASED PAINT HAZARDS is required by Federal law for a residential dwelling constructed prior to 1978.

D. ACCEPTANCE OF PROPERTY CONDITION: Buyer accepts the Property in its present condition; provided Seller, at Seller's expense, shall complete the following specific repairs and treatments: _____

...

G. ENVIRONMENTAL MATTERS: Buyer is advised that the presence of wetlands, toxic substances, including asbestos and wastes or other environmental hazards, or the presence of a threatened or endangered species or its habitat may affect Buyer's intended use of the Property. If Buyer is concerned about these matters, an addendum promulgated by TREC or required by the parties should be used.

...

23. TERMINATION OPTION: For nominal consideration, the receipt of is hereby acknowledged by Seller, and Buyer's agreement pay Seller $_____ (Option Fee) within 2 days after the effective date of this contract, Seller grants Buyer the unrestricted right to terminate this contract by giving notice of termination to Seller within _____ days after the effective date of this contract. If no dollar amount is stated as the Option Fee or if Buyer fails to pay the Option Fee within the time prescribed, this paragraph will not be a part of this contract and Buyer shall not have the unrestricted right to terminate this contract. If Buyer gives notice of termination within the time prescribed, the Option Fee will not be refunded, however, any earnest money will be refunded to Buyer. The Option Fee ❑ will ❑ will not be credited to the Sales Price at closing. **Time is of the essence for this paragraph and strict compliance with the time for performance is required.**

TEXAS ASSOCIATION OF REALTORS®

SELLER'S DISCLOSURE NOTICE

Section 5.008, Property Code requires a seller of residential property of not more than one dwelling unit to deliver a Seller's Disclosure Notice to a buyer on or before the effective date of a contract.[57] **This form complies with and contains additional disclosures which exceed the minimum disclosures required by the Code.**[58]

CONCERNING THE PROPERTY AT _____

THIS NOTICE IS A DISCLOSURE OF SELLER'S KNOWLEDGE[59] OF THE CONDITION OF THE PROPERTY AS OF THE DATE SIGNED BY SELLER AND IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THE BUYER MAY WISH TO OBTAIN. IT IS NOT A WARRANTY[60] OF ANY KIND BY SELLER, SELLER'S AGENTS, OR ANY OTHER AGENT.

Seller ☐ is ☐ is not occupying the Property. If unoccupied (by Seller), how long since Seller has occupied the Property? ☐ _____ or ☐ never occupied the Property.

Section 1. The Property has the items marked below. (Mark Yes (Y), No (N), or Unknown (U).)

Item	Y	N	U
Cable TV Wiring			
Carbon Monoxide Det.			
Ceiling Fans			
Cooktop			
Dishwasher			
Disposal			
Emergency Escape Ladder(s)			
Exhaust Fans			
Fences			
Fire Detection Equip.			
French Drain			
Gas Fixtures			

Item	Y	N	U
Gas Lines (Nat/LP)			
Hot Tub			
Intercom Systems			
Microwave			
Outdoor Grill			
Patio/Decking			
Plumbing System			
Pool			
Pool Equipment			
Pool Maint. Accessories			
Pool Heater			
Public Sewer System			

Item	Y	N	U
Pump: ☐ sump ☐ grinder			
Rain Gutters			
Range/Stove			
Roof/Attic Vents			
Sauna			
Smoke Detector			
Smoke Detector – Hearing Impaired			
Spa			
Trash Compactor			
TV Antenna			
Washer/Dryer Hookup			
Window Screens			

Item	Y	N	U	Additional Information
Central A/C				☐ electric ☐ gas number of units:_____
Evaporative Coolers				number of units:_____
Wall/Window AC Units				number of units:_____
Attic Fan(s)				if yes, describe:_____
Central Heat				☐ electric ☐ gas number of units:_____
Other Heat				if yes describe:_____
Oven				number of ovens: _____ ☐ electric ☐ gas ☐ other:_____
Fireplace & Chimney				☐ wood gas logs mock other:_____
Carport				☐ attached ☐ not attached
Garage				☐ attached ☐ not attached

Garage Door Openers				number of units:_____ number of remotes:_____
Satellite Dish & Controls				☐ owned ☐ leased from _____
Security System				☐ owned ☐ leased from _____
Water Heater				☐ electric ☐ gas other: _____ number of units:_____
Water Softener				☐ owned ☐ leased from _____
Underground Lawn Sprinkler				☐ automatic ☐ manual areas covered:_____
Septic/On-Site Sewer Facility				if yes, attach information About On-Site Sewer Facility (TAR-1407)

Water supply provided by: ☐ city ☐ well ☐ MUD ☐ co-op ☐ unknown ☐ other:_____
Was the Property built before 1978? ☐ yes ☐ no ☐ unknown
(If yes, complete, sign, and attach TAR-1906 concerning lead-based paint hazards).
Roof Type: _____ Age: _____ (approximate)
Is there an overlay roof covering on the Property (shingles or roof covering placed over existing shingles or roof covering)?
☐ yes ☐ no ☐ unknown

Are you (Seller) aware of any of the items listed in Section 1 that are not in working condition, that have defects, or that are need of repair? ☐ yes ☐ no If yes, describe (Attach additional sheets if necessary):_____

Section 2. Are you (Seller) aware of any defects or malfunctions in any of the following? (Mark Yes (Y) if you are aware and No (N) if you are not aware).

Item	Y	N
Basement		
Ceilings		
Doors		
Driveways		
Electrical Systems		
Exterior Walls		

Item	Y	N
Floors		
Foundation/Slab(s)		
Interior Walls		
Lighting Fixtures		
Plumbing Systems		
Roof		

Item	Y	N
Sidewalks		
Walls/Fences		
Windows		
Other Structural Components		

If the answer to any of the items in Section 2 is yes, explain (attach additional sheets if necessary):_____

Section 3. Are you (Seller) aware of any of the following conditions: (Mark Yes (Y) if you are aware and No (N) if you are not aware).

Condition	Y	N
Aluminum Wiring		
Asbestos Components		
Diseased Trees: oak wilt _____		
Endangered Species/Habitat on Property		
Fault Lines		
Hazardous or Toxic Waste		
Improper Drainage		
Intermittent or Weather Springs		
Landfill		
Lead-Based Paint or Lead-Based Pt. Hazards		
Encroachments onto the Property		
Improvements encroaching on others' property		
Located in 100-year Floodplain		
Present Flood Insurance Coverage (If yes, attach TAR-1414)		
Previous Flooding into the Structures		
Previous Fires		
Previous Foundation Repairs		

Condition	Y	N
Previous Roof Repairs		
Other Structural Repairs		
Radon Gas		
Settling		
Soil Movement		
Subsurface Structure or Pits		
Underground Storage Tanks		
Unplatted Easements		
Unrecorded Easements		
Urea-formaldehyde Insulation		
Water Penetration		
Wetlands on Property		
Wood Rot		
Active infestation of termites or other wood-destroying insects (WDI)		
Previous treatment for termites or WDI		
Previous termite or WDI damage repaired		
Termite or WDI damage needing repair		
Previous Use of Premises for Manufacture of Methamphetamine		

If the answer to any of the items in Section 3 is yes, explain (attach additional sheets if necessary):_____

_____

_____

_____

_____

Section 4. Are you (Seller) aware of any item, equipment, or system in or on the Property that is in need of repair, which has not been previously disclosed in this notice?

☐ yes ☐ no If yes, explain (attach additional sheets if necessary):

_____

_____

_____

_____

Section 5. Are you (Seller) aware of any of the following (Mark Yes (Y) if you are aware. Mark No (N) if you are not aware).

Y N

☐ ☐ Room additions, structural modifications, or other alterations or repairs made without necessary permits or not in compliance with building codes in effect at the time.

❑ ❑ Homeowners' associations or maintenance fees or assessments. If yes, complete the following:
Name of association:_____
Manager's name:_____ Phone:_____
Fees or assessments are: $_____ per _____ and are: ❑ mandatory ❑ voluntary
Any unpaid fees or assessments for the Property? ❑ yes ($_____) ❑ no
If the Property is in more than one association, provide information about the other associations below or attach information to this notice.

❑ ❑ Any common area (facilities such as pools, tennis courts, walkways, or other) co-owned in undivided interest with others. If yes, complete the following:
Any optional user fees for common facilities charged? ❑ yes ❑ no If yes, describe:_____
_____

❑ ❑ Any notices of violations of deed restrictions or governmental ordinances affecting the condition or use of the Property.

❑ ❑ Any lawsuits or other legal proceedings directly or indirectly affecting the Property.

❑ ❑ Any death on the Property except for those deaths caused by: natural causes, suicide, or accident - unrelated to the condition of the Property.

❑ ❑ Any condition on the Property which materially affects the health or safety of an individual.

❑ ❑ Any repairs or treatments, other than routine maintenance, made to the Property to remediate environmental hazards such as asbestos, radon, lead-based paint, urea-formaldehyde, or mold.
If yes, attach any certificates or other documentation identifying the extent of the remediation (for example, certificate of mold remediation or other remediation).

If the answer to any of the items in Section 5 is yes, explain (attach additional sheets if necessary):_____
_____
_____
_____
_____

Section 6. Seller ∟ has ∟ has not attached a survey of the Property.

Section 7. Within the last 4 years, have you (Seller) received any written inspection reports from persons who regularly provide inspections and who are either licensed as inspectors or otherwise permitted by law to perform inspections? ∟ yes ∟ no If yes, attach copies and complete the following:

Inspection Date	Type	Name of Inspector	No. of Pages

Note: A buyer should not rely on the above-cited reports as a reflection of the current condition of the Property. A buyer should obtain inspections from inspectors chosen by the buyer.

Section 8. Check any tax exemption(s) which you (Seller) currently claim for the Property:

∟ Homestead ∟ Senior Citizen ∟ Disabled
∟ Wildlife Management ∟ Agricultural ∟ Disabled Veteran
∟ Other:_____ ∟ Unknown

Section 9. Have you (Seller) ever received proceeds for a claim for damage to the Property (for example, an insurance claim or a settlement or award in a legal proceeding) and not used the proceeds to make the repairs for which the claim was made? ∟ yes ∟ no If yes, explain:_____
_____
_____
_____

Section 10. Does the Property have working smoke detectors installed in accordance with the smoke detector requirements of Chapter 766 of the Health and Safety Code?* ∟ unknown ∟ no ∟ yes. If no or unknown, explain. (Attach additional sheets if necessary):_____
_____
_____

** Chapter 766 of the Health and Safety Code requires one-family or two-family dwellings to have working smoke detectors installed in accordance with the requirements of the building code in effect in the area in which the dwelling is located, including performance, location, and power source requirements. If you do not know the building code requirements in effect in your area, you may check unknown above or contact your local building official for more information.*

Seller acknowledges that the statements in this notice are true to the best of Seller's belief and that no person, including the broker(s), has instructed or influenced Seller to provide inaccurate information or to omit any material information.[61]

_____	_____
Signature of Seller Date	Signature of Seller Date
Printed Name:_____	Printed Name:_____

ADDITIONAL NOTICES TO BUYER:

(1) The Texas Department of Public Safety maintains a database that the public may search, at no cost, to determine if registered sex offenders are located in certain zip code areas. To search the database, visit www.txdps.state.tx.us. For information concerning past criminal activity in certain areas or neighborhoods, contact the local police department.

(2) If the property is located in a coastal area that is seaward of the Gulf Intercoastal Waterway or within 1,000 feet of the mean high tide bordering the Gulf of Mexico, the property may be subject to the Open Beaches Act or the Dune Protection Act (Chapter 61 or 63, Natural Resources Code, respectively) and a beachfront construction certificate or dune protection permit may be required for repairs or improvements. Contact the local government with ordinance authority over construction adjacent to public beaches for more information.

(3) If you are basing your offers on square footage, measurements, or boundaries, you should have those items independently measured to verify any report information.

(4) The following providers currently provide service to the property:

Electric:_____	Sewer: _____
Water: _____	Cable: _____
Trash: _____	Natural Gas: _____
Local Phone:_____	Propane: _____

(5) This Seller's Disclosure Notice was completed by Seller as of the date signed. The brokers have relied on this notice as true and correct and have no reason to believe it to be false or inaccurate. YOU ARE ENCOURAGED TO HAVE AN INSPECTOR OF YOUR CHOICE INSPECT THE PROPERTY.

The undersigned Buyer acknowledges receipt of the foregoing notice and acknowledges the property complies with the smoke detector requirements of Chapter 766, Health and Safety Code, or, if the property does not comply with the smoke detector requirements of Chapter 766, the buyer waives the buyer's rights to have smoke detectors installed in compliance with Chapter 766.

_____	_____
Signature of Buyer Date	Signature of Buyer Date
Printed Name:_____	Printed Name:_____

2. TAR Commercial Contract - Improved Property (TAR 1801) 10-18-05

TEXAS ASSOCIATION OF REALTORS®
COMMERCIAL CONTRACT- IMPROVED PROPERTY

…

7. PROPERTY CONDITION:

❑ A. Present Condition: Buyer accepts the Property in its present condition[62] except that Seller, at Seller's expense, will complete the following before closing:_____ .

…

❑ B. Feasibility Period: Buyer may terminate this contract for any reason within _____ days after the effective date (feasibility period) by providing Seller with written notice of termination.[63]

❑ If Buyer terminates under this paragraph 7B, the earnest money will be refunded to Buyer less $____ that Seller will retain as independent consideration for Buyer's unrestricted right to terminate. Buyer has tendered the independent consideration to Seller upon payment of the amount specified in paragraph 5A to the escrow agent. The independent consideration is to be credited to the sales price only upon closing of the sale….

…

❑ C. Inspections, Studies, or Assessments:

(1) During the feasibility period, Buyer, Buyer, at Buyer's expense, may complete or cause to be completed any and all inspections, studies, or assessments of the Property (including all improvements and fixtures) desired by Buyer.

…

❑ D. Property Information:[64]

(1) Delivery of Property Information: Within _____ days after the effective date, Seller will deliver to Buyer:

❑ (a) a current rent roll of all leases affecting the Property certified by Seller as true and correct;
❑ (b) copies of all current leases pertaining to the Property, including any modifications, supplements, or amendments to the leases;
❑ (c) a current inventory of all personal property to be conveyed under this contract and copies of any leases for such personal property;
❑ (d) copies of all notes and deeds of trust against the Property that Buyer will assume or that Seller will not pay in full on or before closing;
❑ (e) copies of all current service, maintenance, and management agreements relating to the ownership and operation of the Property;
❑ (f) copies of current utility capacity letters from the Property's water and sewer service provider;
❑ (g) copies of all current warranties and guaranties relating to all or part of the Property;
❑ (h) copies of fire, hazard, liability, and other insurance policies that currently relate to the Property;
❑ (i) copies of all leasing or commission agreements that currently relate to all or part of the Property;
❑ (j) a copy of the "as-built" plans and specifications and plat of the Property;
❑ (k) copies of all invoices for utilities and repairs incurred by Seller for the Property in the 24 months immediately preceding the effective date;
❑ (l) a copy of Seller's income and expense statement for the Property from _____to _____;
❑ (m) copies of all previous environmental assessments, studies, or analyses made on or relating to the Property;
❑ (n) real and personal property tax statements for the Property for the previous 2 calendar years; and
❑ (o) _____ .

…

19. MATERIAL FACTS: To the best[65] of Seller's knowledge and belief: *(Check only one box.)*[66]

❑ (A) Seller is not aware of any material defects to the Property except as stated in the attached Property Condition Statement.

❑ (B) Except as otherwise provided in this contract, Seller is not aware of:

(1) any subsurface: structures, pits, waste, springs, or improvements;
(2) any pending or threatened litigation, condemnation, or assessment affecting the Property;
(3) any environmental hazards or conditions that affect the Property;
(4) whether the Property is or has been used for the storage or disposal of hazardous materials or toxic waste, a dump site or landfill, or any underground tanks or containers;
(5) whether radon, asbestos containing materials, urea-formaldehyde foam insulation, lead-based paint, toxic mold (to the extent that it adversely affects the health of ordinary occupants), or other pollutants or contaminants of any nature now exist or have ever existed on the Property;
(6) any wetlands, as defined by federal or state law or regulation, are on the Property;
(7) any threatened or endangered species or their habitat are on the Property; and
(8) any present or past infestation of wood-destroying insects in the Property's improvements;
(9) any contemplated material changes to the Property or surrounding area that would materially and detrimentally affect the ordinary use of the Property;
(10) any material physical defects in the improvements on the Property.
(11) any condition on the Property that violates any law or ordinance.

(Describe any exceptions to (1)-(11) in Paragraph 12 or an addendum.)

….

22. AGREEMENT OF THE PARTIES:

C. This contract contains the entire agreement of the parties and may not be changed except in writing.

TEXAS ASSOCIATION OF REALTORS

COMMERCIAL PROPERTY CONDITION STATEMENT

Use of this Form by Persons Who Are Not Members of the Texas Association of Realtors® Is Not Authorized.

CONCERNING THE PROPERTY AT _____

THIS IS A DISCLOSURE OF THE OWNER'S KNOWLEDGE OF THE CONDITION OF THE PROPERTY AS OF THE DATE SIGNED. IT IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES A BUYER OR TENANT MAY WISH TO OBTAIN. IT IS NOT A WARRANTY OF ANY KIND BY SELLER, SELLER'S AGENTS, OR ANY OTHER AGENT.

PART I - Complete if Property is Improved or Unimproved

Are you (Seller) aware of:

		Aware	Not Aware
(1)	any of the following environmental conditions on or affecting the Property:		
	(a) radon gas?	☐	☐
	(b) asbestos components:	☐	☐
	(1) friable components?	☐	☐
	(2) non-friable components?	☐	☐
	(c) urea-formaldehyde insulation?	☐	☐
	(d) endangered species or their habitat?	☐	☐
	(e) wetlands?	☐	☐
	(f) underground storage tanks?	☐	☐
	(g) leaks in any storage tanks (underground or above-ground)?	☐	☐
	(h) lead-based paint?	☐	☐
	(i) hazardous materials or toxic waste?	☐	☐
	(j) open or closed landfills on or under the surface of the Property?	☐	☐
	(k) external conditions materially and adversely affecting the Property such as nearby landfills, smelting plants, burners, storage facilities of toxic or hazardous materials, refining, utility transmission lines, mills, feed lots, and the like?	☐	☐
	(l) any activity relating to drilling or excavation sites for oil, gas, or other minerals?	☐	☐
(2)	previous environmental contamination that was on or that materially and adversely affected the Property, including but not limited to previous environmental conditions listed in Paragraph 1(a)-(l)?..	☐	☐
(3)	any part of the Property lying in a special flood hazard area (A or V Zone)?	☐	☐
(4)	any improper drainage onto or away from the Property?	☐	☐
(5)	any fault line on or near the Property that adversely and materially affects the Property?	☐	☐
(6)	outstanding mineral rights, exceptions, or reservations of the Property held by others?	☐	☐
(7)	air space restrictions or easements on or affecting the Property?	☐	☐
(8)	unrecorded or unplatted agreements for easements, utilities, or access on or to the Property?	☐	☐
(9)	special districts in which the Properties lies (for example, historical districts, development districts, extraterritorial jurisdictions, or others)?	☐	☐
(10)	pending changes in zoning, restrictions, or in physical use of the Property?	☐	☐
(11)	your receipt of any notice concerning any likely condemnation, planned streets, highways, railroads, or developments that would materially and adversely affect the Property (including access or visibility)?	☐	☐
(12)	lawsuits affecting title to or use or enjoyment of the Property?	☐	☐
(13)	your receipt of any written notices of violations of zoning, deed restrictions or regulations of the EPA, OSHA, or TCEQ, or other government agencies?	☐	☐

	Aware	Not Aware
(14) common areas or facilities affiliated with the Property co-owned with others?	☐	☐
(15) an owners' or tenants' association or maintenance fee or assessment affecting the Property?	☐	☐

If aware, name of association: _____;
Name of manager: _____;
Amount of fee or assessment: $_____ per _____;
Are fees current through the date of this notice? ☐ yes ☐ no ☐ unknown

(16) subsurface structures, hydraulic lifts, or pits on the Property?	☐	☐
(17) intermittent or weather springs that affect the Property?	☐	☐
(18) any material defect in any irrigation system, fences, or signs on the Property?	☐	☐
(19) conditions on or affecting the Property that materially affect the health or safety of an ordinary individual?	☐	☐

If you are aware of any of the conditions listed above, explain. (*Attach additional information if needed.*)

PART 11 - Complete Only if Property is Improved

A. Are you (Seller) aware of any material defects in any of the following on the Property?:

(1) Structural Items:	Aware	Not Aware	Not Appl
(a) foundation systems (slabs, columns, trusses, bracing, crawl spaces, piers, beams, footings, retaining walls, basement, grading)?	☐	☐	☐
(b) exterior walls?	☐	☐	☐
(c) fireplaces and chimneys?	☐	☐	☐
(d) roof, roof structure, or attic (covering, flashing, skylights, insulation, roof penetrations, ventilation, gutters and downspouts, decking)?	☐	☐	☐
(e) windows, doors, plate glass, or canopies?	☐	☐	☐
(2) Plumbing Systems:			
(a) water heaters or water softeners?	☐	☐	☐
(b) supply or drain lines?	☐	☐	☐
(c) faucets, fixtures, or commodes?	☐	☐	☐
(d) private sewage systems?	☐	☐	☐
(e) pools or spas and equipments?	☐	☐	☐
(f) sprinkler systems?	☐	☐	☐
(g) water coolers?	☐	☐	☐
(h) private water wells?	☐	☐	☐
(i) pumps or sump pumps?	☐	☐	☐
(3) HVAC Systems: any cooling, heating, or ventilation systems?	☐	☐	☐
(4) Electrical Systems: service drop, wiring, connections, conductors, plugs, grounds, power, polarity, switches, light fixtures, or junction boxes?	☐	☐	☐
(5) Other Systems or Items:			
(a) security or fire detection systems?	☐	☐	☐
(b) porches or decks?	☐	☐	☐

	Aware	Not Aware	Not Appl
(c) gas lines?	☐	☐	☐
(d) garage doors and door operators?	☐	☐	☐
(e) loading doors or docks?	☐	☐	☐
(f) rails or overhead cranes?	☐	☐	☐

(g) elevators or escalators? ☐ ☐ ☐
(h) parking areas, drives, steps, walkways? ☐ ☐ ☐
(i) appliances or built-in kitchen equipment? ☐ ☐ ☐

If you are aware of material defects in any of the items listed under Paragraph A, explain. (*Attach additional information if needed.*)

B. Are you (Seller) aware of:

		Aware	Not Aware
(1)	any of the following water or drainage conditions materially and adversely affecting Property:		
	(a) ground water?	☐	☐
	(b) water penetration?	☐	☐
	(c) previous flooding or water drainage?	☐	☐
	(d) soil erosion or water ponding?	☐	☐
(2)	previous structural repair to the foundation systems on the Property?	☐	☐
(3)	settling or soil movement materially and adversely affecting the Property?	☐	☐
(4)	pest infestation from rodents, insects, or other organisms on the Property?	☐	☐
(5)	termite or wood rot damage on the Property needing repair?	☐	☐
(6)	mold to the extent that it materially and adversely affects the Property?	☐	☐
(7)	mold remediation certificate issued for the Property in the previous 5 years? *if yes, attach a copy of the mold remediation certificate.*	☐	☐
(8)	previous termite treatment on the Property?	☐	☐
(9)	previous fires that materially affected the Property?	☐	☐
(10)	modifications made to the Property without necessary permits or not in compliance with building codes in effect at the time?	☐	☐
(11)	any part, system, or component in or on the Property not in compliance with the Americans with Disabilities Act or the Texas Architectural Barrier Statute?	☐	☐

If you are aware of any conditions described under Paragraph B, explain. (*Attach additional information if needed.*)

Seller:_____ Date:_____

Seller:_____ Date:_____

The undersigned acknowledges receipt of the foregoing statement.

Buyer or Tenant:_____ Date:_____

Buyer or Tenant:_____ Date:_____

NOTICE TO BUYER/TENANT: The Broker representing Seller and the broker representing you advise you that this statement was completed by Seller, as of the date signed. The brokers have relied on this statement as true and correct and have no reason to believe it to be false or inaccurate. YOU ARE ENCOURAGED TO HAVE AN INSPECTOR OF YOUR CHOICE INSPECT THE PROPERTY.

3. Texas Real Estate Forms Manual Sales Contract

TEXAS REAL ESTATE FORMS MANUAL Ch. 8

§8.10 Representations

Representations are negotiated by the parties with specific reference to the transaction. Representations may include such matters as ownership of the property; organization of the parties; authority to execute the contract and close the transaction; condition of title; parties in possession; pending litigation and claims that may ripen into litigation; pending or threatened condemnation or other taking; use restrictions, such as zoning and restrictive covenants; condition of the property or disclaimer of representations—for example, "as"; presence of landfills or hazardous and toxic wastes; floodplain location; utility availability and capacity; compliance with all laws; effectiveness of required licenses and permits; status of leases; operation and maintenance of property before closing; accuracy of books and records; agricultural or other special-use tax assessment; payment of ad valorem taxes; and status of debt to be assumed or taken "subject to."

In negotiating representations, the parties often consider issues such as whether the representations will be absolute or based on the seller's knowledge and belief; whether the representations will be based on the knowledge of the entity that is the seller or on the knowledge of specified individuals; whether the seller must perform further investigation to make the representations or may rely on its current knowledge, without further investigation; and whether and to what extent the representations will survive closing.

The approach used in this contract limits the seller's representations, but it is not intended to insulate the seller from liability for fraud or misrepresentation.

- The seller represents only facts, not opinions. For example, the seller does not represent whether, in the seller's opinion, the property is in compliance with applicable laws and regulations. Instead, the seller represents that it has not received notice of violation of any law, ordinance, regulation, or requirement affecting the property or use of the property, except as stated in the contract

- The seller makes no representation that is not stated in the contract, including exhibit D (notices, statements, and certificates required by law and regulation).

The following optional clauses are also provided:

- The buyer agrees to accept the property in its "as is, where is" condition, investigate the property on the buyer's own behalf, and not rely on information or representations attributable to the seller, except to the extent stated in the contract.

- The buyer waives its rights under the Texas Deceptive Trade Practices—Consumer Protection Act.

- The buyer assumes responsibility after closing for all environmental matters relating to the property.

If the parties negotiate different representations, exhibit B must be revised accordingly.

The contract provides that the parties' representations are true and accurate when made and must be true and accurate at closing, or the buyer may terminate the contract.

It is common practice to include representations regarding the organization and authority of the parties in contracts but to defer the obligation to deliver documentary evidence confirming those representations until the closing of the transaction. That evidence customarily consists of certificates of existence and

good standing from public officials, certified copies of organizational documents, certified corporate resolutions or partnership consents, and certificates of incumbency. The attorney may consider requiring such documentary evidence at the execution of the contract to avoid encountering a claim after substantial obligations have been paid or incurred that the other party is not authorized to consummate the transaction. While the seller's organizational documents should be available at the time of execution of the contract, the buyer's organizational documents are often not prepared until before closing.

Real Estate Sales Contract (Form 8-1)

…

G. Inspection Period

1. *Review of Seller's Records.* Seller will deliver to Buyer copies of Seller's records specified in Exhibit C, or otherwise make those records available for Buyer's review, by the deadline stated in section A.7.

2. *Entry onto the Property.* Buyer may enter the Property before closing to inspect it, subject to the following:

a. Buyer must deliver evidence to Seller that Buyer has insurance for its proposed inspection activities, in amounts and with coverages that are substantially the same as those maintained by Seller or in such lesser amounts or with such lesser coverages as are reasonably satisfactory to Seller;

b. Buyer may not interfere in any material manner with existing operations or occupants of the Property;

c. Buyer must notify Seller in advance of Buyer's plans to conduct tests so that Seller may be present during the tests;

d. if the Property is altered because of Buyer's inspections, Buyer must return the Property to its preinspection condition promptly after the alteration occurs;

e. Buyer must deliver to Seller copies of all inspection reports that Buyer prepares or receives from third-party consultants or contractors within three days after their preparation or receipt; and

f. Buyer must abide by any other reasonable entry rules imposed by Seller.

3. *Buyer's Right to Terminate.* Buyer may terminate this contract for any reason by notifying Seller before the end of the Inspection Period. If Buyer does not notify Seller of Buyer's termination of the contract before the end of the Inspection Period, Buyer waives the right to terminate this contract pursuant to this provision. [**Include if applicable:** If Buyer does not terminate this contract pursuant to this provision, Buyer must deposit the Additional Earnest Money with the Title Company on or before the Additional Earnest Money Deadline.]

4. *Buyer's Indemnity and Release of Seller*

a. *Indemnity.* Buyer will indemnify, defend, and hold Seller harmless from any loss, attorney's fees, expenses, or claims arising out of Buyer's investigation of the Property, except for repair or remediation of existing conditions discovered by Buyer's inspection. The obligations of Buyer under this provision will survive termination of this contract and closing.

b. *Release.* Buyer releases Seller and those persons acting on Seller's behalf from all claims and causes of action (including claims for attorney's fees and court and other costs) resulting from Buyer's investigation of the Property.

H. Representations

The parties' representations stated in Exhibit B are true and correct as of the Effective Date and must be true and correct on the Closing Date.

…

M. Miscellaneous Provisions

…

2. *Entire Contract.* This contract, together with its exhibits, and any Closing Documents delivered at closing constitute the entire agreement of the parties concerning the sale of the Property by Seller to Buyer. There are no oral representations, warranties, agreements, or promises pertaining to the sale of the Property by Seller to Buyer not incorporated in writing in this contract.

…

11. *No Special Relationship.* The parties' relationship is an ordinary commercial relationship, and they do not intend to create the relationship of principal and agent, partnership, joint venture, or any other special relationship.

…

14. *Waiver of Consumer Rights.* BUYER WAIVES ITS RIGHTS UNDER THE TEXAS DECEPTIVE TRADE PRACTICES-CONSUMER PROTECTION ACT, SECTION 17.41 *ET SEQ.* OF THE TEXAS BUSINESS AND COMMERCE CODE, A LAW THAT GIVES CONSUMERS SPECIAL RIGHTS AND PROTECTIONS. AFTER CONSULTATION WITH AN ATTORNEY OF ITS OWN SELECTION, BUYER VOLUNTARILY CONSENTS TO THIS WAIVER.

…

Exhibit B

Representations; Environmental Matters

A. Seller's Representations to Buyer

Seller represents to Buyer that the following are true and correct as of the Effective Date and will be true and correct on the Closing Date.

1. *Authority.* Seller is a [**specify type of organization**] duly organized, validly existing, and in good standing under the laws of the state of [Texas/[**state**]] with authority to convey the Property to Buyer. This contract is, and all documents required by this contract to be executed and delivered to Buyer at closing will be, duly authorized, executed, and delivered by Seller.

2. *Litigation.* There is no litigation pending or threatened against Seller that might affect the Property or Seller's ability to perform its obligations under this contract [**include if applicable:** , except: [**specify**]].

3. *Violation of Laws.* Seller has not received notice of violation of any law, ordinance, regulation, or requirements affecting the Property or Seller's use of the Property [**include if applicable:** , except: [**specify**]].

4. *Licenses, Permits, and Approvals.* Seller has not received notice that any license, permit, or approval necessary to operate the Property in the manner in which it is currently operated will not be renewed on expiration or that any material condition will be imposed in order to obtain their renewal [**include if applicable:** , except: [**specify**]].

5. *Condemnation; Zoning; Land Use; Hazardous Materials.* Seller has not received notice of any condemnation, zoning, or land-use proceedings affecting the Property or any inquiries or notices by any governmental authority or third party with respect to the presence of hazardous materials on the Property or the migration of hazardous materials from the Property [**include if applicable:** , except: [**specify**]].

6. *No Other Obligation to Sell the Property or Restriction against Selling the Property.* Except for granting a security interest in the Property, Seller has not obligated itself to sell the Property to any party other than Buyer. Seller's performance of this contract will not cause a breach of any other agreement or obligation to which Seller is a party or to which it is bound.

7. *No Liens.* On the Closing Date, the Property will be free and clear of all mechanic's and materialman's liens and other liens and encumbrances of any nature except the Permitted Exceptions, and no work or materials will have been furnished to the Property that might give rise to mechanic's, materialman's, or other liens against the Property other than work or materials to which Buyer has given its consent.

8. *No Other Representation.* Except as stated above or in the notices, statements, and certificates set forth in **Exhibit D**, Seller makes no representation with respect to the Property.

9. *No Warranty.* Seller has made no warranty in connection with this contract.

B. "As Is, Where Is"

THIS CONTRACT IS AN ARM'S-LENGTH AGREEMENT BETWEEN THE PARTIES. THE PURCHASE PRICE WAS BARGAINED ON THE BASIS OF AN "AS IS, WHERE IS" TRANSACTION AND REFLECTS THE AGREEMENT OF THE PARTIES THAT THERE ARE NO REPRESENTATIONS, DISCLOSURES, OR EXPRESS OR IMPLIED WARRANTIES, EXCEPT FOR THE WARRANTY OF TITLE STATED IN THE CLOSING DOCUMENTS AND SELLER'S REPRESENTATIONS TO BUYER SET FORTH IN SECTION A OF THIS **EXHIBIT B**.

THE PROPERTY WILL BE CONVEYED TO BUYER IN AN "AS IS, WHERE IS" CONDITION, WITH ALL FAULTS. [**Include if applicable:** SELLER MAKES NO WARRANTY OF CONDITION, MERCHANTABILITY, OR SUITABILITY OR FITNESS FOR A PARTICULAR PURPOSE WITH RESPECT TO THE PERSONAL PROPERTY.] ALL WARRANTIES, EXCEPT THE WARRANTY OF TITLE IN THE CLOSING DOCUMENTS, ARE DISCLAIMED.

The provisions of this section B regarding the Property will be included in the deed [**include if applicable:** and bill of sale] with appropriate modification of terms as the context requires.

C. Environmental Matters

AFTER CLOSING, AS BETWEEN BUYER AND SELLER, THE RISK OF LIABILITY OR EXPENSE FOR ENVIRONMENTAL PROBLEMS, EVEN IF ARISING FROM EVENTS BEFORE CLOSING, WILL BE THE SOLE RESPONSIBILITY OF BUYER, REGARDLESS OF WHETHER THE ENVIRONMENTAL PROBLEMS WERE KNOWN OR UNKNOWN AT CLOSING. ONCE CLOSING HAS OCCURRED, BUYER INDEMNIFIES, HOLDS HARMLESS, AND RELEASES SELLER FROM LIABILITY FOR ANY LATENT DEFECTS AND FROM ANY LIABILITY FOR ENVIRONMENTAL PROBLEMS AFFECTING THE PROPERTY, INCLUDING LIABILITY UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA), THE RESOURCE CONSERVATION AND RECOVERY ACT (RCRA), THE TEXAS SOLID WASTE DISPOSAL ACT, OR THE TEXAS WATER CODE. **BUYER INDEMNIFIES, HOLDS HARMLESS, AND RELEASES SELLER FROM ANY LIABILITY FOR ENVIRONMENTAL PROBLEMS AFFECTING THE PROPERTY ARISING AS THE RESULT OF SELLER'S OWN NEGLIGENCE OR THE NEGLIGENCE OF SELLER'S REPRESENTATIVES.** BUYER INDEMNIFIES, HOLDS HARMLESS, AND RELEASES SELLER FROM ANY LIABILITY FOR ENVIRONMENTAL PROBLEMS AFFECTING THE PROPERTY ARISING AS THE RESULT OF THEORIES OF PRODUCTS LIABILITY AND STRICT LIABILITY, OR UNDER NEW LAWS OR CHANGES TO EXISTING LAWS ENACTED AFTER THE EFFECTIVE DATE THAT WOULD OTHERWISE IMPOSE ON SELLERS IN THIS TYPE OF TRANSACTION NEW LIABILITIES FOR ENVIRONMENTAL PROBLEMS AFFECTING THE PROPERTY.

The provisions of this section C regarding the Property will be included in the deed [**include if applicable:** and bill of sale] with appropriate modification of terms as the context requires.

Exhibit C

Seller's Records

To the extent that Seller has possession of the following items pertaining to the Property, Seller will deliver or make the items or copies of them available to Buyer by the deadline stated in section A.7.:

Governmental

governmental licenses, certificates, permits, and approvals

tax statements for the current year and the last [**number**] years

notices of appraised value for the current year and the last [**number**] years

records of regulatory proceedings or violations (for example, condemnation, environmental)

other: [**specify**]

Land

soil reports

environmental reports

water rights

engineering reports

prior surveys

site plans

other: [**specify**]

Facilities

as-built plans, specifications, and mechanical drawings for improvements

warranty agreements

management, employment, labor, service, equipment, supply, and maintenance agreements
insurance policies

ADA and other building inspection reports

engineering reports

environmental reports

operating and maintenance plans (for example, asbestos maintenance plans)

life-safety plans

other: [**specify**]

Financial

annual operating statements for the most recent [**number**] years of operation

monthly operating statements since the close of the last fiscal year

balance sheet as of [**date**]

books and records for the Property

utility bills for the most recent [**number**] months of operation

other: [**specify**]

Leases

Leases

commission and leasing agent agreements

rent roll setting forth for each Lease:

tenant's name

square footage leased

date of expiration of current and renewal terms

renewal options

basic rent and formula for any additional rents
amount of additional rent paid during the last [**number**] [months/years]

prepaid rent

delinquent rent

security deposit

current tenant or landlord defaults

options to purchase any portion of the Property

rights of first refusal to lease other space

rights to rent concessions, tenant improvements, or other allowances

unpaid or contingent brokerage commissions (including commission on renewals)

estoppel letters and/or subordination agreements

other: [**specify**]

4. Best Practice Forms (Provision Appearing in Thomas Properties sale to Target).

4. Contingencies.

Buyer contemplates acquiring the Property for the construction and operation of a general merchandise store initially containing approximately _____ square feet of ground floor space and related outside sales areas, if any, together with parking and other appurtenant facilities. Seller acknowledges that the Property may be of no use to Buyer unless certain conditions precedent to such use exist, but nothing in this Agreement, by implication or otherwise, shall be interpreted to require Buyer to construct or operate any improvement on the Property, subject to the provisions of Section 4Q below. Buyer's obligation to close the transaction contemplated herein shall therefore be conditioned upon Buyer satisfying itself within 90 days after the Effective Date (the "Contingency Date") that the following contingencies are met:

A. The construction of the improvements contemplated by Buyer will not require extraordinary, excessive, or unusually costly construction techniques, and drainage of both surface and subsurface water can be accomplished by ordinary construction techniques not involving unusual or excessive costs.

B. All utilities, including electricity, telephone, gas, water (fire and domestic), storm and sanitary sewer, are, or will be at the time of Closing, available on site or on the Property's side of abutting streets of size and capacity sufficient to serve the contemplated building and retail use, and at the time of Closing, Buyer will be immediately entitled to connect into such utilities upon payment of only the usual and customary connection fees. Notwithstanding the foregoing, Buyer and Seller contemplate that after the Closing certain utilities will be installed and/or constructed to and within the Property as part of the work to be performed pursuant to the SDA (as defined in Section 4P below.)

C. Buyer shall be satisfied with the results of its investigations, studies and preliminary economic evaluations of the Property, and with matters and conditions which have been disclosed by information delivered to Buyer, either by Seller or at Seller's direction.

D. Buyer's Capital Expenditure Committee shall have approved the transaction contemplated by this Agreement.

E. Buyer shall have obtained a Site Development Permit ("SDP") in a form acceptable to Buyer from the City of Austin or other applicable governing body. Seller shall have the right to monitor all activities related to Buyer's Site Development Permit application. Buyer shall copy Seller on all correspondence with the City of Austin, neighborhood groups and environmental groups related to Buyer's Site Development Permit activities. Seller shall have the opportunity to attend all meetings with the City of Austin, neighborhood groups, and environmental groups related to Buyer's Site Development Permit activities.

F. Buyer shall have reviewed and approved the P.U.D. for _____ Centre, the USFWS 10(a) Permit, and the existing Declaration of Covenants, Restrictions and Easements and Design Guidelines for _____ Centre (the "CCR's")

G. Buyer may use the Property for retail/commercial purposes without being in violation of any applicable legal requirement, including any zoning classification, land use classification, environmental requirement, building classification, or any other classification or requirement established by any entity or authority having legal jurisdiction or authority there over. The availability or probability of the issuance of a variance or special use permit necessary to satisfy this condition shall not be considered sufficient unless the actual issuance thereof is or will be unconditional and the time period for appeal of such issuance has expired without contest.

H. The following plans, acceptable to Buyer in Buyer's sole and absolute discretion, have received all necessary governmental approvals, and all time periods for appeal of such approvals have expired without contest: (i) a site plan for the use and development of the Property, including all points of access and signage locations (the "Site Plan"), and (ii) a signage plan, including the size, type and design of all exterior building and freestanding signage Buyer and Seller intend to erect with respect to the

Property (the "Signage Plan"). Buyer's site design consultant, civil engineer, architect and all other development and design consultants and staff shall cooperate with Seller and Seller's site design consultants to create the Site Plan. The Site Plan also shall be subject to Seller's reasonable approval, on or before the Contingency Date. The final design of all improvements on the Property shall comply with the _____ Centre P.U.D., the USFWS Section 10(a) Permit, and the CCR's. Seller and Buyer shall use reasonable efforts to agree upon the Site Plan on or before the Contingency Date.

I. If the Property must be platted or subdivided pursuant to Section 6 below, a plat or subdivision map (i) has been recorded, or (ii) has received all necessary approvals, is in final recordable form and has been delivered to the Title Company for recording at Closing.

J. The Property has or will have adequate ingress and egress for vehicular traffic to and from adjacent public streets to meet the unique needs of Buyer's business operation. Buyer may determine the adequacy of access based on proposals or plans it assumes or estimates will have been implemented as of the date it projects for the opening of its retail business on the Property.

K. All permits, licenses and other governmental and quasi-governmental authorizations necessary for the development of the Property in accordance with the approved Site Plan and the approved Signage Plan (i) have been or will be issued and outstanding, (ii) shall not be subject to any conditions other than the closing of the transaction contemplated by this Agreement and the obtaining of building permits, and (iii) the time periods for appeal of issuance of such permits, licenses and other authorizations shall have expired without contest.

L. Subject to the closing of the transaction contemplated by this Agreement, if Buyer were to apply for a building permit for a "_____" store on the Property as of the Date of Closing and pay all required application fees, and provided that the plans for such store complied with all applicable building codes, Buyer could, as a matter of right, obtain such building permit without further act.

M. All covenants of Seller required in this Agreement to be performed on or before the Contingency Date have been timely and duly performed in all material respects.

N. At the time of Closing, Buyer will be immediately entitled to connect into all utilities, including electricity, telephone, gas, water (fire and domestic), storm and sanitary sewer, upon payment of only the usual and customary connection and capital recovery fees.

O. Buyer shall have received a certification from its consultant indicating that any and all removal, remediation, transportation, disposal and/or control of all Hazardous Materials on or under the Property or migrating to or from the Property (including any soil contaminated by one or more Hazardous Materials) have been completed.

P. Seller and Buyer shall have approved the final forms of an Operation and Easement Agreement ("OEA"), a Site Development Agreement ("SDA"), and a Developer Acquisition Rights Agreement (the "Acquisition Agreement") for the Property on or before the Contingency Date. Seller and Buyer shall use reasonable efforts to agree upon the final forms of the OEA, the SDA, and the Acquisition Agreement on or before the Contingency Date.

If any of the conditions set forth in this Section 4 are not found to exist to the satisfaction of Buyer, in its sole and absolute discretion, then Buyer may, at its sole option, terminate this Agreement by giving written notice to Seller at any time on or before the Contingency Date. If any of the conditions set forth in Section 4H or Section 4P are not found to exist to the satisfaction of Seller, in its sole and absolute discretion, then Seller may, at its sole option, terminate this Agreement by giving written notice to Buyer at any time on or before the Contingency Date. Upon any such termination, both parties shall be released from all duties and obligations under this Agreement, except as otherwise provided in this Agreement. The conditions set forth in this Section 4, other than Section 4H and 4P above, are for Buyer's sole benefit, and Buyer may, in its sole and absolute discretion, waive the fulfillment of any one or more of such conditions, or any part thereof. Seller shall use reasonable efforts to avoid any action that modifies or changes the circumstances upon which the conditions set forth in this Section 4 were deemed satisfied or waived by Buyer.

7. Buyer's Investigations and Inspections.

A. Access and Resulting Reports. Seller hereby grants to Buyer, its employees, agents, consultants and contractors, the right to enter onto the Property and, to the extent necessary, onto any other part of the Property for the purpose of performing such surveys, soil tests, hydrology tests, percolation tests, environmental tests, and other engineering tests or environmental investigations which Buyer may reasonably deem appropriate. Within 30 days after written notice to Buyer from Seller, Buyer shall make reasonable efforts to deliver to Seller copies of all reports and other information obtained in connection with such inspections. Upon Seller's written request Buyer shall, at Seller's sole cost and expense, use commercially reasonable efforts to have any of such reports and information as designated by Seller, certified to Seller, Seller's attorneys and consultants, and/or the Title Company. Buyer will give Seller's designated representative (who shall be _____, subject to change pursuant to Section 17 below) reasonable prior notice of entry onto the Property, and shall use reasonable care and effort not to disrupt or interfere with any activities within the Property or with the use and enjoyment of the Property by Seller or its tenants. Prior to entering onto the Property, Buyer and Buyer's agents and representatives shall first obtain commercial general liability insurance, naming Seller as an additional insured and with liability limits of at least $1,000,000 per accident and $100,000 for property. The provisions of this subparagraph A. shall survive Closing or termination of this Agreement, as the case may be.

B. Submittals of Information. Within 10 days after the Effective Date, Seller shall deliver to Buyer any information (for example, any surveys, topographical maps, engineering studies, condemnation notices, proceedings and awards, plans, reports, test results, permits or tank registrations, title information, the P.U.D., and all tax bills, including but not limited to property, personal, rental and special assessments for _____ and current tax appraisals) Seller has within its possession regarding the Property including the environmental condition and/or any subterranean structures or utilities which may be present on the Property. Seller agrees that following said initial submission of information to Buyer, throughout the term of this Agreement Seller shall continue to deliver to Buyer all such information obtained by Seller promptly after Seller receives or obtains possession of the same.

C. Cost of Inspection; Buyer's Indemnity; Seller's Indemnity. Buyer agrees to pay all of the costs and expenses associated with its investigations and testing and to repair and restore, at Buyer's expense, any damage to the Property caused by Buyer's investigations or testing. Buyer also agrees to hold Seller and the Property harmless from all costs, expenses and liabilities arising out of Buyer's activities, negligence or willful misconduct or that of its employees, agents, consultants or contractors in performing its evaluation of the Property, except that Buyer shall have no responsibility to Seller, and Seller hereby releases Buyer from liability for any damage to persons or property arising out of existing environmental conditions or subterranean structures or utilities that were known to Seller and not disclosed to Buyer as provided in subparagraph B above. The terms of this subparagraph C shall survive Closing or termination of this Agreement, as the case may be.

D. Samples; Disposal. Soil, rock, water, asbestos, and other samples taken from the Property shall remain the property of Seller. At Seller's request, Buyer will cooperate with Seller with respect to Seller's decisions regarding the lawful disposal of any contaminated samples, and Buyer further agrees to reimburse Seller for (or pay on Seller's behalf) reasonable costs associated with the lawful disposal of such samples. In any case, Seller shall be required to sign any manifests and any other documents required in connection with the disposal of contaminated samples. If Seller is not willing to sign the required documentation, Buyer's only obligation with respect to contaminated samples shall be to return the same to Seller. The terms of this subparagraph D. shall survive Closing or termination of this Agreement, as the case may be.

E. As Is. Other than as specifically set forth or warranted in this Agreement or with respect to the warranty of title Seller agrees to deliver in the Deed required under Section 12A below, it is expressly stipulated and agreed that Buyer accepts the Property "AS IS" and "WITH ALL FAULTS", and that Seller makes and has made NO REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, with respect to the condition of the Property, the fitness of the Property for any intended use or purpose, the existence of any hazardous or toxic materials in or on the Property or any other environmental condition of the Property,

the availability of utilities or other services to the Property, or the present or future income that may be generated from the Property. Buyer acknowledges that is not relying upon any information supplied by, representation, statement or other assertion with respect to the Property Condition made by Seller, its employees or agents, but is relying solely upon its examination of the Property. Without limiting the foregoing, in the event Buyer consummates the Closing pursuant to this Agreement with knowledge contrary to any representations, warranties, covenants, or other information made or provided by Seller pursuant to this Agreement, Buyer shall be conclusively deemed to have satisfied itself, based on its own inspections and investigations, as to the condition of the Property and all matters pertaining thereto, thereby releasing Seller from any liability as to such matters. **BUYER ACKNOWLEDGES THAT THE INFORMATION PROVIDED AND TO BE PROVIDED WITH RESPECT TO THE PROPERTY WILL BE OBTAINED FROM A VARIETY OF SOURCES, AND SELLER HAS NOT MADE ANY INDEPENDENT INVESTIGATION OR VERIFICATION OF SUCH INFORMATION OR ANY EXPRESS, IMPLIED, ORAL OR WRITTEN REPRESENTATIONS AS TO THE ACCURACY OR COMPLETENESS OF SUCH INFORMATION.**

10. Representations and Warranties.

A. General Representations and Warranties. Seller represents and warrants to Buyer that the following statements are now true and accurate:

1. To the extent of Seller's current actual knowledge, Seller has good, indefeasible and insurable record title to the Property; Seller has owned and/or been in possession of the Property for approximately one year.

2. To Seller's current actual knowledge, the Property is not subject to any mechanics' liens, nor are there any third parties in or entitled to possession or use of the Property, and there are no management agreements (other than in connection with the CCR's), maintenance or service contracts, non-governmental use restrictions or other agreements relating to the Property which are unrecorded and which would be binding on the Property or Buyer.

3. Seller has not received any notice nor is it aware of any pending action to take all or any portion of the Property, nor has Seller agreed or committed to dedicate any part of the Property.

4. To Seller's current actual knowledge, the Property and the Property have free and full access to and from all adjoining streets, roads and highways, subject to the P.U.D. and the final plat thereof, and there is no pending or threatened action which would limit or impair such access.

5. The Property has not been classified under any designation authorized by law to obtain a special low ad valorem tax rate or receive either an abatement or deferment of ad valorem taxes which, in such case, will result in additional, catch-up ad valorem taxes in the future in order to recover the amounts previously abated or deferred, and there are no minimum value, minimum tax or other agreements with respect to the Property which would restrict Buyer's right to contest the value or taxes attributable to the Property.

6. To Seller's current actual knowledge, neither the Property nor its use is in violation of any local governmental rule, ordinance, regulation or building code, nor is there a pending or threatened investigation regarding a possible violation of any of the foregoing.

7. Seller has not received any notice nor is it aware of any litigation or administrative proceeding pending or threatened (including the expiration of any appeal period with respect thereto) relating to the Property or its use which may adversely affect the validity of any license, permit or other governmental determination or authorization necessary to development and operation of the Property.

8. Seller is not a "foreign person" as contemplated by Section 1445 of the Internal Revenue Code.

9. Seller has the full capacity, right, power and authority to execute, deliver and

perform this Agreement and all documents to be executed by Seller pursuant hereto, and all required actions and approvals therefore have been duly taken and obtained. The individuals signing this Agreement and all other documents executed or to be executed pursuant hereto on behalf of Seller are and shall be duly authorized to sign the same on Seller's behalf and to bind Seller thereto.

10. This Agreement and all documents to be executed pursuant hereto by Seller are and shall be binding upon and enforceable against Seller in accordance with their respective terms, and, to Seller's current actual knowledge, the transaction contemplated hereby will not result in a breach of, or constitute a default or permit acceleration and maturity under, any indenture, mortgage, deed of trust, loan agreement or other agreement to which Seller or the Property or the balance of the Property is subject or by which Seller or the Property or the balance of the Property is bound.

11. Seller has not (i) made a general assignment for the benefit of creditors, (ii) filed any involuntary petition in bankruptcy or suffered the filing of any involuntary petition by Seller's creditors, (iii) suffered the appointment of a receiver to take possession of all or substantially all of Seller's assets, (iv) suffered the attachment or other judicial seizure of all, or substantially all, of Seller's assets, (v) admitted in writing its inability to pay its debts as they come due, or (vi) made an offer of settlement, extension or composition to its creditors generally.

B. Environmental Representations and Warranties. Seller represents and warrants to Buyer that the following statements are now true and accurate:

1. To Seller's current actual knowledge, there are no Hazardous Materials, as defined below in this subparagraph B, located on, in, or under the Property, except as disclosed on Exhibit D.

2. To Seller's current actual knowledge, neither as of this date nor at any time prior to the date hereof, has there been a Release, as defined below in this subparagraph B, of any Hazardous Material in, on or under the Property, except as disclosed on Exhibit D.

3. Seller has not used the Property for the use, storage, generation, manufacture, treatment, transportation, handling or disposal of any Hazardous Material, nor, to Seller's current actual knowledge, has the Property ever been used for the use storage, generation, manufacture, treatment, transportation, handling or disposal of any Hazardous Material, except as disclosed on Exhibit D.

4. To Seller's current actual knowledge, Seller's activities on the Property and those of its tenants, subtenants and licensees, if any, comply with all applicable Environmental Laws, as defined below in this subparagraph B.

5. To Seller's current actual knowledge, except as disclosed on Exhibit D, there is no, nor has there ever been any, investigation, administrative proceeding, litigation, regulatory hearing or other action proposed, threatened or pending, relating to the Property and alleging non-compliance with or liability under any Environmental Law; nor to Seller's current actual knowledge is the Property listed on CERCLIS or any comparable state list of hazardous waste sites identified for investigation or remediation.

6. Seller has disclosed to Buyer on Exhibit D any assessments, studies, sampling results, evaluations and other reports commissioned by or for Seller or within Seller's possession relating to the environmental condition of the Property. In addition, to Seller's current actual knowledge, there are no land use controls imposed on the Property in connection with environmental concerns, and no real estate tax benefits and/or rebates accruing in connection with the environmental condition of the Property.

7. To Seller's current actual knowledge, there are not now and were not at any time during which Seller had any interest in the Property, nor have there ever been, any above-ground or underground storage tanks located in, on or under the Property, except as disclosed on Exhibit D.

8. No storage tanks have been removed from the Property at a time during which Seller had any interest in the Property.

For purposes of this Agreement:

The term "Hazardous Materials" shall mean and refer to the following: petroleum products and fractions thereof, asbestos, asbestos containing materials, urea formaldehyde, polychlorinated biphenyls, radioactive materials and all other dangerous, toxic or hazardous pollutants, contaminants, chemicals, materials, substances and wastes listed or identified in, or regulated by, any Environmental Law.

The term "Environmental Laws" shall mean and refer to the following: all federal, state, county, municipal, local and other statutes, laws, ordinances and regulations which relate to or deal with human health or the environment, all as may be amended form time to time.

The term "Release" shall mean and refer to any spilling, leaking, pumping, pouring, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment, including the abandonment or discarding of barrels, drums, containers, tanks, or other receptacles containing or previously containing any Hazardous Material.

C. Representations and Warranties deemed Remade as of Closing; Certificate. Except to the extent otherwise set forth on a Certificate delivered to Buyer as provided in this Section 10C, the foregoing representations and warranties shall automatically be deemed to have been remade by Seller as of the Date of Closing. Seller shall execute and deliver to Buyer at Closing a written certification to Buyer disclosing, where applicable, the extent to which Seller cannot remake said representations and warranties as of the Date of Closing (the "Certificate"). If any of Seller's disclosures reveal a matter unacceptable to Buyer in Buyer's sole and absolute discretion, Buyer may at its sole option terminate this Agreement in accordance with and under the same terms as set forth in Section 4 above. The Certificate shall be executed by an authorized and incumbent corporate officer of Seller if Seller is a corporation or a general partner if Seller is a partnership, or Seller, if Seller is an individual, and Seller shall deliver the Certificate to Buyer at Closing. Upon delivery to Buyer, the Certificate shall be deemed to constitute a part of this Agreement. Any disclosure on the Certificate shall not affect Buyer's rights under Section 4 above or Section 10D below.

D. Covenants. Seller covenants and agrees as follows:

1. So long as this Agreement remains in force, Seller shall not lease, convey or otherwise transfer or encumber all or any portion of the Property in any manner that would be binding on Buyer or the Property after the Date of Closing.

2. Seller shall not knowingly take or authorize any action (a) which modifies or alters the accuracy of any of the statements at Section 10A or Section 10 B or (b) which would prevent Seller from representing and warranting as to the truth and accuracy of said statements as of the Date of Closing.

E. Survival for Limited Time Post Closing; Limitation on Recourse. The foregoing representations and warranties set forth in this Section 10 are express representations and warranties upon which Buyer shall be entitled to rely, except as modified by any investigation or inquiry made by, or any knowledge of, Buyer. Consummation of this Agreement by Buyer with knowledge of any such modification shall constitute a waiver or release by Buyer of any claims arising out of or in connection therewith.

Seller shall in lieu of any other remedy available to Buyer, all other remedies against Seller in such case being hereby waived, indemnify and hold Buyer harmless from and against any and all claims, actions, judgments, liabilities, liens, damages, penalties, fines, costs and expenses, including, but not limited to, reasonable attorneys' fees, to the extent any such matter is not covered by insurance, asserted against, imposed on, or suffered or incurred by Buyer (or the Property) proximately caused by any breach of the foregoing representations and warranties of this Section 10 (as made and as remade pursuant to Section 10C)(collectively, "Section 10 Breaches"), that are discovered by Buyer after Closing and as to which Buyer has given written notice to Seller as herein provided during the ____ month period following

the Closing Date, up to a maximum aggregate amount of $_____.

Notwithstanding anything contained in this Agreement to the contrary, the foregoing representations and warranties of this Section 10 (as made and as remade pursuant to Section 10C above), and the foregoing indemnity obligation, shall survive Closing, provided that Seller's obligation shall extend only to those matters as to which Buyer sends to Seller a written notice on or prior to the date which is ____ months following the Date of Closing, but not thereafter. Time is of the essence as to periods specified in this Section 10E. Buyer shall cooperate with Seller in Seller's investigation and attempt to remedy Section 10 Breaches, including providing Seller with all pertinent information in Buyer's possession or control as to the Section 10 Breach, access to the Property, authorization to Buyer's consultants to freely discuss the matter with Seller, and information as to possible insurance coverage. Buyer shall permit Seller to participate in any negotiations with third parties to remedy the matter that is the subject of Buyer's notice. Buyer shall give Seller timely written notice in the method provided in Section 17 of any matter as to which Buyer shall or may seek indemnity from Seller. If Buyer unreasonably rejects a reasonable offer made in settlement of the matter that is the subject of Buyer's complaint to Seller, Buyer may not recover from Seller an amount in excess of the monetary settlement offer made by Seller, and may recover only the amount of reasonable and necessary attorney's fees and costs incurred before the offer was rejected or considered rejected. Seller's offer shall be considered rejected if not accepted by Buyer by written notice sent to Seller within 10 business days of Buyer's receipt of the settlement offer.

THE FOREGOING LIMITATION OF SELLER'S LIABILITY TO A MAXIMUM AGGREGATE AMOUNT OF $_____ LIMITS SELLER'S LIABILITY FOR SECTION 10 BREACHES ARISING OUT OF ANY LEGAL THEORY, INCLUDING BREACH OF WARRANTY, MISREPRESENTATION, FRAUD, NEGLIGENCE, OR STRICT LIABILITY.

F. Knowledge. For all purposes under this Agreement, the term "current actual knowledge" of Seller shall mean the actual, present, knowledge (as opposed to constructive, implied or imputed knowledge) of any employee of Seller, on and as of the Effective Date of this Agreement and the Date of Closing, without any specific or special investigation or inquiry of any kind or nature whatsoever.

14. Default by Seller.

If this transaction fails to close as a result of a material default by Seller with respect to any of the terms of this Agreement, and such material default continues for a period of 10 days after Buyer notifies Seller in writing of such event, Seller's sole and exclusive remedies for such material default shall be as set forth below. Unless such default is cured prior to the expiration of the 10-day period specified in the preceding sentence, Buyer may, at its option, elect to proceed under A, B or C below:

A. To terminate this Agreement and receive a return of the Deposit plus a reimbursement by Seller of the reasonable costs paid by Buyer for the Survey, following which neither party shall have any further rights or obligations under this Agreement, or

B. To enforce specific performance of Seller's obligations under this Agreement, including specifically the conveyance of the Property in the condition required hereby.

C. In the event the remedy of specific performance is not legally enforceable by Buyer, to pursue any and all other remedies available to Buyer at law or in equity (provided, any damages recoverable from Seller shall not exceed a maximum aggregate amount of $250,000.00), including a return of the Deposit plus a reimbursement by Seller of the reasonable costs paid by Buyer for the Survey.

19. Entire Agreement.

All previous negotiations and understandings between Seller and Buyer or their respective agents and employees with respect to the transaction set forth herein are merged into this Agreement, and this Agreement alone fully and completely expresses the parties' rights, duties and obligations with respect to its subject matter. This Agreement may be amended only by subsequent written agreement between Seller and

Buyer.

20. No Merger.

The warranties, representations and/or indemnities expressly made in this Agreement shall survive the Closing as herein provided and shall not be merged therein.

23. Construction.

The rule of strict construction shall not apply to this Agreement. This Agreement has been prepared by Buyer and its professional advisors and reviewed and modified by Seller and its professional advisors. Seller, Buyer, and their separate advisors believe that this Agreement is the product of all of their efforts, that it expresses their agreements, and that it should not be interpreted in favor of or against either Seller or Buyer merely because of their efforts in preparing it.

32. Request for Non-Disclosure.

Seller, Buyer, and each of their respective representatives shall hold in confidence the terms and conditions of this Agreement and all data and information obtained with respect to the Property, whether obtained before or after the execution and delivery hereof (collectively the "Confidential Information"), and shall not use such Confidential Information for purposes unrelated to this Agreement or disclose the same to others except as expressly permitted hereunder. The preceding sentence shall not be construed to prevent Seller from disclosing to its representatives and agents Confidential Information as necessary to perform its obligations under this Agreement, or prevent Buyer from disclosing to its agents and consultants Confidential Information as is necessary for such agents and consultants to perform their designated tasks in connection with Buyer's inspection of the Property. However, neither party shall have this obligation concerning information which: (i) is published or becomes publicly available through no fault of either Buyer or Seller; (ii) is rightfully received from a third party; or (iii) is required to be disclosed by law. In the event this Agreement is terminated or Buyer fails to perform hereunder, Buyer shall promptly return to Seller any statements, documents, schedules, exhibits or other written information obtained from Seller in connection with this Agreement or the transaction contemplated hereby (including all information which was provided to agents and consultants). In the event of a breach or threatened breach of this Section 32 by Seller, Buyer, or their respective agents and/or consultants, the party alleging such breach or threatened breach shall be entitled to an injunction restraining the alleged breaching party or its agents and/or consultants from disclosing, in whole or in part, such confidential information. Nothing herein shall be construed as prohibiting any party hereto from pursuing any other available remedy at law or in equity for such breach or threatened breach.

FOOTNOTES

[1] Lay Understandings. Truth telling: Jack Nicholson to Diane Keeton in Something's Gotta Give (2003).

[2] Lay Understandings. Buyer beware: *Caveat emptor, qui ignorare non debuit guod jus alienum emit*—"let a purchaser, who ought not to be ignorant of the amount and nature of the interest which is about to buy, exercise proper caution." HEBERT BROOM, LEGAL MAXIMS 769.

[3] Lay Understandings. Truthfulness is important: The angel to Pinocchio prior to giving Pinocchio life.

[4] Lay Understandings. Silence is not a virtue: Francis Bacon 1561 – 1626.

[5] Lay Understandings. Silence is golden: Thomas Carlyle 1795 - 1881 quoting a Swiss inscription: "Speech is silvern, Silence is golden, or as I might rather express it: Speech is of Time, Silence is of Eternity."

[6] Lay Understandings. Honesty should be controlled: Don Marquis 1878 – 1937.

[7] Lay Understandings. Honesty may is the best policy: Richard Whatley, Archbishop of Dublin 1787 – 1863.

[8] Consumer Protection.

DTPA. Adopted in 1967. TEX. BUS. & COM. CODE §§ 17.41 *et seq*. (Vernon 2002). See discussion in paper.

Fraud in Real Estate Transactions. TEX. BUS. & COM. CODE §§ 27.01 *et seq*. (Vernon 2002). See discussion in paper.

Implied Warranties as to New Home Construction: Constructed in a Good and Workmanlike and Suitable for Habitability. In 1968 the Texas Supreme Court in Humber v. Morton, 426 S.W.2d 554, 555 (Tex. 1968), announced that a builder of a new home impliedly warranted that the residence is (1) constructed in a good and workmanlike manner and (2) is suitable for human habitation (these warranties are referred to in Texas as the "*Humber* warranties"). In replacing *caveat emptor* with these two implied warranties the court noted the significance of a new home purchase for most buyers and the difficulty of discovering or guarding against latent defects in construction.

Implied Warranty of Good and Workmanlike Construction of a New Home. The implied warranty of good and workmanlike construction of a new home was later restated by the Texas supreme court to be that a builder impliedly warrants that it will construct a home "in the same manner as would a generally proficient builder engaged in similar work and performing under similar conditions." Centex Homes v. Buecher, 95 S.W.3d 266, 273 (Tex. 2002). In determining if the implied warranty of good and workmanlike construction has been breached, the court focuses on the builder's conduct. *Id.* at 272-73. The *Centex* court held that a home builder is required to perform with at least a minimal standard of care, and implicit in the good and workmanlike standard is a builder's use of reasonable skill and diligence. *Id*. at 273.

Freedom of Contract: The *Centex* court held that the implied warranty of good and workmanlike construction of a new home could be waived. The court held that the implied warranty of good workmanship serves as a gap-filler and attaches to a new home sale if the parties' agreement does not provide how the builder is to perform. As a "gap filler," the parties' agreement may supersede the implied standard for workmanship, but the agreement cannot simply disclaim it." *Centex Homes*, at 274. Therefore, the implied warranty of good workmanship

may be disclaimed when the parties' agreement provides for the manner, performance, or quality of the desired construction. *See* further discussion of the of freedom of contract and waivers in the next footnote.

Statutory Override of Freedom of Contract. The portion of the holding in *Centex* that recognized that parties to a new home contract could waive the implied covenant of good and workmanlike construction was superseded by the Texas Legislature's adoption in 2003 of the Texas Residential Construction Commission Act ("TRCCA"). TEX. PROP. CODE §§ 426.001 *et seq.* (Vernon 2003 and Supp. 2008). Pursuant to this legislation, the Texas Residential Construction Commission (the "Commission") was created, which was directed to promulgate state-mandated minimum construction warranty standards applicable to residences constructed or remodeled after the September 1, 2003, effective date of TRCCA. Also, TRCCA set up the "State-Sponsored Inspection and Dispute Resolution Process ("SIRP") outlined in Subtitle D of TRCCA. The state-mandatory warranties promulgated by the Commission and an explanation of the SIRP are found on the Web at www.trcc.state.tx.us . The Commission has established the following warranties:

- a one-year workmanship and materials warranty;
- a two-year mechanical and delivery system warranty;
- a ten-year structural warranty; and
- a ten-year warranty of habitability.

TRCCA provides that after the adoption of TRCCA the only residential construction warranties are the limited statutory warranties that are created by TRCCA. TRCCA § 430.007 provides that the statutory warranties may not be waived in a contract between a builder and a homeowner, but they may contract for more stringent warranties and building standards. TRCCA does not supplant a claimant's cause of action for fraud.

Implied Warranty of Habitability of a New Home. The second implied warranty found by the Texas supreme court to apply to new home construction is the implied warranty of habitability. The court found that this implied warranty is an "essential part of the new home sale." *Centex.* at 273. The court stated that this implied warranty protects new home buyers from conditions that are so defective that the property is rendered unsuitable for its intended use as a home." The implied warranty of habitability protects the purchaser from defects that undermine the basis of the bargain. In other words, the implied warranty of habitability "only protects new home buyers from conditions that are so defective that the property is rendered unsuitable for its intended use as a home." *Id.* A builder breaches the warranty if he fails to construct a home that is "safe, sanitary, and otherwise fit for human habitation." *Id.* In essence, "the warranty of habitability represents a form of strict liability since the adequacy of the completed structure and not the manner of performance by the builder governs liability." The court found that this implied warranty applies only to latent defects – those that are not discoverable by a reasonable inspection. The court noted that while this warranty may not be generally disclaimed, it may be disclaimed under certain limited circumstances (for example, an informed release of a known existing defect).

Extension of Implied Warranty to Commercial Leases. In 1988 the Texas Supreme court abandoned the residential/commercial distinction concerning implied covenants of habitability. The court in *Davidow v. Inwood North Prof'l Group—Phase I,* 747 S.W.2d 373, 377 (Tex. 1988) stated:

> [t]here is an implied warranty of suitability by the landlord in a commercial lease that the premises are suitable for their intended commercial purpose.

The *Davidow* court imposed the implied warranty of suitability in a commercial context and also attacked the doctrine of independent covenants by holding that the obligation to pay rent and the implied warranty of suitability were mutually dependent.

Dr. Davidow leased medical office space from Inwood North Professional Group. The lease required Inwood to provide air condition, electricity, hot water janitorial service, and security services. Dr. Davidow moved into the building and immediately began experiencing problems. The air conditioning did not work properly, the roof leaked, pests and rodents were rampant, electricity service was often interrupted, the office was not cleaned, no hot water was provided, the parking lot was filthy, and he experienced repeated break-ins and vandalism. Eventually, Dr. Davidow had enough, moved out, and stopped paying rent, even though 14 months remained on the lease term. Inwood sued Dr. Davidow for the unpaid rent. Dr. Davidow raised the affirmative defenses of material breach of the lease, and breach of the implied warranty that the premises were suitable for use as a medical office. The jury found that Inwood materially breached the lease, that Inwood warranted that the space was suitable for a medical office, and that the space was not, in fact, suitable for a medical office.

On appeal, the appellate court found that the covenant to pay rent was independent of the obligation of the landlord to maintain the building, and that the implied warranty of habitability did not extend to commercial leases.

The Texas Supreme court examined the rationale for extending the implied warranty of habitability to commercial tenants as it had been extended to residential tenants. The court found, that like residential tenants, commercial tenants were not likely to be in a position to assure the suitability of the premises. The court recognized that, like residential tenants, many commercial tenants had short term leases and limited financial resources to make necessary repairs. The court concluded that there is no valid reason to imply a warranty of habitability in residential leases and not in commercial leases. The *Davidow* court offered the following factors to be considered in determining the scope of the breach of the implied warranty: (1) the type of defect, (2) the effect of the defect on the tenant's use, (3) the length of time the defect existed, (4) the age of the building where the premises are located, (5) the age of the building where the premises are located, (6) the location of the building, (7) whether the tenant waived the defects in the lease, and (8) any unusual or abnormal use of the premises by the tenant. While the *Davidow* court did not address whether or how the implied warranty of suitability could be waived, it did not preclude waiver, and, in fact, went so far as to suggest that the terms of the lease might alter the warranty. The court stated that if "the parties to a lease expressly agree that the tenant will repair certain defects, then the provisions of the lease will control."

Express Negligence and Strict Liability Doctrine. In order for indemnities protecting the indemnified party from the liabilities caused by its negligence or strict liability, the Texas Supreme Court has engrafted on to indemnities, exculpations and releases the consumer protection requirement that the agreement meet the twin tests of fair notice and express negligence.

Fair Notice. The concept of fair notice was introduced into Texas indemnity law in 1963 by the Texas Supreme Court in *Spence & Howe Const. Co. v. Gulf Oil Corp.*, 365 S.W.2d 631 (Tex. 1963). The fair notice requirement focuses on the appearance and placement of the provision as opposed to its "content." The supreme court in *Spence* reasoned that

> [t]he obvious purpose of this rule is to prevent injustice. A contracting party should be upon fair notice that under his agreement and through no fault of his own, a large and ruinous award of damages may be assessed against him solely by reason of negligence attributable to the opposite contracting party. *Id.* at 634.

Express Negligence. In 1987 the Texas Supreme Court expressing frustration with the writing style and craft of Texas lawyers in *Ethyl Corp. v. Daniel Const. Co.*, 725 S.W.2d 705, 707 (Tex. 1987) adopted the "express negligence" requirement. In *Ethyl*, the court observed

> As we have moved closer to the express negligence doctrine, the scriveners of indemnity agreements have devised novel ways of writing provisions which fail to expressly state the true intent of those provisions. The intent of the scriveners is to indemnify the

> indemnitee for its negligence, yet be just ambiguous enough to conceal that true intent from the indemnitor. The result has been a plethora of lawsuits to construe those ambiguous contracts. We hold the better policy is to cut through the ambiguity of those provisions and adopt the express negligence doctrine. The express negligence test replaced the "clear and unequivocal" test....

The express negligence requirement is a rule of contract interpretation and therefore is to be determined by the court as a matter of law. *Fisk Electric Co. v. Constructors & Associates, Inc.*, 888 S.W.2d 813, 814 (Tex. 1994). The indemnity must expressly state that it indemnifies the indemnified person for liabilities caused in whole or in part by its negligence and not leave it to inference. For instance, "x will indemnify y for all loss arising out of the acts or omissions of y except for loss caused by the gross negligence or willful misconduct of y" will not be enforced to indemnify y for loss caused by its negligence.

The fair notice test and the express negligence doctrine has been extended by the Texas Supreme Court to indemnities for liability arising out of the indemnified person's or released person's strict liability. In 1994 the Texas Supreme Court in *Houston Lighting & Power Co. v. Atchison, Topeka, & Santa Fe Railway Co.*, 890 S.W.2d 455 (Tex. 1994) expanded the express negligence doctrine to require indemnity agreements intending to cover a protected party's strict liability to expressly state that it covers such strict liability. The court found that fairness dictates that such an "extraordinary shifting of risk" must be clearly and specifically expressed as to non-negligence based statutory strict liability in order to be enforced.

Extension to Indemnity for Strict Liability for Environmental Contamination. The Fifth Circuit has addressed indemnifications for strict liability under environmental protection laws in *Fina, Inc. v. ARCO*, 200 F.3D 266 (5th Cir. 2000). In *Fina* the court had to determine the enforceability of two indemnity provisions, the first in a 1969 sales contract between ARCO and BP Oil Company (the *"ARCO/BP Agreement"*) as to a refinery located in Port Arthur, Texas being acquired by BP from ARCO, and the second in a 1973 sales contract between BP and Fina (the *"BP/Fina Agreement"*) whereby Fina acquired the refinery from BP. Fina sued BP and ARCO for $14,000,000 in investigatory and remedial response costs it incurred after it discovered contamination at the refinery in 1989. Fina sought contribution from BP and ARCO under CERCLA. BP counterclaimed that the liability was covered in Fina's indemnity of BP in the BP/Fina Agreement. ARCO counterclaimed that the liability was covered by the indemnity in the ARCO/BP Agreement was assumed by Fina by the BP/Fina Agreement. The BP/Fina Agreement contained an express choice of laws provision choosing Delaware law. The ARCO/BP Agreement was silent as to applicable law. The indemnity provisions are the following:

> ARCO/BP Agreement: BP shall indemnify, defend, and hold harmless ARCO ... against all claims, actions, demands, losses or liabilities arising from the ownership or the operation of the Assets ... and accruing from and after Closing ... except to the extent that any such claim, action, demand, loss or liability shall arise from the gross negligence of ARCO.
>
> BP/Fina Agreement: Fina shall indemnify, defend and hold harmless BP ... against all claims, actions, demands, losses or liabilities arising from the use or the operation of the Assets ... and accruing from and after closing.

As to the BP/Fina Agreement the court first determined that it would uphold the parties choice of Delaware law as the court could not discern a fundamental public policy of the State of Texas that would be violated by applying the "clear and unequivocal" test applicable to the enforceability of indemnity provisions covering the Indemnified Person's negligence. The court then held that the "all claims" language in the BP/Fina Agreement clearly covered liabilities arising under CERCLA, even though CERCLA was not enacted until 1980. The court noted that unlike Texas no Delaware case had addressed the applicability of the clear and unequivocal test to claims based on strict liability. The court found that the same policy reasons that existed in Texas' extension of

the express negligence doctrine to strict liability cases also existed in Delaware to extend the clear and unequivocal test to strict liability claims in interpreting indemnities.

The court rejected BP's argument that normal contract rules of interpretation should apply to interpreting the indemnity. BP argued that the clear and unequivocal test should not apply to indemnification for *prior* acts giving rise to *potential future liability* (with "past" and "future" being determined by reference to the time at which the indemnity provision was signed). The court rejected BP's argument that under Texas law the express negligence doctrine is inapplicable to indemnities for past conduct giving rise to potential future liability and therefore similarly the court should find that Delaware would not apply the clear and unequivocal test to potential future liability for past acts. The court stated,

> Even as to Texas law, it is not at all clear that BP's conclusion is correct. The language used by the Texas courts is ambiguous: "Future negligence" might refer to *future negligent conduct*, but it also might refer to *future claims based on negligence*. True, the Texas rule does clearly distinguish between (1) indemnification for past conduct for which claims have already been filed at the time the indemnity provision is signed and (2) indemnification for future conduct for which claims could not possibly have been filed at the time the indemnity provision was signed. Still, no Texas case has addressed the applicability of the rule to the rare situation in which a party attempts to invoke the protection of an indemnity agreement against a claim filed *after* the indemnity was signed but arising from conduct that occurred *prior* to signing of the indemnity. (emphasis added).

The court held that under Delaware law the indemnity in the BP/Fina Agreement did not clearly and unequivocally require Fina to indemnify BP for its strict liability under CERCLA that arose after the indemnity agreement (the *"future claim"*) for conduct prior to the indemnity agreement. As to ARCO's "circuitous indemnity obligation" being enforceable against Fina, the court held that the ARCO/BP Agreement did not pass the fair notice test under Texas law and would not pick up strict liability claims for ARCO's future strict liability for its past conduct. The court noted that Fina's claims under the Resource Conservation Recovery Act, 42 U.S.C. §§ 6901 *et seq.*, and § 361.344 of the Texas Solid Waste Disposal Act similarly would not be barred by the indemnity.

Extension of Fair Notice and Express Negligence Requirements to Releases of Negligence. In 1993 the Texas Supreme Court in *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993) extended the fair notice principle and the express negligence doctrine to releases. This principle is likely to be extended to waivers, exculpations and disclaimers seeking to exclude liability for one's own negligence, being merely a release worded in a different format.

9 Freedom of Contract.

Fundamental Public Policy. BMG Direct Mktg., Inc. v. Peake, 178 S.W.3d 763, 767 (Tex. 2005) (quoting Wood Motor Co., v. Nebel, 150 Tex. 86, 238 S.W.2d 181, 185 (1951) recently reaffirmed this policy, stating that:

> [P]ublic policy requires ... that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider-that you are not lightly to interfere with this freedom of contract. Freedom of contract allows parties to bargain for mutually agreeable terms and allocate risks as they set fit.

Finality of Releases. The court in *Schlumberger* upheld a release even though it had been fraudulently induced, as the court found the public policy to uphold releases of claims between parties which expressly released the claim that the release itself was induced by fraud, to be

greater than the policy to set aside contracts induced by fraud. Schlumberger Technology Corp. v. Swanson, 959 S.W.2d 171 (Tex. 1997). The court stated

> Juxtaposed to this authority (authority supporting setting aside releases induced by fraudulent representations), we have a competing concern—the ability of parties to fully and finally resolve disputes between them. Parties should be able to bargain for and execute a release barring all further dispute. This principle necessarily contemplates that parties may disclaim reliance on representations. And such a disclaimer, where the parties' intent is clear and specific, should be effective to negate a fraudulent inducement claim. As an example, a disclaimer of reliance may conclusively negate the element of reliance, which is essential to a fraudulent inducement claim. *See Prudential*, 896 S.W.2d at 161-62 (holding that agreement to buy property "as is," in which buyer included "voluntary, freely negotiated affirmation that he was depending on his own assessment of the building, precluded claim for damages when building was found to contain asbestos.

Adoption of UCC in Texas. The UCC as adopted in Texas and the case law construing its provisions have established freedom of contract as the norm in sales of personal property and there has developed a well established body of case law interpreting its provisions. TEX. BUS. & COM. CODE §§ 2.313 Express Warranties by Affirmation, Promise, Description, Sample; 2.314 Implied Warranty: Merchantability; Usage of Trade; 2.315 Implied Warranty: Fitness for Particular Purpose; and 2.316 Exclusion or Modification of Warranties (Vernon 2002). §2.316 provides as follows:

> (a) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this chapter on parol or extrinsic evidence (Section 2.202) negation or limitation is inoperative to the extent that such construction is unreasonable.
>
> (b) Subject to Subsection (c), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."
>
> (c) Notwithstanding Subsection (b)
>
> (1) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and
>
> (2) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and
>
> (3) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.
>
> (d) Remedies for breach of warranty can be limited in accordance with the provisions of this chapter on liquidation or limitation of damages and on contractual modification of remedy (Sections 2.718 and 2.719). ....

Contractual Waiver of Implied Warranty of Suitability in Commercial Leases. Gym-N-I Playgrounds, Inc. v. Snider, 220 S.W.3d 905, 913 (Tex. 2007) recently upheld the enforceability of "as is" clause as an effective waiver of the implied warranty of suitability in a commercial lease. The court stated

> Our conclusion that the implied warranty of suitability may be contractually waived is also supported by public policy. Texas strongly favors parties' freedom of contract. BMG Direct Mktg., Inc. v. Peake, 178 S.W.3d 763 (Tex. 2005); In re Prudential Ins. Co. of America, 148 S.W.3d 124, 129 (Tex. 2004) ("As a rule, parties have the right to contract as they see fit as long as their agreement does not violate the law or public policy.").

In the *Gym-N-I* case, Snider owned and operated a playground equipment company, Gym-N-I Playgrounds, Inc. Snider bought six acres of land in New Braunfels and built a 20,075 square foot building. Gym-N-I's bookkeeper, Bonnie Caddell and Patrick Finn, another employee who performed miscellaneous jobs for Gym-N-I, bought the Gym-N-I business from Snider. Snider leased the building to them for the operation of the business they had purchase. Finn and Caddell did not inspect the building before entering into the lese because, as Caddell testified, they "knew more about the building" than anyone else. The lease contained an "as is" "no reliance" clause (the *Gym-N-I* clause is set out in the main body of this paper). The lese required Gym-N-I to insure "all buildings and improvements on the Premises ...against loss or damage by fire." Further, the lese required Gym-N-I to maintain the premises. A fire destroyed the building. Pursuant to the City of New Braunfels' fire code, owners are required to install sprinkler systems in any building exceeding 20,000 square feet if the building contains combustible materials. Although Gym-N-I's building exceeded the 20,000 threshold, the new Braunfels fire marshal recommended, but did not require, that the building be sprinkled. Caddell and Finn knew that the fire marshal's recommendation was never implemented.

Snider's insurer filed a subrogation suit against Gym-N-I, and Gym-N-I filed cross claims against Snider's insurer and third-party claims against Snider. Gym-N-I claimed, among other things, breach of the implied warranty of suitability for commercial purposes, and alleged that the fire was caused by defective electrical wiring and the lack of a sprinkler system. Snider argued that all of Gym-N-I's claims except a breach of contract claim, were barred by the "as is" clause and warranty disclaimer in the lease (or, alternatively, were precluded by the waiver of subrogation clause). The parties settled the contract claim, and the trial court granted Snider's motion for summary judgment.

On appeal Gym-N-I argued that *Davidow* authorized a waiver of the implied warranty of suitability "only when the lease makes the tenant responsible for certain specifically enumerated defects," and that the general "as is" provision could not waive the implied warranty of suitability.

The Texas Supreme Court held that "the 'as is' clause was in effect at the time of the fire, the implied warranty of suitability disclaimer expressly and effectively disclaimed that warranty, and the 'as is' clause negated the causation element of Gym-N-I's other claims against Snider." The court noted that they first recognized the implied warranty of suitability for intended commercial purposes in *Davidow* as meaning "that at the inception of the leas there are no latent defects in the facilities that are vital to the sue of the premises for their intended commercial purpose and that these essential facilities will remain in a suitable condition." The court noted that they "agreed with *Davidow's* argument that 'commercial tenants generally rely on their landlords' greater abilities to inspect and repair the premises.'" The court stated that

> While *Davidow* did not address whether or how the implied warranty of suitability may be waived, we did say that if "the parties to a lease expressly agree that the tenant will repair certain defects, then the provisions of the lease will control." ...
>
> Freedom of contract allows parties to bargain for mutually agreeable terms and allocate risks as they see fit. A lessee may wish to make her own determination of the

> commercial suitability of premises for her intended purposes. By assuming the risk that the premises may be unsuitable, she may negotiate a lower lease price that reflects that risk allocation. Alternatively, the lessee is free to rely on the lessor's assurances and negotiate a contract that leaves the implied warranty of suitability intact.

Noting the distinction from the implied warranty of habitability in the residential context, the *Gym-N-I* court stated that that commercial tenancies are "excluded primarily on the rationale that the feature of unequal bargaining power justifying the imposition of the warranty in residential leases is not present in commercial transactions." The court reasoned further that

> The fact that the lessor impliedly warrants suitability in Texas ensures that, when the warranty is waived, the parties focus their attention on who is responsible for discovering and repairing latent defects, and they may allocate the risk accordingly. We see no compelling reason to disturb that market transaction here.

Contractual Waiver of Implied Warranties in Product Sales Contracts.

In Mid Continent Aircraft Corp. v. Curry County Spraying, Inc., 572 S.W.2d 308 (Tex. 1978) the court determined that the buyer's cause of action for property damage to airplane sustained in crash due to defective product (sale of a reconditioned airplane) was a cause of action for breach of warranty rather than for strict liability in tort, and where buyer bought the airplane "as is," there were no implied warranties of merchantability and fitness on which recovery could be had. The court noted that

> Strict liability arose initially to compensate consumers for personal injuries caused by defective products, although it was sometimes referred to as "implied warranty in law as a matter of public policy." ... The present case does not involve personal injury but concerns only economic loss to the purchased product itself. Distinguished from personal injury and injury to other property, damage to the product itself is essentially a loss to the purchaser of the benefit of the bargain with the seller. Loss of use and cost of repair of the product are the only expenses suffered by the purchaser. The loss is limited to what was involved in the transaction with the seller, which perhaps accounts for the Legislature providing that parties may rely on sales and contract law for compensation of economic loss to the product itself. ... The consumer protection needs upon which strict liability is based are not sufficiently strong to impose that theory of recovery over the existing sales law remedies... In transactions between a commercial seller and commercial buyer, when no physical injury has occurred, injury to the defective product itself is an economic loss governed by the Uniform Commercial Code.... With regard to the implied warranties of merchantability and fitness, Section 2.316(c)(1) of the Code provides for their exclusion with an "as is" disclaimer.... The result is that Curry County has taken the entire risk as to the quality of the airplane and the resulting loss. *Id.* at 312-313.

Contractual Waiver of Implied Warranty of Good and Workmanlike Construction for New Homes. In 1982, the Texas Supreme Court in G-W-L, Inc. v. Robichaux, 643 S.W.2d 392 (Tex. 1982) held that the *Humber* warranties could be disclaimed or waived if that intent were clearly expressed in the parties' agreement. However, the court in Melody Home Manufacturing Co. v. Barnes, 741 S.W.2d 349, 355 (Tex. 1987) found that in the context of repair and modification of tangible goods or property, the implied warranty of good workmanship could not as a matter of public policy be waived or disclaimed. Many commentators concluded that after *Melody Home* the *Humber* warranties no longer could be waived or disclaimed.

In 2002 the Texas Supreme Court in Centex Homes v. Buecher, 95 S.W.3d 266 (Tex. 2002) was presented with a class action brought by Centex's home purchasers which sought an injunction to prevent Centex from asserting that the homeowners had waived implied warranties of habitability and good and workmanlike construction. The sales contracts provided that the builder's express

limited warranty replaced all other warranties, including these two implied warranties. The trial court dismissed the homeowners' petition. Holding that the implied warranties of habitability and good and workmanlike construction could not be waived, the court of appeals reversed the trial court's judgment and remanded the homeowners' claims for further proceedings. The Texas Supreme Court held (1) the implied warranty of good workmanship could be disclaimed by parties if the agreement provided for the manner, performance, or quality of the desired construction, and (2) the implied warranty of habitability could not be disclaimed. The court made the following distinctions between the implied warranty of good and workmanlike construction and the implied warranty of habitability, and on these distinctions justified permitting a contractual waiver of the implied warranty of good and workmanlike construction "if the agreement provided for the manner, performance, or quality of the desired construction":

> The implied warranty of good workmanship focuses on the builder's conduct, while the implied warranty of habitability focuses on the state of the completed structure. (citation omitted). Through the implied warranty of good workmanship, the common law recognizes that a new home builder should perform with at least a minimal standard of care. (citations omitted). This implied warranty requires the builder to construct the home in the same manner as would a generally proficient builder engaged in similar work and performing under similar circumstances. (citation omitted). The implied warranty of good workmanship serves as a "gap-filler" or "default warranty"; it applies unless and until the parties express a contrary intention. (citation omitted). Thus, the implied warranty of good workmanship attaches to a new home sale if the parties' agreement does not provide how the builder or the structure is to perform.
>
> The implied warranty of habitability, on the other hand, looks only to the finished product:
>
> > [T]he implied warranty of habitability is a result oriented concept based upon specific public policy considerations. These include the propriety of shifting the costs of defective construction from consumers to builders who are presumed better able to absorb such costs; the nature of the transaction which involves the purchase of a manufactured product, a house; the buyer's inferior bargaining position; the foreseeable risk of harm resulting from defects to consumers; consumer difficulty in ascertaining defective conditions; and justifiable reliance by consumers on a builder's expertise and implied representations. (citation omitted).
>
> This implied warranty is more limited in scope, protecting the purchaser only from those defects that undermine the very basis of the bargain. (citation omitted). It requires the builder to provide a house that is safe, sanitary, and otherwise fit for human habitation. (citation omitted). In other words, this implied warranty only protects new home buyers from conditions that are so defective that the property is unsuitable for its intended use as a home. As compared to the warranty of good workmanship, "the warranty of habitability represents a form of strict liability since the adequacy of the completed structure and not the manner of performance by the builder governs liability." (citation omitted).
>
> These two implied warranties parallel one another, and they may overlap. For example, a builder's inferior workmanship could compromise the structure and cause the home to be unsafe. But a builder's failure to perform good workmanship is actionable even when the outcome does not impair habitability. (citation omitted). Similarly, a home could be well constructed and yet unfit for human habitation if, for example, a builder constructed a home with good workmanship but on a toxic waste site. Unfortunately, many courts, including this one, have not consistently recognized these distinctions.
> ...
> The implied warranty of good workmanship, however, defines the level of performance expected when the parties fail to make express provision in their contract. It functions as a gap-filler whose purpose is to supply terms that are omitted from but necessary to the

contract's performance. *See* RESTATEMENT (SECOND) CONTRACTS § 204 Supplying an Omitted Essential Term (1981). As a gap-filler, the parties' agreement may supersede the implied standard for workmanship, but the agreement cannot simply disclaim it. (citation omitted).

In conclusion, we hold that the implied warranty of good workmanship may be disclaimed by the parties when their agreement provides for the manner, performance or quality of the desired construction. We further hold that the warranty of habitability may not be disclaimed generally. This latter implied warranty, however, only extends to defects that render the property so defective that it is unsuitable for its intended use as a home. Further, the implied warranty of habitability extends only to latent defects. It does not include defects, even substantial ones, that are known by or expressly disclosed to the buyer. In the trial court, the homeowners, who had purchased homes from Centex under standardized contracts disclaiming the implied warranty of habitability and the implied warranty of good and workmanlike construction, sought a judicial declaration as a class that the disclaimer was unenforceable. The trial court concluded that the disclaimer provision validly waived both implied warranties and dismissed the class claims. Without deciding whether a class action is appropriate in this case, we remand the class claims for consideration in light of our clarification of the purpose and protection afforded by these implied warranties.

(*Note: this result overruled by statute, Texas Residential Construction Commission Act*, TEX. PROP. CODE §§ 426.001 *et seq.* (Vernon 2003 and Supp. 2008).

[10] "Indemnity". Indemnity is, "I agree to be liable for your wrongs." Indemnity is a shifting of the risk of a loss from a liable person to another. However, many times scriveners use an indemnity provision when they do not know whether the Indemnified Person is a potentially liable person. Sometimes, an indemnity provision is no more than a restatement of existing duties, "I will indemnify you for my wrongs;" "You will indemnify me for your wrongs."

[11] "Exculpation". Exculpation is, "I am not liable to you for my wrongs." An exculpatory provision is designed to exclude, as between the parties to a contract, certain designated duties, liabilities or costs due to the occurrence or non-occurrence of events.

[12] "Release". Release s, "You are not liable to me for your wrongs." A release is an agreement in which one party agrees to hold the other without responsibility for damage or other liability arising out of the transaction involved.

[13] "Representation". BLACK'S LAW DICTIONARY 1327 "Representation" (8th ed. 2004).

[14] "Warranty". *Id.* at 1618

[15] Statement of Fact or Opinion. Prudential Ins. Co. of America v. Jefferson Assoc., Ltd., 896 S.W.2d 156 (Tex. 1995).

[16] False Representation. Henry S. Miller Co. v. Bynum, 797 S.W.2d 51, 55 (Tex. App.—Hou. [1st Dist.] 1990, no writ) involving misrepresentations to a tenant by a leasing company. The court stated "[w]hen a seller makes representations to a buyer, it is under a duty to know if the representations are true."

[17] Elements of Common Law Fraud Claim. DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 688 (Tex. 1990).

[18] Fraud by Non-Disclosure. Non Disclosure where a party has a duty to speak is fraud, as silence is misleading. Smith v. National Resort Communities, Inc., 585 S.W.2d 655, 658 (Tex. 1979) cited by Schlumberger Technology Corp. v. Swanson, 959 S.W.2d 171 (Tex. 1997).

[19] Elements of Statutory Fraud in Real Estate Claim. Section 27.01 of the Texas Business and Commerce Code states:

(a) Fraud in a transaction involving real estate or stock in a corporation or joint stock company consists of a (1) false representation of a past or existing material fact, when the false representation is (A) made to a person for the purpose of inducing that person to enter into a contract; and (B) relied on by that person in entering into that contract; or (2) false promise to do an act, when the false promise is (A) material; (B) made with the intention of not fulfilling it; (C) made to a person for the purpose of inducing that person to enter into a contract; and (D) relied on by that person in entering into that contract.

(b) A person who makes a false representation or false promise commits the fraud described in Subsection (a) of this section and is liable to the person defrauded for actual damages.

(c) A person who makes a false representation or false promise with actual awareness of the falsity thereof commits the fraud described in Subsection (a) of this section and is liable to the person defrauded for exemplary damages. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

(d) A person who (1) has actual awareness of the falsity of a representation or promise made by another person and (2) fails to disclose the falsity of the representation or promise to the person defrauded, and (3) benefits from the false representation or promise commits the fraud described in Subsection (a) of this section and is liable to the person defrauded for exemplary damages. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

[20] DTPA – Liability for Failure to Disclose Information with Intent to Induce Buyer to Enter Transaction. TEX. BUS. & COM. CODE § 17.46(b)(24) (Vernon Supp. 2008).

[21] Excesses Arising out of the DTPA. Brighton Homes, Inc. v. McAdams, 737 S.W.2d 340 (Tex. Civ. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.). In *Brighton Homes* the homeowners alleged that they had problems with their foundation and sued their builder under the DTPA. The residence had been purchased new for $30,000 and the foundation problems were repairable. The plaintiffs were successful and recovered $202,000 in damages plus interest and court costs.

[22] DTPA – Liability for Failure to Disclose Information in Public Record. Ojeda de Toca v. Wise, 748 S.W.2d 449 (Tex. 1988) holding that failure to disclose to a buyer that the property is subject to a demolition order is a DTPA violation, even though the order was recorded in the Deed Records.

[23] Negligent Misrepresentation Claim. Fed. Land Bank Ass'n v. Sloane, 825 S.W.2d 439, 442 (Tex. 1991).

[24] Silence Can Be Golden. Bradford v. Vento, 48 S.W.3d 749 Hns 4-6 (Tex. 2001); Moore & Moore Drilling Co. v. White, 345 S.W.2d 550, 555 (Tex. Civ. App.–Dallas 1961, writ ref'd n.r.e.); American Marine Upholstery Co. v. Minsky, 433 S.W.2d 717, 720 (Tex. Civ. App.—Eastland 1968, writ ref'd n.r.e.); Richman Trusts v. Kutner, 504 S.W.2d 539, 544 (Tex. Civ. App.–Dallas 1973, writ ref'd n.r.e.); and Tempo Tamers, Inc. v. Crow-Houston Four, Ltd. 715 S.W.2d 658, 669 (Tex. App. – Dallas 1986, writ ref'd n.r.e.).

[25] No Duty to Raise a Subject Absent Actual Knowledge of Material Adverse Condition. Prudential Ins. Co. of America v. Jefferson Assoc., Ltd., 896 S.W.2d 156, 162 (Tex. 1995); and Robinson v. Preston Chrysler-Plymouth, Inc., 633 S.W.2d 500, 502 (Tex. 1982).

[26] No Liability for Failure to Disclose What One Should have Known, but Did Not. Ozuna v. Delaney Realty, Inc., 600 S.W.2d 780, 782 (Tex. 1980)(per curiam).

[27] Reasonable to Assume that Other Party Knows Facts. Bradford v. Vento, 48 S.W.3d 749 Hns. 4-6 (Tex. 2001).

[28] No Reliance and Immateriality. Schlumberger Technology Corp. v. Swanson, 959 S.W.2d 171, 181 (Tex. 1997).

[29] Buyer Beware. American Marine Upholstery Co. v. Minsky, 433 S.W.2d 717, 720 (Tex. Civ. App.—Eastland 1968, writ ref'd n.r.e.) the court did not allow a tenant to recovery against a landlord that had not disclosed to the tenant that the leased property had been damaged in the past due to overflow from an adjacent creek.

[30] Disclosure Duty Arises in Confidential or Fiduciary Relationships. Ins. Co of N. America v. Morris, 981 S.W.2d 667, 674-75 (Tex. 1998); Hoggett v. Brown, 971 S.W.2d 472, 487-88 (Tex.App.–Houston [14th Dist.] 1997, no writ); SmithKline Beecham Corp. v. Doe, 903 S.W.2d 347 (Tex. 1995); *but see* Formosa Plastics Corp. v. Presidio Engineers and Contractors, Inc., 941 S.W.2d 138, 146-47 (Tex. App.–Corpus Christi 1995), *rev'd on other grounds*, 960 S.W.2d 41 (Tex. 1997).

[31] Disclosure Duty Arises When Other Party Does Not Have a Reasonable Opportunity to Discover a Material Fact. Prudential Ins. Co. of America v. Jefferson Assoc., Ltd., 896 S.W.2d 156, 163 (Tex. 1995); Smith v. National Resort, 585 S.W.2d 655, 658 (Tex. 1979); NRC, Inc. v. Prichardt, 667 S.W.2d 292 (Tex. App.—Texarkana 1984, writ dism'd); Keeton, *Rights of Disappointed Purchasers,* 32 TEX. L. REV. 1 (1953).

[32] Disclosure Duty May Arise If Knowledgeable Party also Knows Other Party is Ignorant or Does Not Have an Equal Opportunity to Discover Fact. Bradford v. Vento, 48 S.W.3d 749 Hns 4-6 (Tex. 2001); and Smith v. National Resort, 585 S.W.2d 655, 658 (Tex. 1979).

[33] Disclosure Duty When Partial Disclosure Conveys a False Impression. Hoggett v. Brown, 971 S.W.2d 472, 487-88 (Tex.App.–Houston [14th Dist.] 1997, no writ); Ralston Purina Co. v. McKendrick, 850 S.W.2d 629, 635 (Tex. Civ. App.–San Antonio 1993); Spoljaric v. Percival Tours, 708 S.W.2d 432, 435 (Tex. 1986); and RESTATEMENT (SECOND) OF TORTS § 551 (1977). The Texas Supreme Court has never adopted § 551. SmithKline Beecham Corp. v. Doe, 903 S.W.2d 347, 352 (Tex. 1995).

[34] Disclosure Duty When Have Knowledge that Prior Statement is False or Misleading. Ralston Purina Co. v. McKendrick, 850 S.W.2d 629, 635 (Tex. Civ. App.–San Antonio 1993); Susanoil, Inc. v. Continental Oil Co., 519 S.W.2d 230, 236 n. 6 (Tex. Civ. App.–San Antonio 1975, writ ref'd n.r.e.); and Tempo Tamers, Inc. v. Crow-Houston Four, Ltd. 715 S.W.2d 658, 669 (Tex. App. – Dallas 1986, writ ref'd n.r.e.).

[35] Limitation of Seller's Remedy to Forfeiture of Earnest Money. John Dull & Co. V. Life of Neb. Ins. Co., 642 S.W.2d 1 (Tex.App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.).

[36] Statements as to One's Knowledge May Expose Representing Party to Liability for Negligent Ignorance. Hexter v. Pratt, 10 S.W.2d 692 (Tex. Comm'n App. 1928, judgm't adopted); Morris v. Reaves, 580 S.W.2d 891 (Tex. Civ. App.—Hou. [14th Dist.] 1979, no writ); and Portman v. Earhnart, 343 S.W.2d 294 (Tex. Civ. App.--Dallas 1960, writ ref'd n.r.e.).

[37] As Is Clause Litigated in *Prudential*. Prudential Ins. Co. of America v. Jefferson Assoc., Ltd., 896 S.W.2d 156, 160 (Tex. 1995).

[38] As Is Clause Litigated in *Gym-N-I Playgrounds*. Gym-N-I Playgrounds, Inc. v. Snider, 220 S.W.3d 905, 907 (Tex. 2007).

[39] Clause in the TAR Form. The TAR form language does not contain standard "as is" and "non-reliance" language. It is likely that a court will hold that the TAR form clause does not operate as the "as is" provision reviewed in Prudential Ins. Co. of America v. Jefferson Assoc., Ltd., 896 S.W.2d 156 (Tex. 1995).

[40] As Is Clause in the TEXAS REAL ESTATE FORMS MANUAL. The "as is" provision contained in the *Texas Real Estate Forms Manual* Real Estate Sales Contract does not contain a "non-reliance" provision as contained in the "as is" provision reviewed in Prudential Ins. Co. of America v. Jefferson Assoc., Ltd., 896 S.W.2d 156 (Tex. 1995). The court in Prudential stressed the importance of the "non-reliance" provision in negating causation, the key element triggering liability or non-liability for seller's conduct outside of the 4 corners of the contract.

[41] As Is Clause in Comparative Negligence Responsibility Allocations. In Folks v. Kirby Forest Ind. Inc., 10 F.3d 1173 (5th Cir. 1994), the court of appeals found that the district court committed an error in advising the jury that the jury should not consider the "as is" terms of the sale in assessing liability between Kirby and Hood Industries, Inc. An employee of Knight's Machinery Removal was injured when a machine collapsed due to the lack of hydraulic fluid. Kirby Forest had sold the machine "as is" to Hood Industries, Inc. at an auction at Kirby's closed plywood plant. After Hood Industries bought the machine, it hired Knight Machinery Removal to remove the machine and reinstall it in Hood Industries' sawmill. Kirby Industries was liable for injuries to Knight Machinery Removal's employee, as the employee was an invitee injured by a condition existing on Kirby's premises. *Id.* at 1176 applying the RESTATEMENT (SECOND) OF TORTS § 343 (1965) adopted in Texas in Adam Dante Corp. v. Sharpe, 483 S.W.2d 452, 454-55 (Tex. 1972), and rearticulated in Corbin v. Safeway Stores, Inc., 648 S.W.2d 292 (Tex. 1983) and Keetch v. Kroger Co., 845 S.W.2d 262, 266 (Tex. 1992). The court noted that *Kirby* did not contend that the "as is" clause reformed an otherwise defective indemnity clause. *Id.* 1180 n.14. However, the court also rejected the dissent's view that the court had changed the "as is" clause into an indemnity by permitting its presence in the sales contract to be considered by the jury as some evidence in apportioning liability between seller and buyer as to responsibility for the plaintiff's injury. *Id.* at 1180 n.16, and 1181 n.19.

[42] As Is Clause Does Not Operate as a Release for CERCLA Liability as Between Sellers and Buyers. 42 U.S.C. § 9607(a)(4)(B). The majority of courts in the United States that have addressed the issue as to the effect of "as is" clauses in sales contracts where after closing the property has been discovered to be contaminated have held that "as is" agreements do not overcome CERCLA's strict liability schemes, and thus do no transfer CERCLA liability to the buyer or even protect against CERCLA contribution actions by buyers. See Wiegmann & Rose Intern. Corp. v. NL Industries, 735 F. Supp. 957 (N.D. Cal. 2990)(holding that "as is" clause did not avoid strict liability for response costs); Southfund Partners III v. Sears, Roebuck and Co., 57 F. Supp. 2d 1369 (N.D. Ga. 1999)("As is" clause did not waive buyer's right to recover from seller under CERCLA or state law. Instead, clause merely released buyer from breach of warranty claims.); Instead, most courts consistently hold that "as is" provisions preclude only breach of warranty causes of action against sellers. No "as is" clause will protect a seller who engaged in any type of fraud against the Buyer. See for example, and Warehouse Associates Corporate Centre II, Inc. v. Celotex Corp., 192 S.W.3d 225 (Tex. App.—Hou. (14th Dist.) 2006), review denied (2 pets.), rehearing of petition for review granted, rehearing of petition for review granted (January 25, 2008), order withdrawn (January 25, 2008); and Bauer v. Giannis, 359 Ill. App.3d 897, 834 N.E.2d 952 (2nd Dist. 2005).

[43] Example of CERCLA Liability Indemnity. An example of a buyer's undertaking to indemnify seller from environmental liability, including CERCLA liability, for pre- and post-closing contamination is found in the TEXAS REAL ESTATE FORM MANUAL REAL ESTATE Sales Contract Exhibit B paragraph C attached as **Exhibit 3** to this paper.

[44] As Is Clause Negates Reliance on Seller's or Agent's Representations or Conduct Outside the

Contract. Prudential Ins. Co. of America v. Jefferson Assoc., Ltd., 896 S.W.2d 156, 161(Tex. 1995); Schlumberger Technology Corp. v. Swanson, 959 S.W.2d 171, 181 (Tex. 1997); Mid Continent Aircraft Corp. v. Curry County Spraying Service, Inc., 572 S.W.2d 308, 313 (Tex. 1978); Dubow v. Dragon, 746 S.W.2d 857, 860 (Tex.App.–Dallas 1988, no writ). The Texas Supreme Court upheld the use of "as is" clauses as a means of risk management in Prudential Ins. Co. of America v. Jefferson Associates, Ltd., 896 S.W.2d 156 (Tex. 1995). In Prudential the buyer recognized that it was neither relying upon materials provided by the seller nor a misstatement by the seller's agent as to the character of the building being purchased. The court held:

> A valid "as is" agreement, like the one in this case, prevents a buyer from holding a seller liable if the thing sold turns out to be worth less than the price paid because it is impossible for the buyer's injury on account of this disparity to have been caused by the seller .... The sole cause of a buyer's injury in such circumstances, by its own admission, is the buyer himself He has agreed to take the full risk of determining the value of the purchase. He is not obligated to do so; he could insist instead that the seller assume part or all of the risk by obtaining warranties to the desire effect. If the seller is willing to give such assurances, however, he will ordinarily insist upon additional compensation. Rather than pay more, a buyer may choose to rely entirely on his own determination of the condition and value of his purchase. In making this choice, he removes the possibility that the seller's conduct will cause him damage ....

Justice Cornyn's concurring opinion argues that Goldman's "as is" agreement is relevant to whether Prudential caused him harm, but not controlling. If Goldman's position at trial were the same as the position he took in the "as is" agreement, he could not recover on any of the theories he asserts. Unable to show any reason why the agreement should not be enforced, such as fraudulent inducement, Goldman ought to be held to his voluntary, freely negotiated affirmation of his own assessment of the building. Justice Cornyn's concurring opinion suggests that Prudential should prevail if this was an arm's-length transaction. Goldman does not dispute that it was.

45 The *Prudential* Case. Prudential Insurance Company foreclosed its construction financing lien on an office building in Austin, and subsequently put the building on the market. Prudential offered the building for sale by closed bid in which the offers were submitted in the form of proposed contracts. Prudential permitted potential bidders to review financial records pertaining to the building and to inspect the building. F. B. Goldman, a knowledgeable real estate investor, purchase the building from Prudential. Goldman owned an interest in at least 30 commercial buildings. He was the president of a Dallas-based company which had developed, built, rehabilitated, owned or managed properties valued altogether at about $100 million. He had bought and sold several large investment buildings on an "as is" basis. The sales contract contained an "as is" "non-reliance" provision (see actual provision set out in paper). Before bidding on the building, Goldman had the building inspected by his maintenance supervisor, his property manager, and an independent professional engineering firm. The inspection reports came back clean, except for a mechanical room foundation problem noted by his property manager. Prudential's on-site property manager, Donna Buchanan told Goldman's maintenance supervisor, Timmy Don Kirk, that the building was "superb", "superfine" and "one of the finest little properties in the City of Austin." Buchanan also told Timmy that the building had no defects except for a mechanical room foundation problem. Timmy asked Buchanan for the building plans and specifications, but she mistakenly told him she had only the "as-built" drawings, which she gave him. She referred Goldman to the architects for additional information. Neither Goldman nor anyone on his behalf contacted the architects or made any further effort to obtain the plans and specifications. Prudential had a set of plans in its possession at the time that showed that a fireproofing material which sometimes contained asbestos had been used in the original construction. The specifications called for use of a fireproofing material called Monokote or an approved substitute. Information published at the time by the manufacturer of Monokote stated that the product contained asbestos. Goldman contended that Prudential concealed the plans and specifications. The Supreme Court for purposes of its decision assumed that in fact

Prudential concealed the plans and specifications. When Goldman later attempted to refinance the building he discovered that the building contained asbestos. he sued Prudential for violations of the DTPA, fraud, negligence, and breach of the duty of good faith and fair dealing. Goldman prevailed at both the trial court (jury found that Goldman suffered $6,023,993 in actual damages, $14,300,000 in punitive damages, and the trial court awarded a judgment, which including interest, costs and attorneys fees, totaled $25,692,571.58) and the court of appeals. There was evidence at trial that the asbestos did not pose a health hazard, did not need to be removed, and could be managed in place at a cost of $61,000. Goldman had paid $7,150,000 for the building.

The Texas Supreme Court, however, held that the "as is" provision precluded the causation element required for Goldman to recover on the asserted causes of action. The court stated:

> The sole cause of a buyer's injury [when he agrees to purchase something "as is"], by his own admission, is the buyer himself. he has agreed to take the full risk of determining the value of the purchase. He is not obliged to do so; he could insist instead that the seller assume part or all of that risk by obtaining warranties to the desired effect. If the seller is willing to give such assurances, however, he will ordinarily insist upon additional compensation. Rather than pay more, a buyer may choose to rely entirely upon his own determination of the condition and value of his purchase. In making this choice, he removes the possibility that the seller's conduct will cause him damage.

Id. at 160.

46 *Prudential* Rule: No Obstruction of Inspection. A seller cannot obstruct an inspection for defects in his property and still insist that the buyer take it 'as is'." *Prudential,* 896 S.W.2d at 162.

47 *Prudential* Rule: Bargained for Provision. The rule of thumb with the terms of an "as is" clause is, "the simpler, the more conspicuous, the more easily understood, the better." Statements that indicate that the purchasers "have inspected" and "are relying solely on their own inspection of the property" are important and have been upheld, particularly if printed in **BIG BOLD LETTERS.** *See* Chesson v. Hall, 2005 WL 2045570 (S.D. Tex., Aug. 25, 2005) and cases cited therein.

48 *Prudential* Rule: Sophisticated Parties. Texas courts may uphold the validity of an "as is" clause if the parties to the agreement were equally sophisticated, particularly if the buyer has the opportunity to inspect the premises before purchase. In *Bynum v. Prudential Residential Servs., L.P.* 129 S.W.3d 781, 788 (Tex. App.—Houston [1st Dist.] 2004, pet. denied), the court upheld an "as is" provision because the purchasing party was represented in the transaction by a licensed real estate broker, had previously purchased other properties "as is," was a manager of a salvage business which sold parts "as is", and had the home inspected by a professional inspector prior to the closing. Similarly, in *Larsen v. Carlene Langford & Assocs., Inc.,* 41 S.W.3d (Tex. App.—Waco 2001, pet. denied) , 252-53, the court found the "as is" clause enforceable where the purchaser was a licensed real estate agent and the seller was represented by a real estate agent and neither party was represented by an attorney. Texas courts will not enforce an "as is" provisions when one party is "unsophisticated" placing the parties in unequal bargaining positions. *Oakwood Mobile Homes, Inc. v. Cabler*, 73 S.W.3d 363, 372 (Tex. App.—El Paso 2002, pet denied.); The *Woodlands Land Dev. Co. v. Jenkins*, 48 S.W.3d 415, 422 (Tex. App.—Beaumont 2001, no pet.). The El Paso Court of Appeals determined that a husband and wife with a 10th grade education and one year of college, respectively, were not of equal bargaining power to a manufactured home salesperson and the general manager of the manufactured home sales lot, and therefore held the "as is" clause in the sales contract unenforceable. *Oakwood*, 73 S.W.3d at 372. On the other hand, the Dallas Court of Appeals, in *Rader v. Danny Darby Real Estate, Inc.*, 2001 WL 1029355 (Tex. App.—Dallas 2001, no pet.) rejected a lack of sophistication argument from buyers who purchased a home in poor condition, negotiated several repairs and attempted to obtain additional repairs all without engaging a real estate agent or lawyer to review the purchase and sale agreement. The court held that the purchasers could not rely on the lack of sophistication argument, *standing alone,* to invalidate the "as is" clause.

Clearly, the degree of sophistication is an issue.

49 Fraudulent Inducement. Prudential Ins. Co. of America v. Jefferson Assoc., Ltd., 96 S.W.2d 156, 161(Tex. 1995); Schlumberger at 181 (Tex. 1997). The court in Gopher Oil Co. v. Union Oil Co., 955 F.2d 519 (8th Cir. 1992) found that an "as is" clause was ineffective in preventing a buyer from obtaining relief from a seller whose employees had made oral statements as to prior occurrences at the property, but had omitted to mention a material hazardous substance spill. See RESTATEMENT (SECOND) OF CONTRACTS § 161 (1981) providing "A person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist in the following cases only: ..." See Smith v. Levine, 911 S.W.2d 427 (Tex. App.—San Antonio 1995, pet. denied) as to fraud by oral misrepresentations.

50 "Puffing" and Statements of Opinion. The court in *Prudential* determined that statements Prudential's building manager, Ms. Buchanan, to Goldman's maintenance supervisor, Timmy Kirk, that the building was "*superb*", "*super fine*, and "*one of the finest little properties in the City of Austin*." were not misrepresentations of material fact but merely "puffing" or opinion, and thus could not constitute fraud. *Citing* Pennington v. Singleton, 606 S.W.2d 682, 687 (Tex. 1980)(statement that boat and motor were "*new*" or in *"excellent*" or "*perfect*" condition were not merely puffing or opinion; also *citing* Autohaus, Inc. v. Aguilar, 794 S.W.2d 459, 462-464 (Tex. App.—Dallas 1990), *writ denied per curiam*, 800 S.W.2d (Tex. 1991)(car salesman's statement that a Mercedes was the "*best engineered car in the world*" did not qualify as an actionable misrepresentation of the car's characteristics or qualities). *See* HOW Ins. Co. v. Patriot Financial Services, Inc. 786 S.W.2d 533, 543-544 (Tex. App.—Austin 1990, no writ)("*meticulous construction*") denoted a high degree of quality such as "excellent" or "perfect," and such use, if inaccurate, was actionable under statutory or common-law fraud theories even though the description was general in nature.

51 Fraud Only if Intent. The court in Prudential Ins. Co. of America v. Jefferson Assoc., Ltd., 896 S.W.2d 156, 163 (Tex. 1995) stated

> Nor do we think Buchanan's statement that there were no defects in the building other than the foundation in the mechanical room was a statement of material fact, since Kirk does not claim to have attached much significance to it, certainly not enough on which to base a decision whether to spend over $7 million to buy an office building. Even if he had attached more significance to Buchanan's statement there is no evidence whatever that Buchanan knew or had any reason to suspect that her statements were not absolutely correct, or that Buchanan knew that the building contained asbestos. A statement is not fraudulent unless the maker knew it was false when he made it or made it recklessly without knowledge of the truth.

52 Concealment. Weitzel v. Barnes, 691 S.W.2d 598, 601 (Tex. 1985); Dallas Farm Mach. Co. v. Reaves, 307 S.W.2d 233, 240 (Tex. 1957); Cockburn v. Mercantile Petroleum, Inc., 296 S.W.2d 316, 326 (Tex. Civ. App. – Dallas 1956, writ ref'd n.r.e.).

53 Concealed Plans and Specifications in *Prudential* Would Not Put Inspector on Notice of Asbestos. The court in *Prudential* noted that the specifications called for use of a fireproofing material called Monokote or an approved substitute. The court determined that

> Even someone aware of the information published by the manufacturer could not be certain whether any Monokote used in the Jefferson Building contained asbestos. Nor could anyone be certain from the specifications alone whether Monokote, or an approved substitute, was actually used in the building. Thus, when the original architects review the specifications in 1987, some three years after the sale, they saw nothing to indicate that the building contained asbestos.

Prudential Ins. Co. of America v. Jefferson Assoc., Ltd., 896 S.W.2d 156, 159 (Tex. 1995).

[54] The *Warehouse Associates* Case. Warehouse Associates Corporate Centre II, Inc. v. Celotex Corp., 192 S.W.3d 225 (Tex. App.—Hou. [14th Dist.] 2006), review denied (2 pets.), rehearing of petition for review granted, rehearing of petition for review granted (January 25, 2008), order withdrawn (January 25, 2008). *Warehouse Associates* involves a dispute between sophisticated parties as to 12 acres of land on North Post Oak Road in Houston, Texas. Celotex Corporation operated an asphalt shingle manufacturing plant on the property for a number of years until 1998, when Celotex permanently closed the plant. Celotex decided to sell the property and retained Cushman & Wakefield as its real-estate broker. While Cushman & Wakefield was entertaining bids for the property, Warehouse Associates asked Cushman & Wakefield for any documents that Celotex had regarding the property. In response, Celotex forwarded part of a 1996 environmental report prepared for Celotex. The part of this report Celotex produced indicates that there had been asbestos issues relating to the buildings on the property but indicates nothing about the asbestos contamination in the soil or use of asbestos in the manufacturing process on the property, as opposed to asbestos in building materials in the structures on the property. Celotex did not give Warehouse Associates the part of the report stating that asbestos previously had been used in the manufacturing process at the plant.

After receiving various offers and inquiries, on January 24, 2000 Celotex entered into a written contact with Warehouse Associates for the sale of the property. The contract provided for a purchase price of $3.25 per square foot, or a total of approximately $1,700,000. The contract recited that Celotex had begun demolition of all existing structures on the property down to the slab level. Celotex agreed to send a notice to Warehouse Associates upon completion of the demolition work. Under the contract, Warehouse Associations was allowed to inspect the property within 60 days from the date Celotex gave notice that it had completed the demolition work. During this 60-day inspection period, Warehouse Associates had the right to terminate the contract by written notice if it its inspections revealed conditions unsatisfactory to it in its sole discretion. In the contract, the parties agreed that, other than the warranties of title contained in the deed, Celotex did not make and was specifically disclaiming any representations, warranties, promises, covenants, or guaranties of any kind. The contract imposed no obligation on Celotex to provide documents or records relating to the property's condition. Warehouse Associates, however, was entitle to conduct inspections, tests, and investigations as it deemed necessary to determine the suitability of the property for its intended use. Unless Warehouse Associates terminated the contract before the inspection period expired, Warehouse Associates would be obligated to close the transaction, and, upon closing, Warehouse Associates would assume all existing and future liabilities associated with the ownership, use, and possession of the property, including any liabilities imposed by local, state, or federal environmental laws or regulations. In the contract, Warehouse Associates, as the buyer, acknowledged that it had the opportunity to inspect the property and agreed that it was relying solely on its own inspection and investigation of the property an not on any information from Celotex. The parties also agreed that the sale of the property at closing would be on an "as is, where is" condition and basis "with all faults."

On February 10, 2000, Celotex gave notice that it had completed demolition of the buildings down to the slabs, triggering the buyer's 60-day inspection period that ended on April 10, 2000. On the day that the inspection period began, Celotex's contractor was excavating soil on the property and found what appeared to the contractor to be raw, friable asbestos buried in the ground. The contractor contacted Lecil M. Colburn, Celotex's Director of Environmental Affairs and chairman of a Celotex committee formed to sell various Celotex properties. The contractor asked Colburn what to do and Colburn instructed the contractor to leave the area of ht property alone and to backfill the excavated area, indicating the matter would be addressed at a later date. The contractor had one employee, wearing a respirator, back fill the excavation as quickly as possible.

During the relevant period, HBC Engineering, Inc. inspected property and conducted a phase I environmental site assessment of the property. HBC had discussions about the property with Colburn and with David Murry, a shipping supervisor for Celotex. HBC did not specifically ask Colburn about asbestos, and Colburn said nothing to HBC about asbestos or the recent discovery

of suspected asbestos-containing material buried in the ground on the property. Colburn listed the major raw materials Celotex had used in its single-manufacturing process. At the end of his interview with Colburn, an HBC representative asked Colburn if he was aware of any other environmental concerns, and Colburn said nothing about the suspected asbestos-containing material recently discovered on the property or about the possibility of asbestos being buried in the soil on the property. HBC also conducted an environmental site investigation that included analysis of soil and groundwater samples taken from the property. HBC did not test the soil for the presence of asbestos. In its reports to the buyer, HBC did not mention anything about any contamination of the soil on the property due to asbestos.

Warehouse Associates did not exercise its right to terminate the contract during the inspection period. On May 24, 2000, the sale closed and Celotex conveyed title to the property to Warehouse Associates by a special warranty deed that contained the same waiver-of-reliance and as-is language as the contract. In August 2000, a contractor demolishing the concrete slabs discovered asbestos-containing material in the soil on the property. An expert analyzed soil borings and detected more than 1% asbestos in 44 of 70 soil borings form sites across the property. This expert concluded that the property had extensive, widespread asbestos-containing material in the soil to a depth of at least 13 feet below the ground surface. Warehouse Associates filed claims against Celotex, alleging damage claims for common law fraud, negligent misrepresentation, and statutory fraud. counterclaimed against Warehouse Associates asserting various claims.

The trial court ranted summary judgment in favor of Celotex awarding them more than $2,000,000 in attorney' fees, expenses, and costs. The appellate court concluded that there is a genuine issue of fact as to whether Warehouse Associates was induced to enter into the contract by Celotex's alleged fraudulent misrepresentation or concealment of asbestos contamination in the soil on the property. Based on *Prudential*, the court concluded that the impairment-of-inspection is limited to conduct by the seller that impairs, obstructs, or interferes with the buyer's exercise of its contractual right to carefully view, observe, and physically examine the property. The court concluded that the summary-judgment evidence proves as a matter of law that Celotex did not engage in such conduct. Celotex argued that, absent reliance upon the language in the contract in fact, Warehouse Associates' claims fail as a matter of law under *Bartlett v. Schmidt*. The court found that is argument lacked merit and does not provide a basis for the court to affirm the trial court' s judgment. Because of the genuine issue of fact as to the fraudulent-inducement exception the court found that the trial court erred in enforcing the contract language as a matter of law and in granting summary judgment based on the doctrines of estoppel by contact and estoppel by deed. Celotex's fraudulent misrepresentations regarding the condition and prior use of the property did not impair Warehouse Associates' ability to inspect the property, and thus, the impairment-of-inspection did not provide a basis to bar enforcement of the as is provision, where as here the buyer had access to the property, was free to take whatever soil and water samples it wanted, and had the ability to test the soil for asbestos contamination.

55 Ability to Learn of Fact Impaired by Seller's Conduct – Impairment of Inspection. Prudential Ins. Co. of America v. Jefferson Assoc., Ltd., 896 S.W.2d 156,162 (Tex. 1995).

56 Totality of Circumstances. Prudential Ins. Co. of America v. Jefferson Assoc., Ltd., 896 S.W.2d 156,162 (Tex. 1995).

57 Statutorily-Required Disclosure Notice for Sale of Used Single Family Housing. TEX. PROP. CODE § 5.008(e)(10) provides that this disclosure notice is not required of a Seller "of a new residence of not more than one dwelling unit which has not previously been occupied for residential purposes."

58 Residential Seller's Disclosure of Property Condition. Note that the TAR form contain disclosures in addition to those required by TEX. PROP. CODE § 5.008. Section 5.008 contains the statutorily-required form. The additional TAR form disclosures include the last disclosure set out to Section

5 as to any known repairs or treatments to the Property to remediate environmental hazards; Section 6 as to the existence of a survey; Section 6 receipt of any written inspection reports; Section 8 tax exemptions claimed by the Seller for the Property; and Section 9 receipt of proceeds for a claim for damage to the Property including insurance claims or settlement or awards in legal proceedings and not used to make the repairs for which the claims was made.

59 Disclosures Qualified by "Knowledge" or "Awareness". This language is the same in the TAR form and in the form and notifies the recipient of the disclosure notice that it is a disclosure of the Seller's "knowledge" of the condition of the Property as of the date signed by Seller. Both the statutory form and the TAR form are set up as a series of check-the-box statements or questions. Seller is instructed by the form to answer the questions by marking the answers with "Yes (Y)", "No (N), or "Unknown (U)." Neither the statutory form nor the TAR form defines the terms "knowledge", "awareness" or "unknown." The form instructs the Seller to "explain" answers to certain questions if answered "Yes". For example, if Seller answers the question in Section 3 as to Seller's awareness of "hazardous or toxic waste", "subsurface structure or pits", "endangered species/habitat" or "underground storage tanks" at the Property, Seller is to write an explanation. Also, for example in Section 5, Seller is to explain a "yes" answer to the following conditions if Seller is aware of any "room additions, structural modifications, or other alterations or repairs made without necessary permits or not in compliance with building codes in effect at the time;" and "any condition on the Property which materially affects the health or safety of an individual."

The TAR form drops in some cases the word "known" before the term "defect."

60 Disclosures are Not Warranties. The statutory disclosure form and the TAR form also caution the Buyer that the disclosures as to the Seller's knowledge are "not a warranty of any kind by Seller, Seller's agents, or any other agent." and that "a disclosure of Seller's knowledge of the condition of the Property ... is not a substitute for any inspections or warranties that the Buyer may wish to obtain."

61 TAR's Self-Serving Clauses. This statement in the TAR form that the broker has not instructed or influenced the Seller to provide inaccurate information or to omit an material information is not contained in the statutory disclosure notice and seems directed at protecting the Realtor/agent who has presented the disclosure notice to the Seller to complete.

62 Not an "As Is" Clause. The TAR Sales Contract utilizes an "acceptance of present condition" clause as opposed to "as is" and "non-reliance" clauses. The contract does not define what it means to "accept the Property in its present condition."

63 The "Free Look" Clause. Paragraph 7B(1) is usually completed by the insertion of a nominal amount of money in the dollar blank (e.g., $100) and thus creates a relatively "free look" permitting the Buyer to terminate the Sales Contract and only forfeit this amount to the Seller.

64 TAR Contract Disclosure of Property Information. The TAR Sales Contract provides for the Seller to deliver to Buyer a copy of an extensive portion of documents and records relating to the Property (¶ 7D) including "copies of all previous environmental assessments, studies, or analyses made on or relating to the Property." Note that the TAR Sales Contract does not limit this document production obligation only to those that are in Seller's possession or control.

65 "Best Knowledge". Paragraph 19 of the TAR Sales Contract and TAR Property Condition Statement use knowledge based qualifiers "to the best of Seller's knowledge and belief" "Seller is not aware". Without definition of these terms, disappointed Buyer's may argue that Seller's disclosure duty is not limited to the current actual knowledge of a specified individual with the Seller, but also encompasses the current actual knowledge of all employees and agents of the Seller, imputed or constructive notice, and knowledge that would be gained by a reasonably prudent seller based on its ownership and operation of the Property.

66 TAR's Material Facts Disclosure Choices. Paragraph 19 of the TAR Sales Contract requires Seller to choose between (A) disclosing to Buyer that to the best of Seller's knowledge and belief Seller is not aware of any material defects to the Property except as stated in the TAR form Property Condition Statement that is attached as an exhibit to the Sales Contract or (B) disclosing that Seller is not aware of any of a laundry list of conditions including for example

"(3) any environmental hazards or conditions that affect the Property;"

"(4) whether the Property is or has been used for the storage or disposal of hazardous materials or toxic waste, a dump site or landfill, or any underground tanks or containers;"

"(5) whether radon, asbestos containing materials, urea-formaldehyde foam insulation, lead-based paint, toxic mold (to the extent that it adversely affects the health of ordinary occupants), or other pollutants or contaminants of any nature now exist or have ever existed on the Property;"

"(9) any contemplated material changes to the Property or surrounding area that would materially and detrimentally affect the ordinary use of the Property;" and

"(11) any condition on the Property that violates any law or ordinance."

The TAR form does not provide Seller the third choice, Buyer's acceptance of the Property "as is" and without disclosures by Seller, and solely based on Buyer's inspection of the Property and not in reliance upon any statements, assurances, or representations of Seller. I typically strike out this provision by ~~strikethrough~~ directly on the form.