DISCLOSURE OBLIGATIONS AND REPORTING REQUIREMENTS FOR ENVIRONMENTAL CONTAMINATION

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Doing the Real Estate Deal: The Ultimate Environmental Toolkit
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I. INTRODUCTION

The presence of known or suspected environmental contamination on real property can depress the price that can be garnered from the sale of the land, prevent a prospective purchaser from developing the property as planned, at least without the possibility of incurring additional expense, and can significantly complicate the negotiations of a transfer. As a result, buyers have tended to avoid environmentally challenged sites in favor of pristine properties. But the increased market for inner-city properties and implementation of several new programs to encourage brownfield redevelopment have created new opportunities for owners of “grey acre” to move their lands into the hands of developers with visions of transforming these old industrial tracts into havens for businesses or homeowners.

It is no news to anyone that in a typical real estate deal, the seller’s goals conflict, and sometimes noisily collide, with the buyer’s goals. The seller will usually wish to maximize price and wash its hands of all liability associated with ownership or operation of the property. To the contrary, the buyer will seek to minimize expenditures on acquiring the land in order to retain available assets for development activities. Buyers usually try to avoid assuming any liabilities that might arise from its property ownership, particularly if those risks might be associated with any former ownership or operation of the property prior to the buyer taking title. Although some efforts are underway to narrow the scope of potential environmental liabilities arising simply from property ownership and to protect buyers of properties with hidden environmental defects, it remains true that the mere ownership of a contaminated site can bring with it a host of costly investigatory or remedial obligations, possible land use restrictions, and vulnerability to legal actions. Consequently, buyers will often attempt to force sellers to tell all and give full disclosure of known or suspected environmental conditions.

The seller’s goals create incentives for the seller to hide the ball concerning a property’s environmental conditions, and because contamination may not be readily discoverable through typical environmental due diligence, a seller may successfully be able to postpone a buyer’s discovery until after closing. Although Phase I environmental site assessments, which have become routine in commercial sales transactions, can and do reveal significant information about the historical uses and potential sources of contamination, a seller may have unique access to environmental information. For example, unless a conspicuous vent pipe is present, old underground storage tanks cannot be readily detected from the surface or necessarily found from old records. Or, a seller may retain information about past dumping practices on the back forty, which could have resulted in the migration of contaminants to the subsurface, but surficial evidences has faded from view. And unless you know where to look, a full environmental investigation of property can be expensive and still not reveal all potential sources of liability.

This paper will address the seller’s legal obligations to disclose environmental information to buyers in transactions involving the sale of real property, as well as the potential legal risks that may arise as a result of a failure to disclose. Separately it includes a discussion of some of the more common reporting responsibilities that may be triggered as a result of intelligence gained during a buyer’s due diligence activities.

Many thanks to Christopher T. Nixon for his valuable assistance in the preparation of this paper.


Phase I ordinarily refers to a non-invasive investigation about the historical condition and use of the site under investigation, as well as surrounding areas, that may impact the environmental condition of the property.

Under successor liability theories, environmental liabilities may also arise from an owner’s off-site disposal activities, therefore, a buyer may be forced to rely on information provided by the seller concerning past disposal practices. 42 U.S.C. § 9607 (1997); Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240 (6th Cir. 1991).
Research for this paper stopped on March 1, 2000, so any developments after that date are not included. The research is not warranted to be comprehensive but is intended more as a starting place for evaluating potential disclosure or reporting obligations. Any opinions expressed are my own and have not been reviewed or approved by my firm or anyone else.

II. DISCLOSURE OBLIGATIONS

B. STATUTORY DISCLOSURE OBLIGATIONS

During the past decade, the Texas Legislature has imposed several statutory duties on sellers to disclose information to buyers of real property. Not surprising, most of these provisions are targeted to protect unsophisticated residential buyers. The more frequently applicable provisions are discussed in this paper and the rest may be found in Title 2 to the Texas Property Code. New federal disclosure measures have also been implemented to make buyers aware of potential lead-based paint hazards.6

1. Residential Property Condition Disclosure

(a) Improved Property Disclosure

In the typical sale of a residence in Texas, a homeowner has a statutory duty to disclose to the prospective purchaser certain physical conditions existing on the property being sold.7 Section 5.008 of the Texas Property Code requires the seller of a single-family dwelling to provide, on or before the effective date of an executory purchase and sale contract, certain disclosures about the property to the prospective purchaser8 The minimal statutory form of the notice is included with this paper at Exhibit A. If the notice is not executed and provided to the purchaser on or before the date the contract binds the purchaser to buy the property, the purchaser may terminate the contract for any reason within seven days after receiving the notice.9 The rules of Section 5.008 require that the seller disclose to the purchaser, to the best of its knowledge, the existence and condition of certain features, defects, or sources of potential problems on the property, such as appliances, fire detection equipment, air conditioning units, plumbing facilities, rain gutters, water heaters, improper drainage, and aluminum wiring.10 The seller must also disclose specific environmental conditions existing on the property, such as hazardous or toxic waste, urea formaldehyde insulation, radon gas, asbestos, and lead-based paint.

(b) Unimproved Property Disclosure

A seller of unimproved property intended for residential development must disclose “the location of a transportation pipeline, including a pipeline for the transportation of natural gas, natural gas liquids, synthetic gas, liquefied petroleum gas, petroleum or a petroleum product, or a hazardous substance” to the best of the seller’s belief and knowledge as of the date of the notice.11 As is often the case with Texas statutes, and depending on your perspective, this language can be read a couple of different ways: either requiring disclosure of only the location of a pipeline transporting various substances (including hazardous substances), or the location of pipelines or hazardous substances. In any event, the notice requirement may be avoided if the earnest money contract obligates the seller to provide a title commitment and grants the buyer an opportunity to terminate the contract if the seller fails to cure before closing the buyer’s permitted objections to title.12 If the notice is not provided on or before the effective date of the contract, the buyer wins a free

5 See TEX. PROP. CODE ANN. §§ 5.008-.012, 5.091-.094 (Vernon Supp. 2000). For properties outside the corporate boundaries of a municipality, sellers must disclose the potential for annexation. Id. § 5.011. For properties in certain low income counties near international borders, specific disclosure notices must be given. Id. § 5.091-.094.


7 A limited category of residential property transfers are exempt from the disclosure requirements, such as those made pursuant to a court order or foreclosure, by a trustee in bankruptcy, and by one co-owner to one or more other co-owners. TEX. PROP. CODE ANN. § 5.008(e) (Vernon Supp. 2000).

8 Id. § 5.008.

9 Id. § 5.008(f).

10 Id. § 5.008(b).

11 Id. § 5.010(a)-(b).

12 Id. § 5.010(f).
termination right within seven days after the effective date of the contract.\textsuperscript{13}

2. Residential Property Owners’ Association Disclosure
Sellers of single family dwellings that are subject to membership in a property owners’ association must provide notice of such restrictions at some point before the buyer becomes obligated to purchase the property.\textsuperscript{14} The notice must be made in language substantially similar to the following:

\textbf{NOTICE OF MEMBERSHIP IN PROPERTY OWNERS’ ASSOCIATION CONCERNING THE PROPERTY AT}
(street address) (name of residential community)

As a purchaser of property in the residential community in which this property is located, you are obligated to be a member of a property owners’ association. Restrictive covenants governing the use and occupancy of the property and a dedicatory instrument governing the establishment, maintenance, and operation of this residential community have been or will be recorded in the Real Property Records of the county in which the property is located. Copies of the restrictive covenants and dedicatory instrument may be obtained from the county clerk.

You are obligated to pay assessments to the property owners’ association. The amount of the assessments is subject to change. Your failure to pay the assessments could result in a lien on and the foreclosure of your property.

Date: ________________  
Signature of Purchaser

As with the rollback property condition and tax notices discussed below, certain types of transfers are exempt from these notice obligations.\textsuperscript{15} But unlike the other remedies for seller’s failure to provide statutory notices, the legislature has made the buyer’s free termination right at any time within seven days from receipt of the notice or before closing, the buyer’s exclusive remedy.\textsuperscript{16}

3. Rollback Tax Notice for Vacant Land
Except in limited circumstances, contracts for the sale of vacant land must include the following bold-faced notice:

\textbf{NOTICE REGARDING POSSIBLE LIABILITY FOR ADDITIONAL TAXES}

If for the current ad valorem tax year the taxable value of the land that is the subject of this contract is determined by a special appraisal method that allows for appraisal of the land at less than its market value, the person to whom the land is transferred may not be allowed to qualify the land for that special appraisal in a subsequent tax year and the land may then be appraised at its full market value.

In addition, the transfer of the land or a subsequent change in the use of the land may result in the imposition of an additional tax plus interest as a penalty for the transfer or the change in the use of the land. The taxable value of the land and the applicable method of appraisal for the current tax year is public information and may be obtained from the tax appraisal district established for the county in which the land is located.\textsuperscript{17}

Like the property condition and property owners association disclosure notices, certain types of transfers are exempt from the requirements of this provision.\textsuperscript{18} The statutory language of the notice may also be omitted if the contract includes a separate paragraph that provides for “payment of any additional ad valorem taxes and interest that become due as a penalty because of: (1) the transfer of the land; or (2) a subsequent change in the use of

\textsuperscript{13} Id. § 5.010(c).
\textsuperscript{14} Id. § 5.012(a)-(b).
\textsuperscript{15} Id. § 5.012(c).
\textsuperscript{16} Id. § 5.012(d)-(e).
\textsuperscript{17} Id. § 5.010.
\textsuperscript{18} Id. § 5.010(b)-(c).
the land." If a seller fails to include the statutory notice in the contract for sale, the transferee may recover the amount of additional taxes and interest resulting from any transfer of the land or a subsequent change in use that occurs within five years of the date of the transfer.  

4. Lead-Based Paint Disclosure

Federal law requires that a seller of residential property that was built prior to 1978 provide the purchaser with notice that the property may contain lead-based paint that may cause lead poisoning in young children. The seller of any such property is required to provide the purchaser with a federally approved written lead-based paint warning and hazard information pamphlet, disclose to the purchaser any known lead-based paint or any lead-based paint hazards on the property, and permit the purchaser a ten (10) day period (or such other mutually agreeable time period) to inspect the property for the presence of lead-based paint hazards. The seller's disclosure must be separately attached to the purchase and sale contract and be signed by the seller and purchaser. Although the validity of the purchase and sale contract is unaffected by the seller's failure to provide such disclosures to the purchaser, a seller who knowingly violates the lead-based paint disclosure requirements may be liable for, among other things, treble damages to the purchaser and may face civil monetary penalties under section 102 of the Department of Housing and Urban Development Reform Act of 1989 (42 U.S.C. § 3545). Detailed information about the disclosure rules and forms may be found on the National Safety Council's web site at http://www.nsc.org/ehc/nlic/disclose.htm.

5. Seller's Disclosure about Storage Tanks

Storage tank system regulations require that any person who sells or otherwise conveys real property on which a regulated underground storage tank is located, and any person who sells or conveys a regulated tank which is designed or intended to be installed as an underground storage tank, must provide the purchaser thereof with written notice of a tank owner's obligations under the Texas Administrative Code with respect to registration and construction notification. The Texas Natural Resource Conservation Commission (the “TNRCC” or “Commission”) has deemed the following language to be sufficient to meet this disclosure requirement: “The underground storage tank(s) which are included in this conveyance are presumed to be regulated by the Texas Water Commission and may be subject to certain registration and construction notification requirements found in 31 Texas Administrative Code, Chapter 334.” Note that although the citation in the approved language is to Title 31 of the Code, the regulations may actually be found in Title 30.

6. Disclosure of CMSWLFs

An owner of land that overlies a closed municipal solid waste landfill facility (“CMSWLF”) must place record notice of restrictions on the development or lease of the land in the real property records of the county in which the land is located. The owner must also notify each occupant of any structure overlying the CMSWLF of the land’s former use and the structural controls in place to minimize hazards posed. Failure to comply with

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19 Id. § 5.010(d). In attempting to avoid the statutory language, but shift rollback tax liability from the seller, practitioners should review their roll-back tax language to be sure it covers the allocation of interest.

20 Id. § 5.010(e).


22 Id. § 4852d(a). The purchaser may also waive such inspection rights. Id. § 4852d(a)(1)(C).

23 Id. § 4852d(a)(2).

24 Id. § 4852d(c).

25 Id. § 4852d(b)(1)-(3).

26 30 Tex. Admin. Code § 334.9 (1998). Certain tank systems are exempt from regulation by the TNRCC, such as small-capacity farm or residential tanks used for storing motor fuel for noncommercial purposes; see Tex. Water Code Ann. § 26.344 (Vernon Supp. 2000) for a more complete list of exempt tanks.


29 Id. § 361.539(b).
the statute can result in civil penalties not to exceed $10,000 for each violation.\textsuperscript{30}

C. TORT RISKS FROM NONDISCLOSURE

1. When Nondisclosure Qualifies as Fraudulent Misrepresentation

Texas common law imposes a duty upon sellers to refrain from any misrepresentations in transactions involving real property. Naturally, an express misrepresentation may be actionable, but in addition, under circumstances where nondisclosure results in deception, a seller’s awareness of information material to a buyer’s decision whether to purchase property, may also give rise to liability if not disclosed. Additionally, although the author’s research has not uncovered a Texas case on point, Texas courts may also hold a seller accountable for selectively disclosing information in such a way as to be misleading.\textsuperscript{31} For example, in \textit{V.S.H. Realty Co. v. Texaco, Inc.}, a buyer was held to state a claim for misrepresentation where a seller made only partial disclosures concerning oil leaks and failed to acknowledge a Coast Guard investigation.\textsuperscript{32} Applying Massachusetts law, the First Circuit indicated that half-truths or partial disclosures were inadequate where full acknowledgment was necessary to avoid deception.\textsuperscript{33}

(a) Elements of Fraudulent Misrepresentation

Texas courts recognize a presumption in favor of the fairness of the transaction that must be overcome by the complaining party.\textsuperscript{34} As a general rule, for a buyer to recover on a fraudulent misrepresentation claim, the buyer must show that

(1) a material representation was made,\textsuperscript{35} (2) the representation proved to be false, (3) the speaker knew the statement to be false when it was made or made it recklessly without any knowledge of the truth,\textsuperscript{36} (4) the speaker made the representation with that intent that the other party act in reliance upon it, (5) the other party acted in reliance on the statement, and (6) the other party thereby suffered injury.\textsuperscript{37}

For a buyer to successfully bring a cause of action for fraud based on the seller’s nondisclosure of information, one additional requirement attaches. The buyer must show that a duty to disclose the information existed because either the defect was not discoverable by the exercise of ordinary care and diligence on the part of the purchaser,\textsuperscript{38} or there existed a confidential or fiduciary relationship between buyer and seller.\textsuperscript{39} Alternatively, the buyer may be able to pursue a claim for active fraudulent concealment.\textsuperscript{40} To succeed in a fraudulent concealment claim, instead of proving the existence of a confidential relationship, a buyer must demonstrate that the seller had actual knowledge of

\textsuperscript{30} \textit{Id.} § 361.540(a).


\textsuperscript{32} 757 F.2d 411, 415 (1st Cir. 1985).

\textsuperscript{33} Id.


\textsuperscript{35} "Pure expressions of opinion are not actionable." \textit{Trenholm v. Ratcliff}, 646 S.W.2d 927, 930 (Tex. 1983) (noting that there are exceptions to this general rule, such as when the speaker knows the opinion to be false or when the speaker purports to have special knowledge as to the happening of future events).

\textsuperscript{36} Bad faith is not an element of actionable fraud. \textit{Polk Terrace, Inc. v. Harper}, 386 S.W.2d 588, 593 (Tex. Civ. App.--Tyler 1965, writ ref’d n.r.e.).

\textsuperscript{37} \textit{Trenholm}, 646 S.W.2d at 930; \textit{Stone v. Lawyer's Title Ins. Corp.}, 554 S.W.2d 183, 185 (Tex. 1977).

\textsuperscript{38} \textit{Smith v. National Resort Communities, Inc.}, 585 S.W.2d 655, 658 (Tex. 1979).

\textsuperscript{39} \textit{Stone}, 537 S.W.2d at 67.

\textsuperscript{40} \textit{Ten-Cate v. First Nat'l Bank of Decatur}, 52 S.W.2d 323, 326 (Tex. Civ. App.--Fort Worth 1932, no writ); see also \textit{W. Page Keeton, Fraud--Concealment and Nondisclosure}, 15 TEX. L. REV. 1, 2-5 (1936).
the facts allegedly concealed and a fixed purpose to conceal the wrong.

(1) Materiality of the Defect

As one would expect, whether a defect is material is a question of fact. Although no one can ever guess exactly what might influence a jury’s decision, the question should turn on whether the defect would alter the buyer’s decision to make the fraudulent misrepresentation, the seller must have at least some knowledge of the defect. Although Texas courts have not clarified the degree of knowledge required, some courts outside Texas have held that the knowledge element includes both actual and constructive knowledge based on currently available information. The question should then turn on whether the buyer would not want to know of actual or constructive knowledge based on available information. No courts have gone so far, however, to impose a duty to disclose speculation about known facts. If a seller has actual knowledge of a


42 Baskin, 837 S.W.2d at 746 (citing Carrell v. Denton, 157 S.W.2d 878, 879 (1942)).

43 Id.

44 Id.

45 MACHLIN & YOUNG, supra note 31, § 9.03[1][a][i]. See Reed v. King, 145 Cal. App. 3d 261, 268 (1983) (denying seller’s motion to dismiss a case on grounds of materiality where the seller failed to disclose the fact that multiple murders had been committed in the home and the nondisclosed occurrence had a measurable effect on the market value of the property). Further, to avoid misrepresentation, even where a defect is non-material, the seller may be required to honestly disclose the defect in response to a question or statement by the buyer. MACHLIN & YOUNG, supra note 31, § 9.03[1][a].

46 Id. In a California case, a developer fully disclosed to the buyer that property had been filled but did not disclose water and slide problems in the fill because he believed he had remedied these problems. When sliding later occurred, the California court allowed suit against the seller for fraudulent nondisclosure. Barnhouse v. City of Pinole, 133 Cal. App. 3d 171, 190 (1983).

47 MACHLIN & YOUNG, supra note 31, § 9.03[1][a][ii].

48 Id.; see Clauser v. Taylor, 112 P.2d 661, 662 (1941).


50 MACHLIN & YOUNG, supra note 31, § 9.03[1][a][ii]; Easton v. Strasberger, 152 Cal. App. 3d 90 (1984) (requiring seller’s agent to inspect residential property and disclose known material facts affecting the value or desirability of the property, but not requiring speculation about known facts). “[A] seller should ascertain and disclose site conditions that could indicate the presence of hazardous substances” but need not speculate or conduct investigations concerning the import of “red flags.” MACHLIN & YOUNG, supra note 31, §
defect, the seller must disclose it if not reasonably discoverable. But, a seller on notice of a possible environmental condition in a jurisdiction that may require only construction knowledge to support a claim for fraud, must evaluate whether the information available constitutes constructive knowledge creating a duty to investigate or disclose, or mere speculation about known facts.

(3) Existence of a Confidential Relationship Creating a Disclosure Duty

It has long been the law in Texas that business dealings creating confidential relationships impose fiduciary duties and obligations on the parties to each other. A confidential relationship may also arise when representations are made recklessly without knowledge of the truth and as positive assertions of fact, provided they are made with the intent that the other party act upon those assertions. At least one Texas court of appeals has refused, however, to find a confidential relationship in an arms-length transaction involving sophisticated parties. The Houston court emphasized that a fiduciary relationship was an extraordinary one, that it would not be lightly created, and must be based on something more than objective trust. The court stated that before an informal fiduciary relationship would arise, the complaining party must show that the dealings between the parties continued for enough time that justified that party's reliance on the other party to act in his best interest.

(4) Reasonable Observability of the Defect

A disclosure duty may arise if a defect is not reasonably discoverable by the buyer. This requirement derives from the presumption that sellers are often in unique proximity to definitive information about the site that may not be readily available to buyers, even upon thorough investigation.

The obviousness of a fact or condition may depend in part upon the sophistication and experience of the buyer and the resulting extent of the buyer's duty to investigate. As a general matter, courts tend to find defects less readily observable when residential buyers are involved. Residential buyers are often presumed to be less sophisticated, expected to have little expertise relevant to possible defects, and are thereby accorded maximum protection by the courts.

9.03[a][ii] (1990). It has been suggested "red flags" not requiring investigation might include visible irregularities such as areas of soil lacking vegetation, discolored soil, stunted or blighted vegetation, oddly colored bodies of water, improperly constructed waste management facilities, and an absence of measures to prevent fuel contamination. Id. § 18. It is unclear how significant "red flags" might be before triggering an investigation duty.

51 Stone, 537 S.W.2d at 74 (citing MacDonald v. Follet, 180 S.W.2d 334 (1944)).

52 Id.


54 Id. at 901-02.
one Texas case, for example, an appellate court affirmed the trial court’s decision finding that a developer was 100% liable to a home-owner for losses caused by hazardous waste. Liability was imposed for developing a residential subdivision next to a chemical plant whose operations were open and obvious, and for failing to advise potential home-buyers that the facility stored chemical byproducts on the premises. Conversely, commercial buyers are presumed to possess adequate sophistication to realize that third party experts may be needed to evaluate environmental conditions. Therefore, in deciding whether a possible defect is reasonably observable, the seller must consider the relative sophistication of the parties to the transaction.

(b) Defenses to Fraudulent Misrepresentation

A seller may be able to defeat a buyer’s fraud claim and avoid liability if it can establish that the defect was immaterial, the seller had no knowledge of the defect, or because of the nature of the defect, the expertise of the buyer, or the relationship between the parties, there was no duty to disclose.

Nonetheless, a buyer’s failure to inspect for defects is not often a defense to fraud. Thus, a seller guilty of making an express fraudulent statement of fact may not assert that the buyer could have learned the truth if the defrauded party had diligently investigated. The Fort Worth Court of Appeals put it this way:

It is not the rule that a person injured by the fraudulent and false representations of another is held to the exercise of diligence to suspect and discover the falsity of such statements. In the absence of knowledge to the contrary, he would have a right to rely and act upon such statements, and certainly the wrongdoer in such a case cannot be heard to complain that the other should have disbelieved his solemn statements.

So to defend against fraud, a seller who has committed an affirmative misrepresentation may be at the mercy of the buyer in the absence of a showing that the buyer actually knew the representation was untrue when made.

The buyer’s duty to investigate as a defense is less clear if the seller simply fails to disclose material information. The courts which have
addressed the issue tend to allow buyer's to rely on affirmative representations by the seller as to matters not subject to reasonable inquiry and this entitlement applies to both sophisticated and unsophisticated purchasers. Sophistication and expertise of the buyer may have an impact, however, on the buyer's measure of duty to conduct its own investigation because the buyer's sophistication determines what matters are reasonably discoverable. For instance, a residential buyer may rely on the seller to provide information, rather than conduct its own investigations, while a commercial buyer may have a duty to conduct its own investigation because the buyer's sophistication and expertise, the buyer had a duty to conduct its own investigation and should be deemed to have accepted all risks that such an investigation would have revealed.

(c) Remedies for Fraudulent Misrepresentation

Two different measures of damages are allowed in Texas for fraudulent misrepresentation. The injured party may recover damages measured either as "out of pocket" damages or "benefit of the bargain" damages. Courts calculate "out of pocket" damages as the difference between the amount paid and the value received. Alternatively, "benefit of the bargain" damages are determined as the difference between the value represented and the value actually received.

In addition, a plaintiff may recover "special" or "consequential" damages shown to be the proximate result of the misrepresentation. The Texas supreme court has also awarded the equitable remedy of rescission where the seller failed to disclose an existing fact where there was a duty to disclose material information may be able to convince a court that because of the buyer's sophistication and expertise, the buyer had a duty to conduct its own investigation and should be deemed to have accepted all risks that such an investigation would have revealed.

See Shore Realty, 759 F.2d at 1048-49; Celotex, 851 F.2d at 88; V.S.H., 757 F.2d at 414; Philadelphia Elec., 762 F.2d at 312-13; Hines Lumber, 669 F. Supp. at 854.

Formosa Plastics Corp. USA v. Presidio Engineers and Contractors, 960 S.W.2d 41, 49 (Tex. 1998).

Id. at 49.

Id.


National Resort, 585 S.W.2d at 658.

Id.

TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (Vernon Supp. 2000). In the past, punitive damages were only required to "be reasonably proportioned to the actual damages suffered." Nolan v. Bettis, 577 S.W.2d 551, 556 (Tex. App.--Austin 1979, writ ref'd n.r.e.) (upholding exemplary damages in the amount of $25,000...
showing of intent to harm is unquestionably sufficient to support an award of punitive damages.\textsuperscript{82} But, a mere showing of a "conscious indifference to the rights of others" has also been held sufficient to support exemplary damages.\textsuperscript{83}

2. When Nondisclosure Qualifies as Negligent Misrepresentation

(a) Elements of Negligent Misrepresentation

For some time, Texas courts have recognized a cause of action for negligent misrepresentation.\textsuperscript{84} The courts have adopted the Restatement (Second) of Torts, section 552's definition of negligent misrepresentation as when (1) one in the course of business, supplies false information for the guidance of others in their business transaction; (2) fails to exercise reasonable care or competence in obtaining or communicating the information; (3) the claimant justifiably relies on the false information; and (4) the claimant thereby suffers pecuniary loss.\textsuperscript{85}

Based on actual damages of only $2,000). The Texas legislature has recently put a cap on punitive damages for fraud at the greater of four times actual damages or $200,000. TEX. CIV. PRAC. & REM. CODE ANN. § 41.007 (Vernon Supp. 2000).

\textsuperscript{82} Dennis v. Dial Finance & Thrift Co., 401 S.W.2d 803, 805 (Tex. 1966).

\textsuperscript{83} Burk Royalty Co. v. Walls, 616 S.W.2d 911, 920 (Tex. 1981).

\textsuperscript{84} Geosearch, Inc. v. Howell Petroleum Corp., 819 F.2d 521, 523-24 (5th Cir. 1987); Federal Land Bank Assoc. of Tyler v. Sloane, 825 S.W.2d 439, 442 (Tex. 1992); Rosenthal v. Blum, 529 S.W.2d 102, 105 (Tex. Civ. App.--Waco 1974, writ ref'd n.r.e.).

\textsuperscript{85} Sloane, 825 S.W.2d at 442; Rosenthal, 529 S.W.2d at 105. The Restatement reads:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by there justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.


Though the elements of negligent misrepresentation are similar to those for fraudulent misrepresentation, they differ in several important respects. A negligent misrepresentation claim is more narrow because it is limited to commercial sellers. It may, however, be more readily available to some commercial buyers than an ordinary fraud claim because it imposes a duty on sellers to use reasonable care and competence in both acquiring and disclosing information, it does not specifically require that the information be material, and it does not require a showing of intent on the part of the seller that the buyer rely on the misrepresentation. Consequently, a seller could be held accountable for negligently failing to disclose information and may be held to a higher standard of care than in the case of a fraudulent misrepresentation claim.

Texas courts have held that sellers of real estate have an affirmative duty to disclose "material facts which would not be discoverable by the exercise of ordinary care and diligence on the part of the purchaser, or which a reasonable investigation and inquiry would not uncover."\textsuperscript{86} Although it does not appear that a court has had reason to go this far, it is troubling that the negligent misrepresentation element requiring the seller to use "reasonable care and competence" in acquiring information could conceivably be read to impose upon sellers some affirmative duty to investigate.

Though the author has found no Texas case law on the application of negligent misrepresentation in the environmental context, it is certainly conceivable that the theory could be successfully applied to the negligent misrepresentation or nondisclosure of environmental contamination in a real estate transaction.\textsuperscript{87} The elements are clearly drafted to apply to affirmative statements that are or turn out to be false.\textsuperscript{88} And a

\textsuperscript{86} National Resort, 585 S.W.2d at 658.

\textsuperscript{87} Claims have been raised for negligent misrepresentations in real estate transactions. See, e.g., Stewart Title Guaranty Co. v. Sterling, 822 S.W.2d 1 (Tex. 1992) (buyer's claim against seller settled); Steubner Realty 19, Ltd. v. Cravens Rd. 88, Ltd., 817 S.W.2d 160 (Tex. App.--Houston [14th Dist.] 1991, no writ).

\textsuperscript{88} Sloane, 825 S.W.2d at 442; Rosenthal, 529 S.W.2d at 105; RESTATMENT (SECOND) OF TORTS § 552(1) (1977); see also Nunn v. Chemical Waste
claim could logically follow from a seller's negligent failure to disclose information, leading the buyer to reasonably draw false inferences about the physical condition of the property.\footnote{89}

(b) Defenses to Negligent Misrepresentation

Though it is not entirely clear whether contributory negligence applies to this tort in Texas, there is evidence that several courts of appeals would consider such a defense. For example, in \textit{Federal Land Associates of Tyler v. Sloane},\footnote{90} the appellate court in Tyler stated that contributory negligence was a defense for negligent misrepresentation.\footnote{91} But the jury found no contributory negligence, so this assertion was merely dicta. In \textit{Blue Bell, Inc. v. Peat, Marwick, Mitchell & Co.},\footnote{92} the Dallas Court of Appeals gave a stronger indication that it was open to a claim for contributory negligence. The court reversed a summary judgment for failure of the plaintiff to negate a fact issue as to whether reliance was justified, and therefore, whether plaintiff was contributorily negligent.\footnote{93} Under this reasoning, if a plaintiff unreasonably relies on a misrepresentation, the damage recovery may be reduced. Finally, in \textit{Greenstein, Logan & Co. v. Burgess Marketing, Inc.},\footnote{94} the court specifically adopted the rule that an accountant may use contributory negligence as a defense "only where it has contributed to the accountant's failure to perform the contract and to report the truth."\footnote{95} Consequently, a seller found to have negligently misrepresented a material fact may be able to at least reduce damages by bringing a contributory negligence defense.

(c) Remedies for Negligent Misrepresentation

Texas courts consider negligent misrepresentation as a species of remedial fraud.\footnote{96} Nevertheless, the supreme court has opted to deny "benefit of the bargain" damages and mental anguish damages for this tort, choosing instead to rely on the Restatement (Second) of Torts section 552B.\footnote{97} The Restatement limits damages to pecuniary losses suffered in reliance upon the negligent misrepresentation.\footnote{98} The court considered

\footnote{94}744 S.W.2d 170 (Tex. App.--Waco 1987, writ denied).

\footnote{95}Id. at 190.

\footnote{96}Rosenthal, 529 S.W.2d at 104.

\footnote{97}Sloane, 825 S.W.2d at 442-43. The court adopted the damages limits delineated in the Restatement § 552B after observing that it saw no trend to reject the pecuniary loss rule for what was "essentially a commercial tort," and that while several other state courts have allowed mental anguish damages for this tort, many others states limited damages to those in § 552B. \textit{Id.}. Justice Mauzy disagreed with this "artificial distinction between remedial fraud actions and actions for fraudulent misrepresentation." \textit{Id.} at 443-44 (Mauzy, J., concurring and dissenting).

\footnote{98}The Restatement provides for negligent misrepresentation damages as follows:

(1) The damages recoverable for a negligent misrepresentation are those necessary to compensate the plaintiff for the pecuniary loss to him of which the misrepresentation is legal cause, including (a) the difference between the value of what he has received in the transaction and its purchase price or other value given for it; and (b) pecuniary loss suffered otherwise as a consequence of the plaintiff's reliance upon the misrepresentation. (2) The damages recoverable for a negligent

Management, Inc., No. 82-1845 (D. Kan. Mar. 1, 1985); \textit{Gauerkle}, 332 N.W.2d at 808-09. One commentator concludes that, "[i]n the context of hazardous substance liabilities, the potential for such unintended misrepresentation is great, and may extend a seller's liability far beyond the boundaries of his duty to disclose," \textit{Machlin & Young, supra} note 31, § 9.03[3] (1990); \textit{see also} Doran v. Milland Dev. Co., 323 P.2d 792 (Cal. App. 1958) (finding actionable misrepresentation where seller stated, based on the city's inspection, that "the house is properly constructed," where the seller failed to make any attempt to confirm that the house was built in compliance with code before making the statement).

\footnote{89}Sloane, 825 S.W.2d at 442; Rosenthal, 529 S.W.2d at 105.

\footnote{90}793 S.W.2d 692 (Tex. App.--Tyler 1990), aff'd in part, rev'd on other grounds, 825 S.W.2d 439 (Tex. 1991).

\footnote{91}Id. at 696 n.4.

\footnote{92}715 S.W.2d 408 (Tex. App.--Dallas 1986, writ ref'd n.r.e.).

\footnote{93}Id. at 415.
negligent misrepresentation to be "essentially a commercial tort," and therefore, the damage limits to be reasonable.

3. Statutory Torts
(a) Deceptive Trade Practices Act

In creating the Deceptive Trade Practices Act (DTPA or the Act), the Texas Legislature saw fit to "provide consumers with a cause of action for deceptive trade practices without the burden of proof and numerous defenses encountered in a common law fraud or breach of warranty suit." The legislature specifically added real estate to the definition of goods covered by the Act in 1975, but relief is available only to consumers as specifically defined in the Act. The DTPA defines a "consumer" as "an individual, partnership, or corporation who seeks or acquires by purchase or lease, any goods or services." In Delaney Realty, Inc. v. Ozuna, the court of appeals held that home-buyers, who did not pay for or seek compensation for services rendered, were not "consumers" under the DTPA with respect to a real estate agent, and could not recover for failure to disclose that the house was subject to being flooded. In the more recent Texas Supreme Court case of Cameron v. Terrell & Garrett, Inc., however, a buyer was held to have consumer standing under the DTPA in a suit against his seller's real estate agent or broker.

The Act is broad in scope because it permits several independent grounds for recovery. It accomplishes this objective by providing either a "providing consumers with a cause of action for cause of action under a general prohibition against deceptive trade practices without the burden of false or misleading acts, for violation of any one of a "laundry list" of specific violations, or for breach of warranty or unconscionable action or course of action as it is defined by the Act." Further, the DTPA eliminates the element of reliance by the injured party as an element of recovery.

(1) Elements of a DTPA Causes of Action

In § 17.46(b) of the DTPA, the "laundry list" enumerates several specific "false, misleading, or deceptive acts" that may be particularly applicable to representations or nondisclosures concerning environmental problems present on real property. Subsection (5), for example, prohibits one from "representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have. . . ." Similarly, subsection (7) forbids "representing that goods or services are of a
particular standard, quality, or grade."\textsuperscript{112} No showing of intent is required for recovery under subsection (7), unlike other subsections requiring scienter.\textsuperscript{113} Consequently, a seller might be held liable under this subsection for passively failing to disclose information concerning the true quality of the property being sold.

Subsection (13) makes unlawful "knowingly making false or misleading statements of fact concerning the need for parts, replacement, or repair service."\textsuperscript{114} Subsection (19) further makes it unlawful to give a warranty which involves rights or remedies that the warranty does not in fact contain.\textsuperscript{115} This subsection would apply, for example, if during negotiations a seller represents that the buyer is indemnified against environmental liabilities when he is not.\textsuperscript{116} Subsection (21) prohibits one from "representing that work or services have been performed on, or parts replaced in, goods when the work or services were not performed or the parts replaced."\textsuperscript{117}

One of the more directly applicable provision of the DTPA to the subject of this paper is subsection (23).\textsuperscript{118} This subsection creates rights in a buyer for a seller's "failure to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed."\textsuperscript{119} If a seller is aware of the presence of a hazardous substances before a transaction, but fails to disclose the information in an effort to induce the buyer to enter the contract, the seller may be held liable if the buyer would not have entered the contract but for the lack of information.\textsuperscript{120} The duty to speak under this subsection is considered broader than the common law duty to disclose because there is no requirement in the DTPA for the buyer to make any reasonable efforts to inspect.\textsuperscript{121} The Texas Supreme Court has noted that "[t]he law is not made for the protection of experts, but for the public--that vast multitude which includes the ignorant, the unthinking and credulous, who, in making purchases, do not stop to analyze but are governed by appearances and general inspection."\textsuperscript{122}

Another advantage for the buyer under the DTPA over common-law theories is that privity is not required. In fact, any party who "sought to enjoy the benefits" of a transaction\textsuperscript{123} or became "inextricably intertwined" with the transaction is a proper defendant.\textsuperscript{124} For example, a buyer has been held to have consumer standing under the DTPA in a suit against his seller's real estate agent or broker.\textsuperscript{125} In Century 21 Page One Realty v.

\textsuperscript{112}Id. § 17.46(b)(7).

\textsuperscript{113} Smith v. Baldwin, 611 S.W.2d at 616.

\textsuperscript{114} TEX. BUS. & COM. CODE ANN. § 17.46(b)(13) (Vernon 1987 & Supp. 2000).

\textsuperscript{115} Id. § 17.46(b)(19). This subsection effectively usurps the merger doctrine and parol evidence rule. David J. Schenck, Remedies for Environmental Liability: Rights of the Toxic Grantee, 43 BAYLOR L. REV. 761 (1991) (see II.B.5.).

\textsuperscript{116} Schenck, supra note 115, at II.B.5.

\textsuperscript{117} TEX. BUS. & COM. CODE ANN. § 17.46(b)(21) (Vernon 1987 & Supp. 2000). Note that this section does not include a requirement that the statement be knowingly false. Id.

\textsuperscript{118} Id. § 17.46(b)(23).

\textsuperscript{119} Id. § 17.46(b)(23).

\textsuperscript{120} Cobb v. Dunlap, 656 S.W.2d 550, 552, 554 (Tex. App.-- Corpus Christi 1983, writ ref’d n.r.e.) (citing Robinson v. Preston Chrysler-Plymouth, Inc., 633 S.W.2d 500, 502 n.1 (Tex. 1982) and Spradling v. Williams, 566 S.W.2d 561, 564 (Tex. 1978)) (requiring knowledge as a necessary element for a cause of action under this section).

\textsuperscript{121} See National Resort, 585 S.W.2d at 655.

\textsuperscript{122} Spradling, 566 S.W.2d at 563 (quoting Florence Mfg. Co. v. J. C. Dowd & Co., 178 F. 73, 75 (2d Cir. 1910)).

\textsuperscript{123} Flenniken v. Longview Bank & Trust Co., 661 S.W.2d 705, 707 (Tex. 1983).

\textsuperscript{124} Knight v. International Harvester Credit Corp., 627 S.W.2d 382, 389 (Tex. 1982).

\textsuperscript{125} See, e.g., Cameron, 618 S.W.2d at 541; ECC Parkway Joint Venture v. Baldwin, 765 S.W.2d 504, 510-11 (Tex. App.--Dallas 1989, writ denied) (allowing action against vendor and broker for failure to disclose deed restrictions limiting height of any building constructed on the property).
Naghad, the court of appeals held a vendor and the real estate agent jointly and severally liable for a purchaser's damages where both knew of the defective condition of a house prior to purchase but failed to disclose this fact to the buyer. Also, the court in Gibbs v. Main Bank of Houston held a title insurance company liable to the buyer for nondisclosure of a recorded lien under the DTPA. Finally, in Loma Vista Development Co. v. Johnson, the Texas Supreme Court held a seller liable for the misrepresentations of his broker, stating that a seller is not allowed to retain the "fruits of the fraud of his agent on the ground that he didn't know of, or authorize, the making of the fraudulent misrepresentation." Consequently, a seller need not only worry about inadvertently making false misrepresentations himself, but must also be sure the seller's broker or other agents refrain from doing so as well.

(2) Defenses to a DTPA Cause of Action

Very few defenses apply to the DTPA. As mentioned above, common-law defenses are generally inapplicable. The Texas Supreme Court has also held that imputed or constructive notice under recording statutes are not intended to bar claims based on fraud or the DTPA. This holding is based on the notion that deed records are not compiled "for the purpose of protecting perpetrators of fraud." One lone affirmative defense has succeeded to avoid a misrepresentation claim in the sale of property. In Dubow v. Dragon, a purchaser made a thorough inspection of the property and obtained professional opinions before making a decision to purchase. The court held that the buyer's careful investigation foreclosed the DTPA action by serving as a new and independent basis for the purchase of the property, thus intervening and superseding any misrepresentations or failures to disclose on the part of the vendor. No doubt, this is not a good defense on which a seller would like to be forced to rely.

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One particular advantage to an injured party claiming a DTPA violation is the increased potential for recovery of damages. Not only is the burden of proof less than that required for common-law misrepresentations, but a successful plaintiff can also recover attorneys' fees, and in some cases, treble damages. Also, at the plaintiff's option, damages may be measured by either the "out of pocket" or "benefit of the bargain" method discussed above. No doubt the DTPA has many advantages to consumers injured by misrepresentations by a seller or its agents.

(b) Fraud in Real Estate and Stock Transactions Act

In 1967, the Texas legislature created a specific statutory cause of action for buyers to recover from harm caused in fraudulent real estate transactions. A seller is jointly and severally liable for the misrepresentations of his broker, or failures to disclose on the part of the vendor. In Gibbs v. Main Bank of Houston, a title insurance company was held liable to the buyer for the buyer's careful investigation foreclosed the DTPA action by serving as a new and independent basis for the purchase of the property, thus intervening and superseding any misrepresentations or failures to disclose on the part of the vendor. No doubt, this is not a good defense on which a seller would like to be forced to rely.

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transactions. This provision is available to a broader scope of injured parties than the DTPA because it applies to those who fail to qualify as consumers under the DTPA. Furthermore, Texas courts have found that a buyer of real property has discretion to sue for fraud either under the Fraud in Real Estate and Stock Transactions Act, at common law, or both.

(1) Elements of a Fraud in Real Estate Cause of Action
Under the statute, fraud in a real estate transaction consists of a false representation of a past or existing material fact, made to induce a person to enter into a contract, and relied on by that person in entering the contract. Note the lack of a requirement for knowledge that the representation was false when made. This is yet another example of potential liability for perfectly innocent statements that turn out to be false. Also, where

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\text{140 Id.}
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\text{141 See, e.g., Wright, 579 S.W.2d at 578; El Paso Dev. Co. v. Ravel, 339 S.W.2d 360, 365 (Tex. Civ. App.--El Paso 1960, writ ref'd n.r.e). To bring a claim under § 27.01, it has been held that the misrepresentation of material fact must have induce the another to enter into a contract for the sale of land or stock. Nolan, 577 S.W.2d at 555-56.}
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\[
\text{142 TEX. BUS. & COM. CODE ANN. § 27.01(a) (Vernon 1987). The language of the statute reads:}
\]

\[
\begin{align*}
\text{Fraud in a transaction involving real estate or stock in a corporation or joint stock company consists of a} \\
\text{(1) false representation of a past or existing material fact, when the false} \\
\text{representation is} \\
\text{(A) made to a person for the purpose of} \\
\text{inducing that person to enter into a} \\
\text{contract; and} \\
\text{(B) relied on by that person in entering} \\
\text{into that contract.}
\end{align*}
\]

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\text{143 Id. § 27.01(b). A person who violates this act may be held liable to the injured party for attorney's fees and costs. Id. § 27.01(c).}
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\text{144 Kerrville HRH, Inc. v. City of Kerrville, 803 S.W.2d 377, 384 (Tex. App.--San Antonio 1990, writ denied).}
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\text{145 Id.; Wright, 579 S.W.2d at 579; Polk Terrace, 386 S.W.2d at 593.}
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\text{146 Id.}
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\text{147 Id.}
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\text{148 Kerrville HRH, 803 S.W.2d at 385-86; see also Koral, 802 S.W.2d at 651; Labbe v. Corbett, 6 S.W. 808, 811 (Tex. 1888).}
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silence can be found to be as misleading as a positive misrepresentation, passive or even seemingly innocent nondisclosure might conceivably subject a seller to liability under this statute.

(2) Defenses to a Fraud in Real Estate Cause of Action
In applying the Fraud in Real Estate Act, the courts have held that where material representations were made by a person responsible for knowing the truth or falsity of the representations, the false representations may still support an action in fraud even if the person made them without knowledge of their falsity. Further, Texas courts seem to agree that failure to investigate will not defeat an action in fraud. They hold that a defrauded party is entitled to rely on the fraudulent party's affirmative representations. One court put it this way, "When one has been induced to enter into a contract by fraudulent representations, the person committing the fraud cannot defeat a claim for damages based upon a plea that the party defrauded might have discovered the truth by the exercise of proper care."

As with common law fraud, it is less clear whether a buyer's duty to investigate might be successfully used as a defense to liability where the seller is guilty only of nondisclosure. It may again depend on the degree of observability of the defect and therefore, the level of sophistication of the buyer.

(3) Remedies for a Fraud in Real Estate Cause of Action
If a person makes a false representation with actual awareness of the falsity of the statement, such person may be held liable under the statute for
exemplary damages. Also, a person who (1) has actual awareness of the falsity of a representation made by another person, (2) fails to disclose the falsity of the representation to the person defrauded, and (3) benefits from the false representation, violates the Act and is liable to the person defrauded for exemplary damages. The statute allows that "[a]ctual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness."

It is interesting to note that the 1983 amendment to this statute both lowered the burden of proof necessary to recover exemplary damages and eliminated the limitation on exemplary damages. Before the 1983 amendments, to recover punitive damages, the plaintiff had to show that the defendant "willfully" made the false representation. Now the plaintiff must only show actual awareness of the falsity of the statement. Also, the 1983 legislature deleted the limit on punitive damages, which were "not to exceed twice the amount of the actual damages." Finally, the legislature added the simplified means of showing actual awareness. So this revised statute makes it simpler for a plaintiff to recover for fraud in real estate transactions than under prior law or current common-law rules.

To avoid any of the different forms of misrepresentation liabilities, several precautions may be taken by sellers. The following precautionary measures have been suggested: (1) communicate the scope of any representations concerning the property, (2) expressly mention the source of the representations, (3) avoid offering any conclusions about the property’s conditions or providing any interpretation of ambiguous information about possible contamination, previous uses, and neighboring property, (4) recommend the buyer retain legal or technical assistance in interpreting information. Also, the seller should make sure his broker or other agents or representatives observe the same guidelines.

D. CONTRACT RISK FROM NONDISCLOSURE

Absent a contrary contract provision, the risk of losses from environmental contamination that is not attributable to the fault of either the buyer or seller, generally shifts from the seller to the buyer at the transfer of either title or of possession. Of course, the parties are free to allocate environmental liabilities differently by including appropriate provisions in their transfer agreements. In the process of negotiating which party will bear certain risks, the parties may create or eliminate certain disclosure duties. For example, a buyer may demand certain disclosures from the seller about the quality of the property that the seller would not otherwise have a duty to disclose. Conversely, some seller disclosure duties may be eliminated by an agreement by the buyer to acquire the property on an "as is" basis, which is discussed in more detail below. In addition, certain contractual provisions may make certain defenses to liability unavailable. For example, in one Texas case a contract between a buyer and a seller provided that the seller would ensure that the air-conditioning equipment would operate to standards required by the lessee of the building on the property. In the buyer’s suit against the seller for breach of that contract provision, the court held that the defense of caveat emptor was unavailable because the buyer reasonably relied upon his contract, rather than his own investigation. This sort of rationale might reasonably extend to environmental liability provisions as well.

Contract provisions intended to shift liabilities between buyers and sellers have routinely been
upheld where the intent to allocate those risks was clear.\textsuperscript{160} The general law of contracts governs in these instances.\textsuperscript{161} It allows "parties bargaining at arms' length to protect themselves by allocating risks to the party best able to bear them."\textsuperscript{162}

The intent to allocate need not necessarily be written in the contract. For example, in \textit{Greenwood Mills, Inc. v. Russell Corp.}, Russell put down a deposit for the purchase of a production facility. Russell later sued Greenwood to get its deposit money back, claiming that Greenwood fraudulently or negligently failed to disclose the plant's environmental problems. The court was unsympathetic to Russell's claim. It held that "Russell got exactly what it bargained for here: an option contract."\textsuperscript{163} The court reminded the complaining party of the purpose of placing the deposit. "Placing the deposit allowed Russell to conduct a thorough environmental investigation and avoid the losses it might well have sustained if it had prematurely entered into a purchase agreement."\textsuperscript{164} The court also found that Greenwood was under no duty to disclose because the full extent of the plant's environmental problems could have been easily determined from a review of records.\textsuperscript{165}

The parties to an agreement to transfer real property may also contractually create some tort liability. For example, if the seller expressly warrants that the property is of a certain quality that it is not, the seller may be held liable for not only a breach of contract, but also some form of misrepresentation or fraud.

1. \textbf{Express Warranties}

Warranties tied to an agreement between parties may be either express or implied. If the parties reduce their contract to writing, the written instrument will be presumed to embody their entire agreement.\textsuperscript{166} Unless the parties agree to expressly extend contractual representations and warranties beyond the closing of the sale, express warranties must also appear within the four corners of the deed effecting the conveyance in order to be effective.\textsuperscript{167} This follows from the application of the merger doctrine, which provides that the sales contract is merged into the deed on delivery, and provisions contained in the sales contract are thereby ineffective if not repeated in the deed itself.\textsuperscript{168} The merger doctrine has been held inapplicable, however, where the granting of the deed is only part performance of earlier agreement\textsuperscript{169} in which fraud, misrepresentation, accident, or mistake caused the omission.\textsuperscript{170}

Buyers of real property frequently seek a laundry list of environmental representations and warranties. These representations and warranties can be problematic to sellers if not fully accurate when made because both contract and tort claims can arise as a result of any breach thereof. In reviewing these provisions, practitioners are cautioned to consider the breadth of the statements

\textsuperscript{160} \textit{Greenwood Mills}, 981 F.2d 148; \textit{Southland Corp. v. Ashland Oil, Inc.}, 19 ENVTL. L. REP. (ENVTL. L. INST.) 20,738 (D.N.J. 1988); \textit{Mardan Corp. v. C.G.C. Music, Ltd.}, 804 F.2d 1454 (9th Cir. 1986).

\textsuperscript{161} \textit{Greenwood}, 981 F.2d at 151.

\textsuperscript{162} \textit{Id.}

\textsuperscript{163} \textit{Id.} at 150.

\textsuperscript{164} \textit{Id.}

\textsuperscript{165} \textit{Id.} at 151.


\textsuperscript{168} \textit{See generally} \textit{JOHN CRIBBET \& CORWIN JOHNSON, CASES AND MATERIALS ON PROPERTY} 1454-56 (5th ed. 1984).


and sellers will want to narrow the statements as much as possible. Sellers may narrow representations by adding qualifiers such as, "to the best of seller's actual knowledge," or limiting knowledge to that of a particular person or group of persons. Perhaps a buyer wants a specific representation that there has been no on-site disposal of petroleum or other pollutants. Since this representation could conceivably be broad enough to include leakage of oil from vehicles on the property, the seller may want to add a qualification that the representation extends only to those substances the presence of which poses a threat to human health, welfare, or the environment. As another example, in *Nunn v. Chemical Waste Management, Inc.*, the court held that seller breached its warranty that the facility complied with all laws, when leakage in violation of state law was discovered.\(^\text{171}\)

2. "As Is" Clauses to the Rescue - Perhaps

Texas courts have long upheld the sale of property on an "as is" basis.\(^\text{172}\) By an "as is" clause, the seller makes no warranties and provides no indemnities to the buyer.\(^\text{173}\) Several other jurisdictions find these clauses ineffective, however, in releasing a seller from liability to the buyer for environmental conditions affecting property. In some cases, to be effective for hazardous conditions, courts have required that the "as is" clause specifically mention the pertinent environmental condition.\(^\text{174}\) Other courts treat "as is" clauses as only disclaimers of warranties that bar only actions based on breach of warranty.\(^\text{175}\)

In Texas, an "as-is" clause contained in a purchase and sale agreement may preclude a buyer of real property from claiming damages against the seller as a result of the seller's non-disclosure of environmental conditions on the property being purchased. For example, in *Prudential Insurance Company of America v. Jefferson Associates, Ltd.*, the buyer of a commercial building purchased on an "as-is" basis and without any express or implied warranties. The conveyance was made after the seller had confirmed to the buyer that the building had no problems or defects other than a foundation problem and after the buyer had inspected the building. Soon after its purchase, the buyer discovered asbestos throughout the building, of which the seller was unaware at the time of the purchase. The buyer sued the seller for damages on several theories, including a claim that the seller fraudulently misrepresented the environmental condition of the building. The Supreme Court of Texas, in reversing the appellate court's decision, held, among other things, that the "as is" clause at issue in this particular case was valid and, thus, prevented the buyer from asserting that the seller's non-disclosure of the asbestos in the building was the cause in fact of the buyer's injury.\(^\text{176}\) The court explained that a valid "as is" clause negates causation and, thus, prevents the buyer from holding the seller liable if the property being purchased is found to be worth less than the price paid.

In its analysis of the case, the Court identified several factors it considered in determining that the particular "as is" clause was valid.\(^\text{177}\) First, the language of the “as is” provision clearly expressed that the buyer was purchasing the property on an "as is" basis and contained an affirmation that the buyer clause to a buyer for an unknown and undisclosed leaking storage tank).


\(^{172}\) See, e.g., *Southland Corp.*, 19 ENVTL. L. REP. (ENVTL. L. INST.) 20,738.

\(^{173}\) An indemnity clause may trump an "as is" clause so that a buyer can pursue its claim against a seller for cleanup costs. *Southland Corp.*, 19 ENVTL. L. REP. (ENVTL. L. INST.) 20,738.

\(^{174}\) Amland Properties Corp. v. Aluminum Co. of America, 711 F. Supp. 784, 802 (D.N.J. 1989) (holding "as is" clause ineffective to avoid liability for abnormally dangerous product); *Garb-Ko, Inc. v. Lansing-Lewis Servs., Inc.*, 423 N.W.2d 355, 358 (Mich. Ct. App. 1988) (refusing to shift the risk of loss under an "as is"


\(^{176}\) *Prudential*, 896 S.W.2d at 161.

\(^{177}\) *Id.* at 161-62.
was not relying on any representations by the seller. The buyer was instead relying upon its own examination of the property. The “as is” clause also stated that the buyer was taking the property “with any and all latent and patent defects” and without express or implied warranties, including any warranty that the property was fit for a particular purpose. The nature of the transaction and the totality of the circumstances further indicated that the “as is” clause was part of an arms-length transaction between sophisticated parties and was an important basis of the bargain, rather than a "boiler-plate" provision in a standard form contract. Finally, the seller had not fraudulently induced the buyer into making the “as is” agreement.

If a seller induces a buyer to purchase property on an "as is" basis by fraudulent representation or concealment of information, the “as is” clause may be found invalid. In such an instance, the seller cannot assure the buyer of the condition of the property and then "disavow the assurance which procured the 'as is' agreement." As discussed above, Texas law requires a seller of real estate to disclose any and all known material facts about the real estate which a buyer would not discover in the exercise of ordinary care and due diligence. Consistent with this precedent, the Prudential court implied that if the seller had known of the asbestos in the building, it would have had a duty to disclose this information to the buyer notwithstanding the “as is” clause contained in the purchase and sale agreement. An "as is" clause may also be ineffective if the buyer is entitled to inspect the condition of the property being sold, but such entitlement is somehow impaired by the seller.

Although fraudulent inducement by the seller may invalidate the effect of an “as is” clause, if the “as is” clause or another clause within the purchase and sale agreement contains a statement that the buyer unequivocally disclaims reliance upon the seller’s representations and clearly expresses the parties’ intent to waive fraudulent inducement claims, the “as is” clause may be upheld notwithstanding a fraudulent inducement or fraudulent nondisclosure by the seller. In determining whether the plaintiff had a right to rely on the defendant’s representations as to the feasibility of a particular diamond mining project, the Court in Schlumberger Technology Corporation v. Swanson held that if a contract contains “a release that clearly expresses the parties’ intent to waive fraudulent inducement claims, or one that disclaims reliance on representations about specific matters in dispute,” such a release may preclude a claim of fraudulent inducement or fraudulent nondisclosure if the nature of the transaction and the totality of the circumstances is such that the express release is valid. Thus, if an “as is” clause contains language to establish that the parties intended to waive fraudulent inducement claims and meets all of the other essential requirements, the “as is” clause may be upheld notwithstanding the fact that the buyer was fraudulently induced by the seller into entering into the “as is” agreement.

There remains some doubt that an "as is" clause may be used to absolve a seller of CERCLA liability or similar Texas cleanup liability, but it may be used to create a source of funds to pay such costs. In International Clinical Laboratories, Inc. v. Stevens, the district court held that while an 'as is' clause could prevent a purchaser from recovering on a breach of warranty theory, it would not necessarily follow that a CERCLA claim would be similarly barred. But, in AM International, Inc. v. International Forging Equipment, the Sixth Circuit adopted the theory of the Ninth Circuit that CERCLA § 107(e)(1) allowed for the contractual allocation of liabilities among responsible parties. Further, an "as is" clause may not absolve a seller of any liabilities to the government or protect a seller

179 Prudential, 896 SW.2d at 162.
180 National Resort, 585 S.W.2d at 657-58; Pairett, 969 S.W.2d at 515.
181 959 S.W.2d 171 (Tex. 1997).
182 710 F. Supp. 466, 469 (E.D.N.Y. 1989); see also Southfund Partners III v. Sears, Roebuck and Co., 57 F. Supp. 2d 1369, 1375 (N.D. Ga. 1999) (finding that an “as is” clause contained in a purchase and sale contract does not relieve the seller of the property from CERCLA liability unless the “as is” clause clearly expresses the purchaser's intent to release the seller from any CERCLA liability).
183 982 F.2d 989, 994 (6th Cir. 1993) (citing Mardan, 804 F.2d at 1460).
from CERCLA-based claims. In any event, if the present owner is financially unable to perform a cleanup or pay for a government-ordered cleanup, the government will look to those parties who were owners at the time of disposal.

3. Indemnification
(a) Construction of Clauses
Texas courts usually construe indemnities strictly against the party seeking recovery. The courts generally conclude that exculpatory or indemnity clauses that "attempt to free an actor from liability for his own negligence are basically valid but must be strictly construed." To enforce such clauses, the courts require express and specific language such as, "including such party's negligence." There is a growing trend away from strict construction, however, especially if the agreement is between sophisticated commercial parties. Thus, if written carefully, the seller may be able to contract away liability for his own negligent nondisclosure of material information.

(b) CERCLA Liability Indemnification
CERCLA specifically provides:

No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this Section.

In this jurisdiction, parties can allocate CERCLA liabilities amongst themselves, but such agreements will not bind the federal government or others not party to the agreement, who may still pursue their CERCLA claims against the indemnified party. For the contractual indemnity to be held to allocate CERCLA liability, the agreement must "clearly and unequivocally" express

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184 42 U.S.C. § 9601(35)(c) (1997); International Clinical Labs., 710 F. Supp. at 469 ("While the 'as is' clause prevents a purchaser from recovering on a breach of warranty theory, it does not necessarily follow that a claim based upon CERCLA is similarly barred."). But see AM Int'l, 982 F.2d at 994 (adopting the theory of the Ninth Circuit that CERCLA § 107(e)(1) allows for the contractual allocation of liabilities among responsible parties).


187 K & S Oil Well Serv., Inc. v. Cabot Corp., 491 S.W.2d 733, 739 (Tex. Civ. App.--Corpus Christi 1973, writ ref'd n.r.e.).

188 B-F-W Constr. Co. v. Garza, 748 S.W.2d 611, 613 (Tex. App.--Fort Worth 1988, no writ); Adams v. Spring Valley Constr. Co., 728 S.W.2d 412, 414 (Tex. App.--Dallas 1987, writ ref'd n.r.e.).


191 Joslyn Mfg. Co. v. Koppers Co., Inc., 40 F.3d 750, 754-55 (5th Cir. 1994) (holding that a tenant’s indemnity agreement to cover CERCLA liability); United States v. Lowe, 29 F.3d 1005, 1009 (5th Cir. 1994) (holding indemnity provision in corporate bylaws to provide a source of funds to officers for CERCLA liability); see also Mardan, 804 F. Supp. at 1456 (release held to cover CERCLA liability); Hays v. Mobil Oil Corp., 736 F. Supp. 387, 393 (D. Mass. 1990), aff'd in part, vacated in part, 930 F.2d 96 (1st Cir. 1991) (prohibiting the indemnified party from shielding itself from the government through an indemnity, but "indemnification clauses are still permitted to allocate the burdens of risks and costs among otherwise liable parties"); Chemical Waste Management, 669 F. Supp. at 1285 (CERCLA's liability provisions do not abrogate the parties' contractual rights).
Disclosure Obligations and Reporting Requirements for Environmental Contamination

8-21

an intent to cover such liability. Thus, there is at least some opportunity to contractually allocate CERCLA liability between buyers and sellers in a sales transaction. Indemnity contracts under CERCLA are interpreted in accordance with the state’s rules governing construction of contracts to determine the mutual intent of the parties.

E. CERCLA LIABILITY AND NONDISCLOSURE

1. CERCLA Liability

As mentioned above, CERCLA was enacted to promote the cleanup of sites contaminated with hazardous chemicals. CERCLA fixes liability for such response costs on those parties connected with the contaminated property or the activities creating the contamination. The Potentially Responsible Parties (PRPs) may include both past and current owners of the contaminated land, as well as other parties. CERCLA may impose liability on interveners between buyers and sellers in a title transaction. Indemnity contracts under CERCLA are interpreted in accordance with the state’s rules governing construction of contracts to determine the mutual intent of the parties.

2. Disclosure Issues Affecting Liability Allocation

(a) Innocent Landowner Defense

The innocent landowner defense was added to CERCLA in 1986 by the Superfund Amendment and Reauthorization Act (SARA). Under the innocent landowner defense, a buyer may avoid liability by establishing by a preponderance of the evidence that the release or threatened release of a hazardous substance and the resulting damages were caused by an act or omission of a third party. The third party may include the seller of the property by land contract, deed or other instrument transferring title or possession.

The innocent landowner defense covers instances where a buyer acquired the property "after the disposal or placement of the hazardous substance on, in or at the facility," and the buyer can establish by a preponderance of the evidence that at the time the buyer acquired the facility the buyer "did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility." To establish that the buyer had

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195 Id.


197 42 U.S.C. § 9607(a) (1997); Monsanto, 858 F.2d at 168-69; Shore Realty, 759 F.2d at 1042; Chem-Dyne, 572 F. Supp. at 806.

198 Schenck, supra note 115, at I.


201 Id. § 9601(35)(A).

202 Id.

203 Id. § 9601(35)(A)(i). A buyer may also successfully bring this defense by showing that he "is a government entity which acquired the facility by escheat, or through any other involuntary transfer . . . or through the exercise of eminent domain authority by purchase or condemnation." Id. § 9601(35)(A)(ii). The claim may also be successful if the defendant "acquired the facility by inheritance or bequest. Id. § 9601(35)(A)(iii).
no reason to know of any hazardous substances, the buyer must have "undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practices in an effort to minimize liability." In determining whether a buyer undertook all appropriate inquiry, the court must consider any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection. A seller’s failure to disclose information not reasonably discoverable to the buyer is irrelevant to the inquiry.

Again, parties involved in commercial transactions are held to a higher standard than those engaged in private or residential transactions. There is also evidence that Congress intended to establish a significant scope of inquiry, particularly in commercial transactions. As a result, commercial real estate transactions now routinely involve considerations of environmental issues and purchasers often conduct environmental assessments to establish the scope of any risks or, if none are indicated, the buyer may take advantage of the innocent landowner defense.

Under this scheme, commercial buyers are effectively subjected to the old rules of caveat emptor. If buyers fail to make a proper inquiry, they may be held jointly and severally liable for cleanup costs along with the seller and any other PRPs. If they do perform a proper investigation and find nothing, however, they are relieved of all CERCLA liability and the seller and other PRPs must bear the full burden of remediation expenses. If the buyer finds contamination or potential contamination, then he must decide whether to make the purchase at all, and if so, how best to contractually relieve himself of any potential liabilities.

(b) Intervening Landowners
Under the statute, a defendant may not claim the innocent landowner defense "if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge." This provision appears to get intervening landowners off the hook if they disclose to the buyer. But the disclosure makes the innocent landowner defense unavailable to the buyer of the property because the new buyer will have reason to know of the presence of hazardous substances on the property. It also seems that if the new buyer discovers the contamination on his own, the intervening owner will still be jointly and severally liable for his nondisclosure.

Thus far, the innocent landowner defense has not often been litigated and only a few courts have upheld the defense. This may be explained by the impact the statute has had on the behavior of buyers, who now routinely perform thorough investigations before they purchase property. If as a result of a thorough investigation, a buyer finds contamination, the defense is unavailable. The buyer then must walk away from the purchase or determine how to allocate the liability risk associated with what was found. If the buyer uncovers no contamination, there probably is none and the buyer is unlikely to discover it later.

II. REPORTING REQUIREMENTS

204 Id. § 9601(35)(B).
205 Id.
207 Id.

210 The analysis in this paper is limited in scope to reporting requirements most often triggered as a result of finding contaminants within the subsurface (soil or groundwater) of the property that is subject of a real estate transaction. Reporting requirements that might be triggered by operational exceedences or other violations discovered during due diligence, or by spills or other releases of hazardous materials, are beyond the scope of this paper.
Discovery of contamination during the process of completing a transactions involving real estate can and sometimes does trigger statutory obligations to report environmental conditions to the TNRCC. In many cases, reports of newly discovered contamination may lead directly down a path toward obligations to perform further investigation of the environmental condition of the property and perhaps remedial activities to correct the environmental condition. Reporting responsibilities typically burden the owner of the land, so savvy property sellers should be sensitive to what a prospective purchaser’s environmental site assessment might reveal and how this information will be managed once generated. Particularly in advance of any invasive sampling, a seller may, among other things, wish to clarify reporting obligations with the buyer and its environmental consultant, protect the confidentiality of any data generated by the investigation, or attempt to shift the liability risk related to the presence of historical contamination.

A. REPORTING RELEASES FROM STORAGE TANK SYSTEMS

The TNRCC has established detailed rules concerning release reporting and any associated corrective action that may be applicable to regulated underground and above-ground storage tank systems. The Commission mandates that both owners and operators of tank systems must report suspected or confirmed releases to either its district or Austin office within twenty-four (24) hours of discovery or receipt of written notification from others. Discovery may occur either by invasive testing, physical observation of free product or vapors, observation of unusual operating conditions, or monitoring results. And of course, any of these release detection methods might be trigger by a buyer’s due diligence in anticipation of a transaction involving real property.

B. REPORTING NON-TANK RELEASES

Section 26.039 of the Texas Water Code governs reporting of historical releases of contamination that is unrelated to a storage tank system. The Commission has historically interpreted this provision to require reporting of all discoveries of historical contamination, but the regulated community has generally considered it more carefully in light of the particular facts and circumstances. The basic language of the statute says that “whenever an accidental discharge or spill occurs from any activity or facility which causes or may cause pollution, the individual operating, in charge of, or responsible for the activity or facility shall notify the commission as soon as possible and not later than 24 hours after the occurrence.” Applying this language to an historical contamination situation is more tricky than it might first appear.

The interpretation problems arise perhaps because the discovery of historical contamination was not in the minds of the drafters at the time the statute was written. The language seems better designed to address a more typical current spill situation. Further, the definitions included, and those excluded, from the statute seem to leave further questions. An “accidental discharge” is defined to mean “an act or omission through which waste or other substances are inadvertently discharged into water of the state.” “Water” or “water in the state” includes both surface and groundwater. The definition of “to discharge”

211 See generally 30 TEX. ADMIN. CODE, Ch. 327, 334, 335 and 350.

212 See Environmental, Health, and Safety Audit Privilege Act, TEX. REV. CIV. STAT. ANN. art. 4447cc (Vernon 2000). Confidentiality issues are beyond the scope of this paper.

213 30 TEX. ADMIN. CODE, Ch. 334, Subchapter D, § 334.129.

214 30 TEX. ADMIN. CODE § 334.72.

215 Id.
includes to deposit, conduct, drain, emit, throw, run, allow to seep, or otherwise release or dispose of, or to allow, permit or suffer any of these acts or omissions. On the other hand, the definition of "spill" means "an act or omission through which waste or other substances are deposited where, unless controlled or removed, they will drain, seep, run, or otherwise enter water in the state." Other substances" are those "which will cause pollution" if discharged into water. "Pollution" means the contamination of water that renders it harmful or impairs its usefulness.

Because the statute requires the discharge or spill to occur from an activity or facility, through some act or omission, the discovery of naturally occurring contaminants would not trigger the notice requirement even if they rendered the water unusable. On the other hand, if historical contamination not likely to be naturally occurring is discovered to be present in surface or usable groundwater at levels that would clearly be harmful, or would impair the water’s usefulness, then although it would not be obvious when the “accidental discharge” or “spill” occurred, the notice provision would likely be considered triggered. The more difficult problems in analyzing the notice obligations arise in the more usual instance which lie somewhere between these two extremes.

Consider a rather extreme example in which certain contaminants are discovered in the shallow subsurface soils but not in the groundwater. The contaminants could be sourced to activities at the facility, but they are also known to be naturally occurring in the area. The contaminants tend to bind to soils, making it unclear whether they will migrate though the soils to the groundwater, and if so, whether they would ever reach a concentration that would harm anyone or anything. Further, the groundwater is deep and of such a quality that it has no usefulness for any purpose.

This example would probably not be reportable. To begin, it creates some doubt whether there was any occurrence at all, given that the contaminants can be traced to natural sources. If one assumes the contaminants were not from a natural source, it would be unclear whether an “accidental discharge” had occurred because that definition suggests the substances have already reached the water (they “are inadvertently discharged into water”). Similarly, it is not obvious that a “spill” had occurred because that definition requires that the substances “will” (not might someday) enter the water. Finally, even if one assumed that the substances will enter the water, given that the groundwater is deep and has no use, the presence of the contaminants in the water can cause no “pollution.” In the real world, there are often elements of this extreme example, that make difficult the analysis of whether a reporting obligation has been triggered.

C. REPORTING CMSWLFs

Before a tract of land that is greater that one acre in size may be developed, soil tests must be performed to determine whether any part of the tract overlies a closed municipal solid waste landfill facility (“CMSWLF”). The tests must be performed in accordance with Commission rules that may be found in Chapter 330 of the Texas Administrative Code, Subchapter T. A developer may wish to perform such testing during the due diligence phase of the real estate transaction in order to discover whether additional engineering and the related expense may be needed for the planned construction activities. The owner or lessee performing the tests must then send the results to the Commission not later than the thirtieth (30th) day before development begins on the land.

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220 Id. § 26.001(19).
221 Id. § 26.039(a)(2).
222 Id. § 26.039(a)(3).
223 Id. § 26.001(13).
Exhibit A
SELLER’S DISCLOSURE NOTICE

CONCERNING THE PROPERTY AT _______________________________________

(Street Address and City)

THIS NOTICE IS A DISCLOSURE OF SELLER’S KNOWLEDGE OF THE CONDITION OF THE PROPERTY AS OF THE DATE SIGNED BY SELLER AND IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THE PURCHASER MAY WISH TO OBTAIN. IT IS NOT A WARRANTY OF ANY KIND BY SELLER OR SELLER’S AGENTS.

Seller _____ is _____ is not occupying the Property.

If unoccupied, how long since Seller has occupied the Property? ___

1. The Property has the items checked below:

<table>
<thead>
<tr>
<th>Item</th>
<th>Y</th>
<th>N</th>
<th>U</th>
</tr>
</thead>
<tbody>
<tr>
<td>Range</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Dishwasher</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Washer/Dryer Hookups</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Security System</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TV Antenna</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ceiling Fan(s)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Central A/C</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Plumbing System</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Patio/Decking</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pool</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pool Equipment</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Gas Lines (Nat./LP)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Garages:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Garage Door Opener(s):</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Water Supply:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Roof Type</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Age: (approx.)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Are you (Seller) aware of any of the above items that are not in working condition, that have known defects, or that are in need of repair? _____ Yes _____ No _____ Unknown.

If yes, then describe. (Attach additional sheets if necessary):

2. Are you (Seller) aware of any known defects/malfunctions in any of the following?

<table>
<thead>
<tr>
<th>Item</th>
<th>Y</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interior Walls</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Door</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Walls/Fences</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Plumbing/Sewers/Septics</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other Structural Components (Describe):</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

If the answer to any of the above is yes, explain. (Attach additional sheets if necessary):

3. Are you (Seller) aware of any of the following conditions?

<table>
<thead>
<tr>
<th>Condition</th>
<th>Y</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>Active Termites (includes wood-destroying insects)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Termite or Wood Rot Damage Needing Repair</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Previous Termite Damage</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Previous Structural or Roof Repair</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hazardous or Toxic Waste</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Asbestos Components</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

| Previous Structural or Roof Repair         |   |   |
| Hazardous or Toxic Waste                   |   |   |
| Asbestos Components                        |   |   |
4. Are you (Seller) aware of any item, equipment, or system in or on the property that is in need of repair? ______ Yes (if you are aware) ______ No (if you are not aware). If yes, explain (attach additional sheets as necessary).

5. Are you (Seller) aware of any of the following?

Write Yes (Y) if you are aware, write No (N) if you are not aware.

______ Room additions, structural modifications, or other alterations or repairs made without necessary permits or not in compliance with building codes in effect at that time.

______ Homeowners' Association or maintenance fees or assessments.

______ Any "common area" (facilities such as pools, tennis courts, walkways, or other areas) co-owned in undivided interest with others.

______ Any notices of violations of deed restrictions or governmental ordinances affecting the condition or use of the Property.

______ Any lawsuits directly or indirectly affecting the Property.

______ Any condition on the Property which materially affects the physical health or safety of an individual.

If the answer to any of the above is yes, explain. (Attach additional sheets if necessary):

Date Signature of Seller

The undersigned purchaser hereby acknowledges receipt of the foregoing notice.

Date Signature of Purchaser
# TABLE OF AUTHORITIES

**CASES**

Adams v. Spring Valley Constr. Co., 728 S.W.2d 412 (Tex. App.--Dallas 1987, writ ref'd n.r.e.) ....... 21

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