THE LAW OF "AS IS"

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State Bar of Texas
AGRICULTURAL LAW COURSE 2009
May 14-15, 2009
Lubbock

Chapter 22

1079483v1

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"*Field Guide for Due Diligence on Income Producing Properties*" (2000)* and "*Papering The Deal: From Land Acquisition to Development*", State Bar of Texas, Advanced Real Estate Law Course (2004).*

"*Documentation for the To-Be-Built Office Condominium*", State Bar of Texas, Advanced Real Estate Drafting Course (2005).*

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American College of Real Estate Lawyers (2007 – 2009).
The Best Lawyers in America (Real Estate) (2000 - 2009).
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Texas Monthly, Super Lawyer - Real Estate (2001-2009).

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Search Tool:

Boolean Search Query: ((real w/2 estate or property) or (sale or purchase w/10 property or home or house or apartment or land or building or condo!) and present condition and (warranty w/4 disclaim! or waive! or no))

National:

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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] "*Established 1966. It is just a business lie. That is ok.*"[8]

B. Competing Public Policies

There are two competing public policies in play in Texas governing the allocation of risks between parties to sales contracts and leases. These are

- consumer protection[9] and
- freedom of contract.[10]

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,[11] exculpation,[12] release[13] 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. DUTY TO SPEAK

A. No Duty to Speak

1. <u>Silence</u>

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.[14] A party does not have an obligation to make predictions or to disclose patent facts or facts which the other party has an equal opportunity to obtain.[15]

2. <u>No Actual Knowledge as to Issue</u>

Sellers have no duty to raise a subject with a buyer, absent actual knowledge of a material adverse condition regarding the subject.[16] Sellers have no liability for failure to disclose what one should have known, but did not.[17]

3. <u>Reasonable to Assume that Other Party Knows Facts</u>

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.[18]

4. <u>No Reliance and Immateriality</u>

Non-disclosure is not actionable, if no reliance was in fact placed on the non-disclosed fact.[19]

B. Duty to Speak

1. Confidential or Fiduciary Relationship

As in many other jurisdictions, early Texas law was "buyer beware".[20] 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.[21]

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. While the Texas Supreme Court has not yet adopted § 551 of the RESTATEMENT (SECOND) OF TORTS §551 *Liability for Nondisclosure* (1977) that is the basis for a general duty to disclose facts in a commercial setting, it has acknowledged that several courts of appeal have held a general duty to disclose information may arise in an arm's length business transaction when a party makes a partial disclosure that, although true, conveys a false impression.[22]

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.[23]

Conversely, a person cannot secure redress for fraud when he or she has acted in reliance on his or her own judgment derived from an independent investigation or the advice of his or her own agents.[24] Additionally, a person is charged with knowledge of the facts that a reasonable investigation would have revealed.[25]

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.[26] Some court of appeals have followed the disclosure rule set out in the RESTATEMENT (SECOND) OF TORTS §353 (1965) which recognizes that the seller of land who conceals or fails to disclose to his buyer a condition, which involves unreasonable risk to persons, is subject to liability to the buyer, others on the land with the consent of the buyer, and subsequent buyers from his buyer for physical harm caused by the condition, if the buyer does not know or have reason to know of the condition or the risk involved, and the seller knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to believe that the buyer will not discover the condition or realize the risk.[27] The American Law Institute's rationale for the duty placed on the seller is grounded on the premises that a seller who does not inform a buyer about a latent dangerous condition is engaging in an "implied misrepresentation, because the seller likely intended to induce the buyer to make a purchase he or she would not have made with full knowledge of the danger.[28]

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.[29]

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.[30]

III. 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, esp. 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].[31]

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.[32]

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.[33]

IV. CAUSES OF ACTION

A. Fraud and Fraudulent Inducement

1. Duty

A party which makes a representation to the other party to a business transaction is under a common law duty to know if the representation is true.[34]

2. Elements of Cause of Action

a. Common Law

To recover on a fraud claim at common law in Texas, 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.[35] 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.[36]

b. Statutory Fraud Claim

In addition to common law fraud, Texas has a statutory cause of action for fraud in a real estate transaction. TEX. BUS. & COM. CODE §27.01.[37] As with common law fraud, the statutory cause of action requires proof of reliance on the misrepresentation.[38] 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. As a general rule, these claims require evidence of intent, knowledge and injury *as a result of conduct.* For example, the allegations are often levied against the developer of a project as opposed to the contractor, since the contractor is not likely to have made representations to the buyer. 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 argue that the condominium association lacks standing to assert these types of "personal" claims.

B. Deceptive Trade Practices

1. Laundry List of Unlawful Trade Practices

In 1967, Texas adopted the Texas Deceptive Trade Practices Act ("DTPA"). TEX. BUS. & COM. CODE §§ 17.41 *et seq.* The DTPA declares false, misleading, and deceptive acts or practices in the conduct of any trade or commerce to be unlawful. The DTPA lists 27 unlawful practices (referred to as the "laundry list") that are *per se* false, misleading or deceptive and create a cause of action for consumers to sue those employing such practices. As examples of unlawful acts or practices on the laundry list, the DTPA prohibits:

> (7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;[39]
> ….
> (24) failing 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.[40]

The DTPA requires disclosure of all known defects and conditions that would influence a consumer/buyer's decision to buy. In this sense the DTPA as to matters governed by the DTPA replaces *caveat emptor* with *caveat vendor*.

2. Recovery

a. Grounds

A consumer may maintain an action under the DTPA where any of the following constitute a producing cause of damages: (1) the use or employment by a person of a false, misleading, or deceptive act or practice that is (a) specifically enumerated on the laundry list of prohibited acts; and (b) relied on by the consumer to the consumer's detriment;[41] (2) breach of an express or implied warranty; or (3) any unconscionable action or course of action by any person.[42]

b. Attorney's Fees

The DTPA is an attractive cause of action for a claimant because it allows recovery of attorneys' fees.

c. Mental Anguish Damages

It also provides for mental anguish damages if the plaintiff shows the defendant(s) acted "*knowingly*" or "*intentionally*."[43]

d. Treble Damages

Finally, a plaintiff who proves the defendant acted "knowingly" or "intentionally" is entitled to treble 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).

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 or practices. 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.[44] 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 was held to be a DTPA violation).[45]

3. Amendments

a. Exclusions

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

<u>Greater than $100,000</u>:

> (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.

<u>Greater than $500,000</u>:

> (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).

b. Contractual Waiver

§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).

4. "As-Is" Clauses and the DTPA

An effective "as-is" clause breaks the causal connection between the seller's DTPA violation (e.g., a misrepresentation) and the buyer's subsequent damages. As the Texas Supreme Court stated in the *Prudential* case, "A valid as-is agreement does not say the plaintiff cannot sue, it says the plaintiff cannot win if a suit is filed.[46] With an enforceable contractual waiver of the DTPA, the plaintiff relinquishes all rights to assert a DTPA claim. With an "as-is" clause, the plaintiff relinquishes the right to recover if a claim is filed.

C. 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.[47]

The maker of the representation's liability is limited to a loss suffered: (1) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it: and (2) through reliance upon it in a transaction that he intends the information to influence or knows the recipient so intends or in a substantially similar transaction.[48]

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".

Usually the "look" is not "free", as independent consideration is required to support the termination right. 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. 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.[49]

2. Express Representations and Warranties

a. Typical Representations and Warranties

Representations and warranties given in the sale of property usually cover three 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? A seller is not excused from advising a buyer of his knowledge, if in his opinion the condition

does not exist.[50]

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.[51]

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. <u>Disclaimers of Representations and Warranties</u>

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. The following are the typical clauses employed to shift to the other party the risk of the existence of adverse conditions.

a. "As-Is" and "Waiver-of-Reliance" Clauses

(1) *Prudential* Case

The following is the "as-is" clause in the commercial building sales contract enforced in the *Prudential Ins. Co. of America v. Jefferson Assoc., Ltd.* case:[52]

> 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.

As held in the *Prudential* case, 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. The buyer in such cases assumes the risk that buyer's appraisal of the bargain is correct.[53] The court in *Prudential* stated the question and answered it 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.[54]

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.[55]

3. The "as is" clause and "waiver-of-reliance" clause must be an important basis of the bargain. It cannot be an incidental provision or a part of the "boiler plate"[56] of the contract.[57]

4. The buyer and seller must have relatively equal bargaining positions, an arms-length transaction with a sophisticated buyer.[58]

(2) *Gym-N-I Playgrounds* Case

The following is the "as-is" clause in the commercial lease enforced in *Gym-N-I Playgrounds, Inc. v. Snider*[59]:

> 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.*

Components

Note that the "as is" and "waiver-of-reliance" clauses litigated in *Prudential* and *Gym-N-I Playgrounds* contain the following components:

(1) The use of the words "as is" or equivalent language, such as "in its present condition."

(2) The use of conspicuous disclaimer language.[60]

(3) In the *Prudential* case, an acknowledgement that the "as-is" purchase of the property with all latent and patent defects is a *material part* of the negotiations. This wording emphasizes that this provision is not boilerplate and the provision has played an important role in the bargaining process.

(4) In the *Prudential* case, an acknowledgment by the buyer that it is not relying upon any representation, statement or other assertion with respect to the Property condition, but is relying upon its own examination of the property.[61]

(5) Provision for the "as-is" clause to survive closing.[62] When the survivorship language is omitted, the "as-is" clause merges into the deed

at closing and is no longer enforceable. This risk has led to drafters including the "as-is" clause in the deed in addition to stating in the contract that the "as-is" clause survives closing (a "belt-and-suspenders" drafting approach).

(6) An express enumeration of the particular implied warranty that is disclaimed or waived.

(7) The transaction is a commercial sale or lease transaction as opposed to a new home sale.

Matters Not Addressed

The following matters were not addressed in the *Prudential* and the *Gym-N-I Playground* cases, but are important in crafting an effective "as-is" clause under other circumstances:

(1) A statement that in addition to a waiver of reliance on assertions by the other party, the disclosure recipient is not relying on the "*non-assertion*" of a matter by the disclosing party.

(2) A statement that the disclosure recipient is relying "*solely*" on its own examination of the property.[63]

(3) A statement that the price has been reduced after discovery of a defective condition and the contract is renegotiated with buyer agreeing to purchase the property "as is".[64]

(4) A statement that the buyer is, and a requirement that the buyer be, represented by counsel, who has explained the meaning of the "as-is" clause to buyer.[65]

(3) Circumstances Where Not Enforceable

However, buyers are not bound by agreement to purchase something "as is" under the following circumstances:

Fraudulent Representations

Buyers are not bound to purchase property "as is" if the "as-is" contract is induced by fraudulent representations;[66] provided the agreement does not contain a "waiver-of-reliance" clause or a "release" clause as to fraudulent inducements, which the court finds under the "totality of circumstances" is to be enforced.[67]

"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.[68] The court in the *Prudential* case 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.[69]

Concealment

Buyers are not bound to purchase property "as is" where the "as-is" clause is induced by - concealment of information by Seller.[70] The court in the *Prudential* case 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, could be a concealment sufficient to set aside the "as-is" contract. However, 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, and thus their concealment would not be grounds to set aside the "as-is" clause in this case.[71]

The following "as-is" provision reviewed by the court in *Warehouse Associates Corporate Centre II, Inc. v. Celotex Corp.*[72] did not shield the seller of contaminated property from liability for having concealed information from the buyer:

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 PURCHASER 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 INFORMATION PROVIDED OR TO BE PROVIDED WITH RESPECT TO THE PROPERTY WAS 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".

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 the condition of what is being sold but is impaired by seller’s conduct.[73]

The Totality of the Circumstances: Other Conditions Negating Effect of "As-Is" Clause

Where the nature of transaction and totality of circumstances surrounding agreement are considered, such as whether the clause is an important part of the basis of bargain rather than an 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.[74]

Public Policy

"As-Is" clauses have been overridden by statute in the sale of new homes. See the discussion in Endnote 9.

(4) No Third Party Beneficiaries of "As Is"

Persons not party to a contract or not named as protected by the "as is" acceptance of the property are not shielded from liability for defective conditions created by them that damage a purchaser's property after it acquires the property.[75] However, a party's agent may be able to rely on the protection of such provisions.[76] Additionally, a third-party report preparer may be protected if the buyer agrees that it is not relying on reports furnished to it by the seller.[77]

(5) Statement of the Subject Matter Covered

Disclaimers as to representations as to the condition of the property being sold are not disclaimers as to other matters not identified in the disclaimer.[78]

(6) "As-Is" Clause Not an Indemnity

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.[79]

(7) "As-Is" Clause Does Not Allocate Environmental Cleanup Costs to Buyer

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.[80]

(8) "As-Is" Clause Coupled with a Seller Covenant to Make Repairs may Not Include a Warranty of Workmanship Quality

A case in another jurisdiction has held in an industrial facility sale that the failure to include an express warranty of workmanship as to repair work coupled with a survival clause negated any warranty of good and workmanlike construction when the contract also contained an "as-is" clause and a "buyer inspection-and-approval" clause.[81]

(9) "As-Is" Clause Does not Shift to Buyer Risk of Loss Prior to Closing

Courts in other states have construed "as-is" clauses or clauses stating that the property is sold "*as now existing, and in its present condition*" as not transferring to the buyer the risk of loss (e.g., fire, vandalism) to the property occurring prior to sale.[82]

(10) "As-Is" Clause in Residential Sales Contracts

As discussed below as to the TREC and TAR residential sales contracts in the review of Standard Form Approaches, "as is" clauses may protect a seller in the resale of a house. Also, as discussed in the Endnote 9, the right of a builder to sell a new homes "as is" and/or with an express waiver of the implied warranty of good and workmanlike construction has been overridden by statute and replaced with minimum statutory warranties. Also, as therein discussed, the Texas Supreme Court in *Centex Homes v. Buecher* held that the implied warranty of habitability was not waived by a general "as-is" clause, but could be released by a buyer of a new home by an informed consent to a release of a known defect.

(11) Liability of a Seller for its Agent's Misrepresentations of a Property's Condition on an "As-Is" Sale

A court in an out-of-state case held that a seller was not liable to the buyer for the misrepresentations of its agent, which induced the buyer to purchase property, on an "as-is" contract, where the seller was unaware of the misrepresentations, and the court determined that the agent was the special agent of the seller without apparent authority to have made the misrepresentations.[83]

b. Release of Claims

(1) *Schlumberger* Case

The following release language was held in *Schlumberger Technology Corp. v. Swanson*[84] 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 ….

(2) *Forest Oil* Case

The Texas Supreme Court in *Forest Oil Corp. v. McAllen*[85] held that the "waiver-of-reliance" clause precluded a fraudulent inducement claim by a settling party (McAllen). McAllen unsuccessfully argued that he was not barred by the "waiver-of-reliance" clause from establishing that he was fraudulently induced in to agreeing to arbitrate environmental claims he had specifically excluded from the scope of the release he signed at a mediated settlement.[86] McAllen argued that there was no "meeting of the minds" regarding arbitration of potential environmental claims because Forest Oil knew all along of the potential for environmental claims while simultaneously assuring McAllen "there [were] no issues having to do with the surface." Noting that courts of appeals[87] subsequent to the Supreme Court's decision in *Schlumberger* were in disagreement over what facts were most relevant in determining whether to enforce a "waiver-of-reliance" clause, the court issued the following guidance:

> It is true that *Schlumberger* noted a disclaimer of reliance "will not always bar a fraudulent inducement claim," [FN 30. 959 S.W.2d at 181], but this statement merely acknowledges that facts may exist where the disclaimer lacks "the requisite clear and unequivocal expression of intent necessary to disclaim reliance" on the specific representation at issue. [FN 31. *Id.* at 179] Courts must always examine the contract itself and the totality of the surrounding circumstances when determining if a waiver-of-reliance provision is binding. We did so in *Schlumberger*, but since courts of appeals seem to disagree over which *Schlumberger* facts were most relevant, [FN 32] we now clarify those that guided our reasoning: (1) the terms of the contract were negotiated, rather than boilerplate, and during negotiations the parties specifically discussed the issue which has become the topic of the subsequent dispute; (2) the complaining party was represented by counsel; (3) the parties dealt with each other in an arm's length transaction; (4) the parties were knowledgeable in business matters; and (5) the release language was clear. These factors were each present in *Schlumberger*, and they are each present in this case.

<u>"Waiver-of-Reliance" Clause</u>:

[1] Each party acknowledges and confirms that each has had the opportunity to consult with counsel and has been fully advised by counsel prior to the execution of this Agreement.
[2] Each of the Plaintiffs and Intervenors 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, her, or it in executing the releases contained in this Agreement, and that none of them is relying upon any statement or any representation of any agent of the parties being released hereby. Each of the Plaintiffs and Intervenors is relying on his, her, or its own judgment and each has been represented by his, her, or its own legal counsel in this matter. The legal counsel for Plaintiffs have read and explained to each of the Plaintiffs the entire contents of the releases contained in this Agreement as well as the legal consequences of the releases....
[3] Defendants expressly represent and warrant and do hereby state and represent that no promise or agreement which is not herein expressed has been made to them in executing the releases contained in this Agreement, and that they are not relying upon any statement or representation of any of the parties being released hereby. Defendants, and each of them are relying upon its own judgment and each has been represented by its own legal counsel in this matter. The legal counsel for Defendants have read and explained to them the entire contents of the releases contained in this Agreement as well as the legal consequences of the releases.

The court concludes with the following admonishments:

After-the-fact protests of misrepresentation

> are easily lodged, and parties who contractually promise not to rely on extra-contractual statements—*more than that, promise that they have in fact not relied upon such statements*—should be held to their word. Parties should not sign contracts while crossing their fingers behind their backs….It is not asking too much that parties not rely on extra-contractual statements that they contract not to rely on (or else set forth the relied-upon representations in the contract or except them from the disclaimer). If disclaimers of reliance cannot ensure finality and preclude post-deal claims for fraudulent inducement, then freedom of contract, even among the most knowledgeable parties advised by the most knowledgeable legal counsel, is grievously impaired….
>
> None of McAllen's arguments materially distinguishes our hold in *Schlumberger:* "a release that clearly expresses the parties' intent to waive fraudulent inducement claims, or one that disclaims reliance on representations about specific matters in dispute, can preclude a claim of fraudulent inducement." [FN 34. 959 S.W.2d at 181] Today's holding should not be construed to mean that a mere disclaimer standing alone will forgive intentional lies regardless of context. We decline to adopt a *per se* rule that a disclaimer automatically precludes a fraudulent-inducement claim, but we hold today, as in *Schlumberger*, that "on this record," the disclaimer of reliance refutes the required element of reliance.

Id. at 60-61.

(3) Components of an Effective Release

The components of the release upheld in each of the *Schlumberger* case and the *Forest Oil* case, and the grounds for the court's upholding enforcement of the release, are the following:

(1) The terms of the contract were negotiated, rather than boilerplate, and during negotiations the parties specifically discussed the issue which has become the topic of the subsequent dispute.

(2) The complaining party was represented by counsel.

(3) The parties dealt with each other in an arm's length transaction.

(4) The parties were knowledgeable in business matters.

(5) The release language is clear. The release identifies with specificity the claim released. The release is knowingly made.[88]

(6) The nature of the transaction and the totality of the circumstances justify upholding the release.[89]

c. "Four-Corner" Clauses and Doctrines

(1) "Entire-Agreements" Clause; "Merger" Clause

An "entire-agreements" clause and a "merger" clause 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.

***Italian Cowboy* Case**

A court of appeals in *Prudential Ins. Co. of America v. Italian Cowboy Partners, Ltd.*[90] concluded that the inclusion in the lease of the following "entire agreements" clause and "waiver-of-reliance" clause "under this record" clearly and unequivocally expressed the intent of the "sophisticated business parties in this arm's length transaction that they were not relying on any representations made outside of the agreement." The court held that, assuming that the trial court's findings were true, that the landlord via its agent had made materially false statements to the tenant, with the intent that the tenant rely upon them and the tenant did rely upon them, and would not have entered into the lease had the statements not been made,[91] the inclusion of these clauses "conclusively negates the element of reliance in the common-law fraud claim, the statutory fraud claim, and the negligent misrepresentation claim."[92]

14.18 *Representations.* Tenant acknowledges that neither Landlord nor Landlord's agents, employees or contractors have made any

representations or promises with respect to the Site, the Shopping Center or this Lease except as expressly set forth herein.

14.21 *Entire Agreement.* This Lease constitutes the entire agreement between the parties hereto with respect to the subject matter hereof, and no subsequent amendment or agreement shall be binding upon either party unless it is signed by each party.

The court of appeals framed the key question and answered it as follows:

> When fraudulent or negligent misrepresentations have been made before a contract is executed, may a party successfully prosecute fraud claims and negligent misrepresentation claims when the contract contains provisions by which it is agreed that there are no representations outside of the contract and that the writing constitutes the entire agreement of the parties? We believe that the answer to that question depends upon the circumstances surrounding the particular transaction.[93]

The *Italian Cowboy* case also addressed a second issue, one dealing with non-disclosure. The trial court found that the landlord had breached its implied warranty of suitability of the premises. Unlike the lease in the *Gym-N-I Playground* case, the lease in the *Italian Cowboy* case did not contain an "as-is" clause with an express waiver of the warranty of suitability. The court of appeals in the *Italian Cowboy* case noted that the Supreme Court in the *Gym-N-I Playground* case drew the following distinction between waivers by tenants of the implied warranty of suitability of leased premises and waivers by residential purchasers of new homes of the implied warranty of habitability. The Supreme Court in *Gym-N-I Playground* stated "We recognize that our holding today stands in contrast to the implied warranty of habitability, which 'can be waived only to the extent that defects are adequately disclosed.'"[94] The *Italian Cowboy* court held that the provision in the lease placing the obligation on the tenant to make all repairs "foreseen or unforeseen" to the plumbing and "any other mechanical installations or equipment serving the Premises or located therein" clearly included latent defects that might exist at the inception of the lease and controlled over the implied warranty of suitability.[95]

(2) Common Law Merger Doctrine

A concept similar to the merger clause is the common law doctrine of merger of the contract into the deed and that the deed alone determines the rights of the parties.[96] However, this common law merger doctrine does not apply when the contract was procured by fraud.[97]

(3) Parol Evidence Rule

The parol evidence rule is invoked to prevent the introduction at trial of parol testimony to add to, vary or contradict the terms of a written agreement, except if there exists a facial ambiguity in the agreement or if the agreement is incomplete.[98] The parol evidence rule "is particularly applicable when the written contract contains a recital that it contains the entire agreement between the parties or a similarly worded merger provision."[99]

d. Arbitration Clause

It is becoming increasingly more common for sales contracts and leases to include binding arbitration clauses, especially in projects where the developer is also providing limited warranties against construction defects. It is the perception of some developers that a "fairer" decision and determination of the facts can be rendered by an arbitrator as opposed to a judge and jury. For instance in condominium projects, binding arbitration provisions will be included in each of the sales contracts and in the condominium declaration.[100] The parties to the contract, the condominium association and subsequent purchasers of units have been held to be bound by this contractual designation of the means to resolve disputes, including breaches of express limited warranties.[101]

e. 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.[102] 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 Form Approaches

1. TREC and TAR Forms

a. TREC 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. www.trec.state.tx.us/pdf/contracts. The TREC sales contract forms include: the One to Four Family Residential Contract (Resale) TREC No. 20-8 (06-30-08); the Unimproved Property Contract TREC No. 9-7 (06-30-08); and the Farm and Ranch Contract TREC No. 25-6 (06-30-08)[103].

Each of these TREC forms follow the same template and almost identical paragraph numbering system; provide for buyer inspection of the Property (Paragraph 7A); utilize a buyer optional termination period (Paragraph 23) for which an Option Fee is paid; delivery by seller to buyer of a seller's disclosure notice in the form required by § 5.008 of the Texas Property Code, if applicable (Paragraph 7.B); and an acknowledgement by buyer that it is accepting the Property in its "present condition" or in its present condition provided Seller, at Seller's expense shall complete specified repairs and treatments.

> **7. PROPERTY CONDITION:**
>
> 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: _________.

Matters Not Addressed

The following are not addressed:

(1) the words "as is" are not used;

(2) a "waiver-of-reliance" clause

(3) an acknowledgment that the "present condition" clause is a material part of the contract;

(4) an express disclaimer of implied warranties;

(5) an acknowledgment that buyer is represented by counsel;

(6) a "no oral agreements" clause;

(7) a "merger" clause;

(8) an "entire-agreements" clause; and

(9) an arbitration clause.

Despite these omissions, the "present condition" acceptance language has been held in some cases to be an "as is" clause and to operate as a bar to a cause of action for fraud and for violation of the DTPA.[104] However, the absence of an express "waiver-of-reliance" clause or a clear disclaimer or release of fraudulent representations in a "present condition" clause, has been held in other cases not to bar a cause of action for fraud or violation of the DTPA.[105]

b. TAR Forms

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. The TAR Commercial Contract – Improved Property (TAR 1801 10-18-05) and TAR Commercial Property Condition Statement utilize a framework similar to the TREC forms: a buyer inspection during a feasibility period (Paragraph 7.C(1); a buyer option to terminate during the feasibility period (Paragraph 7.B) for an agreed portion of the earnest money if buyer terminates during the feasibility period ("independent consideration"); delivery by seller to buyer of a seller's disclosure notice, TAR

1408 1—18-05) 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).

Matters Not Addressed

This form does not address the following:

(1) an acknowledgment that the "present condition" clause is a material part of the contract;

(2) a "waiver-of-reliance" clause;

(3) an acknowledgment that the contract is the result of negotiation;

(4) an express disclaimer of implied warranties;

(5) a disclaimer of oral representations;

(6) an acknowledgment that buyer is represented by counsel;

(7) a "merger" clause;

(8) an environmental condition indemnity or release;

(9) a DTPA waiver; and

(10) an arbitration provision.

2. TEXAS REAL ESTATE FORMS MANUAL

a. One Size Fits All

The TEXAS REAL ESTATE FORMS MANUAL includes in Chapter 8 a basic form of Real Estate Sales Contract for use in the sale of real property, but unlike the TREC and TAR forms it is not tailored to specific classifications of real property, such as the resale of a residence, commercial unimproved property or commercial improved property.

b. Framework

The Real Estate Sales Contract utilizes a similar framework as the TREC and TAR forms: (1) a buyer inspection during an inspection period (Paragraph G.2); (2) 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 J.1.a); (3) delivery during the inspection period by seller to buyer of a copy various records (Paragraph G.1 and Exhibit C to the contract); and (4) a series of representations as to: the 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.

c. Optional Clauses

The FORM MANUAL'S Real Estate Sales Contract contains the following provisions not contained in the TAR form: (1) a disclaimer as to the existence of oral representations or promises (Paragraph M.2); (2) an acknowledgement that there is no special relationship between seller and buyer (Paragraph M.11); (3) a waiver of the application of the DTPA to the transaction (Paragraph M.14); (4) an expanded "as is" clause (Exhibit B, Paragraph B); and (5) 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). These provisions are set out in the discussion below of clauses used in connection with disclaimers of representations and warranties.

(1) "As-Is" Clauses

The Sales Contract form in the TEXAS REAL ESTATE FORMS MANUAL provides for the optional inclusion into the Sales Contract of the following "as is" clause:

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.

Components

The FORMS MANUAL'S "as-is" clause covers the following components:

(a) an acknowledgment that the contract is an arms-length agreement;

(b) the purchase price has been adjusted on the basis of the sale of the property "as is, where is";

(c) an agreement that the property will be conveyed in an "as is, where is" condition, with all faults. The disclaimer language is in conspicuous type;

(d) an acknowledgment that there representations other than those set out in the contract;

(e) a "disclaimer-of-warranties" disclaiming express or implied warranties; except for an exclusion from the "disclaimer-of-warranties" for the warranty of title stated in the Closing Documents;[106]

(f) an option to add a disclaimer of warranties of condition, merchantability, suitability or fitness for a particular purpose if the transaction also involves the sale of personal property; and

(g) an acknowledgment that the "as-is" clause will be contained in the deed and any bill of sale.

Matters Not Addressed

The FORMS MANUAL'S "as-is" clause does not address the following:

(a) 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;

(b) a "waiver-of-reliance" clause specifying that buyer is relying solely on its own investigation and inspection;

(c) a "release-of-claims" clause;

(d) an acknowledgment as to the sophistication of the parties; and

(e) an acknowledgment that the buyer is represented by counsel

(2) Environmental Indemnity

The Real Estate Sales Contract in the FORMS MANUAL provides for inclusion of the following optional environmental indemnity provision:

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.

d. "Four-Corner" Clauses

The TEXAS REAL ESTATE FORMS MANUAL Real Estate Sales Contract contains the following "entire agreements" and "merger" clause:

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.

…

5. *Survival.* The obligations of this contract that cannot be performed before termination of this contract or before closing will survive termination of this contract or closing, and the legal doctrine of merger will not apply to these matters….

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

…

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.

Components

Note that these clauses of the FORM'S MANUAL Sales Contract contain the following components:

(1) Entire Agreement. An acknowledgement that the contract and closing documents constitute the entire agreement between the parties concerning the sale of the property by seller to buyer.

(2) No Oral Representations. An acknowledgment by the buyer that 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.[107] Note, however, that this acknowledgment does not address representations, warranties, agreements, or promises by seller's agents.

(3) Identification of Representations Made. An exclusion of any representations as having been made by seller other than those specifically referenced and contained in the contract or in the notices, statements, and certificates set forth in the exhibit to the contract.

(4) Disclaimer of Warranties. An acknowledgment by the parties that seller has not made any warranties to the buyer.

(5) DTPA Waiver. A waiver of the DTPA.

ENDNOTES

[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 is the best policy: Richard Whatley, Archbishop of Dublin 1787 – 1863.

[8] Lay Understandings. Business lies: Alan Arkin to Amy Adams in Sunshine Cleaning (2009).

[9] Consumer Protection.

1. DTPA.

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

2. Fraud in Real Estate Transactions.

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

3. Implied Warranties as to New Home Construction: Constructed in a Good and Workmanlike Manner 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.

The Texas Supreme Court in *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 354 (Tex. 1987) defined "good and workmanlike" as "that quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work." One of the purposes behind the implied warranty that services be performed in a good and workmanlike manner is the protection of the helpless consumer who takes what he gets because he does not know enough technically to test or judge what is before him. *DiMiceli v. Affordable Pool Maint., Inc.*, 110 S.W.3d 164 (Tex. App.—San Antonio 2003, no pet.); *Sears, Roebuck & Co. v. Nichols*, 819 S.W.2d 900, 904

(Tex. App.—Hou. [14th Dist.] 1991, writ denied).

These implied warranties have not been extended to the sale of a "used" home and at least one court has rejected extending them to newly constructed ancillary elements of a used home, such as a brick retaining wall, fences, and driveways. *Turner v. Conrad*, 618 S.W.2d 850 (Tex. Civ. App.—Ft. Worth 1981, writ ref'd n.r.e.). The court in *Turner* observed

> It is applied to personalty, in the main, that the development of law has been such that the doctrine of *caveat vendor* had supplanted the former doctrine of *caveat emptor* so that one who sells personalty oftentimes dos so at this peril and sometimes finds himself legally liable to his purchaser under existent law for the same act or omission to act which in former years would be the risk imposed upon the purchaser. Thought there has been an extension of the *caveat vendor* doctrine into the realty area where new homes or structures erected thereon are conveyed with the land the same has not been true in an instance where other than a new home or structure (as the principal if not the only subject matter conveyed) is the subject of sale.

a. 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.

(1) 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.

(2) 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.

b. 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).

4. 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 conditioning, 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 location of the building, (6) whether the tenant waived the defects in the lease, and (7) 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."

5. <u>Express Negligence and Strict Liability Doctrine</u>.

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.

a. <u>Fair Notice</u>. 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.

b. <u>Express Negligence</u>. 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.

c. 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.

d. 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.

[10] Freedom of Contract.

1. A 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.

2. 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).

3. Personal Property: 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).

§2.314 Implied Warranty: Merchantability; Usage of Trade provides as follows:

> (a) Unless excluded or modified (Section 2.316), a warranty that goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind….

Comment 8 to this section states "Fitness for the ordinary purpose for which goods of the type are used is a fundamental concept of the present section…."

§2.315 Implied Warranty: Fitness for Particular Purpose provides as follows:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

§2.316 Exclusion or Modification of Warranties 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).…

Care must be exercised in drafting a waiver as for example a waiver of the implied warranty of suitability does not waive the implied warranty of merchantability. *Kleas v. BMC West Corp.*, 2008 WL 5264883 (Tex. App.—Austin) (suit by building supply company to collect on an open account for building supplies – trim base boards) found that the "as is" clause which contained an express waiver of the implied warranty of fitness did not also waive the warranty of merchantability.

4. 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 Playgrounds* 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 lease because, as Caddell testified, they "knew more about the building" than anyone else. The lease contained an "as-is" "waiver-of-reliance" clause (the *Gym-N-I Playgrounds'* clause is set out in the main body of this paper). The lease required Gym-N-I to insure "all buildings and improvements on the Premises …against loss or damage by fire." Further, the lease 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 suitability 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.

5. <u>Contractual Waiver of Implied Warranties in Product Sales Contracts</u>.

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.

6. 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).

7. Statutory Override of Freedom of Contract.

As discussed in Endnote 9 above, 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").

[11] "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."

[12] "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.

[13] "Release". Release is, "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.

[14] 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.).

[15] No Duty to Disclose Facts which Other Party has Equal Opportunity to Obtain. *Keasler v. Natural Gas Pipeline Co. of America*, 569 F.Supp. 1180, 1186, *judgment aff'd* 741 F.2d 1380 (5th Cir. 1984) – citing comment k to the RESTATEMENT (SECOND) OF TORTS § 551 (1965). See Endnote 22 below.

[16] 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).

[17] No Liability for Failure to Disclose What One Should Have Known, but Did Not. *Prudential Ins. Co. of America v. Jefferson Assoc., Ltd.*, 896 S.W.2d 156, 162 (Tex. 1995); *Ozuna v. Delaney Realty, Inc.*, 600 S.W.2d 780, 782 (Tex. 1980) (per curiam); and *Rich v. Olah*, 274 S.W.3d 878 (Tex. App.—Dallas 2008, no pet.) – Prior to selling his property, the seller had his residence inspected by the company that had previously undertaken foundation repairs and the inspector's report stated that the repairs were working as intended and that adjusting the piers would not solve new symptoms (cracks in the walls and kitchen tiles); seller provided buyer with a TREC form Property Disclosure Notice stating seller was not aware of any soil movement or settling or of the need for additional repairs; the court held that seller was not liable for not knowing that its inspector's foundation inspection report showed ground subsidence that was not addressed by its prior foundation repairs and reversed the trial court in its denial of seller's claim for attorney's fees). *Sims v. Century 21 Capital Team, Inc.*, 2006 WL 2589358 (Tex. App.—Austin, no pet.) – real estate agent did not know that property contained underground mines and could not be liable for fraudulent concealment.

[18] Reasonable to Assume that Other Party Knows Facts. *Bradford v. Vento,* 48 S.W.3d 749 Hns. 4-6 (Tex. 2001)—buyer of sports memorabilia store in shopping mall brought suit for, in part, fraud against seller, mall manager, and mall owners. The trial court entered judgment on a jury verdict awarding

plaintiff damages, and the court of appeals affirmed in part. Reversing in part and rendering judgment that plaintiff take nothing, the Supreme Court held that there was no evidence that mall manager knew that plaintiff was ignorant of the lease terms, or that plaintiff did not have an equal opportunity to discover them, so that manager's assurance that he would "take care of" plaintiff's long-term-lease concerns did not amount to fraud for failing to advise plaintiff that the lease was nonassignable, that additional rent was due, or that plaintiff would be required to apply for a new lease; *Pellegrin*i v. *Cliffwood—Blue Moon Joint Venture*, 115 S.W.3d 577, 580 (Tex. App.—Beaumont 2003, no writ)—no duty to disclose under the circumstances of this arm's length commercial transaction, where both parties were expert in the subject matter of the contract, and plaintiff had the opportunity, knowledge, and expertise to determine prior development of the oil and gas prospect.

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

20 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.

21 Disclosure Duty Arises in Confidential or Fiduciary Relationships. *Ins. Co. of N. America v. Morris*, 981 S.W.2d 667, 674-75 (Tex. 1998) ("[f]iduciary duties arise as a matter of law in certain formal relationships, including attorney-client, partnership, and trustee relationships"), such a duty can also arise where there is a confidential relationship between the parties ("confidential relationships may arise when the parties have dealt with each other in such a manner for a long period of time that one party is justified in expecting the other to act in its best interest"); *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); *Adickes v. Andreoli*, 600 S.W.2d 939, 945 (Tex. Civ. App.—Hou. [1st Dist. 1980, writ dism'd)—close personal friends—citing the RESTATEMENT (SECOND) OF TORTS § 551 (1965) see Endnote 22; *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).

22 The Restatement's Position. RESTATEMENT (SECOND) OF TORTS § 551 (1965) provides:

§ 551. *Liability For Nondisclosure*

(1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.

(2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,

(a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and

(b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and

(c) subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so; and

(d) the falsity of a representation not made with the expectation that it would be acted upon, if he subsequently learns that the other is about to act in reliance upon it in a transaction with him; and

(e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of

the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

Comments to § 551:

Comment on Subsection (1):

a. Unless he is under some one of the duties of disclosure stated in Subsection (2), one party to a business transaction is not liable to the other for harm caused by his failure to disclose to the other facts of which he knows the other is ignorant and which he further knows the other, if he knew of them, would regard as material in determining his course of action in the transaction in question. The interest in knowing those facts that are important in determining the advisability of a course of action in a financial or commercial matter is given less protection by the rule stated in this Subsection than is given to the interest in knowing facts that are important in determining the recipient's course of action in regard to matters that involve the security of the person, land or chattels of himself or a third person.

b. The conditions under which liability is imposed for nondisclosure in an action for deceit differ in one particular from those under which a similar nondisclosure may confer a right to rescind the transaction or to recover back money paid or the value of other benefits conferred. In the absence of a duty of disclosure, under the rule stated in Subsection (2) of this Section, one who is negotiating a business transaction is not liable in deceit because of his failure to disclose a fact that he knows his adversary would regard as material. On the other hand, as is stated in Restatement, Second, Contracts § 303(b) the other is entitled to rescind the transaction if the undisclosed fact is basic; and under Restatement of Restitution, § 8, Comment *e*, and § 28, he would be entitled to recover back any money paid or benefit conferred in consummation of the transaction.

Comment on Subsection (2):

c. A person under the duty stated in this Subsection is required to disclose only those matters that he has reason to know will be regarded by the other as important in determining his course of action in the transaction in hand. He is therefore under no duty to disclose matter that the ordinary man would regard as unimportant unless he knows of some peculiarity of the other that is likely to lead him to attach importance to matters that are usually regarded as of no moment.

d. Under the rule stated in this Subsection the person under a duty of disclosure is not subject to liability merely because he has failed to bring the required information home to the person entitled to it. His duty is to exercise reasonable care to do so. If reasonable care is exercised, the fact that the information does not reach the person entitled to it does not subject him to liability. Thus a trustee whose distant cestui que trust is contemplating a sale of part of his interest in the trust res to a third person and who writes to his cestui que trust communicating certain information which it is material for the latter to know in the transaction in question, is not subject to liability in an action of deceit, if the letter goes astray and therefore does not reach the cestui until the sale is made. On the other hand, if the trustee knows that the consummation of the transaction is immediately imminent, it may not be reasonable for him to communicate by mail rather than by telegraph. However, in the great majority of cases the person owing the duty has so available an opportunity to make the required disclosure that it is rare that the failure to give it can be other than intentional or negligent.

Comment on Clause (a):

e. On the duty of a trustee to disclose all material matters to his beneficiary with whom he is dealing on the trustee's own account, see Restatement, Second, Trusts § 170(2). On the duty of a trustee to disclose to his beneficiary matters important for the beneficiary to know in dealing with third persons, see Restatement, Second, Trusts § 173, Comment *d*. On the duty of an agent to disclose to his principal matters important for the principal to know in dealing with the agent or a third person and the similar duty of the principal to the agent, see Restatement, Second, Agency §§ 381 and 435. It is not within the scope of this Restatement to state the rules that determine the duty of disclosure which under the law of

business associations the directors of a company owe to its shareholders.

f. Other relations of trust and confidence include those of the executor of an estate and its beneficiary, a bank and an investing depositor, and those of physician and patient, attorney and client, priest and parishioner, partners, tenants in common and guardian and ward. Members of the same family normally stand in a fiduciary relation to one another, although it is of course obvious that the fact that two men are brothers does not establish relation of trust and confidence when they have become estranged and have not spoken to one another for many years. In addition, certain types of contracts, such as those of suretyship or guaranty, insurance and joint adventure, are recognized as creating in themselves a confidential relation and hence as requiring the utmost good faith and full and fair disclosure of all material facts.

Comment on Clause (b):
g. A statement that is partial or incomplete may be a misrepresentation because it is misleading, when it purports to tell the whole truth and does not. (See § 529). So also may a statement made so ambiguously that it may have two interpretations, one of which is false. (See §§ 527, 528). When such a statement has been made, there is a duty to disclose the additional information necessary to prevent it from misleading the recipient. In this case there may be recovery either on the basis of the original misleading statement or of the nondisclosure of the additional facts.

Comment on Clause (c):
h. One who, having made a representation which when made was true or believed to be so, remains silent after he has learned that it is untrue and that the person to whom it is made is relying upon it in a transaction with him, is morally and legally in the same position as if he knew that his statement was false when made.

Illustrations:
1. A, a stock breeder, tells B, a prospective buyer, that a thoroughbred mare is in foal to a well-known stallion. The mare miscarries. Immediately afterwards B offers $500 for the mare relying, as A knows, upon his statement. A does not inform B of the mare's miscarriage. A is subject to liability to B for the loss that he suffers because the mare is not in foal as originally represented. 2. A, the president of a mercantile corporation, makes a true statement of its financial position to a credit rating company, intending the substance to be published by it to its subscribers. The corporation's financial position becomes seriously impaired, but A does not inform the credit rating company of this fact. The corporation receives goods on credit from B, a subscriber of the rating company, who when the goods are bought is relying, as A knows, on the credit rating based on his statements to the rating company. A is subject to liability in deceit to B.

Comment on Clause (d):
i. One who knowingly makes a misrepresentation without any expectation that the recipient will act upon it may subsequently discover that the other is relying upon it in a transaction then pending between them. If, in this case, he does not exercise reasonable care to inform the other that his misrepresentation is untrue, he is under the same liability as though he had then made it for the purpose of influencing the other's conduct in the transaction in hand.

The rule stated in Clause (d) is not necessarily limited to “a transaction with him.” When, for example, the defendant makes a statement to the plaintiff concerning the credit of a third person not expecting it to be acted upon and then discovers that the plaintiff is about to lend money to the third person in reliance upon the statement, it would appear that the duty of disclosure would arise.

Comment on Clause (e):
j. “Facts basic to the transaction.” The word “basic” is used in this Clause in the same sense in which

it is used in Comment *c* under § 16 of the Restatement of Restitution. A basic fact is a fact that is assumed by the parties as a basis for the transaction itself. It is a fact that goes to the basis, or essence, of the transaction, and is an important part of the substance of what is bargained for or dealt with. Other facts may serve as important and persuasive inducements to enter into the transaction, but not go to its essence. These facts may be material, but they are not basic. If the parties expressly or impliedly place the risk as to the existence of a fact on one party or if the law places it there by custom or otherwise the other party has no duty of disclosure. (Compare Restatement, Second, Contracts § 296).

Illustrations:

3. A sells to B a dwelling house, without disclosing to B the fact that the house is riddled with termites. This is a fact basic to the transaction. 4. A sells to B a dwelling house, knowing that B is acting in the mistaken belief that a highway is planned that will pass near the land and enhance its value. A does not disclose to B the fact that no highway is actually planned. This is not a fact basic to the transaction. 5. Having purchased a certain tract of land for $25,000, A hears that B may have a claim to it. He goes to B and offers to purchase B's interest. B does not believe he has a valid legal claim but agrees to give A a quit-claim deed for $250. B's lack of a valid legal claim is not a fact that he is under a duty to disclose.

Comment:

k. Nondisclosure of basic facts. The rule stated in Subsection (1) reflects the traditional ethics of bargaining between adversaries, in the absence of any special reason for the application of a different rule. When the facts are patent, or when the plaintiff has equal opportunity for obtaining information that he may be expected to utilize if he cares to do so, or when the defendant has no reason to think that the plaintiff is acting under a misapprehension, there is no obligation to give aid to a bargaining antagonist by disclosing what the defendant has himself discovered. To a considerable extent, sanctioned by the customs and mores of the community, superior information and better business acumen are legitimate advantages, which lead to no liability. The defendant may reasonably expect the plaintiff to make his own investigation, draw his own conclusions and protect himself; and if the plaintiff is indolent, inexperienced or ignorant, or his judgment is bad, or he does not have access to adequate information, the defendant is under no obligation to make good his deficiencies. This is true, in general, when it is the buyer of land or chattels who has the better information and fails to disclose it. Somewhat less frequently, it may be true of the seller.

Illustrations:

6. A is a violin expert. He pays a casual visit to B's shop, where second-hand musical instruments are sold. He finds a violin which, by reason of his expert knowledge and experience, he immediately recognizes as a genuine Stradivarius, in good condition and worth at least $50,000. The violin is priced for sale at $100. Without disclosing his information or his identity, A buys the violin from B for $100. A is not liable to B.7. The same facts as in Illustration 6, except that the violin is sold at auction and A bids it in for $100. The same conclusion. 8. B has a shop in which he sells second-hand musical instruments. In it he offers for sale for $100 a violin, which he knows to be an imitation Stradivarius and worth at most $50. A enters the shop, looks at the violin and is overheard by B to say to his companion that he is sure that the instrument is a genuine Stradivarius. B says nothing, and A buys the violin for $100. B is not liable to A.

l. The continuing development of modern business ethics has, however, limited to some extent this privilege to take advantage of ignorance. There are situations in which the defendant not only knows that his bargaining adversary is acting under a mistake basic to the transaction, but also knows that the adversary, by reason of the relation between them, the customs of the trade or other objective circumstances, is reasonably relying upon a disclosure of the unrevealed fact if it exists. In this type of case good faith and fair dealing may require a disclosure.

It is extremely difficult to be specific as to the factors that give rise to this known, and reasonable, expectation of disclosure. In general, the cases in which the rule stated in Clause (e) has been applied have been those in which the advantage taken of the plaintiff's ignorance is so shocking to the ethical sense of the community, and is so extreme and unfair, as to amount to a form of swindling, in which the plaintiff is led by appearances into a bargain that is a trap, of whose essence and substance he is unaware. In such a case, even in a tort action for deceit, the plaintiff is entitled to be compensated for the loss that he has sustained. Thus a seller who knows that his cattle are infected with tick fever or contagious abortion is not free to unload them on the buyer and take his money, when he knows that the buyer is unaware of the fact, could not easily discover it, would not dream of entering into the bargain if he knew and is relying upon the seller's good faith and common honesty to disclose any such fact if it is true.

There are indications, also, that with changing ethical attitudes in many fields of modern business, the concept of facts basic to the transaction may be expanding and the duty to use reasonable care to disclose the facts may be increasing somewhat. This Subsection is not intended to impede that development.

Illustrations:
9. A sells B a dwelling house, without disclosing the fact that drain tile under the house is so constructed that at periodic intervals water accumulates under the house. A knows that B is not aware of this fact, that he could not discover it by an ordinary inspection, and that he would not make the purchase if he knew it. A knows also that B regards him as an honest and fair man and one who would disclose any such fact if he knew it. A is subject to liability to B for his pecuniary loss in an action of deceit. 10. A is engaged in the business of removing gravel from the bed of a navigable stream. He is notified by the United States government that the removal is affecting the channel of the stream, and ordered to stop it under threat of legal proceedings to compel him to do so. Knowing that B is unaware of this notice, could not reasonably be expected to discover it and would not buy if he knew, A sells the business to B without disclosing the fact. A is subject to liability to B for his pecuniary loss in an action of deceit. 11. A, who owns an amusement center, sells it to B without disclosing the fact that it has just been raided by the police, and that A is being prosecuted for maintaining prostitution and the sale of marijuana on the premises. These facts have seriously affected the reputation and patronage of the center, and greatly reduced its monthly income. A knows that B is unaware of these facts, could not be expected to discover them by ordinary investigation and would not buy if he knew them. He also knows that B believes A to be a man of high character, who would disclose any serious defects in the business. A is subject to liability to B for his pecuniary loss in an action of deceit. 12. A sells a summer resort to B, without disclosing the fact that a substantial part of it encroaches on the public highway. A knows that B is unaware of the fact and could not be expected to discover it by ordinary inquiry, and that B trusts him to disclose any such facts. A is subject to liability to B for his pecuniary loss in an action of deceit.

m. Court and jury. Whether there is a duty to the other to disclose the fact in question is always a matter for the determination of the court. If there are disputed facts bearing upon the existence of the duty, as for example the defendant's knowledge of the fact, the other's ignorance of it or his opportunity to ascertain it, the customs of the particular trade, or the defendant's knowledge that the plaintiff reasonably expects him to make the disclosure, they are to be determined by the jury under appropriate instructions as to the existence of the duty.

See Bradford v. Vento, 48 S.W.3d 749, 755-56 (Tex. 2001); *Playboy Enterprises, Inc. v. Editorial Caballero, S.A. de C. V.*, 202 S.W.3d 250, 260 (Tex. App.—Corpus Christi-Edinburg 2006, writ denied).

[23] 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 Communities, Inc.*, 585 S.W.2d 655, 658 (Tex. 1979); *NRC, Inc. v. Prichardt*, 667 S.W.2d 292 (Tex. App.—Texarkana 1984, writ dism'd) citing comment b to the RESTATEMENT (SECOND) OF TORTS § 551 (1965) See Endnote 22. The buyer obtained rescission of the sales contract to buy a lakefront lot from seller that was advertised by seller as being suitable for home construction when it was found that there was an overflow easement on the property held by the local river authority (a material fact), which was not disclosed to buyer, but was know to seller, and which the court found would not be discoverable by the exercise of ordinary care and diligence on the part of the buyer. The court noted that "As to this, there is less strictness in recognizing a right of rescission and restitution in contrast to a deceit action in which damages are sought." *Id.* at 658; Keeton, *Rights of Disappointed Purchasers,* 32 TEX. L. REV. 1 (1953).

[24] No Liability if No Reliance by Disclosure Recipient. *Trentman v. Whiteside*, 163 S.W.2d 418, 421 (Tex. Civ. App.—Austin 192), *aff'd* 141 Tex. 46, 170 S.W.2d 195 (Tex. 1943); *Dillard v. Clutter*, 145 S.W.2d 632, 634 (Tex. Civ. App.—Amarillo 1940, writ ref'd); *Donoho v. Hunter*, 287 S.W. 47, 49-50 (Tex. Comm'n App. 1926, judgm't adopted).

[25] Duty on Disclosure Recipient to Make Reasonable Investigation. *Thigpen v. Locke*, 363 S.W.2d 247, 251 (Tex. 1962) – A party in an arm's length transaction must exercise ordinary care for the protection of his own interests, and any failure to do so will not be excused "by mere confidence in the honesty and integrity of the other party." *Sierra Associate Group, Inc. v. Hardeman*, 2009 WL 416465 (Tex. App.—Austin) – no reliance could be placed on advertisement that the property was "waterfront" property and no reliance could be placed on silence as to the existence of restrictive covenants on adjoining property barring anchoring of boat docks on the adjoining property. The court determined that the buyer had failed to conduct a reasonable investigation and thus could not rely on the affirmative characterization of the property as "waterfront" property. Buyer testified that (1) he reviewed a survey of the sale property and was aware that the shoreline of Lake Travis was below the 670' contour line and, therefore, beyond the boundary of the property; (2) he relied on the advice of his real estate attorney that he could access the lake from his property; and (3) he relied on the report of his real estate agent as to conversations with an employee of the LCRA who had confirmed that there would not be any problem putting a boat dock in that area; but that he had not made any inquiry of the owner of the property below the 670' contour line as to whether it would permit or was restricted against permitting the anchoring of a boat dock on its property.

[26] 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 Communities, Inc.*, 585 S.W.2d 655, 658 (Tex. 1979). The court in *Smith v. Levine*, 911 S.W.2d 427 (Tex. Civ. App.—San Antonio 1995, no writ) held that the jury could reasonably find that the defendant home seller should have disclosed to his buyer that the seller had previously obtained an engineer's report that the house's foundation was so defective that it had damaged the superstructure of the house, even though the seller knew that the buyer had observed minor cracks and a slight slope to the floor in one area of the house and an engineer hired by the buyer to do a "walk through" inspection had reported that the cracks were "minor and superficial." Seller had advertised the property as being in "excellent" condition and had assured the buyer that the cracks were superficial and routine for a house in that area. Under these circumstances the court refused to enforce the "as-is" disclaimer in the TREC form sales contract and a provision that the seller made "no warranties, either express or implied, as to any matter whatsoever including without limitation the condition of the home" or the provision that "[n]o verbal contract or agreement contrary to any of the terms conditioned [sic] in the foregoing contract ha[d] been made. citing comment b to the RESTATEMENT (SECOND) OF TORTS § 551 (1965) See Endnote 22.

[27] The Restatement's Position. RESTATEMENT (SECOND) OF TORTS § 353 (1965) provides:

§ 353 Undisclosed Dangerous Conditions Known to Vendor

(1) A vendor of land who conceals or fails to disclose to his vendee any condition, whether natural or artificial, which involves unreasonable risk to persons on the land, is subject to liability to the vendee and others upon the land with the consent of the vendee or his subvendee for physical harm caused by the condition after the vendee has taken possession, if

(a) the vendee does not know or have reason to know of the condition or the risk involved, and

(b) the vendor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to believe that the vendee will not discover the condition or realize the risk.

(2) If the vendor actively conceals the condition, the liability stated in Subsection (1) continues until the vendee discovers it and has reasonable opportunity to take effective precautions against it. Otherwise the liability continues only until the vendee has had reasonable opportunity to discover the condition and to take such precautions.

See First Fin. Dev. Corp. v. Hughston, 797 S.W.2d 286, 290-91 (Tex. App.—Corpus Christi 1990, writ denied); *Davis v. Esperado Mining Co.* 750 S.W.2d 887, 888 (Tex. App.—Hou. [14th Dist.] 1988, no writ); *Moeller v. Fort Worth Capital Corp.*, 610 S.W.2d 857, 858, 861 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.); *Roberts v. Friendswood Dev. Co.*, 886 S.W.2d 363, 366-68 (Tex. App.—Hou. [1st Dist.] 1994, writ denied) and see *Lefmark Management Co. v. Old*, 946 S.W.2d 52 (Tex. 1997) discussing but not adopting § 353 of the RESTATEMENT (SECOND) OF TORTS.

[28] The Restatement's Rationale for its Position. RESTATEMENT (SECOND) OF TORTS § 353, cmt. b and cmt. d.

[29] 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).

[30] 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.).

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

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

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

[34] 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."

[35] Elements of Common Law Fraud Claim. *In re First Merit Bank*, 52 S.W.3d 749, 758 (Tex. 2001); *Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.,* 51 S.W.3d 573, 577 (Tex. 2001); *Haase v. Glazner*, 62 S.W.3d 795, 798-99 (Tex. 2001) –fraudulent inducement claims include fraud elements in addition

to proof that one entered into a binding agreement as a result of the misrepresentation; *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 688 (Tex. 1990); *Coldwell Banker Whiteside Assocs. v. Ryan Equity partners, Ltd.*, 181 S.W.3d 879, 887-88 (Tex. App.—Dallas 2006, no pet).

[36] 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) citing comment b to the RESTATEMENT (SECOND) OF TORTS § 551 (1965) See Endnote 22.

[37] 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.

[38] Elements of Statutory Fraud Cause of Action – Reliance. *American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 436 (Tex. 1997)–summary judgment is proper if defendant negates the element of reliance.

[39] DTPA – Liability for Misrepresenting the Standard, Quality or Grade of Goods and Services. TEX. BUS. & Com. CODE § 17.46(b)(7) (Vernon Supp. 2008).

[40] 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); *Willowbrook Foods, Inc. v. Grinnell Corp.*, 147 S.W.3d 492, 506 (Tex. App.—San Antonio 2004, pet. denied) – plaintiff has to prove it would not have entered into the transaction had the information been disclosed; *Rich v. Olah*, 274 S.W.3d 878, 887 (Tex. App.—Dallas 2008, no pet.).

[41] Reasonable Reliance on Representations Required. *Peltier Enters., Inc. v. Hilton*, 51 S.W.3d 616, 624 (Tex. App.—Tyler 2000, pet. denied).

[42] DTPA - Grounds for Recovery. TEX. BUS. & Com. CODE § 17.50(a)(1)-(4) (Vernon Supp. 2008).

[43] Mental Anguish Damages. TEX. BUS. & Com. CODE § 17.50(b)(1) (Vernon Supp. 2008). If the trier of fact finds that the conduct of the defendant was committed *knowingly*, the consumer may recover damages for mental anguish and the trier of fact may award not more than three times the amount of economic damages; or if the trier of fact finds the conduct was committed *intentionally*, the consumer may recover damages for mental anguish and the trier of fact may award not more than three times the amount of damages for mental anguish and economic damages.

[44] 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.

[45] 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.

[46] DTPA and "As-Is" Clauses. *Prudential Ins. Co. of America v. Jefferson Assoc., Ltd.*, 896 S.W.2d 156, 160 (Tex. 1995).

[47] Negligent Misrepresentation Claim. *McCamish, Martin, Brown & Loeffler v. F. E. Appling Interests*, 991 S.W.2d 787, 791 (Tex. 1999); *Fed. Land Bank Ass'n v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991); *Rich v. Olah*, 274 S.W.3d 878 (Tex. App.—Dallas 2008, no writ) – Court found it did not need to address the seller-defendant's argument that nondisclosure of information as opposed to an affirmative representation, as the court held that the buyer-plaintiff could not justifiable rely on seller's alleged failure to disclose that seller was aware of cracks in the walls and kitchen tile and of sticking doors prior to the sale of the house; prior to selling his property, seller had his residence inspected by the company that had previously undertaken foundation repairs and the inspector's report stated that the repairs were working as intended and that adjusting the piers would not solve new symptoms; seller provided buyer with a TREC form Property Disclosure Notice stating seller was not aware of any soil movement or settling or of the need for additional repairs; the court held that seller was not liable for not knowing that its inspector's foundation inspection report showed ground subsidence that was not addressed by its prior foundation repairs and reversed the trial court in its denial of seller's claim for attorney's fees).

[48] Reliance Party's Liability Limited to Intended Recipients. RESTATEMENT (SECOND) OF TORTS § 552(2) (1977). The court in *Income Apartments Investors, L.P. v. Building Diagnostics, Ltd.*, 1998 WL 476777 (Tex. App—Austin) held that a buyer, which had been furnished a consultant's report that erroneously stated that the property was copper wired but was aluminum wired, was not entitled to rely to its detriment on the report and did not have a cause of action against the report preparer as the report was prepared for the lender/seller and was issued to the lender/seller under instructions that it was not to be delivered to third parties without the consent of the preparer and granted permission to the lender/seller to only release the environmental assessment portion of the report and not the architectural and engineering portion of the report, which contained the error. Additionally, the court found that the report preparer was protected by the "as-is", "waiver-of-reliance" clauses in the sales contract, although the preparer was not named as a beneficiary of these clauses, as the buyer agreed in these provisions that it was relying *solely* on its own inspections, engineering studies and reports.

[49] 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.).

[50] "Knowledge" versus "Opinion". In *Kessler v. Fanning*, 953 S.W.2d 515 (Tex. App.—Ft. Worth 1997, no writ) the seller was held liable under the DTPA for failing to disclose on the Property Conditions Disclosure Statement his knowledge of rain water "ponding" in response to the question on the form inquiring as to the seller's knowledge of "improper drainage." Also, seller answered "no", in response to the buyer's agent's inquiry as to whether the seller "had anything to tell the Fannings about the house or the property." The court dismissed the seller's argument that seller's statement was merely "puffing" or an expression of an opinion. The court also found that buyer's inspection of the property, even though conducted by the inspector on a rainy day, was not a basis to excuse the seller from disclosing his knowledge as to drainage issues.

[51] 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.).

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

[53] "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 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 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.

[54] 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, purchased 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.

[55] *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.

[56] Boilerplate. BLACK'S LAW DICTIONARY 167 (7th Ed. 1999). "Boilerplate" is defined as "Fixed or standardized contractual language that the proposing party views as relatively nonnegotiable."

[57] *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.

[58] *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 245 (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. *Woodlands Land Dev. Co. v. Jenkins*, 48 S.W.3d 415, 422 (Tex. App.—Beaumont 2001, no pet.); and *Oakwood Mobile Homes, Inc. v. Cabler*, 73 S.W.3d 363, 372 (Tex. App.—El Paso 2002, pet denied.). 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.

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

[60] Conspicuous Disclaimer. In *Turner v. Conrad*, 618 S.W.2d 850, 852-53 (Tex. Civ. App.—Ft. Worth 1981, writ ref'd n.r.e.) the court noted that it was not deciding that the conspicuousness requirement of the Texas UCC (§ 2.316(b)) applicable to waivers of implied warranties in the sale of personal property applied to the waiver of implied warranties in real estate transactions. The court went on to further note that under the Texas UCC the trial court is charged with "the responsibility to test contractual clauses to see that those sought to be enforced were so conspicuous that a reasonable person against whom they are sought to be operative ought to have noticed them" and confirmed that the trial court "did justifiably deem the clause we have copied to satisfy any requirement that they be conspicuous if that be deemed of importance." The court in *MacDonald v. Mobley*, 555 S.W.2d 916, 919 (Tex. Civ. App.—Austin 1977, no writ) held that the conspicuousness requirements of Texas UCC § 2.316(b) are equally applicable to "as-is" disclaimers of implied warranties in real estate transactions. This court held that the disclaimer was not printed in large or contrasting type or in any other manner to draw the buyer's attention to it.

[61] "Acknowledgment of No Reliance on Representations of Seller or Landlord. *Prudential Ins. Co. of America v. Jefferson Assoc., Ltd.*, 896 S.W.2d 156, 160 (Tex. 1995); *Smith v. Levine,* 911 S.W.2d 427, 432 (Tex. App.—San Antonio 1995, pet. denied) – court noted that the "as-is" clause in this case is silent on the reliance issue, and the buyers testified that they relied on the sellers' representation that the house was in "excellent" condition and believed the "as-is" clause referred only to problems that might develop in the future; *Weitzel v. Barnes*, 691 S.W.2d 598 (Tex. 1985)—the court stressed the fact that the "as is" clause in *Weitzel* did not state that the buyer was relying on its own inspection of the property as opposed to representations by the seller and held that the buyer could maintain an action under the DTPA against the seller for its misrepresentations, despite the fact that the contract provided

that the buyer could inspect the property and elected not to do so (in reliance on seller's misrepresentations).

[62] Provision for Express Survival after Closing of "As-Is" Disclaimer. *Prudential Ins. Co. of America v. Jefferson Assoc., Ltd.*, 896 S.W.2d 156, 160 (Tex. 1995); *Smith v. Levine,* 911 S.W.2d 427, 433 (Tex. App.—San Antonio 1995, pet. denied) – the court in this case observed "The 'as is' clause at issue in *Prudential* expressly provided that it would 'survive the Closing.' (omitted citation) By using this language, Prudential avoided the general rule that contractual provisions are merged into the deed by which the property is conveyed at closing; therefore, Prudential could legitimately rely on the 'as is' clause as a viable, post-closing defense to Goldman's allegations that Prudential misrepresented the condition of the property. (omitted citation). In this case, on he other hand, neither the earnest money contract nor the deed contains any indication that the 'as is' clause was intended to survive the closing, and the general rule would suggest that it did not."

[63] "*Solely*". In *Income Apt. Investors L.P. v. Building Diagnostics Ltd.*, 1998 WL 476777 (Tex.App.—Austin) the court held that the buyer could not maintain a cause of action against the seller, despite the seller's having advertised the property as having copper wiring when in fact it had aluminum wiring, because the buyer had agreed in the "as-is" clause to rely *solely* on its own inspection and not on the representations of the seller.

[64] Price Reductions; Election to Purchase "As Is" after Discovery of Defect. *Dubow v. Dragon*, 746 S.W.2d 857, 860 (Tex.App.–Dallas 1988, no writ)—the parties inserted into an amendment to the contract after an inspection of the property revealed a defective foundation the price was reduced and the following provision, which the court held barred buyer's recovery against seller after closing on a DTPA action:

> After careful inspection of the house, and based solely on that inspection, the buyers feel the house will need repairs or ongoing maintenance as indicated by the attached inspection report. The buyers agree to take the home AS IS, WITH ALL CONTINGENCIES REMOVED.

According to the court, "The Dubows' reliance on their inspection of the house constituted a new and independent basis for purchase that intervened and superseded the Dragons' alleged wrongful act." However, the court in *McFarland v. Associated Brokers*, 977 S.W.2d 427 (Tex. App.—Corpus Christi 1998, judgment set aside, pet. granted)—found that the failure of the buyer to enter into an "as-is" agreement coupled with a "waiver-of-reliance" clause after buyer's inspector discovered that the roof leaked and seller caused a third-party contractor to make limited repairs to the roof, based on buyer's inspector's report, and provided a 1 year roof warranty, did not absolve the seller's broker for failing to disclose the full extent of its knowledge as to the defective roof. The roof leaked after closing. The court found that the buyer's inspection was not an intervening factor that broke the causal connection between buyers' damages and the agent's concealment.

Similarly, in *Kupchynsky v. Nardiello*, 230 S.W.3d 685 (Tex. App.—Dallas 2007, writ denied) the court found that the TREC form "as is" was boilerplate and not an important basis of the bargain, and thus upheld the trial court's awarding of damages to the buyer under the DTPA for violation of implied warranties of good and workmanlike manner and habitability. After discovery of moisture seeping through the grout of the balconies and 13 other deficiencies, the seller (a home builder that both built the house and occupied it at time of sale) agreed to fix the 13 other deficiencies, but the parties did not address the balconies as the seller assured the buyer that it was designed that way "per the blueprints". The evidence showed that there were never any blueprints for the balconies and that the builder/seller installed galvanized pans in the balcony substructure without a means for water to escape other than into the structure of the house. The court held that although the buyer had the property inspected, it was not relying *solely* on his own inspection but also on the oral representations of the seller.

[65] Buyer Represented by Counsel. The court in *Erwin v. Smiley*, 975 S.W.2d 335 (Tex. App.—Eastland 1998, no writ) placed importance on the fact that the buyer of the residence was represented by counsel, which explained the meaning of the words "as-is" which were specially added to the TREC form language by the parties, in finding that the buyer could not maintain a DTPA action against the seller for the seller's having orally misrepresented to the buyer that the property had previously had a termite problem, but that it had been remedied. Buyer after closing had the property inspected for termites when he noticed certain areas beginning to show damage. The inspection revealed that the property had never been treated for termites but had severe termite damage as a result of 10 years of active infestation. The court found that neither seller nor buyer were sophisticated real estate investors, and concluded that they were of equal bargaining power.

[66] 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..." See *Smith v. Levine,* 911 S.W.2d 427 (Tex. App.—San Antonio 1995, pet. denied) as to fraud by oral misrepresentations. The court in *Oat Note, Inc. v. Ampro Equities*, *Inc.*, 141 S.W.3d 274 (Tex. App.—Austin 2004, no writ) held that "as is" clause did not bar buyer from recovering from seller for its negligent misrepresentations.

[67] "Waiver-of-Reliance" Clause or "Release" of Fraudulent Clause. *See* discussions of the *Forest Oil* case, the *Italian Cowboys* case.

[68] "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.

[69] 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.

[70] 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.) – "as is" buyer not bound by its independent investigation if seller hindered buyer's investigation.

[71] 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).

[72] 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 entitled 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 that 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 Murray, 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. Celotex counterclaimed against Warehouse Associates asserting various claims.

The trial court granted 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 proved 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 failed as a matter of law under *Bartlett v. Schmidt*. The court found that Celotex's argument lacked merit and did 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 contract 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.

[73] 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).

[74] Totality of Circumstances. *Prudential Ins. Co. of America v. Jefferson Assoc., Ltd.*, 896 S.W.2d 156,162 (Tex. 1995). *Johnson v. Perry Homes*, 1998 WL 751945 (Tex. App.—Hou. [14th Dist.] 1998, pet. denied) –"The disclaimers of reliance on representations in this case are part of the 'boiler-plate' provisions in the contracts, and there is no evidence they were part of the basis of the bargain between appellants and (appellee)."

[75] No Third Party Beneficiaries of "As Is". The court in *Haire v. Nathan Watson Co. and Fugro*, 221 S.W.3d 293, 298 (Tex. App.—Ft. Worth 2007, no pet.) (foundation cracks developed from excessive swelling of the soils beneath the home, and home was not designed nor constructed in a manner that would accommodate this excess swelling) held that neither the subdivision lot developer nor the geotechnical engineer that conducted the soil analysis were third party beneficiaries of the "as-is" provision in the sales contract of the home seller. The court held that the home buyer had standing to sue the developer and the engineer as the property damage arose while the buyer owned the property. *MCI Telecomm. Corp. v. Tex. Util. Elec. Co.* 995 S.W.2d 647, 651 (Tex. 1999); *Loyd v. ECO Res., Inc.*, 956 S.W.2d 110, 134 (Tex. App.—Hou. [14th Dist.] 1997, no writ); and *MJR Corp. v. B & B Vending Co.*, 760 S.W.2d 4, 11 (Tex. App.—Dallas 1988, writ den'd).

The *Haire* court found that the purchaser of a used home had standing to sue the subdivision lot developer and its geotechnical engineer for allegedly improperly designing and building the subdivision lots as the damages suffered by the buyer occurred *after* they purchased the residence. *Haire* at 298. But the court found that the buyer had pre-purchase knowledge of the potential foundation problems as they had received from the seller a copy of a prior owner's seller's disclosure notice that detailed foundation concerns as to the subdivision and a copy of prior seller's engineering report which noted previous foundation movement and resulting damage to the house. *But see Goodson Pontiac GMC, L.L.C. v. AutoNation USA Corp.*, 2009 WL 41124 (Tex. App.—Hou. [1st Dist.], no pet.) (parking lot flooded twice after Goodson acquired it from Moudy who acquired it from AutoNation) – the court held that any duty AutoNation had to a purchaser (Goodson) from its buyer (Moudy) for damages arising out of the defectively constructed parking lot built while AutoNation owned the car lot ceased when AutoNation sold it "as is" to Moudy.

[76] Protection of a Party's Agent by a "As Is" Clause, "Waiver-of-Reliance" Clause Coupled with a "Release-of-Claims" Clause. Assuming that the court finds that the "as-is" clause, the "waiver-of-reliance" clause and "release-of-claims" clause are enforceable despite the seller's agent having made fraudulent misrepresentations, the agent may be protected by such provisions. *Fletcher v. Edwards*, 26 S.W.3d 66, 76 (Tex. App.—Waco 2000, pet. denied).

[77] Third-Party Report Preparers. The court in *Income Apartments Investors, L.P. v. Building Diagnostics, Ltd.*, 1998 WL 476777 (Tex. App—Austin) held that a buyer, which had been furnished a consultant's report that erroneously stated that the property was copper wired but was aluminum wired, was not entitled to rely to its detriment on the report and did not have a cause of action against the report preparer as the report was prepared for the lender/seller and was issued to the lender/seller under instructions that it was not to be delivered to third parties without the consent of the preparer and granted permission to the lender/seller to only release the environmental assessment portion of the

report and not the architectural and engineering portion of the report, which contained the error. Additionally, the court found that the report preparer was protected by the "as-is", "waiver-of-reliance" clauses in the sales contract, although the preparer was named as a beneficiary of these clauses, as the buyer agreed in these provisions that it was relying *solely* on its own inspections, engineering studies and reports.

[78] Disclaimer as to Property Condition is Not Disclaimer as to Other Matters. *Oliver v. Ortiz*, 2008 WL 3166326 (Tex. App.—Austin, no writ) – despite express provision in lease that there were no oral agreements outside of the lease and a disclaimer as to the condition of the leased premises and a disclaimer in bill of sale that there were no representations as to the condition of the personal property sold in connection with the business sold by seller to buyer, these provisions did not a disclaimer that there were no extracontractual representations as to the profitability of the business sold.

[79] "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.

[80] "As-Is" Clause Does Not Operate as a Release for TSWDA or CERCLA Liability as Between Sellers and Buyers.

TSWDA: In *Bonnie Blue, Inc. v. Reichenstein*, 127 S.W.3d 366, 368, (Tex. App.—Dallas 2004, no pet.) the buyer did not seek damages based on misrepresentations or a failure to disclose, but instead sought statutory contribution for environmental cleanup costs under the Texas Solid Waste Disposal Act. TEX. HEALTH & SAFETY CODE §§ 361 *et seq.* (the "TSWDA"). The court held that the holding in the *Prudential* case did not bar the buyer's statutory contribution claim. Unlike the *Prudential* case where causation was required to establish liability, the TSWDA intends to hold those responsible for hazardous waste liable for their fair share of the cleanup costs without the need to establish causation. Under §361.344 of the TSWDA, a person who conducts "a removal or remedial action that is approved by TCEQ and is necessary to address a release or threatened release may bring suit in a district court to recover reasonable and necessary costs of that action and other costs as the court, in its discretion, considers reasonable." In such cases Plaintiff must give prior notice to the defendant of the release and plaintiff's plans to address it. Section 361.344(c). In apportioning costs, the court is to consider the following factors set out in §361.343: the relationship between the parties' actions in dealing with the waste and the remedy required to eliminate the release/threatened release; volume of solid waste each party is responsible for (to the extent the costs of the remedy are based on volume); toxicity or other waste characteristics (if those characteristics affect cost); a party's cooperation with (i) state agencies and (ii) pending efforts to eliminate the release, party's actions concerning the waste, and the party's degree of care. Court shall credit against a responsible party's share the party's expenditure related to

the cleanup. Like CERCLA, under the TSWDA there is an "innocent owner" defense. It is available to an owner if at the time the owner acquired the "facility" the defendant did not know and had no reason to know that a hazardous substance that is the subject of the release or threatened release was disposed of on, in, or at the facility. But to demonstrate that the owner "had no reason to know," the owner must have made "all appropriate inquiry" into the previous ownership and use of the property "consistent with good commercial or customary practice. An owner can lose the innocent owner defense, even it it made "all appropriate inquiry" prior to its purchase, but after its purchase it obtains actual knowledge of a release while it owns the property, and sells it without disclosing that knowledge.

CERCLA: 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. 42 U.S.C. § 9607(a)(4)(B) – CERCLA. See *Wiegmann & Rose Intern. Corp. v. NL Industries*, 735 F. Supp. 957 (N.D. Cal. 1990)(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; *In Re Sterling Steel Treating, Inc.*, 94 B.R. 224 (E. D. Mich. 1989)—buyer cleaned up hazardous waste and recovered from seller under a CERCLA contribution claim against seller's bankruptcy estate despite presence of an "as is" clause in the sales contract; *International Clinical Laboratories, Inc. v. Stevens*, 710 F. Supp. 466, 29 Envt. Re. Cas. 1519, 19 E.L.R. 21084 (E. D. NY. 1989)—hazardous waste contamination caused by tenant of former owner; *Southland Corp. v. Ashland Oil, Inc.*, 696 F. Supp. 994, 28 Envt. Rep. Cas. 1805, 19 E.L.R. 2073, summary judgment den., on reconsideration, 28 Envt. Rep. Cas. 1813, 19 E.L.R. 20738 (D.C. N.J.)—buyer who purchased site which had been a dumping ground for hazardous and toxic wastes for over 30 years under an "as is, basis and without warranty or guaranty as to quality, character, condition, performance, or condition" was not precluded from obtaining clean up costs from seller under a CERCLA contribution action. An "as-is" clause not coupled with an effective release will not protect a seller who engaged in fraud. See for example, *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). See *Niecko v. Emro Marketing Co.* 769 F. Supp. 973, 22 E.L.R. 20503 (E. D. Mich. 1991) for discussion of situation where buyer expressly assumed all CERCLA liabilities.

81 "As-Is" Clause May Negates Finding an Express Warranty of Workmanship as to Work under a Covenant of Repair. *In Rom Terminals, Ltd. v. Scallop Corp.*, 141 App. Div.2d 358 (1st Dept. 1988), 529 N.Y.S.2d 304, *app. den'd* 73 N.Y.2d 707 300, 536 N.E.2d 629). The court stated that an "as is" clause in the sales contract for sale of an oil storage terminal was evidence that the seller's promise to repair the cylindrical cell (aka "dolphin"), which rested on the riverbed and supported the pier, in a good, proper, and workmanlike manner did not create an express warranty of the quality of repairs which survived the closing. The parties agreed that the dolphin would be repaired prior to closing and that the repairs would be subject to buyer's approval, and that if the repairs were not completed by closing, that the seller would remain liable for the completion of the repairs. The repairs were completed and buyer inspected and approved the repairs prior to closing. The dolphin ruptured 7 months after closing. The court held that the promise to make repairs was not an express warranty of the quality of the repairs which survived the closing. The court noted that buyer's attorney failed to include express language providing that seller warranted the methods of repair.

82 "As Is" and "In Present Condition" Clauses Do Not Shift Pre-closing Risk of Loss to Buyer. *Rector v. Alcorn*, 241 N.W.2d 196 (Iowa 1976)—contractor damage; *Approved Properties, Inc. v. N.Y.*, 277

N.Y.S.2d 236 (N.Y. 1966)—fire; *Redner v. N.Y.*, 278 N.Y.S.2d 51 (N.Y. 1967)—debris dumped on site pre-closing permitted contract termination pre-closing; *Bishop Ryan High School v. Lindberg*, 370 N.W.2d 726 (N.D. 1985)—court refused to order buyer to compel buyer to pay the second installment of the earnest money and declined to order the forfeiture of the first installment of earnest money after fire damaged property, and excused buyer from the contract, finding that the seller could not deliver the property in the condition it was in at the time of the contract's execution; *Bryant v. Willison Real Estate Co.*, 350 S.E.2d 748 (W. Va. 1986), 85 A.L.R.4th 221—court permitted buyer to rescind contract and receive return of earnest money after seller refused to either consent to rescission or to repair a water line in the sprinkler system which broke causing water to run throughout the building.

[83] Seller Not Liable to Buyer for Seller's Agent's Misrepresentations in an "As Is" Sale. *Omerick v. Bushman*, 444 N.W.2d 409 (Wisc. 1989)—court stated that the "as-is" clause in the listing contract limited the actual authority of the seller's real estate agent to make representations or warranties to buyers regarding the condition of the property and the "as-is" clause in the sales contract removed any basis for a claim against the seller for a breach of warranty on a theory that the agent possessed apparent authority to make such representations or warranties. Seller did not have knowledge that the misrepresentations had been made by the agent to the buyer.

[84] Release. *Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171 (Tex. 1997).

[85] Release with Waiver-of-Reliance Provision. *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51 (Tex. 2008).

[86] McAllen's Release in *Forest Oil*.

"[The plaintiffs] generally and unconditionally RELEASE, DISCHARGE, and ACQUIT [the defendants] of and from any and all claims and causes of action of any type or character known or unknown, which they presently have or could assert, including but not limited to all claims and causes of action (i) in any manner relating to, arising out of or connected with the McAllen Ranch Leases, or any of them, (ii) in any manner relating to, arising out of or connected with the Lands covered by the McAllen Ranch Leases, or any of them, (iii) in any manner relating to, arising out of or connected with any implied covenants pertaining to the McAllen Ranch Leases, or any of them, including (without limitation) implied covenants or obligations with respect to drainage, development, unitization, marketing or the administration of the McAllen Ranch Leases ... (vi) all claims and causes of action that the [plaintiffs] asserted or could have asserted in the Lawsuit including (without limitation) matters arising or sounding in contract, in tort (including intentional torts, fraud, conspiracy, and negligence), in trespass, for forfeiture, or under any other theory or doctrine, including any claim for attorneys fees, costs, and sanctions; and the [plaintiffs] hereby declare that all such claims and causes of action have been fully compromised, satisfied, paid and discharged; except that the [plaintiffs] reserve and except from this release only (a) their rights to receive the consideration (monetary and otherwise) provided in this Agreement, (b) their rights to accrued but unpaid royalties ..., (c) any rights and claims arising under the McAllen Ranch Leases ... after the Effective Date of this Agreement, (d) any rights or claims they may have, if any, for environmental liability, surface damages, personal injury, or wrongful death occurring at any time and relating to the McAllen Ranch Leases, (e) the funds held [pursuant to this Agreement], and (f) any intentional act done in contravention of this Agreement or the McAllen Ranch Leases between the date of execution hereof and the Effective Date. Any disputes over any of the above items excepted and reserved from this release *shall be resolved in arbitration* pursuant to [this Agreement]." (emphasis added by author)

[87] Court of Appeals Cases after *Schlumberger*. *Warehouse Assocs. Corporate Ctr. II, Inc. v. Celotex Corp.*, 192 S.W.3d 225, 230-34 (Tex. App.—Hou. [14th Dist.] 2006) – limiting *Schlumberger* to cases in which the parties resolve a long-running dispute that is also the topic of the alleged fraudulent representation; *Coastal Bank SSB v. Chase Bank of Texas, N.A.*, 135 S.W.3d 840, 844 (Tex. App.—

Hou. [1st Dist.] 2004, no pet.) – considering the broad language of the waiver-of-reliance provision to be the controlling factor; *IKON Office Solutions, Inc. v. Eifert*, 125 S.W.3d 113, 124-28 (Tex. App.—Hou. [14th Dist.] 2003, pet. denied) – applying *Schlumberger* in a factual situation that did not involve a settlement agreement or a contract that terminated the parties' relationship; *John v. Marshall Health Servs., Inc.*, 91 S.W.3d 446, 450 (Tex. App.—Texarkana 2002, pet. denied) – refusing to apply *Schlumberger* because "[h]ere, the contract was the beginning, not the end, of the relationship between" the parties.

88 Elements of a Release - Basis of the Bargain. *Woodlands Land Dev. Co. v. Jenkins*, 48 S.W.3d 415, 422 (Tex. App.—Beaumont 2001, no pet.); *Johnson v. Perry Homes*, 1998 WL 751945 (Tex. App.—Hou. [14th Dist.] 1998, pet. denied) –"The disclaimers of reliance on representations in this case are part of the 'boiler-plate' provisions in the contracts, and there is no evidence they were part of the basis of the bargain between appellants and (appellee)."; *Cell Comp, L.L.C. v. Southwestern Bell Wireless, L.L.C.*, 2008 WL 2454250 (Tex. app.—Corpus Christi, no pet.).

89 Elements of a Release – Totality of the Circumstances. *Cell Comp, L.L.C. v. Southwestern Bell Wireless, L.L.C.*, 2008 WL 2454250 (Tex. App.—Corpus Christi, no pet.) – "We find, however, that the … *Schlumberger* factors do not point to a meaningful reliance disclaimer. Kerry, a Cell Comp officer, testified by deposition that she signed numerous copies of the agreement at Cingular's offices in Harlingen, Texas. Kerry also testified that she had not received previous drafts of the agreement and did not read the agreement before signing it. There is no evidence that an attorney for Cell Comp reviewed the agreement or that drafts were shuttled between Cell Comp and Cingular for review, edits, and negotiation…. The record, therefore reveals that Kerry, without the aid of counsel, executed an agreement that Cingular had drafted, and that the agreement waives reliance on any other representation or misrepresentation."

90 "Waiver-of-Reliance" Clause and "Entire Agreements" Clause Negating Reliance. *Prudential Ins. Co. of America v. Italian Cowboy Partners, Ltd.*, 270 S.W.3d 192 (Tex. App.—Eastland 2008, no pet.).

91 The False Statements Made to the Italian Cowboy Partners. The trial court in the *Italian Cowboy* case found that Powell, the director of property for Prizm (the landlord's broker), made the following statements to the Secchis (the principals of the tenant and the tenant's guarantors) during lease negotiations:

"a. The Secchis were lucky to be able to lease the Premises because the building on the Premises was practically new and was problem-free;

b. No problems had been experienced with the Premises by the prior tenant;

c. The building on the Premises was a perfect restaurant site and that the Secchis could get into the building as a restaurant site for next to nothing;

d. Given Fran Powell's superior and special knowledge, these matters were represented by PRIZM and Prudential as facts, not opinions. Fran Powell did not think the building was perfect at the time she told the Secchis it was." *Id.* at 198.

92 Clauses Negate Reliance. *Id.* at 201.

93 The Question in the *Italian Cowboy* case. *Id.* at 198.

94 *Gym-N-I Playgrounds* Case – Waiver of the Implied Warranty of Suitability of Leased Premises. *Gym-N-I Playgrounds, Inc. v. Snider*, 220 S.W.3d 905, 913 (Tex. 2007).

[95] Tenant Obligation to Maintain Controls Over Implied Warranty of Suitability of Commercial Leased Premises. *Prudential Ins. Co. of America v. Italian Cowboy Partners, Ltd.*, 270 S.W.3d 192, 203 (Tex. App.—Eastland 2008, no pet.).

[96] Common Law Doctrine of Merger. As a general rule, a deed made in full execution of a contract of sale merges the provisions of the contract. *Harris v. Rowe,* 593 S.W.2d 303, 306-07 (Tex. 1979).

[97] Fraudulent Inducement of Contract Vitiates Merger Doctrine. *ECC Parkway Joint Venture v. Baldwin*, 765 S.W.2d 504, 511-12 (Tex. App.—Dallas 1989, writ denied); *Rich v. Olah*, 274 S.W.3d 878, 887 (Tex. App.—Dallas 2008, no pet.); and see also *1464-Eight, Ltd. v. Joppich*, 154 S.W.3d 101, 104 n. 1 (Tex. 2004) – disapproving court of appeals cursory analysis that based on merger doctrine earnest money contract was superseded by documents executed at closing.

[98] Parol Evidence Rule. *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 747 (Tex. 2006)—court may not consider extrinsic evidence to contradict or to vary the meaning of unambiguous langue in a written contract in order to create an ambiguity; *Edascio, L.L.C. v. Nextiraone L.L.C.*, 264 S.W.3d 786, 800 (Tex. App.—Hou. [1st Dist.] 2008, no pet.) – parol evidence not admissible to change terms of the written agreement; *Ledig v. Duke Energy Corp.*, 193 S.W.3d 167, 178 (Tex. App.—Hou. [1st Dist.] 2006, pet. denied) – parol evidence is admissible to show the parties' true intentions if the writing is ambiguous; *Hilburn v. Providian Holdings, Inc.*, 2008 WL 4836840 (Tex. App.—Hous [1st Dist.], no pet.).

[99] Entire Agreements Clause. *Baroid Equip., Inc. v. Odeco Drilling, Inc.*, 184 S.W.3d 1, 13 (Tex. App.—Hou. [1st Dist.] 2005, pet. denied).

[100] Arbitration – Condominium Defects. Butler, Rieger, and Peterson, *Condominium Defect Litigation – If You Build It, They Will Sue* in STATE BAR OF TEXAS PROF. DEV. PROGRAM, ADVANCED REAL ESTATE LAW COURSE (2006).

[101] Arbitration Clause Binding on Subsequent Purchasers. *Stanford Dev. Corp. v. Stanford Condominium Owners Association*, 2009 WL 214380 (Tex. App.—Hou [1st Dist.] 2009, no writ). The court found that the common law merger doctrine did not prevent the continuing application of the arbitration provision in the sales contract after delivery of the deed to determine the developer's responsibility for construction defects. The court held that the merger doctrine does not apply to a deed that constitutes only partial performance of the sales contract. The deed does not merge other distinct and unperformed provisions of the contract. The court cited *Harris v. Rowe,* 593 S.W.2d 303, 306-07 (Tex. 1979) for the proposition that "A contract of sale of land that creates rights collateral to and independent of the conveyance, such as completion of construction or escrow agreements pending construction, survives a deed that is silent with respect to the construction or escrow agreement."

[102] 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 set out in Article V of this paper.

[103] TREC Forms. 22 TEX. ADMIN. CODE § 537.28 (2008); 33 TEX. REG. 3883-84 (May 16, 2008); and 33 TEX. REG. 5695, 5698 (July 18, 2008).

[104] "Present Condition" Clause Equivalent of "As-Is" Clause; Equivalent of "Waiver-of-Reliance" Clause. *Sims v. Century 21 Capital Team, Inc.*, 2006 WL 2589358 (Tex. App.—Austin, no pet.) – court held that the TREC form acceptance in "present condition" language was the equivalent of an "as-is" clause.

The court noted that TREC forms are mandatory for use by real estate licensees. The court characterized this language as a plain English equivalent to "as is," and as such allows this provision of a contract to be understood by those who must comply with it. The court also noted that the Texas UCC in addressing disclaimers of implied warranties provides that the words "as is" are not mandatory or the exclusive words that may used to express this concept. "… 'as is', 'with all faults', …or other language that 'in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty" may be used to disclaim warranties. TEX. BUS. & COM. CODE § 2.316. *Larsen v. Langford*, 41 S.W.3d 245, 251 (Tex. App.—Waco 2001, pet. denied)--"present condition" acceptance clause in sales contract coupled with an "inspection acceptance" signed at closing, when signed by a sophisticated home buyer sufficient to establish to court that buyer was not relying on statements made by seller's broker (agent stated the property would make a "nice bed and breakfast when it was fixed up" and that the house need only "some leveling"). *Also see Turner v. Conrad*, 618 S.W.2d 850 (Tex. Civ. App.—Ft. Worth 1981, writ ref'd n.r.e.)—court held that the TREC acceptance language of acceptance "in its present condition" was sufficient to constitute a waiver by the buyer of any implied warranty in a sale of a used home (assuming that implied warranties even applied in the sale of a used home). The evidence showed that seller had acquired the property, a lot and home, with the intention of refurbishing it to sell. As part of the remodeling process, seller constructed a retaining wall alongside the driveway. After living in the home for more than 2 years, part of the retaining wall collapsed and buyer brought an action alleging that the wall had not been properly reinforced nor constructed with sufficient materials.

But see MacDonald v. Mobley, 555 S.W.2d 916, 919 (Tex. Civ. App.—Austin 1977, no writ)—the court held that the conspicuousness requirements of Texas UCC § 2.316(b) are equally applicable to "as is" disclaimers of implied warranties in real estate transactions. The disclaimer in this case reads "in the same condition as it is on this date." The court held that since the disclaimer was not printed in large or contrasting type or in any other manner to draw the buyer's attention to it, the implied warranty that the house was constructed in a good and workmanlike manner and suitable for human habitation was not waived. In this case the buyer sued the builder of a new home for violation of the DTPA.

[105] "Present Condition" Clause Not Equivalent of a "Waiver-of-Reliance" Clause. *Fletcher v. Edwards*, 26 S.W.3d 66, 75 (Tex. App—Waco 2000, pet. denied)—court held that a fact issue existed as to whether buyer was fraudulently induced into signing sales contract with a "present condition" acceptance clause followed by a second sales contract with an "as is" clause coupled with an express statement that seller and its agents had not "made any warranties or representations as [sic] the condition of the above-referenced property." The court found that although the agents could rely on the "as is" clauses in the sales contracts, the contract language did not constitute a clear release of claims of fraudulent inducement and a clear waiver-of-reliance. The court also found that the buyer was not a "sophisticated business player" and was not represented by counsel and thus the language in the sales contracts did not satisfy the *Schlumberger* case requirements for an effective release. The court in *Pairett v. Gutierrez*, 969 S.W.2d 512, 516 (Tex. App.—Austin 1998, no writ) held that the TREC "present condition" clause did not "clearly and unambiguously demonstrate(d) the buyer's agreement to rely solely on his own inspection," as did the "as is" coupled with "waiver-of-reliance" clause in the *Prudential* case. The court noted that the parties had filled in the Special Provision section of the TREC form with a handwritten "as is" acceptance of the decking, but that the defect complained of by the buyers was a cracked foundation. *Id.* at 517 FN. 2. The *Pairett* court also noted that the court in *Smith v. Levine*, 911 S.W.2d 427, 430-33 (Tex. App.—San Antonio 1995, writ denied) similarly held that because the "as is" clause failed to contain a "waiver-of-reliance" clause the "as is" clause did not as a matter of law negate causation because the Smiths knowingly concealed material information and made affirmative oral misrepresentations to the Levines regarding the condition of the house; and the Levines did not expressly and in written disclaim their reliance upon these oral representations. and in fact relied on the oral misrepresentations. These courts cited *Weitzel v. Barnes*, 691 S.W.2d 598 (Tex. 1985) as recognizing the requirement that to be effective an "as-is" clause must

also contain a "waiver-of-reliance" clause.

[106] Exclusion from "As-Is" Clause and "Disclaimer-of-Warranty" Clause of Title Warranty. *SMB Partners, Ltd. v. Osloub*, 4 S.W.3d 368 (Tex. App.—Hou. [1st Dist.] 1999, no pet.)—court held that the express exclusion from the "as is" clause "other than the warranty of title to be included in the Deed….[E]xcept for the warranty of title contained in the Deed; Seller makes no representations or warranties" as a matter of law did not preclude buyer from relying on seller's misrepresentation of the size and location of an easement affecting title. Seller provided buyer at closing with a survey that erroneously depicted the size and location of an easement. The surveyor prepared the easement based on an erroneous description of the easement's location in the title company's title commitment (title commitment identified the easement as being "forty feet in width along the southerly property line" when in fact the easement jutted into the property).

[107] "Entire Agreement" Clause. The entire agreements clause in Sales Contract in the TEXAS REAL ESTATE FORMS MANUAL contains an express acknowledgment that there are no oral representations, warranties, agreements, or promises not incorporated in writing in the Sales Contract. An almost identically worded entire agreement clause was held by the court in *Playboy Enters., Inc. v. Editorial Cabalero, S.A. de C.V.*, 202 S.W.3d 250, 258 (Tex. App.—Corpus Christi 2006, pet denied) to negate reliance on any alleged oral representations. The court in *IKON Office Solutions, Inc. v. Eifert*, 125 S.W.3d 113, 126-28 (Tex. App.—Hou. [14th Dist.] 2003, pet denied) held that the plaintiff could not rely on extracontractual representations because the contract contained the following language specifically disclaiming the specific representation that was the subject of the suit:

> "No commitments have been made relative to bonuses, guarantees or any other special provisions, except as specifically identified herein."