A Reprint from *Tierra Grande*

exas real estate practitioners frequently ask whether residential property may be sold legally "as is." Because a downturn in the economy generally means an upturn in litigation, knowing the correct answer helps brokers and sellers avoid legal woes. Both the Texas statutes and case law address the issue.

## Statutory Waivers

An "as-is" sale attempts to place the risk of purchasing property on the buyer. This contradicts the provisions of the Deceptive Trade Practices Act (DTPA) (Chapter 17, Texas Business and Commerce Code [TBCC]). The DTPA requires disclosure of all known defects and conditions that would influence the purchaser's decision to buy. The statute replaces *caveat emptor* (let the buyer beware) with *caveat vendor* (let the seller beware).

Initially, the DTPA prohibited waivers. In 1995, however, the Texas Legislature amended the statute to permit written waivers by consumers. The consumer-buyer must possess equal bargaining power with the seller and be represented by legal counsel not identified, suggested or selected by the defendant (the seller).

The waiver must be placed conspicuously in the sales contract in ten-point boldface type and entitled "Waiver of Consumer Rights." The text must be similar to the prescribed language found in the statute.

While the DTPA recognizes waivers, they are rarely used because attorneys are reluctant to allow clients to enter such contracts because of the threat of malpractice. However, Texas courts (not legislators) have approved "as-is" sales provisions under the proper circumstances.

## Waivers Distinguished from 'As-Is' Agreements

Texas courts distinguish waivers from "as-is" sales arrangements. A waiver is a relinquishment of a known right. In this context, consumers knowingly agree in advance to relinquish any right to sue for a DTPA violation.

The DTPA may be violated by:

- conducting a false, misleading or deceptive practice,
- breaching an express or implied warranty (Uniform Commercial Code [UCC] found in the TBCC, Sections 2.313, 2.314 and 2.315), or
- undertaking an unconscionable act as defined by the statute.

The first of these is most often violated by real estate practitioners. The statute lists 27 practices that are *per se* false, misleading or deceptive. The two most noteworthy are (1) representing that property has characteristics, uses or benefits that it does not have, and (2) failing to disclose information about the property to induce buyers into transactions they would not otherwise enter. Silence is as actionable as overt misrepresentations.

For real estate consumers (buyers) to prevail in a DTPA suit, they must prove the real estate licensee violated the DTPA, and the violation caused an economic loss.

An effective "as-is" agreement, by contrast, breaks the causal connection between the violation and the plaintiffs' subsequent losses and damages. As the Texas Supreme Court stated, "A valid as-is agreement does not say the plaintiff cannot sue (as does a waiver), it says the plaintiff cannot win if a suit is filed" (*Prudential Insurance Co. v. Jefferson Associated Ltd., 896 S.W.2d 156* [Tex. 1995]).

With waivers, the plaintiff relinquishes all rights to assert a DTPA action. With an "as-is" agreement, the plaintiff relinquishes the right to recover if a claim is filed.

In *Prudential*, the Texas Supreme Court approved an "as-is" agreement for commercial property. To date, the high court has not addressed an "as-is" agreement for residential property, but several lower appellate courts have. An examination of these opinions, in light of the *Prudential* case, indicates how best to structure a residential "as-is" agreement.

## Precise Wording Necessary

An effective "as-is" agreement is a combination of the correct contractual language and the circumstances surrounding the transaction. The most effective language appears in the *Prudential* decision.

> 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 representations, statements, assertions *or non-assertions* by the seller with respect to the Property

condition, but is relying *solely* 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 shall survive the Closing.

The words "or non-assertions" were added to prevent claims of misrepresentation by silence. The word "solely" also was added.

Three essential provisions appear in the language for residential property. First, the agreement states that the purchaser is taking the property "as is" with all latent and patent defects and this is a *material part* of the negotiations. The wording emphasizes that the provision is not boilerplate contractual language and the provision has played an important role in the bargaining process. Placing the language in ten-point, boldface type emphasizes this fact and makes it more conspicuous.

Second, the buyer acknowledges that he or she is relying on his or her inspection of the property and not on any representations made by the seller. The Texas Supreme Court stressed the importance of this wording in *Weitzel v. Barnes* (*691 S.W. 2d 598* [1985]). The sales contract gave the buyers the right to inspect all systems in the house and the right to reject the contract if dissatisfied. The buyers never inspected but sued under the DTPA for faulty plumbing and air conditioning after closing.

The high court reviewed the language and ruled in the buyers' favor. Why? The language failed to state the buyers were relying on their examination of the property to make the purchase.

The language may be improved according to the 1998 unpublished opinion of *Income Apt. Investors LP v. Building Diagnostics Ltd.* Here, the promotional material for an auction sale contained an inspection report stating the building contained copper wiring when in fact it contained aluminum. To participate in the bidding, buyers had to sign a disclaimer stating they relied *solely* on their own inspections.

The high bidder discovered the aluminum wiring after closing and sued. The appellate court ruled in the seller's favor because of the disclaimer language. Here, the buyer (supposedly) relied solely on his or her inspection, which precluded causation of damages. For this reason, sellers may consider adding "solely" to the suggested *Prudential* language cited earlier.

Third, the agreement states the "as-is" provision survives closing. The language was omitted in *Smith v. Levine* (*911 S.W. 2d 427* [1995]), and the court invalidated the "as-is" agreement on this basis. When the survivorship language is omitted, the "as-is" provisions merge (disappear) into the deed at closing and are no longer enforceable.

While the *Smith* case stressed the use of the contractual language, other Texas appellate cases enforced "as-is" sales agreements without the wording.

## Totality of Circumstances

In addition to the contractual language, the courts examine the totality of the circumstances surrounding the sale. The inspection and the buyer's reliance on it are critical factors.

Courts are more prone to enforce the as-is agreement when the buyer inspects the property. If the inspection reveals problems, the contract should be renegotiated or amended with the following language inserted from *Dubow v. Dragon (746 S.W. 2d 857* [1988]): "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."

In the *Dubow* case, the buyers discovered a defective foundation after inspecting the home. The contract was renegotiated with the language inserted, and the price reduced. Later, the buyers sued for violation of the DTPA.

The appellate court ruled in the sellers' favor. According to the court, "The Dubows' (the plaintiff-buyers) reliance on their inspection of the house constituted a new and independent basis for purchase that intervened and superseded the Dragons' (the defendant-sellers) alleged wrongful act."

If the contract is not renegotiated or amended with the suggested language included, sellers face continued liability according to *McFarland v. Associated Brokers, (977 S.W. 2d 427* [1998]). The inspection, which occurred after the contract was signed, revealed a defective roof. The seller agreed to repair it with a one-year warranty attached. The contract was not altered. The price was not reduced. The buyer sued six months after closing when the roof leaked.

The appellate court ruled that the case should go to trial because the terms of the contract were not altered after the inspection. The buyer did not agree to rely solely upon his or her examination of the property as occurred in *Dubow***.**

Here are other factors the courts consider when analyzing the totality of the circumstances.

- Because the parties need to be in equal bargaining positions, "as-is" agreements are rarely upheld against first-time homebuyers *(Smith).*
- The "as-is" language is more apt to be enforced if it is inserted in the contract *by the buyer after* the property is inspected *(Prudential)*.
- If the contract is renegotiated after the inspection, the courts look favorably on a price reduction *(Dubow).*
- If the buyers have the property inspected more than once, the courts are more likely to find the agreement enforceable *(Dubow, Kessler and Smiley).*

**An effective "as-is" agreement is a combination of the correct contractual language and the circumstances surrounding the transaction.**

- If the seller induces the buyer into an "as-is" contract by fraudulent (or negligent) misrepresentations or by concealment of information, enforcement is suspect (*Kessler v. Fanning, 953 S.W. 2d 515* [1997]).
- If the buyers consult an attorney as to the legal significance of an "as-is" agreement, the courts are more apt to find the agreement enforceable *(Erwin v. Smiley, 975 S.W. 2d 335* [1998]).

In 2007, the Dallas Court of Appeals rendered the latest decision regarding the "as-is" sale of residential property (*Kupchynsky v. Nardiello, 230 3rd 685*).

The case involved the seller-owner-builder (hereafter "the seller") misrepresenting the construction and drainage of two balconies connected to the house. The inspection report urged the buyer to contact the builder for comments on possible problems, stating "[r]epairs may be needed."

The buyer pursued the matter with the seller. The seller commented "that was the design of the balcony per the blueprints." Also, he stated "it was designed that way."

***TEXAS CASE LAW*** *addressing "as-is" agreements in residential transactions has revolved around everything from leaking roofs, defective foundations, faulty plumbing and air conditioning to electrical wiring.*

Later, the buyer provided the seller with a list of 13 items that needed repair. The list did not mention the balconies. The contract was not renegotiated or amended. The language from *Dubow* was not inserted. The price was not reduced. The seller agreed to make the 13 repairs in exchange for the buyer agreeing that all contingencies had been satisfied or waived. Although the contract contained an "as-is" boilerplate provision, it was not mentioned, discussed or made a part of the negotiations.

Five months after closing the back balcony leaked. Shortly after that, the other balcony leaked. The buyer contacted several inspectors to find the cause. The buyer also contacted the architect who designed the home. The buyer discovered there were no plans or blueprints for the balconies. The design and construction of the balconies sprang solely from the mind of the seller-builder.

The buyer successfully sued the seller for engaging in false, misleading or deceptive practices and for negligent misrepresentation. The seller appealed unsuccessfully based on the "as-is" agreement contained in the contract. Here's how the appellate court ruled.

First, the buyer had the property inspected but did not rely solely on the inspection to make the purchase. Instead, as the inspector directed, the buyer asked the seller about the design of the balconies. The seller misrepresented the facts by indicating blueprints existed.

Second, the parties did not renegotiate or amend the contract after the inquiry was made. This is similar to the *McFarland* case discussed earlier. The buyer provided the seller with 13 items that needed repair. The balconies were not mentioned. No price reduction occurred as in *Dubow.*

Third, the court reiterated the general rule and emphasized the basis-of-the-bargain rule and equal bargaining positions.

"The nature of the transaction and the totality of the circumstances surrounding the agreement must be considered," ruled the court. "Where the 'as-is' clause is an important part of the basis of the bargain, not an incidental or 'boilerplate' provision, and is entered into by parties of relatively equal bargaining position, a buyer's affirmative agreement that he is not buying on the representations of the seller should be given effect . . . ."

Here, the "as-is" agreement was held unenforceable for the following reasons.

- The parties did not possess equal bargaining positions. The owner-seller was also the builder and presumably had more knowledge and credibility than an ordinary seller.
- The "as is" clause was never discussed and was not a part of the original negotiations or renegotiations. Rather, it was part of the boilerplate language in the contract that did not comply with the wording in *Prudential.*
- The seller misrepresented the condition of the property.
- The buyer did not submit the "as-is" proposal after the inspection occurred.

The violation of one of the *Prudential* factors rarely disqualifies an "as-is" sales agreement. The totality of the circumstances plus examination of the language must be considered.

For specific advice, consulation with an attorney is recommended.

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## THE TAKEAWAY

Selling residential property "as is" raises questions because the Texas Supreme Court has never addressed the issue. It has, however, approved the sale of commercial property in this manner. Based on that decision, several lower appellate courts have now approved the "as is" sale of residential property as long as certain requirements are met.

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***Tierra Grande*** (ISSN 1070-0234) is published quarterly by the Real Estate Center at Texas A&M University, College Station, Texas 77843-2115. Subscriptions are free to Texas real estate licensees. Other subscribers, $20 per year. Views expressed are those of the authors and do not imply endorsement by the Real Estate Center, Mays Business School or Texas A&M University. The Texas A&M University System serves people of all ages, regardless of socioeconomic level, race, color, sex, religion, disability or national origin. Photography/Illustrations: Bob Beals III, pp. 1, 4.