"AS IS" IN A CONTAMINATED WORLD

by

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

FORECLOSURE: TEXAS FORECLOSURE MANUAL (State Bar of Texas – 1990, 2nd ed. 2006 and 2008 Supplement). (Available from State Bar of Texas). *Ins and Outs of Deed of Trust Foreclosures - Practical Tips for the Practitioner*, State Bar of Texas, Advanced Real Estate Law Course (2005).

RISK MANAGEMENT: *Annotated Risk Management Provisions (Focus on Texas Real Estate Forms Manual's Retail Lease)*; *Allocating Extraordinary Risk in Leases: Indemnity/Insurance/Releases and Exculpations-Condemnation (Including a Review of the Risk Management Provisions of the Texas Real Estate Forms Manual's Office Lease)*; *Risk Management*; and *Shifting of Extraordinary Risk: Contractual Provisions for Indemnity, Additional Insureds, Waiver of Subrogation and Exculpation*, State Bar of Texas, Annual Advanced Real Estate Drafting Course (2007, 2003, 2002) and the Annual Advanced Real Estate Law Course (2006); *Additional Insured Endorsements to Liability Policies: Typical Defects and Solutions*", State Bar of Texas, Advanced Real Estate Drafting Course (2008); and *CGL Coverage of Defective Work*, ACREL Fall Program October 2009.

SALES: *The Law of "As Is"*, State Bar of Texas, Agricultural Law Course 2009 (2009); and *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).

* Copy of articles may be downloaded from website: www.gdhm.com.

HONORS AND ACCOMPLISHMENTS

American College of Real Estate Lawyers (2007 – 2009); The Best Lawyers in America (Real Estate) (2000 - 2009); Who's Who in America (1995 - 2009) and Who's Who in American Law (1985 - 2009); and Texas Monthly, Super Lawyer - Real Estate (2001-2009). Established the Palmer Drug Abuse Program in Corpus Christi in 1979 and in Austin in 2000 as programs helping teens and young adults recover from alcohol and drug abuse.

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Listed in *The Best Lawyers in America*® published by Woodward/White, Inc., Administrative Law 2010.

LAW RELATED PUBLICATIONS AND PRESENTATIONS:

- Author/Speaker, *Complying with Storm Water Regulations*, Lorman Seminars, Texas Storm Water Law and Regulations, August 12, 2009, Austin, Texas.
- Author/Speaker, *Complying with Storm Water and Surface Water Management Regulations*, HalfMoon Seminars, LLC, Texas Water Laws and Regulations, April 30, 2009, Austin, Texas.
- Author/Speaker, *New Phase I Requirements for Real Estate Transactions: Implications of the New "All Appropriate Inquiries" Rule*, State Bar of Texas 28th Annual Advanced Real Estate Law Course, June 29 – July 1, 2006, San Antonio, Texas.
- Author/Speaker, *Curious Characteristics of Karst: Legal Environmental Considerations*, presented at the American Bar Association Section of Environment, Energy and Resources, October 3-7, 2001, Adam's Mark Hotel, St. Louis, Missouri.
- Faculty Member and Author/Speaker, *Recent Developments – Texas Water Law*, the University of Texas School of Law 3rd Annual Conference on Land Use Planning Law, March 4-5, 1999, Austin, Texas.

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I. INTRODUCTION

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,[1] exculpation,[2] release[3] 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.

The authors examine first examine in this paper the approaches and provisions contained in industry-standard sales contract forms, TREC, TAR and the State Bar of Texas' TEXAS REAL ESTATE FORMS MANUAL that allocate responsibility for the condition of the property as of closing and that establish the "deal" between the parties. In the second part of this paper the authors address contractual risk shifting as to environmental matters.

II. SHIFTING THE RISK OF THE PROPERTY'S CONDITION

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.[4]

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.[5]

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: (1) What does "knowledge" mean?; (2) Does knowledge mean actual knowledge, implied knowledge, or constructive knowledge?; (3) Can a person have knowledge through negligent or blind ignorance?; (4) Does the seller have a duty to find out facts?; and (5) Is suspicion knowledge? A seller is not excused from advising a buyer of his knowledge, if in his opinion the condition does not exist.[6]

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.[7]

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. Disclaimers of Representations and Warranties

Many times if a seller permits the buyer a "free look", the seller also insists upon selling the property "as is", that is without representations or warranties as to its condition. Even honest mistakes in making a representation can result in seller liability. The typical clauses employed to shift to the other party the risk of the existence of adverse conditions are an "as is" clause coupled with a "waiver of reliance" clause, a "release of claims" clause, and "four-corner" clauses (*i.e.*, an "entire agreements" clause, a "no oral agreements" clause, a "merger" clause).

Also, as addressed in the Article III of this paper the parties may bolster their risk allocation agreements by employing indemnities, assumption of liabilities and specific releases, especially in the context of environmental liability allocations, where "as is" clauses are not effective.

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:[8]

> 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.[9] 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.[10]

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.[11]

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"[12] of the contract.[13]

4. The buyer and seller must have relatively equal bargaining positions, an arms-length transaction with a sophisticated buyer.[14]

(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*:[15]

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

(2) "Fair Notice". The use of conspicuous disclaimer language.[16]

(3) Acknowledgement of Bargained for Provision. 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) Acknowledgment of Reliance on Own Investigation. 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.[17]

(5) No Merger into Closing Provision. Provision for the "as is" clause to survive closing.[18] When the survivorship language is omitted, there is a risk that a court may hold that 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) Specificity as to Waivers Disclaimed. An express enumeration of the particular implied warranty that is disclaimed or waived.[19]

(7) Commercial Transaction. 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) Acknowledgement of Non-Reliance on Silence of Other Party. 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) Acknowledgment Relying "Solely" on Own Inspection. A statement that the disclosure recipient is relying "*solely*" on its own examination of the property.[20]

(3) Acknowledgment as to Reduction in Price. 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".[21]

(4) Acknowledgment Represented by Counsel. 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.[22]

(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;[23] 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.[24]

"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.[25] 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.[26]

Concealment

Buyers are not bound to purchase property "as is" where the "as is" clause is induced by - concealment of information by seller.[27] 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.[28]

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.[29]

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.[30]

(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.[31] However, a party's agent may be able to rely on the protection of such provisions.[32] 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.[33]

(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.[34]

(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.[35]

(7) "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.[36]

(8) "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.[37]

(9) "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 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.

(10) 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.[38]

b. Release of Claims

(1) *Schlumberger* Case

The following release language was held in *Schlumberger Technology Corp. v. Swanson*[39] 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*[40] 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.[41] 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[42] 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.

"Waiver of reliance" Clause

> [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) Negotiated Terms. 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) Represented by Counsel. The complaining party was represented by counsel.

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

(4) Sophisticated Parties. The parties were knowledgeable in business matters.

(5) Specificity. The release language is clear and unequivocal. The release identifies with specificity the claim released.[43]

(6) Understood. The release is knowingly made.[44]

(7) Totality of the Circumstances. The nature of the transaction and the totality of the circumstances justify upholding the release.[45]

(8) Express Negligence and Fair Notice Requirements. Depending on the nature of the risk released, the "express" negligence and "fair notice" tests may be applicable.[46]

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.*[47] 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,[48] 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."[49]

> 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.[50]

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.'"[51] 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.[52]

(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.[53] However, this common law merger doctrine does not apply when the contract was procured by fraud.[54]

(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.[55] 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."[56]

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.[57] 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.[58]

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).[59]

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) Words. The words "as is" are not used.

(2) Acknowledgment of No Reliance on Other Party. A "waiver of reliance" clause.

(3) Acknowledgment of Bargained for Provision. An acknowledgment that the "present condition" clause is a material part of the contract.

(4) Specificity of Warranties Disclaimed. An express disclaimer of implied warranties.

(5) Acknowledgment of Representation by Counsel. An acknowledgment that buyer is represented by counsel.

(6) No Oral Agreements Clause. A "no oral agreements" clause.

(7) Merger Clause. A "merger" clause.

(8) Entire Agreements Clause. An "entire agreements" clause.

(9) Arbitration Clause. 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.[60] 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.[61]

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) Acknowledgment of Bargained for Provision. An acknowledgment that the "present condition" clause is a material part of the contract. An acknowledgment that the contract is the result of negotiation.

(2) Acknowledgment of No Reliance on Other Party. A "waiver of reliance" clause.

(3) Specificity of Warranties Disclaimed. An express disclaimer of implied warranties.

(4) No Oral Agreements Clause. A disclaimer of oral representations.

(5) Acknowledgment of Representation by Counsel. An acknowledgment that buyer is represented by counsel.

(6) Merger Clause. A "merger" clause.

(7) Environmental Indemnity. An environmental condition indemnity or release.

(8) DTPA Waiver. A DTPA waiver.

(9) Arbitration Provision. 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) Inspection Period. A buyer inspection during an inspection period (Paragraph G.2).

(2) Termination Option. 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) Required Records Delivery. Delivery during the inspection period by seller to buyer of a copy various records (Paragraph G.1 and Exhibit C to the contract).

(4) Representations. 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) No Oral Agreements Clause. A disclaimer as to the existence of oral representations or promises (Paragraph M.2).

(2) Acknowledgment of No Special Relationship. An acknowledgement that there is no special relationship between seller and buyer (Paragraph M.11).

(3) DTPA Waiver. A waiver of the application of the DTPA to the transaction (Paragraph M.14).

(4) Detailed As Is Clause. An expanded "as is" clause (Exhibit B, Paragraph B).

(5) Environmental Indemnity. An environmental condition and liability indemnity including if such condition or liability arose before closing, whether the condition is known or unknown, even if the condition or liability arose or arises under CERCLA, RCRA, the Texas Solid Waste Disposal Act, or the Texas Water Code, and even if the liability arises out of Sellers negligence, products liability or strict liability (Exhibit B, Paragraph C). The environmental indemnity is set out later in this paper.

d. "As Is" Clause

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:

(1) Acknowledgment of Arm's Length Contract. An acknowledgment that the contract is an arm's length agreement.

(2) Acknowledgment Price Reduced. The purchase price has been adjusted on the basis of the sale of the property "as is, where is".

(3) Fair Notice. 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.

(4) Acknowledgment of No Extra-Contract Representations. An acknowledgment of no representations other than those set out in the contract.

(5) Disclaimer of Implied Warranties. 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.[62]

(6) Optional Disclaimer of UCC Warranties. 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.

(7) Inclusion in Closing Documents. 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:

(1) Disclaimer of Reliance on Parol Statements. An express disclaimer in the "as is" clause 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. There are separate "entire agreements" and "no other representations" clauses.

(2) Acknowledgment of Reliance Solely on Own Investigation. A "waiver of reliance" clause specifying that buyer is relying solely on its own investigation and inspection.

(3) Release of Claims Clause. A "release of claims" clause.

(4) Acknowledgment of Sophisticated Parties. An acknowledgment as to the sophistication of the parties.

(5) Acknowledgment of Representation by Counsel. An acknowledgment that the buyer is represented by counsel.

e. "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.[63] 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.[64]

III. CONTRACTUAL RISK SHIFTING AS TO ENVIRONMENTAL MATTERS

A. "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 the Texas Solid Waste Disposal Act (the "TSWDA")[65] or CERCLA.[66] Lay sellers often are surprised to learn an "as is" transaction does not protect against potential liability under the TSWDA (*see Bonnie Blue, Inc. v. Reichenstein* discussed below). For a seller of property to be fully protected (probably unlikely), the seller would need the following:

(1) "As Is" Clause and Investigation. "As Is" clause (plus an unimpeded investigation – see discussions of the *Prudential* and *Warehouse Associates Corporate Centre II, Inc. v. Celotex Corp.* cases).

(2) Specific Release. Release by the buyer from statutory liability (described specifically). This should protect seller from a statutory cost recovery action by seller's buyer (and if possible extending to claims by the buyer against the seller arising from third party claims against the buyer). Consider the extent to which the release should specify the types/scope of contamination to be released, as part of the specificity.

(3) Indemnification Clause. Indemnification by the buyer from statutory liability. This may help protect seller from downstream purchasers with respect to specific environmental liability.

1. TSWDA

a. Liable Persons

A person is liable under the TSWDA for a release unless it establishes by a preponderance of the evidence that the release was caused by an act of God, an act of war or "an act or omission of a third person".

b. "Act or Omission of a Third Party" Defense to Liability

To establish the defense of "act or omission of a third person," under § 361.275(a)(3) TEX. HEALTH & SAFETY CODE, the person must establish that it: (1) took precautions against foreseeable acts or omissions of the third person and the consequences that could foreseeably result and (2) "exercised due care concerning the solid waste" in light of relevant facts and circumstances.

The "act or omission of a third person" defense is unavailable if the third person is the defendant's employee or agent or has a direct or indirect contractual relationship with the defendant – such as land contracts, deeds, "or other instruments transferring title or possession of real property" (*e.g.*, leases).

(1) Act of Third Party Requirement

A defendant with such a "contractual relationship" can escape liability if at the time the defendant 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. §361.275(e)(2)(B) TEX. HEALTH & SAFETY CODE.

(2) "Innocent Owner" Requirement

But to demonstrate that the defendant "had no reason to know," the defendant must have made "all appropriate inquiry" into the previous ownership and use of the property "consistent

with good commercial or customary practice"; the statutory factors the Court will consider in evaluating the defense are these (§361.275(f)):

(1) PRP's Expertise. Any specialized knowledge or experience of the defendant.

(2) Reduced Price. Relationship of purchase price to the value of the property if clean.

(3) Easily Available Information. Commonly known or reasonably ascertainable information on the site.

(4) The Obvious. Obvious or likely presence of contamination at the site.

(5) Results of an Appropriate Inspection. Defendant's ability to detect the contamination by appropriate inspection.

You can lose the innocent owner defense, even if you follow the above procedures, if you obtain actual knowledge of a release while you own property, and sell it without disclosing that knowledge. Section 361.275(g) TEX. HEALTH & SAFETY CODE.

The "appropriate inquiry" requirement of §361.275 TEX. HEALTH & SAFETY CODE has always suggested (by implication) that a commercial buyer should conduct a Phase I environmental site assessment. EPA's rule about what investigation constitutes "all appropriate inquiry" will likely be considered by Texas courts as defining what is "commercially reasonable". Not only should commercial buyers get a Phase I; the Phase I should follow the EPA rule or the well-recognized ASTM E 1527-2005 standard, which is an option under the rule.

c. Cost Recovery Actions

Under §361.344 TEX. HEALTH & SAFETY CODE of the TSWDA, a person who conducts "a removal or remedial action that is approved by the [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." Plaintiff must give prior notice to the defendant of the release and plaintiff's plans to address it. Section 361.344(c) TEX. HEALTH & SAFETY CODE. In apportioning costs, the court is to consider the following factors in §361.343 TEX. HEALTH & SAFETY CODE:

(1) Relationship between Parties' Actions and Remedy. Relationship between the parties' actions in dealing with the waste and the remedy required to eliminate the release/threatened release.

(2) Volume Attributable to PRP. Volume of solid waste each party is responsible for (to the extent the costs of the remedy are based on volume).

(3) Waste Characteristics. Toxicity or other waste characteristics (if those characteristics affect cost).

(4) Cooperation. A party's cooperation with state agencies and pending efforts to eliminate the release, party's actions concerning the waste, and the party's degree of care.

Courts are also directed to credit against a responsible party's share the party's expenditure related to the cleanup.

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 TSWDA, as well as common law contribution and indemnity. The defendant Reichensteins had operated a wood-preserving business on the property until 1982, when they sold to T. D. Corporation. The sales contract included the following (termed by defendants an "as is" clause):

> Purchaser acknowledges that he has inspected all buildings and improvements situated on the property and is thoroughly familiar with their condition, and Purchaser hereby accepts the property and the buildings and improvements situated thereon, in their present condition, with such changes therein as may hereafter be caused by reasonable deterioration.

T. D. Corp. sold to Rex-Tex Equipment Company. In 1991, Bonnie Blue, Inc. bought the property. Eight years later, in 1999, after discovering contamination, Bonnie Blue entered the property into the Voluntary Cleanup

Program and began cleanup. Bonnie Blue then filed this cost recovery action. The trial court granted summary judgment for the sellers, the Reichensteins, on all claims. On appeal, the Reichensteins argued that the purported "as is" clause barred appellants' TSWDA claim under *Prudential Insurance Co. v. Jefferson Associates, Ltd.* The appeals court disagreed. Noting that "No Texas case specifically addresses the effect of an 'as is' provision on a contribution claim under the SWDA," the court examined the broad remedial purpose of the TSWDA, and the express statutory scheme which sets forth factors for the trial court to take into account in apportioning cleanup liability. The court stated

> Unlike *Prudential* where causation was required to establish the seller's liability, the statute here clearly intends to hold those responsible for hazardous waste liable for their fair share of the cleanup costs without the need to establish causation. Allowing an otherwise 'responsible party' to avoid liability based on paragraph 8 [the "as is" clause] would clearly circumvent both the intent and language of the statute.

The court noted that unlike CERCLA, the TSWDA did not include a provision permitting parties to enter contracts affirmatively to insure or to indemnify against CERCLA liability (42 U.S.C.A. 9607(e)). However, that issue was not before the Court: "Our holding is limited to the purported 'as is' clause before us." 127 S.W.3d at 369. Finally, the court noted that the claim was not a damages lawsuit based on misrepresentations or failure to disclose (*i.e.*, was not a *Prudential* lawsuit), but was effectively a statutory contribution claim for environmental cleanup costs.

2. 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.A. § 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.

3. Fraudulent Concealment

The following "as is" provision reviewed by the court in *Warehouse Associates Corporate Centre II, Inc. v. Celotex Corp.*[67] 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".

B. Assumption of Environmental Liability and Indemnity Agreements

The allocation of environmental risks in a sales transaction through representations, warranties, indemnities and releases will generally result in a contractual allocation of liability. In cases where a condition is known to exist, a preferable method may be to provide for an express assumption of liability.

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.

1. Texas' "Express Negligence" Doctrine Extended to Indemnities for Environmental Liabilities

Under the express negligence doctrine, an obligation to indemnify an indemnitee (an indemnified person) from the consequences of its own negligence must be specifically expressed in the contract. *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 708 (Tex. 1987) (adopting the express negligence doctrine).

> The express negligence doctrine provides that parties seeking to indemnify the consequences of its own negligence must express that intent in specific terms. Under the doctrine of express negligence, the intent of the parties must be specifically stated within

> the four corners of the contract. *Id*. at 708.

Furthermore, the express negligence test also applies to contractual "comparative indemnity":

> Indemnitees seeking indemnity for the consequences of their own negligence which proximately causes injury jointly or concurrently with the indemnitor's negligence must also meet the express negligence test. *Id.*

The express negligence doctrine extends to strict liability claims. *Houston Lighting & Power Co. v. Atchison, Topeka, & Santa Fe Ry. Co.*, 890 S.W.2d 455, 459 (Tex. 1994)

> [P]arties to an indemnity agreement must expressly state their intent to cover strict liability claims in specific terms.

See also Avco Corp. v. Interstate Southwest, Ltd., 251 S.W.3d 632 (Tex. App.-Hou. [14th Dist.] 2007, review denied); *Aetna Cas. & Sur. v. Texas Workers' Compensation Ins. Facility*, Not Reported in S.W.2d, 1998 WL 153564 (Tex. App. – Austin 1998) (clause must expressly state it indemnifies for strict liability); *Pham v. Mongiello*, 58 S.W.3d 284 (Tex. App. – Austin 2001, pet. denied) (applying express terms and conspicuousness applicable to indemnities for strict liability, to a guaranty, *citing Houston Lighting & Power* and *Dresser*). *See also FINA, Inc. v. ARCO*, 200 F.3d 266 (5th Cir. 2000)

> Texas law requires that each type of claim be separately referenced by an indemnity provision, *citing Houston Lighting & Power Co.*

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). The Fifth Circuit interpreted two indemnification clauses in connection with an oil refinery sale agreement, in *Fina, Inc. v. ARCO*, 200 F.3d 266 (5th Cir. 2000) (*FINA*), holding that the indemnification clauses did not preclude CERCLA claims.

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. In 1989 Fina discovered contamination and reported it to TCEQ. In 1996 Fina sued BP and ARCO for $14,000,000 in investigatory and remedial response costs it incurred 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 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.

The BP/Fina Agreement contained an express choice of laws provision choosing Delaware law. Delaware applies a "clear and unequivocal" test to determine whether a contracting party intended to indemnify the indemnitee for its own negligence. (The court said this did not violate Texas policy for such agreements.) The court held that the BP/Fina Agreement failed the "clear and unequivocal" test. Accordingly, the indemnity did not bar Fina's CERCLA, RCRA Resource Conservation Recovery Act, 42 U.S.C. §§ 6901 *et seq*.) and TSWDA contribution claims against BP:

> Although we follow the lead of the district court and the parties to the case in addressing our opinion solely to Fina's CERCLA claims, we discern no

> reason why our holding should not be equally applied to these other claims as well ….

The ARCO/BP Agreement was silent as to applicable law. The court determined that Texas law applied to the Arco/BP Agreement:

> We are satisfied that Texas would apply the "express negligence" test to all claims that were merely prospective at the time the indemnity provision was signed."

Fina, 200 F.3d at 273. Moreover, the express negligence test extends to strict liability claims, under *Houston Lighting & Power*. Accordingly, the court held that ARCO could not seek indemnification from BP for any amount that Fina recovered from ARCO based on the strict liability (CERCLA) claims.

In *FINA*, BP unsuccessfully argued that the fair notice requirements were inapplicable to indemnification for <u>prospective liabilities</u> from <u>future</u> acts of the indemnitee. The Fifth Circuit said no Delaware case had distinguished between past and future conduct or past and future liability in applying its "clear and unequivocal" test to an indemnity. BP was relying on *Green International, Inc. v. Solis*, 951 S.W.2d 384 (Tex. 1997), which held that a "no-damages-for-delay" clause was not required to meet the conspicuousness requirement, distinguishing *Dresser* as applying to "certain contractual provisions relieving a party <u>in advance</u> for its own negligence" (emphasis added). BP argued that the express negligence test did not apply to indemnification for <u>past conduct</u> giving rise to potential future liability (a classic CERCLA or TSWDA situation). The Fifth Circuit disagreed, terming *Solis* "ambiguous." "'Future negligence' might refer to *future negligent conduct*, but it also might refer to *future claims based on negligence*." *Id.* at 272. Moreover,

> Both types of prospective claims [prospective claims based on past conduct, and prospective claims based on future conduct] constitute unknown quantities. Virtually all prospective claims are in fact *unknowable* quantities to an indemnitor unless the indemnitee brings the prospective claims to the indemnitor's attention: An indemnitor can always determine whether claims have already been filed against an indemnitee, but it is nearly impossible for an indemnitor to determine whether an indemnitee has engaged in conduct that is likely to give rise to claims in the future.

Applying *FINA*, conspicuousness in environmental releases and indemnities would be advised.[68]

<u>Advice</u>: Spell out claims which are being indemnified, including specifically TSWDA and CERCLA claims. With regard to the past/future claim issue, be mindful of potential allegations that a <u>past</u> release was aggravated or re-released, or that knowing failure to address existing contamination worsened the situation. The safer course in a release or indemnification clause is to avoid a dispute over application of fair notice requirements.

While "all claims" by itself is not enough, perhaps the *DuPont*/*Shell* litigation shows that an indemnity concerning "certain waste materials" can be adequately specific. *E.I. DuPont de Nemours and Co. v. Shell Oil Co.*, 259 S.W.3d 800 (Tex. App. – Hou. [1st Dist.] 2007, no writ). DuPont sued Shell, for breach of an indemnity agreement. The district court granted summary judgment for Shell. The appellate court reversed and rendered, holding that Shell's indemnity obligation to pay "all claims … related to" certain waste materials required Shell to pay for defense costs for other DuPont waste materials disposed at the same site where those costs could not be segregated. "Claims" did not mean "Claims *solely related to*" the certain waste materials. DuPont made "Shop Ligand" using Shell's raw materials, and for Shell's use. Shell retained ownership of the waste and waste byproducts ("Waste Materials") from the Shop Ligand production process. Shell also designated the transporter and disposal site. The DuPont-Shell agreement contained two indemnity provisions requiring Shell to "defend and indemnify DuPont … against all Claims related to Waste Materials." DuPont shipped 12 million pounds of Waste Materials to an injection well in Louisiana which ultimately became the subject of multiple lawsuits which alleged injury from the "commingled wastes" disposed by various parties at the injection well.

DuPont had also separately shipped waste from its Ponchartrain plant. Shell resisted DuPont's indemnity demand and sought to condition indemnity. Shell stated it would only indemnify for shipments of Waste Materials and that defenses costs should be *solely* related to the Waste Materials. The law firm that defended DuPont provided affidavits which sought to break out costs; however, one "pool" of costs were "impossible'" to segregate because of claims concerning commingled wastes.[69] The law firm stated that even if DuPont had been sued only for the Waste Materials, these costs would still have been incurred.

The indemnity agreement provided:

> 15.2 Shell shall defend and indemnify DuPont…against all claims, suits, actions, liabilities, losses and expenses (including reasonable attorney's fees) including but not limited to injury, disease or death of persons or damage to property including environmental damage (hereinafter referred to as "Claims") *related to* the materials.
>
> 15.4 Shell shall defend and indemnify DuPont…against all Claims *related to* Waste Materials. (Court's emphasis)

Shell argued these clauses meant defense costs must be "directly attributable to" or "solely related to" or "specifically related to" the Waste Materials. The Court rejected Shell's argument, stating that "this qualifying terminology is nowhere in the indemnity agreement."

Sometimes a reference to "parties" is sufficient. An oil well operator (indemnitee), sued by the contractor's employee, was able to enforce an indemnity clause against a contractor who had agreed to indemnify for causes including "the negligence of any party or parties, arising in connection therewith in favor of Contractor's employees…" The indemnity obligation was to "the negligence of any party or parties, whether such negligence be sole, joint or concurrent, active or passive." The Court found this sufficiently specific to met the express negligence test, since there were only two "parties" to the agreement, and one was the operator. *Adams Resources Exploration Corp. v. Resource Drilling, Inc.*, 761 S.W.2d 63 (Tex. App. – Hou. [14th Dist.] 1988, no pet.).

2. Texas Courts Have Recognized Settlements and Indemnity Agreements in a TSWDA Context Even Though the TSWDA (in Contrast to CERCLA) is Silent on Private Indemnity Agreements

CERCLA's §9607(e) expressly recognizes private indemnity agreements, though providing they are ineffective as to EPA.[70] TSWDA has no parallel provision. *FINA* (5th Cir.) included TSWDA as well as CERCLA and RCRA claims. According to the Court,

> Although we follow the lead of the district court and the parties to the case in addressing our opinion solely to Fina's CERCLA claims, we discern no reason why our holding should not be equally applicable to these other claims as well.

Thus, presumably, if the BP/Fina and Arco/BP indemnification agreements had met applicable state law tests (Texas – express negligence; Delaware – clear and unequivocal), as between the private parties they would have been enforceable.

Texas courts have enforced settlements centering around the TSWDA. *Compton v. Texaco, Inc.*, 42 S.W.3d 354 (Tex. App. – Hou. [14th Dist.] 2001, pet. denied). In *Compton* Texaco was the former owner of a contaminated refinery property near San Antonio. WSI Properties bought the property "as is" in 1977, and installed USTs. WSI sold the property to Winn's Stores (and the USTs leaked while WSI owned them). TCEQ ultimately notified Texaco and Winn's that they were "PRPs" for the contamination. Winn's filed for bankruptcy. Plaintiff Compton was trustee of the bankrupt estate's Liquidating Trust. Because remediation under the Voluntary Cleanup Program ("VCP") was expensive, Compton elected to pay $1.25 million to the State's general remediation fund and get a release from future environmental liability. He got the $1.25 million from selling the property to two separate companies, Sideoats LLC and LGC Land LLC. Sideoats and LGC assigned to Compton any rights they had to recover the $1.25 million from Texaco. He paid an additional $250,000 to the State fund for release as to himself, LGC and Sideoats. Texaco agreed to clean up and signed a

settlement agreement with the State, which recited that its effect was to resolve all Texaco's liability to the State and bar third party claims against Texaco for cost recovery under §344(a) of the TSWDA: The settlement agreement specifically provided that under §361.277 of TSWDA,

> The State has resolved all liability of Texaco to the State for the Site, and that Texaco is hereby released from all liability under §361.344(a) of the Act to any person or entity….for cost recovery, contribution, or indemnity.[71]

Compton sued Texaco for common law indemnity and statutory contribution under §344(a) of TSWDA. The Court agreed that Texaco's settlement barred Compton's claims, and in so doing looked to CERCLA decisions in other jurisdictions interpreting the contribution protection provision, 42 U.S.C.A. §9613(f)(2). The Court also rejected Compton's common law indemnity claim as abolished by the comparative negligence statute, citing *Aviation Office of America, Inc. v. Alexander & Alexander of Texas, Inc.*, 751 S.W.2d 179, 180 (Tex. 1988).[72]

Epstein v. Hutchison, Not Reported in S.W.3d, 2004 WL 2612258 (Tex. App. – Hou. [1st Dist.]). Dry cleaner contamination from the Memorial shopping center in Houston led to a lawsuit by the neighboring Town & Country shopping center against the Memorial owner for violation of CERCLA and TSWDA, gross negligence, and nuisance. The court rejected Memorial's owner's effort to set aside the court-approved settlement (wording of the releases/indemnity was not at issue).

3. The FORMS MANUAL 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.

C. Releases of Environmental Liability

In *Trinity Industries, Inc. v. Ashland, Inc.*, 53 S.W.3d 852 (Tex. App. – Austin 2001, pet. denied), Trinity had bought the stock of Beaird, a steel vessel manufacturing subsidiary in Louisiana, owned by Ashland. The purchase agreement, amended to address contamination revealed by a Phase I and subsequent Phase II testing, purported to release the seller (Beaird)

from "all claims … and liabilities … of any nature whatsoever." Trinity later sued Ashland for fraud and breach of contract regarding the extent of environmental cleanup costs. Meanwhile Ashland, which had pre-closing obtained a certificate from Beaird's president that he knew of no other contamination, counterclaimed against its former subsidiary for fraud and negligent misrepresentation. The Court held that since the release language did not mention fraud or negligent misrepresentation, the agreement did not release Beaird from claims of fraud or negligent misrepresentation. Thus Ashland did not breach the release provision by suing Beaird (its own former subsidiary) for negligent misrepresentation and fraud. *Trinity Industries,* 53 S.W. at 869.

D. Ethical Considerations Raised by EPA Rule

EPA's "Phase I" rule, adopted effective November 1, 2006, for the first time sought to standardize what would constitute "all appropriate inquiries" for purposes of qualifying for the "innocent purchaser" defense to CERCLA (or TSWDA) liability under 42 U.S.C. 9601(40).

CERCLA was amended to provide that a "bona fide prospective purchaser," defined under §9601(40), has "made all appropriate inquiries into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices…." Those practices, for commercial property, are defined in §9601(35)(B), which was amended to provide for EPA to issue a rule to establish standards for satisfying this requirement. The statute specifically required EPA to include:

(1) EP Report. Results of inquiry by an environmental professional.

(2) Interviews. Interviews with past and present owners, operators and occupants regarding potential for contamination of the facility.

(3) Title and Use Review. Reviews of historical sources such as chain of title documents, aerial photographs, building department records, and land use records, to determine previous uses and occupancies of the real property since the property was first developed.

(4) Lien Searches. Searches for recorded environmental cleanup liens.

(5) Governmental Record Review. Reviews of federal, state, and local government records, waste disposal records, underground storage tank records, hazardous waste handing, generation, treatment, disposal, and spill records, concerning contamination at/near the facility.

(6) Visual Inspection. Visual inspection of the facility and adjoining property.

(7) PRP's Knowledge. Specialized knowledge/experience of the defendant (buyer).

(8) Reduced Price. Relationship of the purchase price to the value of the property if the property was not contaminated.

(9) Easily Available Information. Commonly known, reasonably ascertainable information on the property.

(10) The Obvious. Degree of obviousness of the presence or likely presence of contamination of the property, and the ability to detect the contamination by appropriate investigation.

The EPA rule sets out procedures at 40 CFR Part 312 ("Rule"). The Rule provides that ASTM E1527-05, "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" ("Standard Practice") may be used to satisfy the Rule. We recommend the Standard Practice because it includes petroleum hydrocarbons as well as CERCLA "hazardous substances."

Because Texas courts look to CERCLA case law in TSWDA cases, it seems likely that Texas courts evaluating whether a Texas buyer made "appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability" (Tex. Health & Safety Code §361.275(f) will expect that a buyer obtained a Phase I Environmental Site Assessment following either the Rule format, or the Standard Practice. However, I've seen no case so holding.

Buyer and seller obligations under the Standard Practice now require a much more proactive approach, requiring client counseling on issues of the scope of disclosures required.

(1) Designation of Key Site Manager. Sellers must identify a key site manager "with good knowledge of the uses and physical characteristics of the property" (Standard Practice 10.5.1). This interviewee and others are to be asked to be as specific as reasonably feasible in answering questions and to answer in "good faith" and to the extent of their knowledge. Standard Practice 10.6.

(2) Answering in Good Faith. "Good faith" is defined by the Rule and the Standard Practice as "the absence of any intention to seek an unfair advantage or to defraud another party; an honest and sincere intention to fulfill one's obligations in the conduct or transaction concerned."

(3) Identification of Helpful Documents. The "key site manager" and the "user" (if different from the property owner) must identify "helpful documents" for the Environmental Professional ("EP"), and state whether they will provide copies to the EP. Standard Practice 10.8. Thus, early in a transaction, the seller and user must decide what those documents are and must state whether they will provide copies. This is to allow the EP to note any "data gaps" in the ESA. Consequently, a seller (or a buyer "user" who has acquired earlier ESAs on the property), must disclose their existence and state whether they will provide copies. In addition, the helpful documents may include:

- Environmental compliance audit reports.
- Environmental permits.
- UST registrations.
- Underground injection well registrations.
- Material Safety Data Sheets.
- Community right-to-know plan.
- Safety plans, spill prevention plans, etc.
- Hydrogeologic and geotechnical reports.
- Regulatory correspondence.
- Hazardous waste reports.
- Risk assessments.
- Limits on site use (recorded waste sites, zoning limitations, etc.

In addition, this requirement confronts seller's counsel with the need to consider what documents are in the legal file which may fall within the "helpful documents" requirement. Seller's counsel may have old environmental site assessments on the property which, for reasons of privilege, were addressed to counsel.

(4) Duties of the User of the ESA. Buyers who will be "users" of the ESA also have new obligations, and should be counseled as to these obligations. The user, like the current owner and key site manager, must identify "helpful documents." Experienced developers may have extensive knowledge about the property they contemplate buying, and the Standard Practice requires that this be disclosed. The user must also consider the relationship of the purchase price to the price of the land if the land is not contaminated. Finally, the user must convey to the EP:

- Any specialized knowledge or experience that is material to recognized environmental conditions (Standard Practice 6.3).
- Knowledge of any environmental lien or use limitation (6.4).
- Commonly known, reasonably ascertainable information within the community about the property that is material to recognized environmental conditions (6.6).
- Knowledge that a prior site assessment is not accurate (4.8).

(5) Ethical considerations. Rule 4.01, Truthfulness in Statements to Others, provides:

> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; or
>
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.

In the egregious facts of *Warehouse Associates Corporate Center II, Inc., et al. v. Celotex Corp., et al.*, 192 S.W.3d 225 (Tex. App. – Hou. [14th Dist.] 2006, review denied (2 pets.), rehearing of pet. for review granted, rehearing of pet. for review granted, order withdrawn), the seller's manager failed to disclose potential for contamination at the site to the environmental consultant who conducted the Phase I. Under the contract, the seller disclaimed all warranties and was not required to provide prior reports. The buyer was permitted to test and investigate. (It's not clear why the failure to disclose to the consultant did not constitute "impairment of inspection" under *Prudential*.) Under a post November, 1, 2006 sales contract, requiring a Rule or Standard Practice ESA, the "good faith" requirement would be violated by such nondisclosure on seller's part. A lawyer knowing of such nondisclosure in the transaction would need to consider Rule 4.01.

ENDNOTES

[1] **"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."

[2] **"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.

[3] **"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.

[4] **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.—Hou. [1st Dist.] 1981, writ ref'd n.r.e.).

[5] **Duties and Liability for Disclosures.** 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. *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.).

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. *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).

Sellers have no duty to raise a subject with a buyer, absent actual knowledge of a material adverse condition regarding the subject. *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).

Sellers have no liability for failure to disclose what one should have known, but did not. 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. *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 petition); *Sims v. Century 21 Capital Team, Inc.*, 2006 WL 2589358 (Tex. App.—Austin, no petition).

Non-disclosure is not actionable, if no reliance was in fact placed on the non-disclosed fact. As in many other jurisdictions, early Texas law was "buyer beware". 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. *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) *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).

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. *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).

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. *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); and Keeton, *Rights of Disappointed Purchasers*, 32 TEX. L. REV. 1 (1953).

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. *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).

Additionally, a person is charged with knowledge of the facts that a reasonable investigation would have revealed. *Thigpen v. Locke*, 363 S.W.2d 247, 251 (Tex. 1962); *Sierra Associate Group, Inc. v. Hardeman*, 2009 WL 416465 (Tex. App.—Austin).

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. *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).

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. RESTATEMENT (SECOND) OF TORTS § 353 (1965); *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.

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.

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. *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).

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. *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.).

6 **"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.

7 **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.).

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

9 **"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.

[10] **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.

[11] ***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.

[12] **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."

[13] ***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.

[14] ***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.—Hou. [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, 252-53 (Tex. App.—Waco 2001, pet. denied) 2the 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.

[15] **"As is" Clause Litigated in *Gym-N-I Playgrounds*.** *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 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.

[16] **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.

[17] **"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).

[18] **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.

[19] **Implied Warranties.**

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.

Waiver of Implied Warranties in Product Sales Contracts.

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

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

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.

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.

Waiver of Implied Warranty.

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 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).

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.

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.

Extension of Implied Warranties 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."

[20] **"*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.

[21] **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.

[22] **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.

[23] **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.

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

[25] **"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.

[26] **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.

[27] **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.

[28] **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).

[29] **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).

[30] **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)."

[31] **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 denied).

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.], pet. denied) (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.

[32] **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).

[33] **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.

[34] **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.

[35] **"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.

[36] **"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. denied* 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.

[37] **"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.

[38] **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.

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

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

[41] **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)

[42] **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.

[43] **Release – Specificity Requirement.** The release must specifically identify the claim to be released. *Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931, 938 (Tex. 1991). In *Victoria Bank*, an agreement purporting to release the Bank "from any and all claims and causes of action…directly or indirectly attributable to the above-described loan transaction" (a note to the Brady-Cattle Company) did not preclude a tortious interference claim by Brady against the Bank relating to a separate transaction which was "not mentioned or clearly within the subject matter" of the release. The court stated "In order to effectively release a claim in Texas, the releasing instrument must 'mention' the claim to be released. Even if the claims exist when the release is executed, any claims not clearly within the subject matter of the release are not discharged", *citing Vela v. Pennzoil Producing Co.*, 723 S.W.2d 199, 204 (Tex. App.–San Antonio 1986, writ ref'd n.r.e.). "Furthermore, general categorical release clauses are narrowly construed." *Id.* Because releases are subject to the rules of construction governing contracts, "courts will not rewrite agreements to insert provisions parties could have included or to imply restraints for which they have not bargained." *Trinity Industries, Inc., v. Ashland, Inc.*, 53 S.W.3d 852, 868 (Tex. App.–Austin 2001, pet. denied), *citing Tenneco Inc. v. Enterprise Prods. Co.*, 925 S.W.2d 640, 646 (Tex. 1996).

[44] **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.).

[45] **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.

[46] **Releases – "Express Negligence" and "Fair Notice" Requirement May be Applicable.** *See* Endnote 16. 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. 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.

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.

In 1993 the Texas Supreme Court extended the "fair notice" requirements of "conspicuousness" and "express negligence" to releases as well as indemnities. *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 509 (Tex. 1993) (applying UCC standards of conspicuousness to release provisions and holding they were inadequate – on the back of a work order without headings or contrasting type). *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 511 (Tex. 1993) ("We thus adopt the standard for conspicuousness contained in the [Uniform Commercial] Code for indemnity agreements and releases like those in this case that relieve a party in advance of responsibility for its own negligence.") (holding that the release provisions at issue were not conspicuous: in both contracts, "the provisions are located on the back of a work order in a series of numbered paragraphs without headings or contrasting type").

47 **"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.).

48 **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.

[49] **Clauses Negate Reliance.** *Id.* at 201.

[50] **The Question in the *Italian Cowboy* case.** *Id.* at 198.

[51] ***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).

[52] **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.).

[53] **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).

[54] **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.

[55] **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.—Hou. [1st Dist.], no pet.).

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

[57] **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).

[58] **Arbitration Clause Binding on Subsequent Purchasers.** *Stanford Dev. Corp. v. Stanford Condominium Owners Association*, 285 S.W.3d 45 (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."

[59] **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).

[60] **"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.

[61] **"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.

62 **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).

63 **"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.

64 **DTPA Waiver.** §17.42 of the DTPA, TEX. BUS. & COM. CODE §§ 17.41 *et seq.*, 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).

65 **TSWDA.** TEX. HEALTH & SAFETY CODE §§ 361 *et seq.* (the "TSWDA"). TSWDA defines who is a "responsible person" for solid waste, and apportions liability. The Texas liability scheme for solid waste generally – but with a notable omission - tracks the federal "Superfund" act or CERCLA (Comprehensive Environmental Claims, Response and Liability Act of 1980, as amended, 42 U.S.C.A. §§ 9601 *et seq.*). Texas courts look to CERCLA decisions in TSWDA cases. *R. R. Street & Co., Inc. v. Pilgrim Enter., Inc.*, 166 S.W.3d 232, 242-3 (Tex. 2005); *Celanese Corp. v. Coastal Water Authority*, 2008 WL 2697321 (S.D. Tex. 2008) ("For purposes of determining 'arranger' status, the Texas Supreme Court has concluded that guidelines developed in federal CERCLA cases are 'faithful to the statutory language and purposes of SWDA,'" *citing R. R. Street*).

Section 361.271, "Persons Responsible for Solid Waste," lists four basic liability categories: (1) current owner/operator; (2) owner/operator at the time of disposal; (3) "arranger" liability of a person who arranged for disposal of waste (for instance, contracted to send waste to a landfill); and (4) transporter who selects site and transports waste to site.

[66] **"As Is" Clause Does Not Operate as a Release for CERCLA Liability as Between Sellers and Buyers.** 42 U.S.C.A. § 9607.

[67] **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 Hou., 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.

[68] **Fair Notice Requirement Applicable to Environmental Indemnities.** *But see OXY U.S.A., Inc. v. Southwestern Energy Production Co.*, 161 S.W.3d 277 (Tex. App.–Corpus Christi, 2005, pet. denied) (refusing to apply the fair notice requirement to an indemnity agreement that shifted liability for actions that have already occurred), citing *Green*. *See also Lehmann v. Har-Con Corporation*, 76 S.W.3d 555 (Tex. App.— Hou. [14th Dist.] 2002, *reversed on other grounds* 39 S.W.3d 191 (Tex. 2001), criticizing *FINA* at n.2:

> The conclusion that the express negligence doctrine must be satisfied whenever there are *existing* but *not yet filed* claims at the time the release or indemnity is executed is overly

formalistic and contrary to the public policy favoring settlements as a means of amicably resolving doubts and preventing lawsuits.

Har-Con counsel had apparently tried to comply with fair notice and express negligence (though contending these doctrines were inapplicable); the court (responding to Har-Con's opponent who claimed *attempted* compliance was an admission that the doctrines applied) said it would not unnecessarily penalize Har-Con for employing cautious counsel.

69 **Requirement that Costs be Allocated If Possible Between Indemnified and Non-Indemnified Costs.** The court concurred that under *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299 (Tex. 2006), the disputed costs fell within the Supreme Court's segregation exception for "discrete legal services [that] advance both a recoverable and unrecoverable claim" and are so intertwined that they need not be segregated.

70 **CERCLA and Indemnity.** 42 U.S.C.A. §9607(e):

> (1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.
>
> (2) Nothing in this subchapter, including the provisions of paragraph (1) of this subsection, shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise, against any person.

71 **Settling With State Settles All Contribution Claims by Other Responsible Parties.** Under Tex. Health & Safety Code Ann. §361.277(b), "A person who enters a settlement agreement with the state that resolves all liability of the person to the state for a site subject to Subchapter F is released from liability to a person described by Section 361.344(a) for cost recovery, contribution, or indemnity under Section 361.344 regarding a matter addressed in the settlement agreement." According to the Court in *Compton*, "This statute was apparently patterned after the contribution provision found in [CERCLA,]," *citing* 42 U.S.C. §9613(f)(2).

72 **Abolition of Common Law Indemnity for Claims between Joint Tortfeasors.** *Aviation Office* explains that the comparative negligence statute "has abolished the common law doctrine of indemnity between joint tortfeasors even though the statute does not expressly mention that doctrine." 751 S.W.2d at 180.