THE ENFORCEABILITY OF "AS IS" CLAUSES IN REAL ESTATE SALE CONTRACTS

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I. Historical Background: *Caveat Emptor*

Sellers of real property have always sought to limit their liabilities to buyers for defects in the real property which is the subject of the purchase and sale transaction. The ideal situation for a seller is that all risk of loss related to the condition or status of the real property is transferred to the buyer at the closing, leaving the seller to put the purchase price in the bank without fear of having to subsequently pay money back to the buyer because of problems with the property.

One may presume that sellers had their day during the long reign of the common law doctrine of caveat emptor, or "let the buyer beware". Under this doctrine, in the absence of any express agreement, the seller of property is not liable to its buyer, or to the buyer's successors or assigns, for the condition of the transferred property.

II. Modern Theories of Seller Liability

In the modern era, the doctrine of caveat emptor is more talked about than practiced. The idea of "letting the buyer beware" has been substantially eroded in all United States jurisdictions. In place of that doctrine, a disgruntled buyer may look to a number of theories in asserting liability on the part of a seller of defective real property:

A. *Contract*

Depending upon the content of the real estate sale contract, the buyer may be able to assert a breach of an express contractual covenant or, more likely, an express contractual warranty.

B. *Tort*

i. Elements of Fraud.

Where the seller did not commit itself by contract to an express covenant or warranty (or even where the seller did enter into such an obligation), the buyer may resort to a tort claim. The most commonly used cause of action is one sounding in fraud or misrepresentation. In the author's home state of California, a fraud cause of action may be based upon *intentional* misrepresentation or *negligent* misrepresentation. The elements of the tort of fraud that may be summarized as follows:

a. a false representation or concealment of a material fact relating to the subject matter of the transaction;

b. made with knowledge of its falsity (in the case of intentional misrepresentation) or without sufficient knowledge on the subject to provide a reasonable ground for believing the representation to be true (in the case of negligent misrepresentation);

c. with the intent to induce the person to whom it was made to enter into the transaction or change possession to his detriment;

d. the injured party relies upon the representation, in a manner that is reasonable and justifiable; and

e. the injured party suffers injury or damage as a result of such reliance.

_____1 Miller & Starr California Real Estate 2nd ("Miller & Starr") 327; see also Harding v. Robinson, 175 Cal. 534, 538 (1917).

ii. *Fraud Based Upon Concealment; Duties to Disclose*

The elements of fraud described above are obviously satisfied by an affirmative misrepresentation. But what rule applies when a seller merely conceals information known to the seller? In general, in the absence of a fiduciary or other special relationship between the parties,

one party to a contract does not have a duty to provide information to the other party. However, there are several exceptions to this rule:

a. If a party has made a partial true disclosure, it must disclose other facts that affect the truth and accuracy of the statement made;

b. Where one party knows that the other party is under the influence of a mistake, which mistake is either known to the first party or induced by the first party, then the first party has a duty to correct the mistake in the mind of the other party;

c. If a party has intentionally concealed a material fact from disclosure, it must disclose that fact to the other party;

d. Where one party has exclusive knowledge of a material fact such that the fact cannot be discovered by the other party, the first party has a duty to disclose;

e. Under certain circumstances, a party may be under a duty to disclose dangerous conditions not to other parties.

If a duty to disclose can be established under the foregoing rules, then fraud based upon *concealment* can be established upon proof that the party concealing the facts did so with intent to induce reliance, and that the injured party did in fact rely on his or her lack of knowledge of the concealed fact and suffered injury or damage as a result of such reliance. Miller & Starr 404-405, and cases cited at 407 et seq.

The duty of the seller to make disclosure is particularly applicable where the seller knows that the undisclosed fact is not known to the buyer and that it will not be discovered by the buyer, even with diligent attention and observation. Herzog v. Capital Co. 27 Cal.2d 349, 353 (1945); Lingsch v. Savage (1963) 213 Cal. App. 2d 729, 735, 737-738 (1945)[check cites].

The duty to make disclosure does not extend to a duty on the part of the seller to discover matters that are not in fact known to the seller. The "rule does not of itself require of a property owner that he acquire knowledge of and inform his buyer concerning laws that affect and restrict the use of the property or suffer damages for his unwitting concealment." Watt v. Patterson, 125 Cal. App. 2d 788, 792-793 (1954).

C. *Statutory*

Under certain statutes, absolute liability may be established by a buyer as a result of the condition of the property sold. The classic example is the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C.A. Section 9605 et seq. ("CERCLA"). Discussion of liability for contaminated properties and other environmental issues is beyond the scope of this paper; suffice it to say that under certain circumstances such liabilities may be asserted independent of any concealment, misrepresentation or breach of contract by the buyer.

Similarly, sellers may be held liable for failure to make statutorily required disclosures. These disclosures can be extensive. In California, prompted by the steady flow of high profile forest fires, floods, mudslides and earthquakes of recent years, the state legislature has imposed a series of special disclosures upon sellers of real property. Thus, a California seller must make disclosure as to whether the subject property is located in:

(i) An "earthquake fault zone" (California Public Resources Code Section 2621.9);

(ii) A "seismic hazard zone" (California Public Resources Code Section 2694);

(iii) A "special flood hazard area" (California Government Code Section 8589.3);

(iv) An "area of potential flooding" (California Government Code Section 8589.4);

(v) A "very high fire hazard severity zone" (California Government Code Section 51183.5); and

(vi) A "wildlife area that may contain substantial forest fire risk and hazard" (California Public Resources Code Section 4136).

D. *Implied Warranty*

Occupying a realm somewhere between contract and tort is the doctrine of implied warranty. Under this doctrine, a seller may be treated as if it had made an express warranty as to certain basic elements concerning the property sold. Examples include an implied warranty of habitability with respect to residential property, especially when sold by a professional developer to a residential owner-occupant.

E. *Factual Distinctions*

If a disappointed buyer seeks to affix liability on its seller for a defect in the real property, whether on a tort or contract theory, the factual context of the action is certain to influence the result. Among the facts that may have an effect are the following:

(i) Whether the subject property is a residence or a commercial property;

(ii) The sophistication of the parties, and their relative sophistication when compared with one another;

(iii) The nature of the defect, including its severity, materiality, impact upon the use and/or habitability of the property, etc.;

(iv) Whether the defect was patent or latent;

(v) The nature of the seller's conduct, including a consideration of whether the seller knew or should have known of the defect and whether the seller affirmatively misrepresented the condition of the property;

(vi) Whether the buyer was afforded an opportunity to inspect the property, and the degree to which the buyer conducted such an inspection; and

(vii) The content of the contract.

III. *Contractual Devices for Limitation of Liability*

The element listed above that is most obviously within the control of the real estate lawyer is the content of the contract. For this reason, real property sellers' lawyers have sought to protect their clients from liabilities through the use of various devices:

A. The most primitive device is the mere *absence of warranties* from the contract, coupled with an *"integration" clause* which states that the contract expresses the entire agreement of the parties;

B. The use of an *"as is" clause,* which states that the seller is selling the property in its present condition (as is); the clause is often rendered as "as is, where is," but the "where is" element seems curious as applied to real property (except, perhaps, in Califomia, due to its propensity for earth movement);

C. A more articulated *"as is" clause*, combined with an express *disclaimer of warranty* and description of the fact that the buyer is afforded the *opportunity to conduct an inspection* and will rely upon the results of such inspection. The addition of other provisions reflecting the special facts of the property, the positions or qualifications of the parties and the nature of the bargain struck between them may give additional weight to the clause, and such provisions may be added by the seller's counsel in the hope of enhancing the chances for enforceability.

IV. *Gold or Snowballs: The Development of the "As Is" Clause.*

The use of an "as is" clause in a real property sale is not a new development. In Smith v. Richards (1839) 38 U.S. 26, a seller sold a gold mine that had been fraudulently "salted" in order to induce the buyer to purchase it. In an effort to protect himself from a fraud allegation, the seller wrote a letter to the buyer which stated, "I, however, sell it for what it is, gold or snowballs; and leave it to you to decide, whether you will take it at my price, or not." Id. at 40. The Court was unimpressed by this early attempt at an "as is" disclaimer, and held the seller liable for fraud.

The massive transformation of gold to snowballs which occurred during the nationwide real estate recession of the last decade resulted in increased use of "as is" clauses. Foreclosing lenders and other "involuntary sellers" like the RTC used "as is" clauses in an effort to limit liabilities related to the condition of properties with which they were unfamiliar. The

return of good times to the real estate industry has not resulted in a loss of popularity for the "as is" clause. In particular, the advent of sales of large portfolios of real property has provided additional impetus for the use of the "as is" clause.

V. *Enforceability of "As Is" Clauses at State Law.*

A. *Protection for Claims Regarding Condition of Property in the Absence of Fraud or Nondisclosure.*

Most jurisdictions have allowed the "as is" clause to be enforced to protect the seller against claims related to the condition of the property where there is no allegation of concealment or nondisclosure by the seller. In K. Woodmere Associates, L.P. v. Menk Corp., 720 A. 2nd 386 (N.J. App. Div. 1998), the court held as follows:

> "When used in connection with the sale of real property, 'as is' generally means the purchaser is acquiring real property in its present state or condition. The term implies real property is taken with whatever faults it may possess and that the grantor is released of any obligation to reimburse purchaser for losses or damages resulting from the condition of the property conveyed". Id. at 392.

In 1845 Ocean Associations v. Stein, 449 N.Y.S. 2d 54 (1982), the plaintiffs purchased an apartment building pursuant to a contract which provided that the premises were to be taken "as is." Subsequently, the purchaser alleged that the building's trash compactor was not in working condition at the time of the closing. The court granted summary judgment in favor of the seller, holding that "the passing of title on an 'as is' basis generally extinguishes any claim for after-discovered defects or breakdowns." Id. at 56.

In Prudential Insurance Company of America v. Jefferson Associates, Ltd., 896 S.W. 2d 156 (Tex. 1995), the court upheld the use of an "as is" clause. In that case, improved property was sold pursuant to a contract that contained an "as is" clause. The buyer was a sophisticated real estate investor. After closing, the buyer found asbestos-containing materials in the building. The buyer sued, alleging fraud, negligence, breach of the duty of good faith and fair dealing and violations of Texas deceptive practice statutes. The court carefully analyzed the sophistication and knowledge of the buyer and the buyer's opportunity to inspect the property, and concluded that the seller was entitled to protection by the "as is" clause from liabilities in contract and tort. In the words of the court in the Prudential case,

> "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." Id. at 161.

Thus, the "as is" clause should work to insulate the seller against claims arising from defects in the subject property where the elements of fraud discussed above are not established. As such, the "as is" clause should be effective, as an express contract provision, to exclude implied warranties from deemed attachment to the contract. In Perrett v. Dollard, 338 S.E.2d 56 (Ga. Ct. App. 1985), the court upheld an "as is" provision as being effective to negate any implied warranties. In that case, the buyer argued that it should be allowed to introduce parol evidence of its real estate broker's understanding as to the items within the subject property intended to be covered by the "as is" clause. The court refused to admit parol evidence, stating that parol evidence is admissible to explain ambiguity in a contract, but not to create ambiguity where none existed. Thus, the court treated the "as is" provision as dispositive of the issue of implied warranties in the contract.

Courts in other states, however, have been unwilling, at least in certain circumstances, to support the proposition that the "as is" clause should be given effect to negate the presence of implied warranties in the purchase contract. A Pennsylvania Court rejected the argument that inclusion in a purchase agreement of an "as is" clause negates an implied warranty of habitability, apparently basing its decision on a finding that the agreement did not adequately inform the buyer of its duty to ascertain latent defects normally covered by implied warranties. Tyus v. Resta, 476 A.2d 427 (Pa. Super. Ct. 1984).

B. *"As Is" Clauses and Nondisclosure*

Although an "as is" clause may be given effect to negate contractual or quasi-contractual liabilities with respect to implied warranties, much more difficult issues arise when the "as is" clause is used as a defense to tort claims involving fraud or nondisclosure.

At least one court has allowed the seller to take shelter behind the "as is" clause against the claims of misrepresentation by the buyer. In O'Connor v. Scott, 533 So. 2d 241 (Ala. 1988), the buyers purchased a residence from the seller. The contract stated that the seller warranted the HVAC, electrical and plumbing systems and appliances, but stated that otherwise the house was sold in an "as is" condition. Subsequent to the sale, the buyer noticed cracks in the walls and ceiling, and learned that they were caused by settling due to insufficient piers in the foundation. The buyers sued the sellers for fraud and suppression of material facts. The Court held that, *even if there were misrepresentations by the seller*, the buyer's case failed because the sellers had limited their liability with an "as is" provision.

Allowing the "as is" clause to serve as a protection against liability for affirmative misrepresentation is a proposition supported by very few, if any, other jurisdictions. In Dygert v. Leonard, 525 N.Y.S.2d 436 (App. Div. 1988), the buyers purchased a single family residence pursuant to a contract which contained an "as is" clause. They subsequently learned from neighbors that extensive work had been performed on the foundation of the house, and that the sellers had painted over repaired wall areas. Subsequently, cracks appeared throughout the foundation, and the buyers commenced a fraud action against the sellers. The court refused to grant the sellers' motion for summary judgment, holding that an "as is" provision does not "shield defendants from judicial inquiry into specific allegations of fraud in the inducement of the contract." Id. at 438.

The court in Silva v. Stevens, 589 A.2d 852 (Vt. 1991), sounded a similar note. In that case, the Court stated that an "as is" provision means that there are no implied warranties, but does not insulate the seller from tort liability, and that the presence of an "as is" provision does not, as a matter of law, defeat a fraud claim.

The Court in Prudential Insurance Company of America v. Jefferson Associates, Ltd., supra, gave a well-reasoned explanation for the majority view that an "as is" clause is ineffective to protect against liability for fraudulent misrepresentations:

> "A buyer is not bound by an agreement to purchase something 'as is' that he is induced to make because of a fraudulent representation or concealment of

information by the seller. . . A seller cannot have it both ways: he cannot assure the buyer of the condition of a thing to obtain the buyer's agreement to purchase 'as is', and then disavow the assurance which procured the 'as is' agreement." Id. at 162

In V.S.H. Realty, Inc. v. Texaco, Inc., 757 F.2d 411 (1st Cir. 1985), the court (applying Massachusetts law) reached a similar result. In that case, the buyer agreed to purchase a petroleum storage facility in "as is" condition. After the offer was accepted, the buyer discovered oil seepage on the property and commenced a suit for return of its deposit. The buyer alleged the seller had violated a state nondisclosure law. The Court held that the presence of an "as is" clause was not sufficient to bar the buyer's claim based upon violation of the nondisclosure statute.

Several cases decided by the Ohio courts stand for the proposition that the inclusion of an "as is" clause, although ineffective to protect against claims for affirmative fraud or misrepresentation, may be allowed to protect against mere passive nondisclosure. In Kaye v. Buehrle, 457 N.E.2d 373 (Ohio App. 1983), the seller of a property which flooded after closing of the sale was granted summary judgment in an action for fraudulent concealment on the basis that the "as is" clause in the contract relieved the sellers of any duty to disclose defects. The appellate court affirmed the summary judgment with respect to issues of fraudulent nondisclosure, holding that the "as is" clause was effective to negate any duty to disclose defects and that, absent a duty to disclose, a claim for fraudulent nondisclosure must fail. However, the appellate court reversed the judgment that had been granted by the trial court, on the basis of the "as is" clause, with respect to causes of action for affirmative fraud and misrepresentation, stating that the "as is" clause was not effective in precluding that type of claim. See also, Wilson v. Zender, 574 NE2d 1076 (1991); Dennison v. Koba, 86 Ohio App. 3d 605 (1993).

C. *California Cases*

The approach that has been developed by the California courts focuses on the physical facts of the subject property. In Lingsch v. Savage, 213 Cal. App. 2d 729 (1963), the buyer purchased a building "in its present state and condition." The buyer discovered after closing that the seller had failed to disclose that the building was in disrepair, that certain units in the building were illegal and that the building had been designated for condemnation. The buyer brought an action for fraud against the seller. The seller filed a demurrer (i.e., a challenge to the complaint on the basis of failure to state a cause of action as a matter of law), arguing that the buyer's claim was not actionable because of the "present state and condition" clause. The Court

refused to sustain the demurrer, holding that "generally speaking, [an 'as is'] provision means the buyer takes the property in the condition visible to or observable by him. . . . An 'as is' provision may therefore be effective as to a dilapidated stairway but not as to a missing structural member, a subterranean creek in the backyard or an unexploded bomb buried in the basement, all being known to the seller." Id.. at 742. The case was remanded to the trial court for a determination of whether the alleged defects were *visible or observable.*

California courts have been willing to deny recovery to buyers where properties containing visible or observable defects were purchased subject to "as is" contracts. In Driver v. Melone, 11 Cal. App 3d 746 (1970), the buyer purchased a parcel of land improved with an old and dilapidated house. The purchase contract contained an "as is" clause. A few months after the sale was consummated, the county fire department posted the property as dangerous and declared it condemned because of defective electric wiring. The buyer subsequently filed an action for rescission and damages. On the issue of whether the alleged defects were visible or observable, the court noted that "the defective wiring was obvious to anyone who inspected the building. Likewise the wooden foundations were unobscured and were conspicuous without the necessity of looking through the access hole under the house." Id. at 750. The court therefore affirmed the judgment in favor of the sellers.

A similar result was reached in Shapiro v. Hu, 188 Cal. App. 3d 324 (1986). In that case, the buyer purchased a building in "as is" condition for use as a restaurant. Prior to closing, the buyer inspected the premises; the basement, however, was pitch black and the walls were blocked by stacks of boxes. After closing, the buyer discovered a large bulge in the south wall of the basement, and brought an action for fraud and negligent misrepresentation. The buyers claimed that the bulge in the basement wall was not "visible or observable" because of the darkened condition of the basement and the presence of debris on the floor and stacked boxes against the wall. The court, however, held that a routine inspection would have revealed the problem in the basement wall and that the buyer should have taken the precautions to inspect the property thoroughly before purchasing it. The court therefore affirmed judgment in favor of the seller.

D. *Application of the California Approach in Other States*

In making determinations as to enforceability of "as is" provisions, courts in other states have evinced a similar interest in the degree to which defects are detectible. In Mulkey v. Waggoner, 338 S.E.2d 755 (Ga. App. 1985), a buyer who purchased a house pursuant to a contract with an "as is" clause discovered wood beetle damage after closing, and also discovered

that the sellers had hired an exterminator to deal with infestation of the house over two years prior to sale. The buyer sued the seller for fraud in the inducement of the contract and affirmative and willful nondisclosure of the insect damage. The court held that "an 'as is' clause concerns itself with obvious defects or at least those which are reasonably discernable." Id. at 757. Because the court found no evidence that the beetle damage would have been seen or detected by observation, it concluded that the buyer's claims were not barred by the "as is" provision in the purchase contract. However, the court noted that the sellers' arguments would have had more validity if the house had been purchased "with a patent defect easily exposed." Id. at 757.

In Bryant v. Troutman, 287 S.W.2d 918 (Ky. App. 1956), the purchaser purchased a residence "as such" and subsequently discovered defects. The court held that, if the buyer was induced to enter into the purchase agreement by the seller's fraud, then the "as such" provision would not relieve the seller of liability for fraud. However, the court noted that, due to the inclusion of the "as such" clause, the buyer should not be allowed to recover on defects which could have been discovered through a reasonable inspection.

A Louisiana court followed a similar approach in dealing with a factual situation which stands the normal fraud claim facts on their head. In Bond v. Broadway, 607 So.2d 865 (La. App.2d Cir. 1992), a buyer refused to close its purchase of a residence, citing the presence of minor defects such as excessive depth of the swimming pool, damaged fences, decayed door frames, and torn wallpaper. The purchase contract contained an "as is" provision. The court stated that inclusion of an "as is" provision does not give protection to the seller against all implied warranties, but went on to hold that, since all of the alleged defects were readily discoverable through a simple inspection, the refusal to honor the agreement constituted bad faith. Judgment was awarded to the seller.

One New York case which considered the interplay between the "as is" clause and the duty of the seller to make disclosure followed the issue of what is visible or observable to a diligent purchaser into the realm of the positively creepy. In Stambovsky v. Ackley, 572 N.Y.S. 2d 672 (1991), a seller sold a house with a contract containing an "as is" clause. The buyer subsequently discovered that the house was widely considered in the neighborhood to be inhabited by ghosts, and that the seller had promoted the haunted status of the house in the local and national media. The court noted that the buyer would not have been able to detect the defect even with a meticulous inspection. The court stated that "where a condition which has been created by the seller materially impairs the value of the contract and is peculiarly within the knowledge of the seller, or unlikely to be discovered by a prudent purchaser exercising due care with respect to the subject transaction, nondisclosure constitutes a basis for rescission as a matter of equity." Id. at 676. The court rejected the utility of the "as is" clause as a protection for the seller, stating

that even an express disclaimer of liability should not be given effect where the facts are peculiarly within the knowledge of the party invoking the disclaimer. The court found, in addition, that the broad language of the "as is" clause was limited to tangible or physical matters, and did not extend to "paranormal phenomena."

E. *Use of "As Is" Clauses With Opportunity to Inspect*

It stands to reason that an "as is" clause has a greater chance of enforceability where the buyer is given an opportunity to inspect the condition of the property. In Langert v. Hein, 218 Wis.2d 712 (Ct. App. 1998), the court gave effect to an "as is" provision where the buyer became aware of cracks and water problems in the subject property as a result of its inspection, but nonetheless went ahead with its purchase. In reviewing the agreement, the court found that the buyer had the option to disapprove of the property's condition; failure to do so meant that the buyer accepted the property in its current condition. The court held that the buyer, by electing to close the transaction, waived any claims based on implied warranties or representations relating to the defect disclosed by the inspection.

In Greeves v. Rosenbaum, 965 P.2d 669 (Wyo. 1998), the court decided in favor of enforceability of an "as is" clause where the buyer had the right to inspect the property but did not do so. In that case, the buyers signed a contract which contained both an "as is" clause and a provision for inspection. The lumber used in the flooring turned out to be defective. The buyers argued that public policy did not permit a builder to take advantage of the "as is" clause to avoid responsibility for shoddy workmanship or materials. The court dismissed this argument, saying that "[t]he protection afforded to purchasers of a new home . . . does not go so far as to allow the purchasers to ignore *their* negotiated responsibilities." Id., at 673.

In Tyus v. Resta, infra, the court considered whether a "reasonable pre-purchase inspection" would have disclosed the alleged defect (excessive dampness beneath the floor of the house). The court found that detection of this problem would have required exploration of a cramped crawlspace beneath the house, and concluded that such exploration would not have been within the scope of a "reasonable prepurchase inspection." As a result, the failure of the buyer to conduct such an inspection did not serve as a grounds for allowing enforcement of the "as is" clause to protect the seller against liability for the defect.

As discussed in Section V.C, above, California courts have given effect to "as is" clauses with respect to defects that are visible or observable. The California courts have also required buyers, as a condition to success in assertion of a fraud claim, to conduct a reasonable

visual inspection, and have charged buyers with knowledge of conditions or defects which are patent or obvious to persons with similar skills and knowledge upon such an inspection. See, e.g., Kahn v. Lischner, 128 Cal. App. 2d 480, 490 (1954). Miller & Starr at page 390 summarizes California law on this point as follows: "when the truth or falsity of a representation, or the presence of a material defect, can be determined by a reasonable investigation, and the buyer has the opportunity and ability to perform the investigation, the law presumes that he relies on his own inspection and not the representations or concealment of the seller."

F. *Other Factors*

Courts may also look to the overall context of the "as is" clause in determining whether to give it enforceability. As was stated in Prudential Insurance Company of America v. Jefferson Associates, Ltd., supra, at 162:

> "[W]e also recognize that other aspects of a transaction may make an 'as is' agreement unenforceable. The nature of the transaction and the totality of the circumstances surrounding the agreement must be considered. Where the 'as is' clause is an important basis of the bargain, not an incidental or 'boiler-plate' provision, and is entered into by parties of relatively equal bargaining position, a buyer's affirmation and agreement that he is not relying on representations by the seller should be given effect. . . . We think it too obvious for argument that an 'as is' agreement freely negotiated by similarly sophisticated parties as part of the bargain in an arms-length transaction has a different effect than a provision in a standard form contract which cannot be negotiated and cannot serve as the basis of the parties' bargain."

One of the contextual factors that may be considered by a court which is called upon to determine the enforceability of an "as is" provision is the identity of the party responsible for drafting of the clause. In O'Mara v. Dykema, 942 S.W.2d 854 (Ark. 1997), the court held that an "as is" provision effectively waived any implied warranty, and affirmed summary judgment for the seller. The court noted that the buyer had solicited the purchase of the subject property, which was not listed on the market, and had drafted the language of the sale contract, including the "as is" provision. (The buyer had also elected to inspect the house, without a professional inspector.) The court held since the buyer had drafted the agreement, it could not seriously argue that it was unaware of the effect of the "as is" clause in disclaiming implied warranties of condition of the property.

VI. *A "Menu" for a Model "As Is" Clause*

In view of the foregoing, counsel for seller of real property should certainly devote careful attention to the drafting of an "as is" provision. Few courts are likely to construe the provision to afford *carte blanche* protection for the seller, especially as against defects known to the seller and not readily observable by the buyer, or as against affirmative misrepresentation by the seller. However, the clause may be given effect to limit liability with respect either to defects unknown to the seller or defects known to the seller but observed or observable by the buyer, especially when the buyer is given the opportunity to inspect the property.

A "menu" of provisions from which an "as is" clause can be crafted in order to tie together these disparate threads is as follows:

- Buyer acknowledges that [except with respect to the portion of the Property described as _____, as to which the provisions of Sections __ and __ of this Agreement apply,] Buyer will, upon satisfaction of the conditions to Buyer's obligations contained in Section __ of this Agreement, take title to the Property "AS IS" and in its present condition, status and state of repair.

- Buyer acknowledges that [, except for the warranties made in Sections __ through __ of this Agreement,] Seller has made no representation or warranty, express or implied, as to the Property or the improvements thereon or as to value, condition, state of maintenance or repair, fitness for use, [habitability,] state of title, access, availability of utilities, capacity for development, compliance with law (including without limitation building codes, safety codes, zoning laws and ordinances and environmental laws) or _____ of the Property or improvements (collectively, the Property Condition").

- Buyer acknowledges that it has not relied upon, and that Seller is not liable for, and is not bound in any manner by, any oral or written statements, representations, information or data furnished to Buyer or its agents or representatives by any real estate broker or agent or any title insurer or abstractor with respect to the Property.

- Buyer acknowledges that it has received and reviewed the following reports and data with respect to the Property:_____

- Buyer hereby waives, exonerates and releases Seller and its shareholders, partners, members, owners, officers, directors, representatives and agents from any and all claims, demands, liabilities, obligations and causes of action which Buyer might otherwise have in connection with the Property Condition. [In connection with this release, Buyer hereby waives any and all rights under Section 1542 of the California Civil Code, which provides as follows: "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."] Buyer understands that the facts with respect to the Property Condition may hereafter turn out to be different from the facts now known or believed by Buyer to be true, and Buyer expressly assumes the risk of the facts turning out to be different, and agrees that this release will be effective and not subject to termination or rescission by reason of any such difference in facts.

- Buyer acknowledges that, pursuant to this Agreement, Buyer is being afforded the opportunity to inspect the Property and any and all legal records or files concerning the Property, either personally or through consultants selected by Buyer.

- Buyer agrees to conduct such inspections, and to retain such consultants, as are necessary or appropriate in order to furnish Buyer with an understanding of the condition and status of the Property. Buyer represents that it will rely solely upon the results of such inspections with respect to the Property Condition.

- Buyer assumes the risk that the Property Condition is other than as revealed to Buyer as a result of its inspections.

- Buyer agrees that, if Buyer fails to conduct any such inspections, Buyer will nonetheless be deemed to have knowledge of any defects in the condition or status of the Property which would have been discovered if such inspections had been conducted.

- Buyer acknowledges that the Property is a _____, that neither Buyer nor any other person will occupy the Property or any portion thereof, or cause the Property or any portion thereof to be occupied, as a residence, and that the sale of the Property is a commercial transaction.

- Buyer acknowledges that it is a commercial [investor] [developer] who is in the business of, and is sophisticated and experienced in, real estate [investment] [development].

- Buyer acknowledges that it participated in the negotiation and drafting of this Section __ and was represented in connection with such negotiation and drafting by competent counsel.

- Buyer acknowledges that this Section __ and the allocation of risk related to Property Condition effected by this Section __ were a material factor in the negotiation of the purchase price for the Property, and that the purchase price is less than it would have been if Seller had undertaken liability for representations and warranties related to the Property Condition.

- [Consider use of bold face type or all capital letters and/or separate initialling of the clause by Buyer and its counsel.]

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