

TPIJ

Texas Paralegal Journal



REAL ESTATE



When You Have to Find the Right Experts



Ron Luke, JD, PhD — Economic analysis of medical and vocational damages; reasonableness of medical charges



Mary L. Hoane, CPA/CFF, MBA — Analysis of lost earnings capacity and economic damages



Brian Buck, MD — Independent medical examinations and life care planning



J. William Wellborn, MD — Independent medical examinations and life care planning



Kacy Turner, MS, CRC, CVE, CLCP — Vocational evaluation and life care planning



Donna Finkbeiner, BSN, RN, CLCP, MSCC — Medicare set aside reports and life care planning

Research & Planning Consultants can provide a complete team of experts to analyze economic damages in personal injury cases.

RPC's experts have served plaintiff and defense attorneys since 1982, and have been accepted in state and federal courts.



**Contact RPC,
at 512-371-8000
about your case.**



Research & Planning Consultants, L.P.
www.rpcconsulting.com

PRESIDENT'S *Message*

Misti Janes, TBLS-BCP, 2013–2014 President, Paralegal Division, Amarillo, TX

2014 will be the 20th Anniversary of the Texas Board of Specialization exam for Paralegals. This special anniversary has caused me to think about the importance of certification.

There are more than 300 paralegals in the State of Texas who are privileged to refer to themselves as board certified paralegals. The TBLS website states that the Paralegal certification “recognizes and promotes the availability, quality, and utilization of the services of paralegals who, working under the supervision of duly licensed attorneys, have achieved a level of special knowledge in particular areas of law.”



When I decided to take the TBLS exam, I had a few people ask me why I was taking the exam. I had a secure job with a firm that I loved. So why do it? My response was pride in the profession. Some people do not understand my service to the Paralegal Division, but it is the same response: Pride in the Profession. I feel lucky to name paralegal as my profession. I don't just have a job, I have a career. When people ask me what I do for employment, I am always proud to say that I am a paralegal.

I am excited to announce that the Paralegal Division has developed a TBLS Helpful Hints Guide. You can find the guide at www.txpd.org under the

Members Only tab. A special Thanks to the following persons who developed this guide:

Javan Johnson, ACP, TBLS-BCP,
Chair of TBLS helpful hints guide committee
Martha Ramirez, TBLS-BCP
Janet Nolley, TBLS-BCP
Deborah Andreacchi, TBLS-BCP
Robert Soliz, TBLS-BCP
Penny Grawunder, TBLS-BCP
Andrea M. Podlesney, TBLS-BCP
Donna E. K. Soules, TBLS-BCP, CP, RP®, CSB
Kimberly Spivey, TBLS-BCP
Teresa King, CP, TBLS-BCP
Cindy Curry, ACP, TBLS-BCP
Scheryl S. Beauchamp, TBLS-BCP
Jody Vann, TBLS-BCP
Debbie House, TBLS-BCP
Ginger D. Gage, TBLS-BCP

If you are considering taking the exam, I encourage you to review the guide. I think it will convince you that this is something that you should do to help further your career.

PRESIDENT-ELECT—NOTICE OF NOMINATIONS FOR ELECTION

Pursuant to Standing Rule XIV of the Paralegal Division of the State Bar of Texas, notice is hereby given of an election for the office of 2014–2015 President-Elect. This election will be held by mail during the month of January 2014 by the Board of Directors. Qualifications for serving as President-Elect of the Paralegal Division are contained in Standing Rules XIV as follows:

XIV. OFFICERS

B. ELIGIBILITY

1. Any current or past Director who is currently an Active member of the Division is eligible to be elected as President or President-Elect.

Any qualified individual who is interested in running for office of President-Elect should forward a one-page resume, together with a letter of intent to run, to the nominations committee at the following address **NO LATER THAN MONDAY, JANUARY 13, 2014.**

Pamela Snavelly • Chair, President-Elect Nominating Committee
Hayes, Berry, White & Vanzant, LLP • 512 W. Hickory, Suite 100
Denton, Texas 76201 • (940) 387-3518 (o)
District12@txpd.org

Note: In the event the Board of Directors of the Paralegal Division elects an individual who is currently serving as a Director, a vacancy will be declared in the district in which that individual serves. An election will be held to replace the outgoing Director (President-Elect) at the time the elections for the Board of Directors are regularly scheduled.

TPIJ

Texas Paralegal Journal

Focus on...

Real Estate Contracts

"As Is" Issues Both Pre- and Past-Sale

7

Hot Cites

Life-Insurance Riders That Pay for Long-Term Care

24

Understanding Legal Descriptions

25

Review of *Texas Rice Land Partners, Ltd v. Denbury Green Pipeline-Texas, LLC*.

27

Family Law Update

28

E-Filing Is Spreading Across Texas

29



TAPS 2013: Spectacular CLE, p. 33

Columns

President's Message

1

Editor's Note

3

Scruples: A Practical Guide Regarding Our Ethical Duty to Report Uneithical Behavior

31

Et Al.

President-Elect—Notice of Nominations for Election

1

Notice of 2014 District Director Election

5

Upcoming Events

5

Notice of Election for Amendment to By-Laws and/or Referendum

32

TAPS 2013: Spectacular CLE

33

EDITOR'S *Note*

By Heidi Beginski, TBLS-BCP

As a personal injury paralegal, even I've had to work on cases where I'd wished I'd known something about real estate and how to read property descriptions. I wish I'd read this issue's real estate articles a decade ago!

The article by attorneys Michael Baucum and Kathryn E. Allen was presented at TAPS 2013. We are very fortunate and grateful to have the input and support of these attorneys, and wanted to bring their paper to our membership in the *TPJ*'s format. The second real estate article in this issue, by Cathy Clamp, is a great primer on how to read property descriptions. I encourage you to read both articles, even if just for your personal benefit. I promise you, it will come in handy to have this knowledge.

Speaking of TAPS, Susan Wilen's recap of TAPS 2013 accomplishes one of two things: 1) reminds you of the great time you had if you were there; or 2) makes you wish you had gone if you had not. Either way, I know it will encourage you to make plans now to attend TAPS 2014! Please turn to Susan's article for all the highlights and advance notice on TAPS 2014.

SAVE THE DATE!

TAPS 2014—October 1-3

The Texas Advanced Paralegal Seminar (TAPS) is scheduled for October 1-3, 2014 in Austin, TX at the DoubleTree Hotel (Interstate 35 North). Seminar details will be posted to the Paralegal Division's website in April 2014.



Texas Paralegal Journal (ISSN# 1 089-1633) is published four times a year in Summer, Fall, Winter, and Spring for \$15 set aside from membership dues for a 1-year subscription by the Paralegal Division of the State Bar of Texas, 3505 Black Mesa Hollow, Austin, Texas 78739. Periodical Postage Paid at Austin, TX. POSTMASTER: Send address changes to the Texas Paralegal Journal, P.O. Box 13 75, Manchaca, Texas 78652

Circulation Fall 2013: Total Printed: 1,600; Paid or Requested: 1,502; Mail Subscriptions: 1,502; Total Paid and/or requested circulation: 1,502; Free Distribution: 75; Total Distribution: 1,550; Office Use or Leftover: 23

WINTER 2014

Publications:

Heidi Beginski, TBLS-BCP, Editor
Misti Janes, TBLS-BCP, President
Norma Hackler, CMP, Coordinator
Mona Hart Tucker, ACP, Board Advisor

Art Direction

David Timmons Design, 4703 Placid Place, Austin, Texas 78731. Phone 512-451-4845, Fax 512-451-1087. E-mail: dtimmonso@gmail.com

The *Texas Paralegal Journal* is published four times a year as a service to the paralegal profession. A copy of each issue is furnished to the members of the Paralegal Division as part of their dues.

Paralegal Division

President Misti Janes, TBLS-BCP
President Elect Clara Buckland, CP
Parliamentarian Deirdre Trotter, ACP
Treasurer Erica Anderson, ACP
Secretary Linda Gonzales, CP

BOARD OF DIRECTORS

Misti Janes, TBLS-BCP, President, Amarillo; Clara Buckland, CP, President Elect, El Paso; Christine R. Cook, Houston, District 1 Director; Mariela Cawthon, TBLS-BCP, CP, Dallas, District 2 Director; Megan Goor, TBLS – BCP, Fort Worth, District 3 Director; Kristina Kennedy, TBLS-BCP, Austin, District 4 Director; Allison C. Seifert, San Antonio, District 5 Director; Deirdre Trotter, ACP, Lubbock, Parliamentarian and District 6 Director; Erica Anderson, ACP, Amarillo, Treasurer and District 7 Director; Sharon Wornick, CP, Silsbee, District 10 Director; Lydia P. McBrayer, CP, Midland, District 11 Director; Pamela Snavely, CP, Denton, District 12 Director; Mona Hart-Tucker, ACP, Daingerfield, District 14 Director; Martha Ramirez, TBLS-BCP, McAllen, District 15 Director; and Linda Gonzales, CP, El Paso, Secretary and District 16 Director.

PUBLICATIONS COMMITTEE MEMBERS

Heidi Beginski, TBLS-BCP, Chair, El Paso; Mona Hart Tucker, ACP, Board Advisor, Daingerfield; Brenda Pennington, Houston; Nancy V. Cortez, Houston; Kimberly Gorny, Dallas; Katrina Lea, Roanoke; Dora Hudgins, CP, Round Rock; Georgia Seeley, Lubbock; Bonnie Kennedy, San Angelo; and Gail Lungaro, Houston.

DEADLINE FOR SPRING 2014 IS MARCH 1, 2014

Texas Paralegal Journal © 2006 by the Paralegal Division, State Bar of Texas. Published quarterly in Texas by the Publications Committee of the Paralegal Division, P.O. Box 12487, Austin, Texas 78711. The *Texas Paralegal Journal* is a magazine published to provide information specifically for the members of the Paralegal Division of the State Bar of Texas, as well as for members of the paralegal community in general, both in Texas and nationwide. Opinions expressed herein are solely those of the writer and not the Board of Directors or of the Division. Publication of any advertisement herein does not imply endorsement in any manner. None of the information contained herein is intended nor should it be construed as legal advice. Inclusion and editing of material submitted is at the discretion of the editor and the editorial subcommittee



State Bar of Texas

Paralegal Division

www.txpd.org

We provide... leadership • professionalism • public service

Join PD and reap the benefits!

Below is a highlight of a few of the benefits that can make your membership invaluable.

- » **E-Group Forum:** Join the members-only forum with hot topics, forms, ethics, and general questions posted and answered by paralegals. The eGroup is a way for members to share information and to obtain input to help address questions. Say you have a question and think the group would be a good resource; you could send your question to the eGroup. In a matter of minutes, you can have an answer to your question, a fresh idea about the matter, or a lead in the right direction. The amount of time that you can save with the eGroup is worth the cost of membership alone.
- » **CLE:** The Paralegal Division provides many opportunities to obtain CLE. Every year the Paralegal Division sponsors the Texas Advanced Paralegal Seminar (TAPS), a 3-day CLE seminar where you can obtain up to 14 hours of CLE for one low great price. A majority of the topics are TBLS approved for those board certified paralegals. If you are not able to attend TAPS, the Paralegal Division provides other opportunities by providing at least 3 hours of CLE in your district and online CLE. The Paralegal Division has over 60 different CLE topics available online for those paralegals that are not able to attend CLE outside of the office. You can obtain your CLE hours while at your computer.
- » **Mentor Program:** The mentor program is available to all members of the Paralegal Division. The purpose of this program is to provide support on topics such as ethics, career advancement, professionalism, and the Division. Mentors will provide support, guidance, and direction to new paralegals that will strengthen their links to the paralegal community, and contribute to their success as a paralegal. Protégés also have access to valuable networking opportunities with other paralegals and the legal community through their mentor, as well as at state-wide and district Paralegal Division events.

Membership criteria and additional member benefits can be found at www.txpd.org under “Membership” tab. All applications are accepted and processed online at www.txpd.org/apply. Dues payment accepted by check, money order or credit card (\$5 convenience fee is charged for all credit card payments). Questions regarding membership in the Paralegal Division can be forwarded to pd@txpd.org or memberchair@txpd.org.

A Division with Vision... Empowering Paralegals!

PARALEGAL DIVISION

Notice of 2014—District Director Election

The Paralegal Division's DIRECTOR ELECTION for District Directors in even-numbered districts (Districts 2, 4, 6, 8, 10, 12, 14, and 16) will take place **March 28 through April 14, 2014**.

All Active members of the Paralegal Division in good standing as of March 28, 2014 are eligible to vote. **All voting must be completed on or before 11:59 p.m., April 14, 2014.**

All voting will be online and no ballots will be mailed to members.

Please take a few minutes to logon to the PD's website and cast your vote for your District's Director. The process is fast, easy, anonymous, and secure.

- Between **March 28th and April 14, 2014** go to www.txpd.org
- In the Member-Only section, click on "Vote"
- Follow the instructions to login and vote

Beginning on **February 7, 2014** each Elections Subcommittee Chair shall prepare and forward, upon request, the following materials to potential candidates for director in their respective district at any time during the nominating period:

- a. A copy of the List of Registered Voters for their district;
- b. A sample nominating petition; and
- c. A copy of Rule VI of the Standing Rules entitled "Guidelines for Campaigns for Candidates as Director."

Each potential candidate must satisfy the following requirements:

- a. Eligibility Requirements. The candidate must satisfy the eligibility requirements of Article III, Section 3 and Article IX,

Section 1 A and Section 4 of the Bylaws and Rule V B, Section 5c of the Standing Rules.

- b. Declaration of Intent. The candidate must make a declaration of intent to run as a candidate for the office of director through an original nominating petition declaring such intent that is filed with the Elections Subcommittee Chair in the candidate's district pursuant to Rule V B, Section 5 of the Standing Rules.
- c. Nominating Petition. The original nominating petition must be signed by the appropriate number of registered voters and must be submitted to the Elections Subcommittee Chair in such district, on or before **February 27, 2014**.

If you are interested in running for District Director, or need further information regarding the election process, contact the Elections Committee Sub-Chair in your District, or the Elections Chair, Shandi Farkas, at Elections@txpd.org.

2013–2014 District Election Committee Sub-Chairs in Even-Numbered Districts:

District 2: Meyon Lawson, CP – meyon.lawson@hanson.biz

District 4: Jennifer Fielder Meiners – jmeiners@riewelaw.com

District 6: Michael Akins – makins@pbfc.com

District 8: Misti Janes, TBLS-BCP – President@txpd.org

District 10: Angie Laird, ACP – alaird@obt.com

District 12: Sunnie Palmer – sunnies@zellmerlaw.com

District 14: Javan Johnson, ACP, TBLS-BCP - jj@texasparalegal.us

District 16: Mary LaRue, CP – alarue@elp.com

UPCOMING EVENTS

■ Board of Directors Meeting—February 28 & 29, 2014, Dallas, TX

■ Texas Forum (sponsored by the State Bar Paralegal Committee)—February 28, 2014, Dallas, TX

■ Annual Meeting of the Paralegal Division [*The Paralegal Express: Your Train to Success*]

—June 27, 2014, Fort Worth, TX

■ Board of Directors Meeting—June 26, 27 and 28, 2014, Fort Worth, TX

ANNOUNCEMENT

The **2014 Texas Alliance of Paralegal Associations (TAPA)** Leadership Conference will be held in Irving, TX on **April 4–5, 2014** at the Westin Element Hotel. The conference theme is *Above and Beyond: Unlocking Your Leadership Potential* and will be hosted by the Paralegal Division of the State Bar of Texas. Leaders of the local associations please contact Debbie Oaks, Chair of the 2014 TAPA Leadership Conference, for additional information at doaks@ngptrs.com.

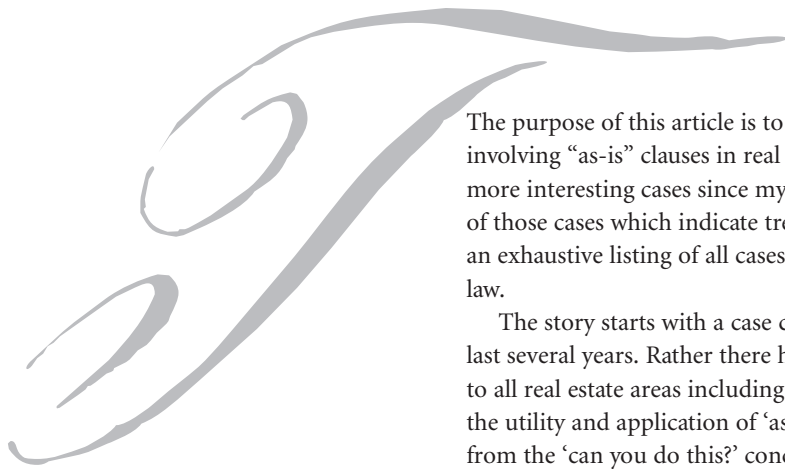




Real Estate Contracts

“As Is” Issues Both Pre- & Post- Sale

By Michael Baucum and Kathryn E. Allen



The purpose of this article is to give an over view of the case law and current practices involving “as-is” clauses in real estate contracts. This paper summarizes some of the more interesting cases since my article written in the Spring of 2008 and discusses some of those cases which indicate trends in this area of law. This paper is not intended to be an exhaustive listing of all cases, but rather is a discussion of trends in this area of the law.

The story starts with a case called *Prudential*. Frankly little new has occurred in the last several years. Rather there has been a continued application of the *Prudential* rules to all real estate areas including commercial leasing and residential. Further, concerning the utility and application of ‘as-is’ clauses, there has been a much greater emphasis away from the ‘can you do this?’ concern towards ‘did you do it right?’ The interesting development, however, is the emphasis on *Schlumberger* (1997) and *Forest Oil* ((2008).

As always, you will note that these cases are intensely fact driven, and the Courts do a complex balancing of the factors in each and every decision. I think a good general rule is buyer/lessee beware!

You must start with an understanding of the *Prudential* case. In 1989 Robert Fulghum wrote *All I Really Need to Know I Learned in Kindergarten*. With the exception of the renewed emphasis on waiver of reliance, all You Really Need to Know About “As-Is” is in the *Prudential* case. Everything else is merely application.

The other thing you need to remember when reading ‘as-is’ cases is the admonition of Charles Weatherby: “When the case starts out saying ‘The Widow Brown and her seven children...” you know how the case will come out. An appellate court can pretty much make the case come out like they want by applying the *Prudential* checklist.

In 1995 the Texas Supreme Court approved of a commercial sale “as-is” transaction in *Prudential Insurance Company of America v. Jefferson Associates Ltd.*, 896 S.W.2d 156 [Tex.1995]. This case has been a “gold standard” and gave real estate practitioners a set of rules to work with in resolving “as-is” issues.

What the courts now still call the “Prudential Rule” [revised based on later case law] sets out the following conditions as prerequisites for an effective “as-is” sale. They are:

1. To enforce an “as-is” clause the Seller must have disclosed all known defects. The “as is” clause would be ineffective and unenforceable if the purchaser is induced by knowing misrepresentations of a known fact.
2. The Seller cannot obstruct the buyer’s ability to inspect the property.



3. The “as-is” clause and the “waiver of reliance” clause must be an important basis of the bargain. The parties must have discussed the issue and actually negotiated the provision, not just included them as part of the “boiler plate” of the contract.
4. The Purchaser and Seller must have been in a relatively equal bargaining position, knowledgeable in business matters, must have been represented by counsel, and must have dealt with each other at arms-length.
5. Disclaimer-of-reliance clauses are subject to an “elevated requirement of precise language.” The language must be “clear and unequivocal”, to reflect the parties’ clear and specific intent and understanding that the contract may be binding even if it was induced by fraud. A standard merger clause or other general disclaimer as to matters not set forth in the written contract is not sufficient.

Prudential involved the sale of an office building in Austin. The Purchaser sued the Seller for misrepresentation and concealment regarding the existence of asbestos fireproofing in the building. Prudential had financed the original construction of the building in 1972 and acquired the building four years later by foreclosure. In 1983 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. The Purchaser was a knowledgeable real estate investor who owned an interest in at least thirty 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. Prior to the purchase, the Purchaser had the building inspected by his maintenance supervisor,

by his property manager, and by an independent professional engineering firm.

The Seller’s on-site property manager told the Purchaser that the building was “superb”, “superfine”, and “one of the finest little properties in the City of Austin”. The purchaser was also told that the building had no defects except for a mechanical room foundation problem. 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. Prudential apparently did not know it had these plans in its possession at the time it furnished a set of “as built” plans to the Purchaser.

The sales contract contained an “as-is provision” as follows:

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 that there are no Express or implied warranties (except for limited warranties of title set forth in the closing documents). Provisions of this paragraph shall survive closing and shall not merge.

The Supreme Court opinion says “We think Goldman’s agreement to buy the Jefferson Building “as-is” precludes him from proving that Prudential’s conduct caused him any harm.

By agreeing to purchase something “as-is”, a buyer agrees to make his own appraisal of the bargain and to accept that

he may be wrong.... The seller gives no assurances, express or implied concerning the value or condition of the thing sold.... Goldman’s contract leaves no doubt exactly what he agreed to.... Goldman’s “as-is” agreement negates his claim that any action by Prudential caused his injury. His contractual disavowal of reliance upon any representation by Prudential was an important element of their arm’s-length transaction and is binding on Goldman unless set aside. The “as-is” agreement negates causation essential to recovery on all the theories Goldman asserts — DTPA violations, fraud (excluding, of course, fraud in the inducement of the “as-is” agreement, which Goldman does not assert), negligence, and breach of the duty of good faith and fair dealing. This, Goldman’s injury could not have been caused by Prudential.

The Court rejected Goldman’s contention that Prudential had a duty to disclose general concerns or constructive suspicions (“A seller has no duty to disclose facts he does not know.... Nor is a seller liable for failing to disclose what he only should have known.”) or to conduct its own investigation of the building’s condition.

An early post-Prudential case to consider, as a result of its factual background, is *Warehouse Associates Corporate Centre II, Inc. v. Celotex Corp.*, 192 S.W.3d 225 (Tex.App.-Hous. (14 Dist.) Mar 30, 2006) (NO. 14-03-01444-CV), review denied (2 pets.) (Apr 27, 2007), rehearing of petition for review granted (Nov 02, 2007), rehearing of petition for review granted (Jan 25, 2008), order withdrawn (Jan 25, 2008), involves apparent active fraud. This dispute between sophisticated parties involves approximately twelve acres of land at 1400 North Post Oak Road in Houston, Texas (the “Property”). Appellee 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 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 on the Property.

After receiving various offers and inquiries, on January 24, 2000, Celotex entered into a written contract with appellant Warehouse Associates Development, Inc. for the sale of the Property (the "Contract"). The Contract provided for a purchase price of \$3.25 per square foot, or a total of approximately \$1.7 million. 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 this demolition work. Under the Contract, Warehouse Associates was allowed to inspect the Property within sixty days from the date Celotex gave notice that it had completed this demolition work. During this sixty-day inspection period, Warehouse Associates had the right to terminate the Contract by written notice if 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, prom-

ises, 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 and 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 sixty-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 appellee 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 that area of the 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,

backfill the excavation as quickly as possible.

During the relevant period, HBC Engineering, Inc. ("HBC") inspected the Property and conducted a Phase I Environmental Site Assessment of the Property. HBC had discussions about the Property with Colburn and with David Murry, a shipping supervisor for Celotex. HBC did not specifically ask Colburn about asbestos, and Colburn said nothing to HBC about asbestos or the recent discovery of suspected asbestos-containing material buried in the ground on the Property. Colburn listed the major raw materials Celotex had used in its shingle-manufacturing process without mentioning asbestos. He also stated his belief that Celotex's predecessor had used a similar shingle-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 appellant Warehouse Associates Corporate Centre Post Oak, Ltd. by a special warranty deed that contains 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 one percent asbestos in forty-four



of seventy soil borings from sites across the Property. This expert concluded that the Property has extensive, widespread asbestos-containing material in the soil to a depth of at least thirteen feet below the ground surface.

Warehouse Associates filed claims against Celotex, alleging damage claims for common law fraud, negligent misrepresentation, and statutory fraud under section 27.01 of the Texas Business and Commerce Code. Warehouse Associates also sought the equitable remedy of rescission of the transaction, as well as punitive damages and attorney's fees. The Celotex Parties counterclaimed against Warehouse Associates asserting various claims. Subsequently, the trial court granted summary judgment in favor of the Celotex Parties (the Sellers) awarding them more than \$2,000,000 in attorney's fees, expenses, and costs.

Warehouse Associates presented the following issues (among others) for appellate review:

- (1) Is a seller of real property who (a) knowingly conceals and intentionally fails to disclose environmental hazards to a buyer and (b) interferes with the buyer's investigation of the property nevertheless immunized from fraud and misrepresentation claims because the sales contract and warranty deed contain an "as-is-no reliance" clause?
- (2) Is a seller of real property who (a) actively conceals or purposefully fails to disclose material information about the environmental condition of the property or (b) provides misleading information to the buyer immunized from fraud and misrepresentation claims because the buyer undertook investigation of the Property?
- (3) Does the doctrine of estoppel by contract or deed apply to a fraudulently induced contract or deed?

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, they concluded that the impairment-of-inspection exception 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. They concluded that the summary-judgment evidence proves as a matter of law that Celotex did not engage in such conduct. The Celotex Parties argue that, absent reliance upon the Contract Language, Warehouse Associates's claims fail as a matter of law under *Bartlett v. Schmidt*. This argument lacks merit and does not provide a basis for this court to affirm the trial court's judgment. Because of the genuine issue of fact as to the fraudulent-inducement exception, 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 property did not impair purchaser's ability to inspect property, and thus, the impairment-of-inspection exception did not provide a basis to bar enforcement of as-is purchase agreement, where purchaser had access to the property, it was free to take whatever soil and water samples it wanted, and had the ability to test soil for asbestos contamination.

A note of caution on Celotex: this case wasn't good law when decided and certainly isn't now on the "waiver of reliance" issue - you can't fraudulently induce a disclaimer of reliance and the rule applies in all contexts, not just settlement agreements. It seems to me that the only really helpful aspect of this case is that the court established a standard for "interference or obstruction" of an inspection, and that you really need to have language in the contract that places the burden of inspection on the purchaser because the

common law isn't quite enough to get you there.

COMMERCIAL LEASES

There is little need for more in this area than referring you to Anne Newtown's article "As-Is Provisions in Commercial Leases" written and presented at the Advanced Real Estate Drafting Course (State Bar of Texas, Dallas March 2008). I have borrowed heavily from Ann's discussion and analysis and urge you to obtain and read the article.

Prior to 1988, commercial tenants remained obligated to pay rent even if the landlord breached the Express covenants of the lease or the premises were not fit for commercial purposes. The Texas legislature, like most other state legislatures, had not extended to commercial tenants the statutory protections provided for residential tenants.

In 1988 the Texas Supreme Court abandoned the residential/commercial distinction concerning implied covenants of habitability *Davidow v. Inwood North Prof'l Group—Phase I*, 747 S.W.2d 373, 377 (Tex. 1988), stating, "there 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, by its terms, required Inwood to provide air conditioning, electricity, hot water, janitor services, 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 fourteen 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 the residential tenants, many commercial tenants had short term leases and limited financial resources to make necessary repairs. Finally, the court concluded that: There is no valid reason to imply a warranty of habitability in residential leases and not in commercial leases. Although minor distinctions can be drawn between residential and commercial tenants, those differences do not justify limiting the warranty to residential leaseholds. The Davidow court offered the following factors to be considered in determining the scope of the breach of the implied warranty: (i) the type of the defect, (ii) the effect of the defect on the tenant's use, (iii) the length of time the defect existed, (iv) the age of the building where the premises are located, (v) the amount of rent, (vi) the location of the building, (vii) whether the tenant waived the defects in the lease, and (viii) any unusual or abnormal use

of the premises by the tenant. While the Davidow court did not specifically address whether or how the implied warranty of suitability could be waived, it did not preclude waiver, and, in fact, as noted in (vii) above, went so far as to suggest that the terms of the lease agreement might alter the warranty. Further, the court did state that if "the parties to a lease expressly agree that the tenant will repair certain defects, then the provisions of the lease will control."

As Newtown discusses, it appeared that carefully drafted "as-is" language in a commercial lease could effectively waive the implied warranty of suitability, at least as to the physical condition of the property, and, that if the parties expressly provided in the lease that the tenant would be obligated to repair specified defects, the lease would control. Until *Gym-N-I* in 2007, however, it was not clear how a court would view an "as-is" provision in a lease with both an "as-is" provision and a requirement that the landlord would maintain critical facilities during the term of the lease.

In *Gym-N-I Playgrounds, Inc. v. Ron Snider*, 220 S.W.3d 905 Tex., 2007 the Texas Supreme Court determined that the "as-is" clause and the Express disclaimer of the implied warranty of suitability were enforceable.

Snider owned and operated founded 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 purchased. 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 the following provisions:

ACCEPTANCE OF PREMISES:

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. ... (e) THE REPRESENTATIONS, WARRANTIES, COVENANTS, TERMS, CONDITIONS, AND WAIVERS SET FORTH IN THIS SECTION SHALL SURVIVE THE TERMINATION OF THE LEASE.

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:

MAINTENANCE OBLIGATIONS OF TENANT. Tenant covenants and agrees, at Tenant's sole cost and expense, to perform all maintenance and repairs of the Premises and to repair or replace any damage or injury done to the Premises, or any part thereof, caused by any reason, except the gross negligence of Landlord. All such maintenance and repairs shall restore the Premises to the same or as good a condition as existed prior to such injury or dam-



age and shall be effected in compliance with all building and fire codes and other applicable laws and regulations. The lease also provided that “Any holding over without written consent of Landlord shall constitute a lease from month-to-month, under the terms and provisions of this Lease to the extent applicable to a tenancy from month-to-month.”

The original term of the lease expired in September of 1996, and the parties did not execute any instrument to extend the term of the lease; however, Gym-N-I continued to pay rent to Snider and Snider continued to accept the checks from A fire destroyed the building on August 10, 2000. 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 the “as-is” clause was no longer in effect after the expiration of the original term of the lease in 1996, and that even if it was in effect, it was unenforceable. The appellate

court affirmed the trial court’s judgment. 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 rejected Gym-N-I’s argument that the “as-is” provision did not survive during the hold over period based on the plain language of the hold over provision in the lease, which expressly stated that the month-to-month tenancy continued “under the terms and provisions of this Lease”. The court moved on to consider the effect of the “as-is” provision and disclaimer of the implied warranty of suitability. 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. Relying on the finding in *Prudential*, Snider responded that Gym-N-I’s claim was waived because the “as-is” provision in the lease expressly disclaimed the implied warranty of suitability. The court agreed with Snider. The court acknowledged that they first recognized the implied warranty of suitability for intended commercial purposes in Davidow as meaning “that at the inception of the lease there are no latent defects in the facilities that are vital to the use of the premises for their intended commercial purpose and that these essential facilities will remain in a suitable condition,” and that they “agreed with Davidow’s argument that ‘commercial tenants generally rely on their landlords’ greater abilities to inspect and repair the premises.’” Acknowledging that Davidow “both recognized the implied warranty of suitability and noted that the agreement’s terms could alter that warranty,” 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.’”⁸⁸ The court distinguished the Gym-N-I case from *Parts Industries* and *Gober* because the Gym-N-I lease expressly disclaimed the implied warranty of suitability. The court concurred with the appellate court’s application of the decision in *Prudential*, to conclude that the “as-is” clause would foreclose the implied warranty of suitability.

Application of *Prudential* to Gym-N-I. The Gym-N-I court pointed out that while in *Prudential* they “did not address what effect, if any, an “as-is” provision would have on a claim for breach of the implied warranty of suitability, as this warranty applies only to commercial leases and *Prudential* involved a sale of commercial property,” in Gym-N-I they: [S]quarely address whether an Express disclaimer may waive the implied warranty of suitability in a commercial lease. Davidow noted that the provisions of the lease would control if the parties expressly agreed that the tenant would repair certain defects. *Prudential* stands for the proposition that—absent fraud in the inducement—an “as-is” provision can waive claims based on a condition of the property. Taken together, these cases lead to one logical conclusion: the implied warranty of suitability is waived when, as here, the lease expressly disclaims that warranty. We hold, therefore, that as a matter of law, Gym-N-I waived the implied warranty of suitability. In a footnote to the Gym-N-I opinion, the court deferred to the finding of the court of appeals that the “as-is” clause was enforceable because neither party challenged that finding, and referred to *Prudential* for the factors to be considered in determining whether the “as-is” clause is enforceable. The court reasoned further that public policy also supports the conclusion that the implied warranty of suitability may be contractually waived, as Texas strongly favors parties’ freedom of contract. The court stated: 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.

As Anne Newtown states in her paper "As noted above, while the Texas Supreme Court in Gym-N-I clearly recognized that "as-is" clauses in commercial leases can be enforceable and that the implied warranty of suitability can be waived, it relied on the appellate court's finding that the "as-is" provision in Gym-N-I's lease was enforceable based on application of the factors set out in the Prudential case. Recognizing that the circumstances of each transaction must be considered separately, the appellate court applied the Prudential factors to the facts of Gym-N-I and found the "as-is" provision to be enforceable, noting "no meaningful distinction between sales contracts and leases for purposes of determining enforceability." Applying the Prudential factors to the facts in Gym-N-I, the appellate court found that the tenants knew the business, were aware of the fire marshal's recommendation to install a sprinkler system, which had not

been installed, and understood the effect of the "as-is" provision in the lease. The tenants admitted that the landlord had not misrepresented anything in the negotiation of the lease. As a result, the appellate court upheld the trial court's finding that the "as-is" clause was valid, and thus negated the causation element of claims associated with the physical condition of the premises.¹⁰¹ B. Where Do Prudential and Gym-N-I Leave Us? Taken together, the "as-is" provisions from the Prudential contract and the Gym-N-I lease, as well as the opinions rendered, suggest that to be effective and waive the implied warranty of suitability, an "as-is" provision and waiver of the implied warranty of suitability in a commercial lease should, at a minimum:

- Clearly state that the tenant is accepting the premises "as-is".
- Provide the tenant the right to inspect the property, as well as include an acknowledgment that the tenant has, in fact, inspected the premises.
- Include an acknowledgment that the tenant is relying solely on its own inspection of the premises, and is not relying on any representation by the landlord.
- State that the inclusion of the "as-is" provision is a material part of the consideration for the lease.
- Expressly disclaim the implied warranty of suitability.
- Depending on the circumstances, acknowledge that the tenant is a sophisticated tenant familiar with real estate transactions of the sort reflected by the lease.

BACK TO THE FUTURE

Two prominent cases are heavily used in the current wave of 'as-is' litigation.

Enforceability of Disclaimer of Reliance Provision

In *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171 (Tex.1997), a dispute arose

over a joint venture formed to mine diamonds in South Africa. 959 S.W.2d at 173-74. Schlumberger was a member of the joint venture, and John and George Swanson were to be paid a royalty on the diamonds mined by the joint venture. A dispute arose, and in settlement negotiations between Schlumberger and the Swansons, Schlumberger represented that the sea-diamond project was neither technologically feasible nor commercially viable. Eventually, the Swansons agreed to sell their interest in the project for \$814,000. In connection with the settlement, the Swansons signed a release which specifically stated that they were not relying on any statement or representation made by Schlumberger but were relying on their own judgment, and that they had been represented by counsel who explained the entire contents and legal consequences of the release to them. Schlumberger later sold its interest to the remaining members of the joint venture for a substantial profit.

The Swansons sued Schlumberger asserting it fraudulently induced them to sell their interest at an undervalued price based on misrepresentations regarding the project's viability and value. A jury found in favor of the Swansons; however, the trial court granted a judgment notwithstanding the verdict in favor of Schlumberger. The court of appeals reversed and rendered judgment in favor of the Swansons, holding the disclaimer of reliance provision in the release did not preclude the fraudulent inducement claim.

The Texas Supreme Court first assumed, based on the evidence presented, that Schlumberger misrepresented the project's technological feasibility and commercial viability and that such misrepresentations were actionable as fraudulent inducement. Schlumberger argued that if a party is represented by independent legal counsel in negotiating a release, the presence of counsel should always preclude a claim that the release was fraudulently induced. The Texas Supreme Court rejected this bright-line test.

After examining conflicting authorities



on whether a disclaimer of representations was enforceable, the court asserted:

Parties should be able to bargain for and execute a release barring all further dispute. This principle necessarily contemplates that parties may disclaim reliance on representations. And such a disclaimer, where the parties' intent is clear and specific, should be effective to negate a fraudulent inducement claim. As an example, a disclaimer of reliance may conclusively negate the element of reliance, which is essential to a fraudulent inducement claim. The question is under which circumstances such disclaimers are binding.

The court concluded "The contract and the circumstances surrounding its formation determine whether the disclaimer of reliance is binding." The court noted the following circumstances were present in the case in question:

- (1) the parties were attempting to put an end to their deal;
- (2) the parties were represented by highly competent and able legal counsel;
- (3) the parties were dealing at arm's length;
- (4) both Schlumberger and the Swansons were knowledgeable and sophisticated business players; and
- (5) the Swansons continued to disagree with Schlumberger regarding the feasibility and value of the project throughout the negotiations and the release recited that there remained considerable doubt and disagreement about the parties' claims.

The court then concluded that in those particular circumstances and in clear language, "the Swansons unequivocally disclaimed reliance upon representations by Schlumberger about the project's feasibility and value" in agreeing to the following language in the release:

[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....

The court held that the disclaimer of reliance was binding, and the Swansons were precluded from claiming they were fraudulently induced.

In *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51 (Tex.2008), the Texas Supreme Court next considered the enforceability of a waiver-of-reliance provision. In that case, the parties also entered into a settlement agreement resolving their royalty and non-development disputes; however, the parties reserved the right to arbitrate any environmental liability, surface damages, personal injury, or wrongful death claims. The settlement agreement expressly disclaimed reliance "upon any statement or any representation of any agent of the parties," and also stated,

"Each of [us] is relying on his, her or its own judgment."

McAllen subsequently sued Forest Oil to recover for environmental damages caused by Forest Oil's burying of highly toxic mercury-contaminated material. Forest Oil sought to compel arbitration under the settlement agreement; however, McAllen asserted the arbitration provision was induced by fraud and unenforceable. Specifically, McAllen argued that Forest Oil assured

McAllen that no environmental pollutants or contaminants existed on the property despite Forest Oil's knowledge of the buried material. The trial court denied Forest Oil's motion to compel, and the appellate court affirmed.

The Texas Supreme Court held that its decision in *Schlumberger* controlled the outcome of the case. In discussing *Schlumberger*, the court noted:

Our analysis in *Schlumberger* rested on the paramount principle that Texas courts should uphold contracts negotiated at arm's length by "knowledgeable and sophisticated business players" represented by "highly competent and able legal counsel," a principle that applies with equal force to contracts that reserve future claims as to contracts that settle all claims. Essentially, *Schlumberger* holds that when knowledgeable parties expressly discuss material issues during contract negotiations but nevertheless elect to include waiver-of-reliance and release-of-claims provisions, the Court will generally uphold the contract. An all-embracing disclaimer of any and all representations, as here, shows the parties' clear intent.

The court cautioned that courts "must always examine the contract itself and the totality of the surrounding circumstances when determining if a waiver-of-reliance provision is binding."

Because courts of appeals appeared to disagree over which *Schlumberger* factors were most relevant to its analysis, the court clarified that its reasoning was guided by the following factors:

- (1) the terms of the contract were negotiated, rather than boilerplate, and during negotiations the parties specifically discussed the issue which became 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.

The court held the disclaimer of reliance was enforceable, noting:

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.

That brings us to *Italian Cowboy*.

In *Italian Cowboy Partners, Ltd. v. Prudential Insurance Company of America*, 341 S.W.3d 323 (Tex.2011), the Texas Supreme Court noted that it recognized decades ago that a merger clause “does not waive the right to sue for fraud should a party later discover that the representations it relied upon before signing the contract were fraudulent.”

The principal issue presented in *Italian Cowboy* was whether disclaimer-of-extracontractual-representations language within a lease contract, together with a standard merger clause, was sufficient to foreclose a claim for fraudulent inducement.

Jane and Francesco Secchi, owners and operators of a restaurant, *Italian Cowboy*, terminated a lease because of a persistent gas odor, and filed suit against the landlord, *Prudential Insurance Company of America*, and its property manager, *Prizm Partners*. The Secchis sought to rescind the lease and recover damages for fraud and breach of the implied warranty of suitability. During lease negotiations, Fran Powell, *Prizm*’s management director, told the Secchis the restaurant building the Secchis

were interested in leasing was practically new, was in perfect condition, and had no problems whatsoever. When the Secchis’ general contractor in charge of remodeling was told by another tenant that the location was plagued with a severe odor, the Secchis confronted Powell, who again denied any problems and stated it was the “first time” she had ever heard this information. The Secchis subsequently learned from the former manager of the restaurant which previously leased the space that the sewer gas odor was present during their tenancy, and Powell knew about the odor and was present on the premises when the smell was present. Powell had personally characterized the odor in the prior restaurant as “horrid, “ungodly,” and a smell that would “make one gag.”

The trial court ruled in favor of the Secchis, finding Powell had superior knowledge during the lease negotiations and made statements of fact, known to be false when made, that were relied upon by the Secchis in signing the lease. The trial court further found that Powell’s conduct and attempted cover-up evidenced consciousness of guilt of her pre-lease misrepresentations.

On appeal, *Prudential* argued that the following provisions contained in the Secchis’ lease negated the reliance element of the Secchis’ claim:

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 Texas Supreme Court first noted that the parties disputed whether the lease provisions constituted a disclaimer or simply amounted to a merger clause which would not disclaim reliance. “The question of whether an adequate disclaimer of reliance exists is a matter of law.” “In construing a contract, a court must ascertain the true intentions of the parties as expressed in the writing itself,” harmonizing and giving effect to “all the provisions of the contract so that none will be rendered meaningless.”

The landlord argued that the language in 14.18 constituted a disclaimer, asserting that *Italian Cowboy* “impliedly agreed not to rely on any external representations by agreeing that no external representations were made.” The Texas Supreme Court disagreed, noting, “Standard merger clauses, however, often contains language indicating that no representations were made other than those contained in the contract, without speaking to reliance at all.” After reviewing the contractual language, the Texas Supreme Court concluded that the only reasonable interpretation of the contract was that the parties “intended nothing more than the provisions of a standard merger clause, and did not intend to include a disclaimer of reliance on representations.” The court distinguished the language used from that used in *Schlumberger* and

Forest Oil in which the parties expressly disclaimed reliance, asserting:

There is a significant difference between a party disclaiming its reliance on certain representations, and therefore potentially relinquishing the right to pursue any claim for which reliance is an element, and disclaiming the fact that no other representations were made. In addition to differences in the contract’s language, the facts surrounding this lease agreement differ significantly from those in Schlumberger and Forest Oil, where we could more easily determine that the parties intended once and



for all to resolve specific disputes. A lease agreement, as here, which is the initiation of a business relationship, should be all the more clear and unequivocal in effectively disclaiming reliance and precluding a claim for fraudulent inducement, lest we “forgive intentional lies regardless of context.”

The court emphasized that the term “rely” did not appear in any form in the Italian Cowboy lease unlike the settlement documents in Schlumberger and Forest Oil. The court held as a matter of law that the lease did not disclaim reliance, and thus did not defeat the fraudulent inducement claim.

The take-away:

The standard merger clause did not disclaim tenants reliance by clear and unequivocal language.

Fraudulent inducement is almost always grounds to set aside a contract despite a merger clause, but in certain circumstances, it may be possible for a contract’s terms to preclude a claim for fraudulent inducement by a clear and specific disclaimer-of-reliance clause.

Getting caught lying gives a bad result.

A recent case applying these principles is *Dragon Fish, LLC v. Santikos Legacy, Ltd.*,

--- S.W.3d ---, 2012 WL 1523041 Tex. App.-San Antonio, 2012. May 02, 2012.

CAUTION: THIS CASE WAS WITHDRAWN AS A PART OF A SETTLEMENT OF THE CASE. WHILE IT IS NOT BINDING CASE AUTHORITY, IT GIVES AN EXCELLENT DISCUSSION OF THE ISSUES.

Five tenants and their lease guarantors sued the developers of the Legacy Shopping Center and their agents asserting numerous causes of action. The claims were based on representations by the developers and their agents that the Legacy Shopping Center would be a “lifestyle center” and include upscale residential development which arguably would result

in a higher traffic volume. The trial court granted partial summary judgment in favor of the developers and their agents based on a disclaimer of reliance provision contained in the leases, and the trial court and the parties agreed to an interlocutory appeal of the ruling. On appeal, the tenants and guarantors contended that the disclaimer of reliance provision does not bar their claims, and claim the trial court erred in striking portions of their summary judgment evidence. The appellate court affirmed the trial court’s decision based on the disclaimer of reliance provision.

The developers, Santikos Legacy, Ltd., Santikos Income Property, LLC, and John L. Santikos (collectively “Santikos”), and the developers’ agents, C. Hodges & Associates, PLLC d/b/a Hodges & Associates, C. Hodges Development, Inc., and Charles M. Hodges (collectively

“Hodges”), as part of marketing, made representations were made that the Legacy Shopping

Center being constructed as a “lifestyle center,” to include office space, retail development, restaurants, entertainment (a Santikos movie theater), and multi-family residences. The “lifestyle center” as represented would allegedly ensure a higher volume of traffic than other shopping centers like power centers which rely on big box retailers to draw traffic. Summary judgment evidence was also presented, however, to establish that the developers knew the multi-family residences would not be included in the development at the time each of the following tenants and their guarantors signed their leases/guaranties: (1) Dragon Fish, LLC d/b/a Motif Modern

Living; (2) Greektown Restaurants, Ltd. d/b/a Papouli’s Greek Grill Restaurants; FN1 (3) Spa Jane, LLC; (4) All About Shoes, Inc.; and (5) Team Spears, LLC d/b/a Sharkey’s Cuts for Kids.

The Court concluded that the disclaimer language in the lease in the instant case is more similar to the language considered in Schlumberger and Forest Oil than the language in Italian Cowboy.

The relevant language is set forth as follows:

LEGACY LEASE:

Reliance. LANDLORD AND TENANT HEREBY ACKNOWLEDGE THAT THEY ARE NOT RELYING UPON ANY BROCHURE, RENDERING, INFORMATION, REPRESENTATION OR PROMISE OF THE OTHER, OR AN AGENT OR BROKER, IF ANY, EXCEPT AS MAY BE EXPRESSLY SET FORTH IN THIS LEASE.

SCHLUMBERGER PROVISION:

[E]ach of us ... expressly warrants and represents ... 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.

FOREST OIL PROVISION:

[We] expressly warrant[] 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 none of them is relying upon any statement or representation of any agent of the parties being released hereby. [We are] relying on [our] own judgment

ITALIAN COWBOY LEASE:

Tenant acknowledges that neither Landlord nor Landlord’s agents, employees, or contractors have made any representations or promises ... except as expressly set forth herein.....This Lease



constitutes the entire agreement between the parties.

During oral argument, counsel for the tenants/guarantors stated that a plat depicting the inclusion of residential development was attached to a brochure. Yet, the disclaimer language expressly disclaims reliance on any brochure. The language in the Legacy lease is, in fact, even broader than the language in Schlumberger and Forest Oil because it disclaims reliance not only on statements and representations, but also on brochures, renderings, and other information. The Court held that the disclaimer language in the lease was sufficiently clear and unequivocal.

In addition to the clarity of the disclaimer language, the other factors listed in Forest Oil also support the enforceability of the disclaimer, including:

- (1) The terms of the contract were negotiated. Evidence was introduced to show the negotiations undertaken for each lease. Several of these mark-ups show negotiation occurring with regard to Article XXVI which contained the "Reliance" provision, but no comments were made to the actual provision. Specifically, in the Spa Jane lease, comments were made regarding sections 26.23 and 26.25. In the Papouli's lease, comments were made to section 26.11. In the Dragon Fish lease, comments were made to thirteen sections of Article XXVI. In the Sharkey's lease, comments were made to six sections of Article XXVI. Moreover, since the "lifestyle concept" was discussed during the negotiations, the tenants/guarantors were aware of the representations being made concerning the "lifestyle concept" "yet elected to disclaim reliance on those representations."
- (2) The tenants were represented by counsel. Although the tenants cite evidence that the representation by their attorneys was limited in scope, the tenants' decision to limit the scope of the representation does not detract from the

evidence that they were represented by counsel. Any limitations they placed on that representation were at their own peril. Moreover, at least two courts have stated that they would uphold a disclaimer provision even if this factor was not met. Finally, the mark-ups show the attorneys were reviewing the lease terms.

- (3) The parties dealt with each other at arm's length.
- (4) The parties were knowledgeable in business matters and several also had brokers assisting them. Nick Anthony, Papouli's representative, had an MBA, seventeen years of restaurant experience, including two other Papouli's locations, and had a broker involved. LaTanya Facen, All About Shoes' representative, had an MBA and was a Certified Public Accountant who previously worked as a corporate auditor. Lori Massey, Spa Jane's representative, was an attorney and informally consulted with a broker about some of the lease provisions. Steven Lora, Dragon Fish's representative, had an MBA, attended one year of law school, and had a broker involved. Todd Spears, Sharkey's representative, had an MBA, was a professional project manager, and had a broker involved; and
- (5) The disclaimer language is clear. Not only does the disclaimer state that the tenants are not "relying" on any representation, the provision is entitled "Reliance" and is one of very few provisions in the lease typed in all capital letters.

Although the situation was not a "once and for all" settlement which is an additional factor that can be considered, the trial court properly concluded that the disclaimer language was enforceable.

The tenants also brought suit based on Landlord/Developer's failure to disclose new information after the leases were entered into, arguing that the disclaimer did not preclude their claims relating to Santikos and Hodges' failure to disclose

new information after the lease was signed that made prior representations false.

Specifically, the tenants/guarantors rely on cases holding that "when one makes a representation, he has a duty to disclose new information when he is aware the new information makes the earlier representation misleading or untrue." *Anderson, Greenwood & Co v. Martin*, 44 S.W.3d 200, 212 (Tex. App.-Houston [14th Dist.] 2001, pet. denied).

The flaw in this argument, however, is that the tenants/guarantors had disclaimed reliance on the earlier representation; therefore, even if new information made the representation false, the tenants/guarantors were not relying on the representation whether true or false. See *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.) (new information must be disclosed where party knows the other party is relying on the prior representation). Accordingly, the reliance element for the failure to disclose the new information also fails.

The disclaimer of reliance provision is enforceable against the tenants and guarantors and extends to any representations made by Santikos and Hodges. The disclaimer provision defeats all of the claims of the tenants and guarantors involving representations and promises other than those expressly set forth in the lease. The trial court's order striking portions of the summary judgment evidence did not result in reversible error. Accordingly, the trial court's order granting summary judgment is affirmed.

OTHER RECENT CASES OF INTEREST

McLernon v. Dynegy, Inc., 347 S.W.3d 315 Tex.App.-Houston [14 Dist.], 2011 (no pet.)

Plaintiff claimed fraudulent inducement of severance agreement that included the following provision:

[T]his [severance agreement] sets forth the entire agreement between the parties hereto and supercedes any and all prior



agreements or understandings, written or oral, between the parties pertaining to the subject matter of this [severance agreement]. This [severance agreement] expresses the full terms upon which [Dynergy] and [McLernon] conclude the employment relationship. All obligations or responsibilities of either party under the [employment agreement] are encompassed within or superseded by this [severance agreement]. There are no other representations or terms relating to the employment relationship or the conclusion of that relationship other than those set forth in writing in this [severance agreement]. [McLernon] hereby represents and acknowledges that in executing this [severance agreement], [McLernon] does not rely and has not relied upon any representations or statements made by any of the parties, agents, attorneys, employees, or representatives with regard to the subject matter, basis or effect of this [severance agreement].

Held: disclaimer enforceable

- The severance agreement was negotiated-not boilerplate-because its terms, including the provision requiring repayment of the loan and execution of the replacement note, were unique to the relationship between McLernon and Dynergy. The fact that one party actually drafted the agreement does not control whether its terms were negotiated, as opposed to boilerplate.
- The severance agreement reflects it resulted from an arm's length transaction because McLernon acknowledged therein that (1) he was "advised in writing by [Dynergy] to consult with an attorney before executing this [severance agreement]," (2) he was "extended a period of twenty-one (21) days within which to consider this [severance agreement] and this has afforded [him] ample opportunity to consult with personal, financial, and legal advisors prior to executing this [severance agreement]," and (3) he executed the severance agreement "voluntarily,

knowingly, and without any duress or coercion."

- Contract language clearly disclaims reliance on representations regarding a specific subject matter of the severance agreement that is now in dispute-Dynergy's attempt to recover outstanding amounts due under the note.
- McLernon does not claim that he lacked his own counsel to explain the consequences. The Supreme Court did not set forth as a factor whether the consequences of a disclaimer were explained to the releasing party by the other party. McLernon was advised, and given ample opportunity, to consult counsel; even if he elected not to do so, he represented in the severance agreement that he "has carefully read ... and understands its contents" and "fully understand[s] and agree[s] to be bound by all of the provisions...."
- Enforcement of a disclaimer of reliance is not limited to situations in which parties were settling a past dispute.

Allen v. Devon Energy Holdings, L.L.C.
--- S.W.3d ---, 2012 WL 880623 Tex.App.-Houston [1 Dist.], 2012 pet. Filed

On rehearing:

Plaintiff claimed he was fraudulently induced to redeem shares. The "Finality" clause provides that the redemption agreement "is the complete and final integration" of the parties' undertakings and "supersedes all prior agreements and undertakings ... between the parties with respect to the subject matter hereof." The "Independent Investigation" clause states that the redemption price was calculated and agreed to by the parties based on the Phalon appraisal and the Haas reserve report and recognizes that intervening events may have increased or decreased the value of Allen's interest, that Allen had the opportunity to obtain any additional information about such intervening events necessary to permit him to evaluate the redemption offer, and that Allen had an opportunity to discuss and obtain answers regarding any information relating to the

redemption from Chief, Phalon, Haas, and his own advisors and consultants. In this clause, Allen represents that he "has based his decision to sell" on (1) his own independent due diligence investigation, (2) his own expertise and judgment, and (3) the advice and counsel of his own advisors and consultants.

Held: disclaimer unenforceable

- The threshold requirement for an effective disclaimer of reliance is that the contract language be "clear and unequivocal" in its expression of the parties' intent to disclaim reliance.
- Generic merger provision does not amount to a clear and unequivocal expression of the parties' intent to disclaim reliance
- The "Independent Investigation" clause does not contain the kind of absolute and all-encompassing language that satisfies the clarity requirement as to any fraudulent inducement claim. To make it clear that Allen did not rely on any facts other than his own investigation, the disclaimer needed limiting language making it clear that Allen relied "only," "exclusively," or "solely" on his own investigation. Or, the clause could include a broad and absolute abjuration of reliance on any oral representations by any other party
- The redemption agreement lacks a number of provisions that would provide greater clarity. It lacks: (1) an all-embracing disclaimer that Allen had not relied on any representations or omissions by Chief; (2) a specific "no liability" clause stating that the party providing certain information will not be liable for any other person's use of the information; and (3) a specific waiver of any claim for fraudulent inducement based on misrepresentations or omissions. ("A clause that specifically waives any claim for fraud is more clear than an independent investigation or anti-reliance clause because while the purpose of an anti-reliance clause "is to head off a suit for fraud,"



such a clause “doesn’t say that; it uses the anodyne term ‘reliance,’ “the significance of which may not be understood by the buyer.”)

- redemption agreement does disclaim reliance on some matters, but the totality of the circumstances does not support enforcing the disclaimer when the only factors that are present are clarity, sophistication, and representation by counsel because all three focus on the public policy concern that the party may be unable to understand the terms of the disclaimer but not the concern that the party may be unable to alter the terms of the disclaimer

Fazio v. Cypress/GR Houston I, L.P.

--- S.W.3d ---, 2012 WL 3524842 Tex.App.-Houston [1 Dist.], August 16, 2012 (opinion on reh.)

Plaintiff claimed fraud in the inducement of purchase of property based on nondisclosure of information related to property’s financial/economic condition. Verbally and via signed LOI, buyer specifically requested – and seller agreed to provide— “all information about the property in [seller’s] possession.” Purchase contract thereafter executed required seller to provide certain documents (referred to as “Documents”), but did not include financial information. Jury concluded that seller committed fraud in the inducement by failing to disclose that the tenant was restructuring its real estate leases, was considering bankruptcy and was insisting upon a

30% reduction in the rent, and that seller’s own lender was so concerned about the tenant’s financial condition that it had required a personal guaranty from seller’s president.

LOI provided “this proposal shall not be binding on both parties until and unless a formal Purchase Agreement is executed.” LOI did not include any disclaimers or other exculpatory provisions.

Purchase contract provisions included:

5.2 (d): No Representation or Warranty by

Seller. Purchaser hereby acknowledges that, except as otherwise specifically set forth in this Agreement, Seller has not made and does not make any warranty or representation regarding the truth, accuracy, or completeness of the Documents or the source(s) thereof, and that Seller has not undertaken any independent investigation as to the truth, accuracy, or completeness of the Documents and is providing the Documents solely as an accommodation to Purchaser. Except with respect to any express warranties made in this Agreement, Seller expressly disclaims and Purchaser waives any and all liability for representations and warranties, express or implied, statements of fact, and other matters contained in the Documents, or for any omissions from the Documents, or in any other written or oral communication transmitted or made available to Purchaser. Except with respect to any express warranties made in this Agreement, Purchaser shall rely solely upon its own investigation with respect to the Property, including, without limitation, the Property’s physical, environmental, or economic condition, compliance or lack of compliance with any ordinance, order, permit, or regulation or any other attribute or matter relating thereto.

5.5(a): Purchaser accepts the property “‘as-is,’ ... subject to any physical or environmental condition which may exist, and without the existence of and reliance on any representation or warranty by seller.” The “as-is” clause further provided that Fazio acknowledged and agreed that he had “or will have, prior to the end of the inspection period, thoroughly inspected and examined the property to the extent deemed necessary ... to enable [him] to evaluate the purchase of the property” and that he was “relying solely upon such inspections, examination, and evaluation of the property ... in purchasing the property on an ‘as-is,’ ‘where is’ and ‘with

all faults’ basis, without representations, warranties or covenants, express or implied, of any kind or nature.”

11.1 Entire Agreement: This Agreement contains the entire agreement of the parties hereto. There are no other agreements, oral or written, and this Agreement can be amended only by written agreement signed by the parties hereto, and by reference, made a part hereof.

Question posed by court was whether, “given [Fazio’s] individual characteristics, abilities, and appreciation of facts and circumstances at or before the time of the alleged fraud”-including, in particular, the merger clause, the disclaimer of reliance, and the “as-is” clause in the Purchase

Agreement—“it is extremely unlikely that there [was] actual reliance on [Fazio’s] part” on the accuracy and completeness of the financial information provided to him by Cypress in response to his due diligence inquiries.”

Held: Seller was actually aware of the importance buyer placed on the property’s economic performance, seller had superior knowledge of material information regarding that matter that a reasonable investigation would not uncover, and seller contractually obligated itself to provide such information. Neither the LOI nor the Purchase Agreement contained language sufficient for the court to conclude that buyer intended to contract away his fraudulent inducement claim based on seller’s concealment of information relating to the financial condition of the tenant and the economic condition of the property.

- Buyer verbally requested “all information” related to the property, without any limitation, and (with seller’s knowledge) gave substantial attention to matters involved with the property’s economic performance. LOI contractually obligated seller to provide the requested financial information, and reflected that buyer’s offer was based entirely on “currently reported net income”



from the property. Appreciating the significance of the matter, seller actively withheld precisely the documents and information that would have informed buyer of the true state of affairs.

- Texas courts have long held that a seller of real estate has a common law duty to disclose material facts that would not be discoverable by the exercise of ordinary care and diligence on the part of a purchaser or which a reasonable investigation and inquiry would not uncover, stating that “where there is a duty to speak, silence may be as misleading as a positive misrepresentation of existing facts.” In the absence of an express disclaimer of that obligation, buyer was entitled to rely on the fact that the seller would not actively conceal information material to the transaction, which seller did, in fact, conceal.
- By its terms, LOI became binding when the purchase agreement was executed and, because it was collateral to the purchase agreement, was not merged therein. Under the LOI, seller was obligated to provide the documents and information it withheld. The LOI did not contain any disclaimer of reliance or waiver of claims with regard to such information.
- The Purchase Agreement does not clearly and unequivocally express buyer’s intent to disclaim reliance on seller’s representations or omissions regarding the economic condition of the Property. Moreover, the circumstances surrounding formation of the contract do not “evinced the agreement of the parties that the plaintiff is relying exclusively on his own investigation and that he knowingly waives reliance on representations or omissions of the type on which the plaintiff’s claims are based.”
- Section 5.2 is limited to “the truth, accuracy, or completeness of the Documents” and, “[e]xcept with respect to any express warranties made in this Agreement,” to “representations or warranties, express or implied,

statements of fact, and other matters contained in the Documents, or from any omissions in the Documents, or in any other written or oral communication transmitted or made available to Purchaser.” By its terms, such disclaimer does not apply to the financial information seller withheld. First, the Documents, as defined in the Purchase Agreement, did not include the financial documents. Further, the financial information was not “transmitted or made available to Purchaser.”

- The general statement in Section 5.5 that “Purchaser shall rely solely upon its own investigation with respect to the property, including, without limitation, the Property’s . . . economic condition” is too generic to express an intent to waive liability for fraudulent inducement due to active withholding of material information of which seller had superior knowledge and which seller had contractually bound itself to provide.
- The “as is” clause covers only physical or environmental conditions, thus does not apply to the financial condition of the property.
- The “boiler-plate” merger clause was not a disclaimer of reliance.

The court gave particular attention on rehearing to its earlier decision in *Allen v. Devon Energy Holdings, L.L.C.*, in which it had given partial preclusive effect to contractual disclaimers and releases. Identifying several important respects in which it considered the *Allen* facts distinguishable, the court concluded that its analysis and holdings in the two cases are consistent. The distinguishing factors included: (i) *Allen* involved a negotiated disclaimer of reliance in which Allen clearly and unequivocally acknowledged and specifically agreed that the Appraisal and Reserve Report were “estimates of value and reserves only and could differ from the value and reserves that might be determined in some other context by some other appraiser, engineer or other party”

[here, there was no evidence the disclaimer was negotiated, and no clear and unequivocal language]; (ii) Allen acknowledged that he had done his own due diligence investigation and had based his decision on his own expertise and judgment and “the advice and counsel of his own legal, tax, economic, engineering, geological and geophysical advisors and consultants” [here, there was no disclaimer as to the economic condition of the property, and material information was actively concealed notwithstanding a contractual obligation to provide it]; (iii) Allen acknowledged that he had the opportunity to obtain any additional information necessary to permit him to evaluate the redemption offer [here, no opportunity was given and information was concealed]; and (iv) the parties specifically released each other “from any claims that might arise as a result of any determination that the value of the Interest at the

Closing was more or less than the Redemption Price” [here, the contract included no such releases]. And even then, the contract in *Allen* was effective only as to claims involving the value of Allen’s interest and the redemption price, but not as to claims related to other matters.

Matlock Place Apartments, L.P. v. Druce --- S.W.3d ---, 2012 WL 117838 Tex.App.-Fort Worth, 2012

Plaintiff claimed it was fraudulently induced to purchase apartment complex. Contract provided:

9. LIMITATIONS OF SELLER’S REPRESENTATIONS AND WARRANTIES

EXCEPT AS OTHERWISE SPECIFICALLY STATED IN THIS CONTRACT, SELLER HEREBY SPECIFICALLY DISCLAIMS ANY WARRANTY, GUARANTY OR REPRESENTATION, ORAL OR WRITTEN, PAST, PRESENT OR FUTURE, OF, AS TO, OR CONCERNING (I) THE NATURE AND CONDITION OF THE PROPERTY, INCLUDING



WITHOUT LIMITATION, THE WATER, SOIL AND GEOLOGY, AND THE SUITABILITY THEREOF AND OF THE PROPERTY FOR ANY AND ALL ACTIVITIES AND USES WHICH BUYER MAY ELECT TO CONDUCT THEREON, AND THE EXISTENCE OF ANY ENVIRONMENTAL HAZARDS OR CONDITIONS THEREON (INCLUDING THE PRESENCE OF ASBESTOS) OR COMPLIANCE WITH ALL APPLICABLE LAWS, RULES OR REGULATIONS; (II) EXCEPT FOR ANY WARRANTIES CONTAINED IN THE DEED TO BE DELIVERED BY SELLER AT THE CLOSING, THE NATURE AND EXTENT OF ANY RIGHT-OF-WAY, LEASE, POSSESSION, LIEN, ENCUMBRANCE, LICENSE, RESERVATION, CONDITION OR OTHERWISE; AND (III) THE COMPLIANCE OF THE PROPERTY OR ITS OPERATION WITH ANY LAWS, ORDINANCES OR REGULATIONS OF ANY GOVERNMENT OR OTHER BODY. BUYER ACKNOWLEDGES THAT IT WILL INSPECT THE PROPERTY AND BUYER WILL RELY SOLELY ON ITS OWN INVESTIGATION OF THE PROPERTY AND NOT ON ANY INFORMATION PROVIDED OR TO BE PROVIDED BY SELLER. BUYER FURTHER ACKNOWLEDGES THAT THE INFORMATION PROVIDED AND TO BE PROVIDED WITH RESPECT TO THE PROPERTY WAS OBTAINED FROM A VARIETY OF SOURCES AND SELLER (I) HAS NOT MADE ANY INDEPENDENT INVESTIGATION OR VERIFICATION OF SUCH INFORMATION; AND (II) DOES NOT MAKE ANY REPRESENTATIONS AS TO THE ACCURACY OR COMPLETENESS OF SUCH INFORMATION. THE SALE OF THE PROPERTY AS PROVIDED FOR HEREIN IS MADE ON AN "AS-IS" BASIS, AND BUYER EXPRESSLY ACKNOWLEDGES THAT, IN CONSIDERATION OF THE AGREEMENTS OF SELLER HEREIN, EXCEPT AS OTHERWISE SPECIFIED HEREIN, SELLER MAKES NO WARRANTY OR REPRESENTATION,

EXPRESS OR IMPLIED, OR ARISING BY OPERATION OF LAW, INCLUDING, BUT NOT LIMITED TO, ANY WARRANTY OF CONDITION, HABITABILITY, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, IN RESPECT OF THE PROPERTY. [Emphasis added.]

Held: disclaimer enforceable

- the language of the clause clearly and unequivocally disclaimed Druce Properties's reliance
- although some of the evidence is conflicting, the parties specifically discussed and negotiated the issue of the property's need for repairs and maintenance when arranging for the sale of the property.
- Druce Properties concedes the third factor, which inquires whether the parties dealt with one another in an arm's length transaction, and the fourth factor, the parties' knowledge in business matters, favors enforcement
- it does not appear that Druce had an attorney assist with the negotiation of the letter of intent or the contract, but Forest Oil considerations are factors rather than elements

CONTRACT FACTORS

Ken Alexander, of Porter and Hedges Houston suggests the following things a Seller would like to include in the contract or lease (revise accordingly for a lease):

- "As-is, where is, with all faults. If seller has limited knowledge of the property, e.g. foreclosure properties, sale by an executor or guardian, so state. Make it clear that the Seller cannot represent the condition of the property.
- "Buyer is relying exclusively on his own judgment and sole investigation.
- Buyer is not relying on any representations made by seller or seller's agents or representatives.
- Buyer acknowledges that Seller has not made any representations except those

in the contract.

- Address the Forest Oil factors:
 - Buyer is represented by counsel
 - Buyer is knowledgeable in business (if appropriate)
 - Terms of the Contract are freely negotiated
 - Buyer and Seller are dealing at arm's length
 - Disclaimer is specific and clear.
- Address known issues specifically—environmental, regulatory, etc.
- Even the best drafting may not protect your client from intentional misrepresentations regarding known material facts.

Alexander goes on to suggest what you might advise your client to sign:

- Nothing that is **untrue**.
- "As-is, Where Is" is ok if acceptable.
- "Buyer is relying exclusively on his own judgment and sole investigation." OK, if this is true but often it is not.
- Buyer acknowledges that Seller has made no representations, except those in the Contract. Again, often untrue!
- Buyer is represented by counsel (so you are the expert, right?)

Don't let your malpractice carrier be the guarantor against a Seller's fraud.

DRAFTING A GOOD AS-IS CLAUSE

I am reminded of a bar review article I saw many years ago: *Drafting the Best Contract Ever Written-Will Anyone Sign It?*

The following are things which must be in an enforceable 'as-is' clause.

1. The use of the term 'as-is' or equivalent language, such as 'in its present condition'
2. The use of conspicuous disclaimer language.
3. Acknowledgment that the Provision was bargained for, as this shows that the provision is not boilerplate and the provision has played an important part in the bargaining process.
4. Acknowledgment that Buyer has relied



‘solely’ on its own investigation and is not relying on any representation, statement or other assertion with respect to the property condition.

5. Provision for the ‘as-is’ clause to survive closing (non-merger language), and with a provision that the ‘as-is’ language will be inserted into the deed.
6. An Express enumeration of the particular implied warranty that is disclaimed or waived.
7. Acknowledgment of non-reliance on silence of the other party.
8. If applicable, Acknowledgment as to a reduction in price after discovery of a defective condition and the contract is renegotiated after that discover, with buyer agreeing to purchase ‘as-is.’
9. Acknowledgment of representation of counsel and a representation that buyer’s counsel has explaining the meaning of the ‘as-is’ provision to buyer.

AS-IS IN COMMONLY USED CONTRACTS

The Texas Association of Realty contract does not include an ‘as-is’ provision and only provides that Buyer accepts the Property ‘in its present condition’ except for repairs to be completed by Seller before closing. So the TAR contract is missing the following:

1. Acknowledgment of Bargained for Provision
2. Acknowledgment of No Reliance on Other Party
3. Specificity of Warranties Disclaimed
4. No Oral Agreements Clause
5. Acknowledgment of Representation by Counsel
6. Merger Clause
7. Environmental Indemnity or Release
8. DPTA Waiver
9. Arbitration Provision

The Texas Real Estate Commission promulgated contracts state: Buyer accepts the Property in its present condition, provided Seller, at Seller’s expense shall complete the following specific repairs and treatments:

_____”. The TREC contracts are missing the following:

1. The words “as-is”
2. Acknowledgment of No Reliance on Other Party
3. Acknowledgment of Bargained for Provision.
4. Specificity of Warranties Disclaimed
5. Acknowledgment of Representation by Counsel
6. No Oral Agreements Clause
7. Merger Clause
8. Entire Agreements Clause
9. Arbitration Provision

The Texas Real Estate Forms Manual has optional clauses set out for the following:

1. No Oral Agreements
2. Acknowledgment of No Special Relationship
3. DTPA Waiver
4. Detailed As-Is Clause
5. Environmental Indemnify

What do we suggest you use?
Following you will find what we call the BLOCKBUSTER PROVISION.

Will anyone sign it?

As a material part of the consideration for this agreement, Seller and Buyer agree that Buyer 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. Buyer acknowledges that it is not relying upon the accuracy or completeness of any representation, brochure, rendering, promise, statement or other assertion or information with respect to the Property made or furnished by or on behalf of, or otherwise attributed to, Seller or any of its agents, employees or representatives, any and all such reliance being hereby expressly and unequivocally disclaimed, but is relying solely and exclusively upon its own experience and its independent judgment, evaluation and examination of the Property. Buyer further unequivocally disclaims (i) the existence of

any duty to disclose on the part of Seller or any of its agents, employees or representatives and (ii) any reliance by Buyer on the silence or any alleged nondisclosure of Seller or any of its agents, employees or representatives. Buyer takes the Property under the express understanding that there are no express or implied warranties (except for limited warranties of title set forth in the closing documents). Buyer expressly warrants and represents that no promise or agreement which is not herein expressed has been made to it and hereby disclaims any reliance upon any such alleged promise or agreement. This contract constitutes the entire agreement between the parties. This provision was freely negotiated and played an important part in the bargaining process for this contract. Buyer has agreed to disclaim reliance on Seller and to accept the Property “as-is” with full awareness that the Property’s prior uses or other matters could affect its condition, value, suitability or fitness; and Buyer confirms that Buyer is hereby assuming all risk associated therewith. Buyer understands that the disclaimers of reliance and other provisions contained herein could limit any legal recourse or remedy Buyer otherwise might have. Buyer acknowledges that it has sought and has relied upon the advice of its own legal counsel concerning this provision. Provisions of this paragraph shall survive closing and shall not merge.

Finally, we have the following list of suggestions to help keep your transaction out of trouble. The best legal representation can be undone at the Seller level by mishandling by the seller, its, property managers, brokers, etc. You might consider sending this to key personnel at your lender client so they understand the issues involved.

SELLER CHECKLIST FOR SALE OF REAL ESTATE

1. Always do what you promise to do. If Seller agrees to provide certain documents or information, be sure to com-



- ply fully. Don't start what you can't or don't intend to finish. Gratuitous partial disclosure can give rise to a duty to make full disclosure. If you say "this is our whole file," you'd better be right.
2. Make sure the Buyer has every opportunity to do whatever due diligence it wants to do. Beware of anything that would stifle this opportunity (See *Celotex*)
 3. Always be willing to give Buyer more time to do due diligence, as if a problem comes up later on Seller can always say you got extra time to do your feasibility.
 4. Make sure that everyone on the team understands the importance of full, truthful disclosure. Make sure that everyone on the team understands and abides by the "no-reliance" and "as is" contract terms. Conduct that is inconsistent with the contract terms may undercut the enforceability of exculpatory provisions.
 5. Make sure at some point there is a negotiation of the 'as is' terms of the contract, including identification of any specific conditions/matters known to or suspected by Seller as having potential to impact property. Document these discussions.
 6. Make sure that the 'as is' provision actually makes it into the contract and covers all matters the parties intend to include.
 7. Say what you mean; don't beat around the bush. To persuade a court the parties intended to exculpate tortious conduct, you must show clear and unequivocal language that says so.
 8. Document the Buyer's willing and active participation in the making of the bargain. An "agreement" that Buyer will not rely may not be as strong as

- an express disclaimer of any reliance and an affirmative representation that buyer has conducted such independent investigation (without any reliance on information/materials from seller) as it deems necessary. Document Seller's reliance on buyer's disclaimers and representations.
9. Document the benefits to buyer - reduced purchase price, quicker closing, etc.
 10. Document presence of other "factors," e.g. Buyer's level of sophistication/experience, Buyer represented by competent legal counsel, absence of any special relationship or other matter affecting arms-length nature of the transaction, equality of the parties' bargaining power
 11. Always tell the truth (See *Italian Cowboy* for what happens when you don't).

Author Credits

Credit to William H. Locke, Jr. and Helen Currie Foster, whose article "AS-IS" IN A CONTAMINATED WORLD [REPTL REPORTER VOL. 48 NO. 4] is the best all-around treatise on the world of 'as-is'. The article has a focus on commercial transactions and was written pre-Italian Cowboy, but it stands the test of time.

Invaluable research assistance from Mark Prihoda and Laurie Baucum, both of whom did research on the articles which are the basis for this article. Alicia Surratt also gave valuable assistance.

Most valuable assist with the earlier versions of this topic came from Anne Newtown, Vinson & Elkins LLP, of Houston who wrote a must-read article "As Is Provisions in Commercial Leases" for the State Bar of Texas Advanced Real Estate Drafting Course March 6-7, 2008.

*Anne's article has valuable lease clauses drafted in light of *Gym-N-I Playgrounds v. Ron Snider*. Ann's analysis of the death of Davidow is a masterpiece. Anne Newtown in turn gives credit to Clay B. Pulliam who wrote and presented "Drafting 'As Is Where Is' Clauses Know What you are Doing" given at the State Bar of Texas Advanced Real Estate Drafting Course in 2004.*

*Kenneth Alexander of Porter Hedges addresses many of these issues in his presentation *Where is "As Is, Where Is" in Texas, 2011 and I have used some of his ideas with his consent.**

Finally, my co-author Kathryn E. Allen who brought a different perspective to this topic. I am a transactional attorney. Kathryn gets to clean up the damage when the transaction goes wrong. Her viewpoint is on prevention and she brings a lot to the topic.

As a further note, I have relied heavily in my case descriptions on the published opinions. Please note that I do not claim credit for writing these summaries and believe it is in most cases the best source for the court findings. But in all cases you should read the actual reported case as my editing of these opinions might leave out something important to you.

*Michael Baucum
August 2013*

Michael Baucum is a partner in the law firm of Baucum Steed Barker in San Antonio and concentrates in the area of real estate law including oil and gas. He is certified as a specialist in commercial and residential real estate law by the Texas Board of Legal Specialization.

Kathryn E. Allen works for the law firm of Graves Dougherty Heaton & Moody, PC, in Austin.

Life Insurance Riders that Pay for Long-Term Care

Craig Hackler, Branch Manager / Financial Advisor
Raymond James Financial Services, Inc., Member FINRA/SIPC

Life insurance has many uses, including income replacement, business continuation, and estate preservation. Long-term care insurance provides financial protection against the potentially high cost of long-term care. If you find yourself in need of both types of insurance, a life insurance policy that combines a death benefit with a long-term care benefit may appeal to you.

Here's how it works

Some life insurance issuers offer life insurance with a long-term care rider available for an additional charge. If you buy this type of policy, you can pay the premium in a single lump sum or by making periodic payments. In any case, the policy provides you with a death benefit that you can also use to pay for long-term care related expenses, should you incur them.

The amount of death benefit and long-term care allowance is based on your age, gender, and health at the time you buy the policy. The appeal of this combination policy lies in the fact that either you'll use the policy to pay for long-term care expenses or your beneficiaries will receive the insurance proceeds at your death. In either case, someone will benefit from the premiums you pay.

Long-term care riders

The long-term care benefit is added to the life insurance policy by either an accelerated benefits rider or an extension of benefits rider.

Accelerated benefits rider—An accelerated benefits rider makes it possible for you to access your death benefit to pay for expenses related to long-term care. The death benefit is reduced by the amount you use for long-term care expenses, plus a service charge. If you need long-term

care for a lengthy period of time, the death benefit will eventually be depleted. This same rider also can be used if you have a terminal illness that may require payment of large medical bills. Because accelerating the death benefit can have unfavorable tax consequences, you may want to consult your tax professional before exercising this option.

Example: You pay a single premium of \$50,000 for a universal life insurance policy with a long-term care accelerated benefits rider. The policy immediately provides approximately \$87,000 in long-term care benefits or \$87,000 as a death benefit. If you incur long-term care expenses, the accelerated benefits rider allows you to access a portion, such as 3% (\$2,610), of the death benefit amount (\$87,000) each month to reimburse you for some or all of your long-term care expenses. Long-term care payments are available until the total death benefit amount (\$87,000) is exhausted (about 33.3 months). Whatever you don't use for long-term care will be left to your heirs as a death benefit.

(The hypothetical example is for illustration purposes only and does not reflect actual insurance products or performance. Guarantees are subject to the claims-paying ability of the issuer.)

Extension of benefits rider—An extension of benefits rider increases your long-term care coverage beyond your death benefit. This rider differs from company to company as to its specific application.

Depending on the issuer, the extension of benefits rider either increases the total amount available for long-term care (the death benefit remains the same) or extends the number of months over which

long-term care benefits can be paid. In either case, long-term care payments will reduce the available death benefit of the policy. However, some companies still pay a minimum death benefit even if the total of all long-term care payments exceeds the policy's death benefit amount.

Continuing from the previous example, if the policy's extension of benefits rider increases the long-term care benefit (the death benefit—\$87,000—remains the same) to three times the death benefit (\$261,000), the monthly amount available for long-term care increases to \$7,830. On the other hand, if the extension of benefits rider extends the length of time the monthly long-term care benefit is available, then the monthly payments (\$2,610) are extended for an additional 24 to 36 months beyond the initial number of months (33.3) available.

Other provisions

Typically, qualifying for payments under a long-term care rider is similar to the requirements for most stand-alone long-term care policies. You must be unable to perform some of the activities of daily living (bathing, dressing, eating, getting in or out of a bed or chair, toilet use, or maintaining continence) or suffer from a severe cognitive impairment.

An elimination period may also apply: you pay for the initial cost of long-term care out-of-pocket for a specific number of days (usually 30 to 90) before you can apply for payments under the policy. As with all life and long-term care insurance, the insurance company will require you to answer some health-related questions and submit to a physical examination before issuing a combination policy to you.

Is a combination policy right for you?

Deciding whether a combination policy is right for you depends on a number of factors. Do you need life insurance and long-term care insurance? How much life and long-term care insurance will you need? How long will you need it? Will the long-term care part of a combination policy provide sufficient coverage?

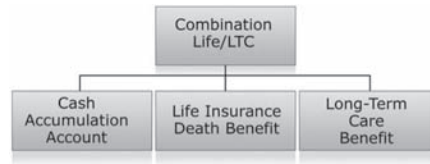
A long-term care rider may not provide as many features as a stand-alone long-term care policy. For example, the

combination policy may not cover assisted living or home health aides. It also may not provide an inflation adjustment, an important feature considering the rising cost of long-term care. The tax benefits offered by a qualified long-term care policy may not apply to the long-term care portion of combination policies, which could result in taxation of long-term care benefits received from the policy.

What if your life insurance needs change as you get older and you find that you no longer want life insurance protection? It's not uncommon for people to drop their life insurance in their later years if there's no compelling need for it, but if you surrender the combination policy, you're also forfeiting the long-term care benefit it provides, usually at a time when you are most likely to need it.

And keep in mind that as you use your long-term care benefits, you're depleting the death benefit—a death benefit you presumably wanted to pass on to your heirs or perhaps use to pay for estate taxes.

Example of Combination Permanent Life/LTC Policy Features



Finally, compare costs of combination policies to other forms of life insurance, such as term insurance, and stand-alone long-term care policies. Depending on your age and health, the cost for the combination life policy may actually be higher than the total premiums paid for separate life insurance and long-term care policies, especially if your life insurance need is temporary (such as income replacement during your working years) rather than permanent.

Prepared by Broadridge Investor Communication Solutions, Inc. Copyright 2013.

This information, developed by an independent third party, has been obtained from sources considered to be reliable, but Raymond James Financial Services, Inc. does not guarantee that the foregoing material is accurate or complete. Raymond James Financial Services, Inc. does not provide advice on tax, legal or mortgage issues. These matters should be discussed with the appropriate professional.

Craig Hackler holds the Series 7 and series 63 Securities Licenses, the Series 9/10 Supervisory Licenses, as well as the Group I Insurance License (life, health, annuities). Through Raymond James Financial Services, he offers complete financial planning and investment products tailored to the individual needs of his clients. He will gladly answer any of your questions. Call him at 512.391.0919 or 1-800-650-9517 or email at Craig.Hackler@RaymondJames.com. Raymond James Financial Services Inc., 3345 Bee Caves Road, Suite 208, Austin, TX 78746

Understanding Legal Descriptions

(it's not as hard as you think)

By Cathy L. Clamp, PLS, CLAS

In law, knowledge is a precious commodity, as well as a valuable tool. Even if you are involved in criminal or corporate law, knowing how to read a metes and bounds description from a Warranty Deed, or knowing how a subdivision plat map works could become important.

What Is a Legal Description?

Since time began, man has found ways to mark the boundaries to land he claimed as his own. Fences were devised not only to keep horses and cattle from straying, but also to mark the perimeter of a person's land. As people moved closer and closer together, disputes began to arise about whether a fruit-producing tree or a water source was on Joe's land, or Bill's. Fences could be moved, and often were, when someone wanted more. More land, More water. More minerals. As town developed,

the need to determine boundaries to tightly packed houses and businesses became even more important. Maps were created, showing streets and natural landmarks, which divided a town into parcels. Each parcel could be individually owned, and there was a set boundary to each parcel which everybody agreed upon.

Texas Does it Bigger, but maybe not Better...

Texas land division is unique among of the western and southern states because of the Six Flags that have flown over the state. When Congress decided to open the western land obtained in the Louisiana Purchase to homesteading, Texas wasn't part of the land rush. At the time, the majority of Texas was owned by Spain. In 1784, Thomas Jefferson presented the original Public Land Survey System to the

Continental Congress. But Spain had their own ideas. They plotted land grants in Texas to provide the best access to water—an important commodity in a dry land.

Even though by 1785, the PLSS was considered the standard for surveying, based on north and south lines, known as "Meridian" lines, and east and west lines, known as "Base" lines that divide most of the rest of the continent, Texas didn't join in. The PLSS is based on squares and rectangles, which are easy to divide. A meridian is divided into north and south rectangular parcels, known as "Townships". Each Township is six miles in width and the length of the Meridian. "Range" lines, also six miles apart, divide the rectangular township parcels into square Sections. A Section of land is approximately one mile square and consists of 640 acres. The squares have sides approximately 5,280 feet long, which run north and south and east and west. A Township is divided into 36 sections.

Compare that to the survey system in eastern Texas, which have irregular shapes that make the map look like an abstract picture puzzle with no apparent standard

width or length and acreages that range from 36 acres to more than 700 acres.

When Mexico overthrew the Spanish government in 1821, the new government started to welcome settlers from the United States and abroad. Unlike its predecessor, Mexico divided land under a series of strict statutes of requirements and limitations into "labors" (177 acres), "leagues" (4,428 acres), and "haciendas" (five leagues, or 22,140 acres.) These terms are still used in many Texas counties. Older measurements are also based on Spanish definitions, including lengths by "varas" (2.78 feet), "rods" (16.5 feet) and even a "gallop" (literally the length of a horse's stride at a gallop, 11.48 feet, or 3.5 meters).

When the new settlers suffered under the Mexican rule long enough, they revolted and took over. During the brief Republic of Texas rule, bounty land grants were issued to encourage settlers to join the republic's army, with the quantity of acreage based on the length of service. Lands were also granted to veterans who fought in the Siege of Bexar and Battle of San Jacinto. Eastern Texas was opened to colonization, as well as around the city of Austin Again, access to water was critical, and surveys were often prepared using crude instruments, inconsistent units of measurement and were performed in dangerous conditions—which led to irregular gaps in boundaries.

Once Texas became part of the United States, in addition to donations to veterans and original Spanish land grants, the Texas legislature began to grant land to railroads like the Houston & Central Texas (H&TCRR) and Atchison, Topeka and Santa Fe (AT&SF) to open the state to trade, and for education to fund the building of University of Texas and Texas A&M. The state also began to sell (as opposed to granting) land to build the capital and to establish a permanent school fund.

The sale of these parcels on a timeline required rapid surveying, and so was often performed by outside sources (such as the railroads) that developed their own system of division close to, but not the same as the Jeffersonian PLSS. Still, it created a grid of parcels in Western Texas that is much more organized than the haphazard,

"first-come/first-served" system in Eastern Texas.

Fortunately, regardless of the shape or size of the parcel, or the name or system of surveying, the measurements of all of them can be turned into a uniform, understandable tract of land.

What is a Metes and Bounds Description?

Very simply, the word "metes" (pronounced "meets") means the angle of the description, and the "bounds" means the distance. The most important thing to remember when looking at a huge and confusing metes and bounds description is that, ultimately, it must form a complete closed piece of land. This means it must have a definable beginning that is tied to a monument of some sort. It must give angles and measurements to determine the boundaries. Finally it must come back to its starting point to "close" the parcel. Without a closed piece, the description is meaningless.

Let's look at a simple legal description set in my own county in central Texas, where most of the land was divided during the veterans bounty and school funds sales. The description here is not an actual piece of land, just an illustration.

"A parcel of land located in the H&TC RR Survey 1, Abstract 1400, situate in McCulloch County, Texas, being the NE/4 of the SW/4, described as follows: Beginning at the SW corner of the NE/4; thence N 00° 14' 35" E, 140 feet; thence N 89° 56' 18" E, 428 feet; thence S 00° 16' 00" W, 140 feet; thence S 89° 56' 18" W, 427.94 feet, more or less, to the point of beginning.

Simple, she says? Yeah, right. But really, it is. You can read it as follows: "A parcel of land located in the Northeast quarter of the Southwest Quarter of Survey 1, Abstract 1400, McCulloch County, Texas." Legal descriptions are written backwards, from smallest to largest but to draw it on paper, you have to draw it from largest to smallest. The land is located in Texas, and further in McCulloch County. Abstract 1400 in McCulloch County can be looked up on a General Land Office map.

Let's assume Survey 1 is completely square and is 320 acres. To help you visualize the actual parcel, draw a square

on a piece of paper. The square represents Survey 1. Divide the square Survey into quarters. The land described is in the Southwest quarter (the lower left square). Highlight it in color, or crosshatch it. Divide that quarter into quarters. The described land is in the Northeast quarter (the upper right square). Highlight it in a different color or reverse crosshatch. You now have an eighth section of the Survey.

Now you can begin the remainder of the description. Begin at the Southwest corner of the eighth section (again, lower left.) A one-eighth section of a 320 acre parcel would be 660 feet long on each side. Travel 140 feet (about one-fifth of the length of the eighth section) Northwest using the following angle. N00°14'35"E. This can be read as: "North zero degrees, fourteen minutes, thirty-five seconds east." This is easy to understand once you remember that a right angle has 90 degrees. But what if an angle is 90 and a half degrees? How do you write it? Simple. A degree is divided into minutes. There are 60 minutes in a degree, like a clock, and there are 60 seconds in a minute.

For N00°14'35"E, the "N" is North. The angle 00°14'35" means you will turn less than a degree, since 00° is a straight line. 14 Minutes 35 Seconds is just a slight veer away from straight. But, veer which way? To the east, which is the final direction. Stop at 140 feet, then look at the next angle.

Each angle is known as a "Call." So, calling out a legal description usually means drawing it on paper so you can see that it makes sense. The next call is, "Thence N 89°56'18E. So, turn 89 degrees, 56 minutes, 18 seconds (nearly a right angle) again toward the north. But because of the angle, you're actually traveling nearly due east. Keep traveling for 428 feet (about two-thirds of the width of the eighth section.) Stop, then turn S00°16'00W, for 140 feet (nearly a straight line south, leaning toward the west.) Stop again, and complete your parcel by turning south, 89°56'18"W, (the exact opposite of your first turn east), 427.94 feet, more less, to the point of beginning.

You will frequently see the term, "more or less" used to define both land size and distance. It's not that the surveyor wasn't careful, but that it was necessary to make a closed parcel. In the illustrated metes

and bounds description, note that the final call is .06 feet LESS than the first call. But the surveyor write, "more or less" to get the distance back to the beginning. The difference might have been because of a tree or a rock or some other obstruction that the surveyor had to go around to make the distance.

Congratulations! You just read a legal description. Your drawing should be just slightly lopsided from the true square edges, and comprise about two-thirds of the lower left corner of the eighth section. If your picture doesn't match, go over it again, drawing smaller and smaller pictures until it makes sense.

The Plat Map

The other way to measure a piece of ground is by Lot and Block. You've probably seen a subdivision Plat Map. On a Plat Map, a subdivision is divided into Lots and Blocks. In order for this to make sense, the outer boundaries of the subdivision must first be defined using the metes and bounds method. The outer

boundaries are then defined with a name, like Thackery Park (a subdivision in Dallas County). After the name is given, the subdivision is further divided into numbered blocks which are then split into numbered lots. The resulting legal description would look like this:

"Lot 1, Block 1, of Thackery Addition, an Addition to the City of University Park, Dallas County, Texas, according to the Plat thereof recorded in Volume 81167, Page 339 of the Map Records of Dallas County, Texas."

Again, the largest parcel is the subdivision, which can be reviewed on a map filed with the Clerk and Recorder. Block 1 is the next biggest parcel, and then Lot 1 is the actual parcel being described. The distances and angles of Lot 16 don't need to be called, since the outer boundaries have been. Each Lot has a specific dimension, which is stated on the Map. It could be an acre, or it could be a tenth of an acre. In many subdivisions, the Lots are evenly

divided by acreage so that each lot is approximately the same size.

This is only a brief overview. Many more items can complicate a legal description, including curves, roads, removing portions of a larger parcel for easements or sales to neighbors or crossing section lines for larger tracts. If you get confused, or if you find an error when you're reading a legal description, it's best to have someone look at the description with you.

In conclusion, real property law is exacting, because people like to get what they pay for. If you learn how to read a legal description, you can help your attorney make sure his or her clients are protected.

Cathy Clamp, PLS, ACP is an abstract examiner and escrow officer for Heart of Texas Title Co. LLC in Brady, Texas, which serves McCulloch County. In addition to her paralegal credentials, she is also a Certified Abstract Examination Association through the Texas Land Title Association.

Review of *Texas Rice Land Partners, Ltd v. Denbury Green Pipeline-Texas, LLC*

2011 Tex. LEXIS 607; 54 Tex. Sup. J. 1732

Tammy Essing, ACP, PHP

Under the 5th Amendment to the United States Constitution, eminent domain protects against abuses by federal government against securing private property for public use without proper compensation. This issue has become the heart of this case because of the questionable area of being able to acquire private land for public use.

Denbury Resources, Inc. is a Delaware corporation that is the owner of (2) subsidiaries, Denbury Green Pipeline-Texas, LLC and Denbury Offshore, LLC. ("Denbury"), based in Plano, Texas. It was engaged in operations to inject CO₂ (carbon dioxide) into oil wells in order to increase production of oil. Denbury

owned a CO₂ reserve in Mississippi, known as the "Jackson Dome", but wanted to build a CO₂ pipeline running from the Jackson Dome to Texas to continue with its tertiary operations.

In March of 2008, Denbury applied for a permit (known as a "T-4") with the Texas Railroad Commission to build out their pipeline, starting at Jackson Dome, running through Louisiana, and having a portion of it extend from the Texas-Louisiana border to the Hastings Field in Brazoria and Galveston counties. In completing the T-4, it requires the applicant to check whether the pipeline will be operated as a "common carrier" or as a "private line." Denbury marked off that they were

going to operate as a common carrier. Then, within the common carrier status, the application also requires the applicant to mark off one of (3) areas:

- "Gas to be purchased from others"
- "Owned by others, but transported for a fee" or
- Both purchased and transported for others

Denbury opted for the second option.

Eight days after the application was filed, the Texas Railroad Commission granted the T-4 permit to Denbury, without a hearing or notice given to the land-owners along the proposed route.

Texas Rice Land Partners, Ltd. ("Texas Rice") owned two tracts along the pipeline route proposed by Denbury. After the T-4 was granted, Denbury attempted to conduct a survey of the land to prepare for a pipeline easement. They were refused entry to the land by Texas Rice. Denbury sued Texas Rice Land, and won on summary judgment by the trial court, under Section 111.019 of the *Texas Natural Resources Code*, stating that Denbury did

qualify as a common carrier because their pipeline would be available for public use. The Court of Appeals upheld the decision.

Texas Rice appealed to the Supreme Court of Texas. The court disagreed with both lower court decisions. They held that Denbury did not fall under the definition of "common carrier" within Chapter 111 of the *Texas Natural Resources Code*, holding that the provisions for common carrier status did not apply to pipelines that were limited in use to the wells. The court made a point to note that there was nothing in the Texas Railroad Commission's decision on the T-4 that would qualify Denbury from set out as a common carrier, and granting them power of eminent domain. In other words, the court held

that since Denbury was building the pipeline for its own benefit, and not for the benefit of the public, Denbury failed to meet the test requirements for obtaining common carrier status as a matter of law, and the T-4 permit did not qualify them as a common carrier, as well. As such, summary judgment should not have been granted, and the case was remanded to district court.

Since the overturn of this case in 2011, Texas H.B. 2748 was introduced to be able to allow the Texas Railroad Commission to make the determinations of status of common carrier. However, the bill was blocked by various private property owner groups. Oil and gas companies and private land interest groups will closely

watch 2015 legislature to see if the area of "eminent domain" becomes more clearly defined, which will have a definite impact on the definition of "common carrier" status for oil and gas companies in constructing future pipelines.

Tammy Essing, ACP, PHP is a senior litigation paralegal with over 20 years of litigation experience of a wide-variety of litigated matters in oil and gas, commercial, complex commercial, construction, environmental and tort matters in both federal and state level courts. She is advanced certified in trial practice through the National Litigation of Legal Assistants.

2013 Family Law Update

By Michelle Iglesias, TBLS

There were a number of changes and amendments made to the Texas Family Code during this legislative session. You can access the changes and explore how they might affect your caseload by going to: <http://www.legis.state.tx.us/bill-lookup/billnumber.aspx>

The following are some highlights of the changes:

- Under HB 154, Section 161.005(e) and (i) of the Texas Family Code changed the statute of limitations for filing a termination suit based on mistaken paternity from the anniversary of the first year to the second year on which the petitioner becomes aware of the facts alleged in the petition regarding paternity of the child.
- HB 847 amended Section 157.162 of the Family Code and repealed Sections 157.162(d) and (e). The court may now award court costs or reasonable attorney's fees to Petitioner even if

there is no finding of contempt. It also removes the "get out of jail free" card of a last minute payment.

- The time period to file de novo hearing requests has been shortened as of September 1, 2013. It is now reduced to "not later than the third working day." This reduces the time frame from seven days. There could be considerable case issues if paralegals are not vigilant about this new scheduling/calendaring deadline.
- Several amendments were made to those sections of the code that address children in State custody including, but not limited to, requirements about relative placements, permanency hearings and duties of attorney ad litem.
- There were additional changes to sections of other Codes that influence or direct issues that appear in family law cases. These changes dealt with the transfer of cases between District Courts, Family Drug Court Programs and benefit designations for the Teacher Retirement System.

- The most impactful change for our family law cases was not based on any legislation. The Child Support Division of the Attorney General has advised that the "cap" on net resources for child support calculations will increase from \$7,500 to \$8,550. This increase was based on the authority granted under Section 154.125 of the Texas Family Code.

All changes or amendments from this legislative session went into effect on September 1, 2013.

A special thanks is due to Brian L. Webb and Brant M. Webb of the Webb Family Law Firm in Dallas, Texas who graciously provided a legislative update and authorized use of the information for the benefit of our *Paralegal Journal*.

Michelle Iglesias is a member of the Professional Development Committee of the Paralegal Division (PD) of the State Bar of Texas. She has been a member of PD since 2009. Michelle currently works as a family law paralegal for the Law Office of R. Shane McFarland, P.C. in Austin, TX. She became Board Certified in Family Law by the Texas Board of Legal Specialization in 2009. She began her career as a paralegal in 2003 and began focusing on family law in 2006.

E-Filing is Spreading across Texas

By Jennifer Fielder Meiners

History and Benefits

E-Filing arrived in Texas in the 1990s with only two district courts—Jefferson and Montgomery Counties. Benefits to e-filing were immediate—courts saved on storage expenses, documents were no longer damaged or lost, and clerks were assigned to more productive activities. The Judicial Committee on Information Technology (JCIT)¹ led the team to define an e-filing model for Texas. A pilot project began in January 2003 with statewide implementation in 2004.² Texas.gov³ was the court's Electronic Filing Manager (EFM) and attorneys and litigants had to use a certified Electronic Filing Service Provider (EFSP). Texas now had e-filing but attorneys and litigants (Filers) were faced with learning different systems depending on which county they were filing in.

In 2011, the Supreme Court held a hearing to consider a uniform statewide e-filing system. Testimony revealed many benefits including faster access to e-filed documents and greater security of court documents in the event of a disaster. Documents were searchable so information could be found quickly and hyperlinks were used to link documents to filings, legal databases and exhibits. Filers could file anywhere using the Internet and at any time of the day eliminating the need for delivery services and reducing postage costs. Concerns were also revealed including the high cost of e-filing with the "toll-road" structure.⁴

A new vendor, Tyler Technologies, Inc., was contracted by the Office of Court Administration (OCA)⁵ to develop a new EFM - TexFile. This system will reduce the cost of e-filing and electronic service (e-service) and will permit indigent litigants to file with no cost. The system will allow multiple filings in one session and will improve integration with the court's existing case management software.⁶ It will be the only system for e-filing in civil

cases in Texas. **IMPORTANT TO NOTE:** In December 2013, the EFM TexFile became eFileTexas.gov (www.eFileTexas.gov). The EFSP TexFile became eFile. TXCourts.gov and remains as the State provided certified EFSP. What is required?

The Supreme Court's Amended Order Requiring Electronic Filing in Certain Courts states:

1. This Order governs e-filing in all civil cases, including family and probate cases, at the Supreme Court of Texas and courts of appeals, and in all non-juvenile civil cases, including family and probate cases, at the district courts, statutory county courts, constitutional county courts, and statutory probate courts.
2. E-filing will be mandatory in the Supreme Court of Texas and in all civil cases in the courts of appeals effective January 1, 2014.
3. E-filing will be mandatory in all non-juvenile civil cases in the district courts, statutory county courts, constitutional county courts and statutory probate courts according to the following implementation schedule based upon

the counties' 2010 Federal Census population:

- a. Courts in counties with a population of 500,000 or more—January 1, 2014
 - b. Courts in counties with a population of 200,000 to 499,999—July 1, 2014
 - c. Courts in counties with a population of 100,000 to 199,999—January 1, 2015
 - d. Courts in counties with a population of 50,000 to 99,999—July 1, 2015
 - e. Courts in counties with a population of 20,000 to 49,999—January 1, 2016
 - f. Courts in counties with a population less than 20,000—July 1, 2016
4. Once a court is subject to mandatory e-filing under this Order, attorneys must e-file all documents in civil cases, except documents exempted by this Order or rules adopted by this Court, through TexFile, the e-filing portal provided by OCA. Attorneys must not file documents through any alternative electronic document filing transmission system (including fax filing), except in the event of emergency. Persons not represented by an attorney may e-file documents, but e-filing is not required.
 5. Once a court is subject to mandatory e-filing under this Order, courts and clerks must not offer to attorneys in civil cases any alternative electronic



document filing transmission system (including fax filing), except in the event of emergency. And courts and clerks must not accept, file, or docket any document filed by an attorney in a civil case that is not filed in compliance with this Order, except in the event of emergency.

6. The Supreme Court will adopt rules governing e-filing and e-service in accordance with the mandate schedule above.
7. Courts or clerks who believe they cannot comply with this Order by the implementation date specified may petition the Supreme Court for an extension, which may be granted for good cause shown⁷

Rules

Statewide e-filing rules are coming. The current draft of proposed amendments to the Texas Rules of Civil Procedure and the Texas Rules of Appellate Procedure can be located on the JCIT website at <http://www.supreme.courts.state.tx.us/misc-docket/13/13912800.pdf>. Some proposed changes to note are:

1. All e-filing must be done through the official statewide portal (eFileTexas.gov);
2. Attorneys in civil cases where e-filing is mandatory must consent to e-service;
3. The attorney's e-mail address is required on the document;
4. A "/s/" and a name typed where a signature would appear is acceptable; and
5. Documents must be in a text-searchable format.

Each county will also include their own e-filing rules in their local rules. The Supreme Court is expected to issue rule amendments before the end of 2013.⁸

The Process and Costs

E-filing through eFileTexas.gov is similar to the state's previous system (Texas.gov). The Filer selects an EFSP to submit the document to the EFM (eFileTexas.gov) and the EFM submits the document to the clerk's office.

Once the Filer has registered for e-filing with a certified EFSP, he/she is free to use any of the EFSPs for filing. The Filer will use the same ID and Password for the

EFSPs. A listing of certified EFSPs can be located on the eFileTexas.gov website at www.eFileTexas.gov.

The process to complete a filing is longer, initially. Steps were added in order to improve the integration with the court's existing case management software. When filing in a case for the first time, the Filer will need to search for the case (by case number or party). If it is not located, then the Filer will need to provide details of the case in order to locate the case. Next, the Filer will need to select a Filing Code to let the court know what type of document is being filed - this listing will be unique for each county and court. The Filer will then select if e-filing or e-serving (or both), provide a Filing Description, provide the firm's own Reference Number, and select any Optional Services needed. Next, the Filer will attach the Lead Document and mark if it is Public/Sealed/Confidential (and attach any further documents). Be careful in this step - the Filer cannot always review what has been attached. If the Filer is using e-service, he/she will need to enter the contact information for opposing counsel. Finally the Filer arrives at the summary page where he/she can confirm the information before submitting the filing.⁹ Once the Filer has made a filing in a case, the case stays in his/her account with the EFSP. When making the next filing, simply select the case.

The Filer will receive an e-mail once the filing has been accepted and it will provide a link where he/she can retrieve the file-stamped document. It is wise to download the file-stamped document soon. Storage of these documents varies with each EFSP.

E-service is handled by eFileTexas.gov, not the EFSP. The Filer will receive notification through an e-mail from eFileTexas.gov that service was completed. It is the only way to retrieve proof of service. Be sure to whitelist no-reply@efiletxas.gov in your firm's e-mail system.

The cost to e-file has reduced. Prices for an EFSP vary based on their services. Current pricing for EFSPs appears to be anywhere from \$0.00 to \$12.00 (not including filing fees, service fees, county/jurisdiction fee, convenience fee and sales tax). Counties are allowed to charge \$2.00 per filing in order to recoup their costs

for the new electronic process. The convenience fee covers credit card processing fees and can vary by county. Credit cards are no longer processed through the EFSP. They are handled by another company (which is why you can use any EFSP).

Training

Contact one of the certified EFSPs for training on the new system. Training lasts about an hour. **It is free.** If the Filer has any questions or challenges when filing, contact the EFSP or the clerk's office. **Everyone** is taking notes and making lists for improvements to the new filing system.

eFileTexas.gov went live in September 2013. Over 100 courts joined eFileTexas.gov and beat their deadlines set by the Supreme Court. The previous system through Texas.gov shut down on November 30, 2013. A new day is here—**Be Prepared, Be Patient and Embrace It!**

Jennifer Fielder Meiners is a paralegal for Brian E. Riewe, P.C. in Austin, TX and current member of the Elections Committee of the Paralegal Division and also a past Outstanding Committee Chair Award Recipient.

1. Judicial Committee on Information Technology, <http://www.courts.state.tx.us/jcit/jcit-home.asp>
2. *Electronic Court Filing: The Texas Model* by Peter Vogel and Mike Griffith. <http://www.courts.state.tx.us/jcit/efiling/pdf/TheTexasModel.pdf>
3. The portal was originally named TexasOnline.
4. Misc. Docket No. 12-9208, as amended by Misc. Docket No. 13-9092, *Order Requiring Electronic Filing in Certain Courts*. <http://www.supreme.courts.state.tx.us/miscdocket/13/13909200.pdf>
5. Office of Court Administration, <http://www.courts.state.tx.us/oca/>
6. Misc. Docket No. 12-9208, as amended by Misc. Docket No. 13-9092, *Order Requiring Electronic Filing in Certain Courts*. <http://www.supreme.courts.state.tx.us/miscdocket/13/13909200.pdf>
7. Misc. Docket No. 12-9208, as amended by Misc. Docket No. 13-9092, *Order Requiring Electronic Filing in Certain Courts*. <http://www.supreme.courts.state.tx.us/miscdocket/13/13909200.pdf>
8. Rule amendments have been approved but may change in response to public comments received before October 31, 2013.
9. Based on filing with the State provided EFSP.

Scruples

A Practical Guide Regarding Our Ethical Duty to Report Unethical Behavior

Ellen Lockwood, ACP, RP

Most paralegals are clear on the definition of the Unauthorized Practice of Law (UPL). We know not to give legal advice and make every effort to abide by the ethical canons. However, exactly what paralegals may not do isn't always clear to members of the public.

Several states now permit legal document preparers or limited license legal technicians. Once someone has met the requirement including any required training, and registered or been licensed by the applicable state, these technicians may offer their services directly to the public. In the states that offer these positions the public may get certain types of legal assistance without having to engage an attorney.

We have had issues in Texas with members of the public thinking they can engage a non-attorney to assist them as is available in some other states. We have also had issues with non-attorneys taking advantage of those assumptions to illegally offer legal services to the public.

I was recently contacted by some paralegals who had become aware of non-attorneys who had surreptitiously set up in a county courthouse and were offering legal services such as document preparation to the public. The paralegals were unsure how to proceed.

Paralegals have an ethical duty to report unethical behavior. Several of the canons of the Paralegal Division's Code of Ethics and Professional Responsibility address this issue:

- Canon 1 of states in part that "the

paralegal shall assist in preventing the unauthorized practice of law."

- Canon 8 states that in part that paralegals "shall contribute to the integrity of the paralegal profession."
- Canon 10 states in part that paralegals "shall do all other things incidental, necessary, or expedient to enhance professional responsibility."

As the above indicates, it is not an option for paralegals to avoid reporting UPL and unethical behavior.

If a paralegal suspects someone is committing UPL, the best course of action is to complete the online form for the Supreme Court of Texas Unauthorized Practice of Law Committee at www.txuplc.org. All information regarding the person reporting the suspected violation is kept confidential and not revealed to the party that is the subject of the complaint. Depending on the situation, unethical behavior may be reported to your supervising attorney, local paralegal association, or the Paralegal Division. All reports should be made as soon as possible.

Many paralegals try to avoid reporting UPL and unethical behavior by offering excuses such as the following:

- Too much time has passed
While there is certainly a point at which the information is too old to be properly investigated, the passage of a few weeks or months should not deter you from reporting the information. Further, someone who is intentionally

committing UPL will likely continue to do so.

- I don't know whether the paralegal at issue is a member of the Paralegal Division or local organization.
You may always submit a question to ethics@txpd.org. The current ethics chair will be glad to check the PD membership roster and suggest the best course of action for reporting the unethical behavior.
- I don't have firsthand knowledge of the situation.
If someone else has firsthand knowledge, you should urge that person to report the incident. If that person won't report it, you should report the information you have, particularly if the issue is UPL.
- It's not that big a deal, or alternatively, I don't want to get involved.
It actually is a big deal. As paralegals we are bound by the ethical canons which make clear we have a duty to report UPL and other unethical behavior.

As professionals, and particularly as members of a profession that is not regulated in Texas, we must do everything we can to maintain high ethical standards, including reporting even suspected unethical behavior.



Ellen Lockwood, ACP, RP, is the Chair of the Professional Ethics Committee of the Paralegal Division and a past president of the Division. She is a frequent speaker

on paralegal ethics and intellectual property and the lead author of the Division's Paralegal Ethics Handbook published by West Legalworks. You may follow her at www.twitter.com/paralegalethics. She may be contacted at ethics@txpd.org.

Notice of Election for Amendment(s) to Bylaws and/or Referendum

The following proposed Amendment will be submitted to membership for vote during Spring 2014 (March 28, 2014 – April 11, 2014) during the same time as the even-numbered District Director Elections.

Bylaws. Article IX. Elections.c.3.

a. Proposed Amendment. The following proposed Amendment was brought before the Board of Directors at the Fall 2013 Board Meeting. The proposition was approved by the Board of Directors.

Amendment to the Bylaws at Section 4. Districts. to move all counties currently listed under District 13 to District 1. The counties that would, if approved by the membership, be a part of District 1 are: Austin, Brazoria, Colorado, Fayette, Fort Bend, Galveston, Harris, Jackson, Lavaca, Matagorda, Waller, Washington, and Wharton.

b. Need. The proposed Amendment is necessitated by the fact for a period of at least one year, there has been no known Paralegal Division Active member(s) working in the affected counties who has been willing to serve as director, leaving communication with the members in the District to the President and/or President-Elect. With no leadership in the affected District, it was determined that the members would be best served through merger with another active District.

c. Discussion. An Ad Hoc Committee was appointed to inves-

tigate a solution to the problem of no leadership or representation in District 13. Multiple possible solutions were presented to the Board, including continued attempts to find a member who would accept the position of Director of District 13, seeking a solution to the issue from members of District 13, separation of the counties of District 13 into multiple districts, and moving the counties of District 13 into one District. Ultimately, as no member from the District came forward with a solution, it was determined and approved by the Board that the best resolution would be to move all affected counties of District 13 into District 1.

d. Effective Date. The proposed Bylaw amendment, if adopted by the membership, will be effective upon approval by the Board of the State Bar of Texas at the June 2014 Annual Meeting.

New Bylaw section, as amended:

Section 4. Districts.

The Districts of the Division shall be comprised of the following counties:

- (1) **District #1:** Austin, Brazoria, Colorado, Fayette, Fort Bend, Galveston, Harris, Jackson, Lavaca, Matagorda, Waller, Washington, and Wharton.
- (13) **District #13:** Austin, Brazoria, Colorado, Fayette, Fort Bend, Galveston, Jackson, Lavaca, Matagorda, Waller, Washington, and Wharton

UNITED STATES POSTAL SERVICE		Statement of Ownership, Management, and Circulation	
(All Periodicals Publications Except Requester Publications)			
1. Publication Title Texas Paralegal Journal	2. Publication Number 10891633	3. Filing Date 09/26/13	
4. Issue Frequency Quarterly	5. Number of Issues Published Annually Four (4)	6. Annual Subscription Price \$15.00	
7. Complete Mailing Address of Known Office of Publication (Not printer) (Street, city, county, state, and ZIP+4®) 3505 Black Mesa Hollow Austin, TX 78739		Contact Person Norma Hackler Telephone (include area code) 512.280.1766	
8. Complete Mailing Address of Headquarters or General Business Office of Publisher (Not printer) P. O. Box 1375, Manchaca, TX 78652			
9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor (Do not leave blank) Publisher (Name and complete mailing address) Paralegal Division, P. O. Box 12487, Austin, TX 78711 Editor (Name and complete mailing address) Heidi Beginski, 619 Arizona Ave., El Paso, TX 79902 Managing Editor (Name and complete mailing address) N/A			
10. Owner (Do not leave blank. If the publication is owned by a corporation, give the name and address of the corporation immediately followed by the names and addresses of all stockholders owning or holding 1 percent or more of the total amount of stock. If not owned by a corporation, give the names and addresses of the individual owners. If owned by a partnership or other unincorporated firm, give its name and address as well as those of each individual owner. If the publication is published by a nonprofit organization, give its name and address.)			
Full Name	Complete Mailing Address		
Paralegal Division	3505 Black Mesa Hollow		
State Bar of Texas	Austin, TX 78739		
11. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages, or Other Securities. If none, check box <input checked="" type="checkbox"/> None			
Full Name	Complete Mailing Address		
12. Tax Status (For completion by nonprofit organizations authorized to mail at nonprofit rates) (Check one) <input type="checkbox"/> Has Not Changed During Preceding 12 Months <input type="checkbox"/> Has Changed During Preceding 12 Months (Publisher must submit explanation of change with this statement)			

PS Form 3526, September 2007 (Page 1 of 3) (Instructions Page 3) PSN 7530-01-000-9031 PRIVACY NOTICE See our privacy policy on www.usps.com

13. Publication Title Texas Paralegal Journal		14. Issue Date for Circulation Data Below 9/26/13	
15. Extent and Nature of Circulation		Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Total Number of Copies (Net press run)		1775	1600
b. Paid Circulation (By Mail and Outside the Mail)	(1) Mailed Outside-County Paid Subscriptions Stated on PS Form 3541 (Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)	1476	1323
	(2) Mailed In-County Paid Subscriptions Stated on PS Form 3541 (Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)	184	179
	(3) Paid Distribution Outside the Mails Including Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Paid Distribution Outside USPS®	N/A	N/A
	(4) Paid Distribution by Other Classes of Mail Through the USPS (e.g., First-Class Mail®)	N/A	N/A
c. Total Paid Distribution (Sum of 15b (1), (2), (3), and (4))		1660	1502
d. Free or Nominal Rate Distribution (By Mail and Outside the Mail)	(1) Free or Nominal Rate Outside-County Copies Included on PS Form 3541	N/A	N/A
	(2) Free or Nominal Rate In-County Copies Included on PS Form 3541	N/A	N/A
	(3) Free or Nominal Rate Copies Mailed at Other Classes Through the USPS (e.g., First-Class Mail)	N/A	N/A
	(4) Free or Nominal Rate Distribution Outside the Mail (Carriers or other means)	101	88
e. Total Free or Nominal Rate Distribution (Sum of 15d (1), (2), (3) and (4))		101	88
f. Total Distribution (Sum of 15c and 15e)		1761	1590
g. Copies not Distributed (See instructions to Publishers #4 (page 3))		14	10
h. Total (Sum of 15f and g)		1775	1600
i. Percent Paid (15c divided by 15f times 100)		94%	94%
16. Publication of Statement of Ownership <input checked="" type="checkbox"/> If the publication is a general publication, publication of this statement is required. Will be printed in the Winter/Spring 2014 issue of this publication. <input type="checkbox"/> Publication not required.			
17. Signature and Title of Editor, Publisher, Business Manager, or Owner <i>Norma Hackler</i>		Date 9/26/13	
I certify that all information furnished on this form is true and complete. I understand that anyone who furnishes false or misleading information on this form or who omits material or information requested on the form may be subject to criminal sanctions (including fines and imprisonment) and/or civil sanctions (including civil penalties).			

PS Form 3526, September 2007 (Page 2 of 3)

TAPS 2013: Spectacular CLE

By Susan Wilen

More than 250 paralegals descended on San Antonio from all parts of the State of Texas to attend the Texas Advanced Paralegal Seminar (TAPS) 2013: Spectacular CLE held at the Omni Colonnade Hotel October 2–4, 2013. This three-day seminar for advanced level paralegals provided attendees an opportunity to obtain 15 hours of CLE from 67 presenters on a broad range of topics including updates on changes in the Texas Rules of Civil Procedure, technical sessions regarding paperless offices, administrative sessions on professional Board complaints and attorney grievances, litigation strategies at trial, oil and gas issues, family law issues, and a unique window into the 4th Court of appeals.

The seminar was structured to provide five different sessions each hour with no overlap of specialty areas. Attendees were given the opportunity to either learn about their area of specialization or to explore new areas with which they had no experience. The speakers, primarily from the San Antonio legal community, included attorneys and judges, but also, other professionals and experienced paralegals.

On Wednesday evening, attendees and vendors gathered for the “Opening Night Happy Hour” sponsored by Esquire Deposition Solutions which gave everyone a chance to acquaint or re-acquaint themselves. Afterwards, buses shuttled those who wished to have dinner on San Antonio’s Riverwalk to and from the downtown area.

On Thursday, the vendor hall opened at 7 a.m. and attendees enjoyed a continental breakfast as they strolled through the exhibit area. In order to participate in the grand prize drawing during lunch on Friday, each attendee had to visit the vendors and receive acknowledgement on their vendor card before the exhibit hall closed. A box lunch was provided to both attendees and vendors during the lunch hour, allowing additional opportunities for information sharing before the afternoon CLE sessions.



On Thursday evening, “The VIP Production” social sponsored by the Center for Advanced Legal Studies, HG Litigation Services, Hollerbach & Associates, Innovative Solutions, Kim Tindall & Associates, and Merrill Corporation featured a Red Carpet with attendees and vendors dressing in 1980s garb. “Slash” of Gun’s and Roses, “Heart”, and several “Madonnas” walked the run-

way with a wonderful backdrop and the “paparazzi” taking lots of pictures. The main event that evening was a grand performance by the Ethics Follies of “The Age of Rock,” a musical production by a troupe comprised of lawyers, judges, and other legal talents who address current ethical issues in a thoroughly entertaining way. This production was underwritten by Cox Smith, a law firm based in San

Antonio. The evening was not only engaging, it also provided an hour of CLE ethics credit. The evening was a truly a great "hit."

Friday morning started bright and early with a yoga class at 6:30 am, not an easy accomplishment for those who stayed out a little too late the night before. Once again, attendees enjoyed a nourishing breakfast prior to a Leadership Summit, "Whose Career Is This Anyway?" chaired by Paralegal Division Past-President, Debbie Oaks at 8:30 am. A panel of Paralegal Division leaders addressed issues including career planning, creating your "brand," enhancing skills and experience, evaluating opportunities, networking, and building relationships. The room was filled to capacity and it was a great way to start the day.

After the conclusion of the morning sessions, the keynote luncheon was held in the La Joya ballroom. Keynote speakers, attorneys Allan K. DuBois and Thomas Keyser, offered a powerful presentation "Practicing Law and Wellness: Modern Strategies for the Paralegal Dealing with Anxiety, Addiction, and Depression." The topic was very personal for them and they reinforced the importance of the role of paralegals to assist not only one another, but other legal professionals in the grips of substance abuse or other mental illnesses. They received a standing ovation for their courage and honesty.

During the luncheon, Susan Wilen, Chair of the TAPS Planning Committee introduced the recipients of the TAPS 2013 scholarship: Amalia Gorena-Bullis and Alma Perez. Each year, the Paralegal Division presents two educational scholarships to attend TAPS. In order to qualify and be considered for a scholarship, the applicant must be a member of the Paralegal Division, submit a written essay, and provide personal reference letters.

Lastly, the event was capped with drawings for the lucky winners of the grand prize, a \$500.00 check for each of the three winners Tracy Heffner of Fort Worth, Donna Chance of Helotes, and Carolyn Johnson of Amarillo. These prizes were underwritten by Langley & Banack, Inc., Nell McCallum & Associates, and Wayne Wright, LLP.

This event was co-chaired by Past

Presidents Susan Wilen and Joncilee Davis, and the planning committee included Misti Janes, Rhonda Brashears, Patti Giuliano, Kristina Kennedy, Charlyne Ragsdale, Debbie Oaks, Nicole Rodriguez, Allison Seifert, and Public Members, Frank Hinnant, Patty Ochoa, and Carl Seyer. Norma Hackler, Maryanne Riordan, and Tricia Humber were indispensable for making this event a huge success.

TAPS 2013 was a spectacular opportunity to see old friends and make new ones, all the while improving our skill sets and broadening our understanding of the law and our jobs.

If you are interested in a sample of CLE presentations, several TAPS presentations were live webcast during the event. These presentations are now available on the Paralegal Division's Online CLE (via the Paralegal Division's website at www.txpd.org). The presentations that can be accessed online are:

- I Went Paperless and So Can You!
- Family Law—Legislative Update
- Searching Databases in Texas Courts
- What is Available and What You Can Find
- Texas Rules of Civil Procedure (TRCP): Changes in Latitude and Changes in Attitude
- HIPAA Privacy Rule—a Compliance Guide
- Patent Law Update

Please mark October 1–3, 2014 on your calendar now, and plan to join us in Austin for TAPS 2014!!

Susan Wilen is a nurse paralegal at Brin & Brin, P.C. in San Antonio and is a past president of the Division.

On behalf of the Paralegal Division, thank you to all of the TAPS 2013 sponsors. This event could not have been accomplished without the generous contributions made by legal vendors across the State of Texas. And a special thank you to each of the following companies for sponsoring the TAPS 2013 socials, tote bags, speaker materials CD, and attendee directory: Center for Advanced Legal Studies, Cox Smith, Esquire, Elite Document Technology, HG Litigation, Hollerbach & Associates,

Innovative Legal Solutions, Kim Tindall & Associates, Merrill Corporation, and US Legal Support for contributing to the socials, TAPS tote bags, and Speaker materials CD.

Exhibitors

Attorney Resource
BlumbergExcelsior, Inc.
Capitol Services, Inc.
CCI—Confidential Communications International, Ltd
Center for Advanced Legal Studies
Datascopelitigation Support Services
DepoTexas
easy-serve, LLC
Element55
Elite Document Technology
Esquire Deposition Solutions
File & ServeXpress
Fredericks-Moore Howard Court Reporters
Haag Engineering Co.
HG Litigation Services
Huseby Court Reporting
iDocket.com
Innovative Legal Solutions
Kim Tindall & Associates Litigation Support Services
Legal Partners
Merrill Corporation
NALA—The Association of Paralegals & Legal Assistants
One Legal, LLC
Parasec
Preferred Counsel Legal Placement, L.P.
ProActive Legal Solutions
Providus
Registered Agent Solutions, Inc. (RASi)
Research & Planning Consultants, L.P.
Second Image National, Inc.
Special Delivery, Inc.
Stratos Legal
Sunbelt Reporting & Litigation Services
Team Legal
Texas Board of Legal Specialization
The Legal Connection, Inc.
The Verity Group
Thomson Reuters
U.S. Legal Support, Inc.
Vocational Solutions

Grand Prize Sponsors:

Langley & Banack, Incorporated
Nell McCallum & Associates, Inc.
Wayne Wright, LLP



THE NATIONAL ACADEMY OF
DISTINGUISHED NEUTRALS

ATTENTION LITIGATION STAFF



OVER 50 OF TEXAS' PREMIER CIVIL-TRIAL
MEDIATORS & ARBITRATORS
PUBLISH THEIR AVAILABLE DATES ONLINE

Save **HOURS** of scheduling time directly at

www.TexasNeutrals.org

** This online calendar service is entirely free, funded by the attorneys of the NADN's Texas Chapter.*

To view the National Academy's free roster of over 800 top-tier mediators & arbitrators, visit www.NADN.org/directory

Now Available at the APP Store

Continuing Legal Education

General • Advanced • Exam Preparation

Paralegal CLE by NALA is now available for your iPad! Through this app, you may register or access previously purchased NALA Campus Self-Study programs and Advanced Paralegal Certification courses. Today, there are 32 self-study courses, web based programs offered by NALA. These include:

- 7 Certified Paralegal examination prep courses
- 3 general education courses
- 22 Advanced Paralegal Certification courses

For users of other non-Apple tablets and operating systems, NALA Campus Self-Study courses are on the internet at www.nala.org/onlineed.aspx. All web-based courses will run on all tablets using the tablet's internet browser

Paralegal continuing education at your fingertips, 24/7!

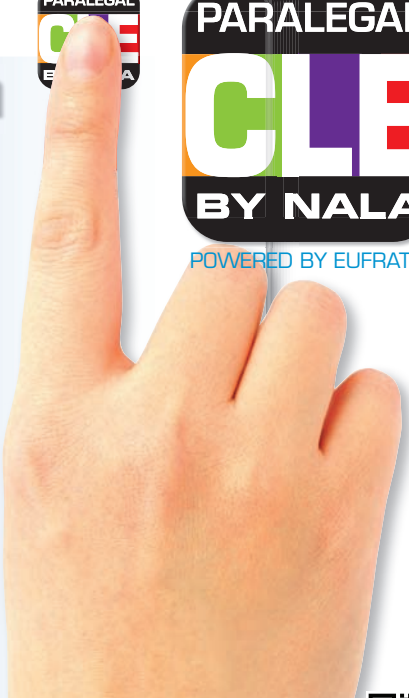


**THE ASSOCIATION OF
LEGAL ASSISTANTS • PARALEGALS**

1516 South Boston, Suite 200 • Tulsa, OK 74119 • 918.587.6828



POWERED BY EUFRATES

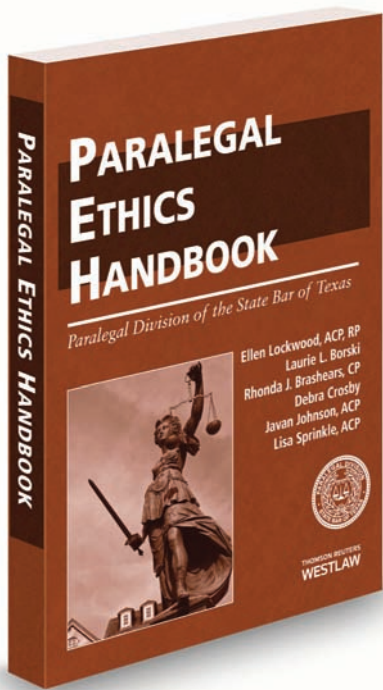


Available on the
App Store



THOMSON REUTERS

WESTLAW™



PARALEGAL ETHICS HANDBOOK

By: Ellen Lockwood, Et Al

This handbook is an essential resource for experienced paralegals, those new to the profession, and attorneys working with them.

Paralegal Ethics Handbook discusses topics such as defining ethics and ethical obligations and remaining ethical, and addresses ethical considerations for in-house, corporate, freelance, administrative, governmental, and regulatory law paralegals as well as paralegals working in the area of alternative dispute resolution. It also covers specific ethical considerations in 17 practice areas and provides resources for state information and paralegal association ethics cannons and related information.

~~\$72.00 USD~~
\$57.60 USD

HOW TO ORDER AND SAVE 20%

Order online at legalsolutions.com and at checkout, enter promo code 666686 and discount will be applied.

Or order by phone at 1-800-344-5009.



THOMSON REUTERS™

Expand your horizons

Advance your career



Need to enhance your skills? Want to take a class in another practice area?
We offers options for paralegals to take one course at a time.

Choose from:

Personal Injury
Legal Research and Writing
Civil Procedure
Corporate and Business Law
Computers and the Law

Immigration Law
Wills, Trusts and Probate
Intellectual Property
Real Estate
Family Law

New classes coming this spring!

Oil and Gas Law
Advanced Research and Writing

Advanced Civil Procedure
E-Discovery

Ask us about our online Prep Course for NALA's CP/CLA Exam.



CENTER FOR ADVANCED LEGAL STUDIES
The Paralegal People®

www.paralegal.edu • info@paralegal.edu • 1.800.446.6931



In a world of *e*mail and *e*business, we're *e*service



Place orders, track projects, create and file documents, access state websites and statutes, review your Service of Process history – 24/7. Receive reports and filings via email – instantly.

With all the speed and efficiency that our specialized technology makes possible, we have not overlooked what our clients rely on: our personal attention and customized service.

Log on today or better yet, call us today to speak with a state-of-the-art customer service representative.

★ **Corporate Document Filing & Retrieval**

★ **Registered Agent Services**

★ **UCC Searches & Filings**

★ **Nationwide**



800-345-4647
www.capitol-services.com