

## **A Clause For Concern?**

What buyers and sellers need to know about the "as-is" clause.

**BY RUSTY ADAMS**



# A CLAUSE FOR CONCERN?

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## WHAT BUYERS AND SELLERS NEED TO KNOW ABOUT THE “AS-IS” CLAUSE.

Many Texas real estate contracts contain the phrase “as-is,” yet the legal significance of this phrase is often misunderstood. At first glance, it seems to mean only that the buyer accepts the property in its current condition, with no promises or warranties from the seller. After all, that’s what it says. But does it always work that way? Do courts actually enforce these clauses?

Texas courts are strongly committed to freedom of contract, and as such, as-is clauses are generally given effect. Legally, an as-is clause redefines the seller’s potential liability by negating essential elements of causes of action such as fraud, negligent misrepresentation, and breach of warranty. But Texas law also contains exceptions to this protection.

An as-is clause typically provides that the buyer accepts the property in its present condition without reliance on any representations

or warranties by the seller. The phrase “as-is” is not required but is often included. Such a clause might read:

“Buyer accepts the Property in its present condition, AS IS, WHERE IS, AND WITH ALL FAULTS, without warranty or representation, express or implied, except as expressly set forth in this contract.”

This language is a contractual allocation of risk. The buyer assumes the risk that the property may have defects or deficiencies, while the seller is relieved of most post-closing obligations relating to the property’s condition.

The seminal case for applying as-is language is the Texas Supreme Court’s decision in *Prudential Insurance Co. of America v. Jefferson Associates, Ltd.* In *Prudential*, the buyer purchased an Austin office building

“as-is.” After closing, it discovered the property contained asbestos and sued for fraud, negligence, violation of the Texas Deceptive Trade Practices—Consumer Protection Act (DTPA), and breach of the duty of good faith and fair dealing. Each of these causes of action requires proof of causation. That is, to recover, the buyer must prove that the seller’s conduct caused the buyer’s injury.

The Supreme Court held that the as-is clause barred recovery because the agreement *negated causation* as a matter of law. In the Court’s words, “[a] valid ‘as-is’ agreement... prevents a buyer from holding a seller liable if

example of this exception is found in *Pairett v. Gutierrez*. The Pairets bought a home from Gutierrez. A day after closing, the Pairets discovered a foundation defect and sued. While the contract contained an as-is provision, the Pairets alleged that Gutierrez affirmatively represented that he was not aware of any defects in the foundation. The Austin Court of Appeals noted that fraudulent inducement is an exception to the enforceability of an as-is clause. Because the case came to the court after a summary judgment, the case was remanded to the trial court for additional findings of fact.

**"The as-is clause operates as a disclaimer of the buyer’s reliance on the seller’s representation of the property’s condition."**

the [property] turns out to be worth less than the price paid because it is impossible for the buyer’s injury on account of this disparity to have been caused by the seller.”

The as-is clause operates as a disclaimer of the buyer’s reliance on the seller’s representation of the property’s condition. The buyer agrees to make his own appraisal of the bargain and accepts the risk that he might be wrong. Therefore, the buyer’s injury—the reduced value of the building—is not caused by the seller’s conduct. Rather, it is the result of a risk the buyer chooses to take, often in exchange for a lower price.

The Court went on to emphasize that an as-is clause does *not* bar recovery in all circumstances. It identified three key exceptions: fraudulent inducement, impairment of inspection, and other circumstances, such as unconscionability or unequal bargaining power, given the totality of the circumstances.

## **Fraudulent Inducement Exception**

The fraudulent inducement exception applies when a seller makes false representations or conceals material facts to get the buyer to agree to purchase the property as-is. An

## **Impairment of Inspection Exception**

Notably, the Pairets had an opportunity to inspect the home, including the foundation, but did not do so. If the buyer is entitled to inspect but is kept from doing so by the seller’s conduct, the clause will not stand. On the other hand, if an inspection is conducted, the buyer is generally charged with knowledge of what a reasonable inspection would reveal and cannot blame the harm on the seller.

## **Totality of the Circumstances Exception**

Courts will consider the nature of the transaction and the totality of the circumstances surrounding the agreement. If the seller actively conceals known defects, the clause offers no protection. The courts also may take into account the sophistication of the parties, whether they are represented by counsel, and their relative bargaining power. Additionally, where the as-is clause is an important and bargained-for part of the basis of the bargain, rather than a “boilerplate provision,” it is more likely to be given effect.

Boilerplate is a term used to describe “fixed or standardized contractual language that a proposing party views as relatively non-negotiable.” Notably, the Texas Real Estate Commission One to Four Family Residential contract contains the following language in Paragraph 7D:

“As-is’ means the present condition of the Property with any and all defects and without warranty except for the warranties of title and the warranties in this contract. Buyer’s agreement to accept the Property As-is under Paragraph 7D(1) or (2) [check boxes for accepting] does not preclude Buyer from inspecting the Property under Paragraph 7A, from negotiating repairs or treatments in a subsequent amendment, or from terminating this contract during the Option Period, if any.”

In *Van Duren v. Chife*, the court observed, “The contract was a standard form promulgated by the Texas Real Estate Commission that brokers generally must use in home sales. The form provides buyers with two options as to the acceptance of a property’s condition: one in which they accept the property ‘in its present condition’ and another in which they accept the property subject to the seller’s completion of specified repairs. A mandatory form contractual provision that requires the parties in any given transaction to choose from two or more options is by definition negotiable and not boilerplate.”

Thus, the rule grants strong protection, but the protection is conditional. A seller who acts in good faith may rely on an as-is clause, but a seller who conceals defects or misleads the buyer cannot. Courts look at the “totality of the circumstances,” including the sophistication of the parties, the nature of the transaction, and the presence or absence of deception.

## Other Considerations

Note that as-is clauses deal with the physical condition of the property. They do not do away with warranties of title. As-is clauses may contain disclaimers of warranties, where allowed by law. Also, an as-is clause does not relieve the seller from providing the required seller’s disclosure.

As-is clauses should be examined carefully to make sure their effect is clear. They should expressly state that the buyer accepts the property’s condition. The clause is strengthened by a buyer’s acknowledgement that he has an opportunity to inspect the property and is relying on his own investigation. Buyers with an opportunity to inspect fail to do so at their own peril. Additionally, the provision should disclaim reliance on any representations other than those contained in the contract. Keep in mind though, that concealment and deception will render the clause unenforceable. The clause should also identify any exceptions, including express warranties that survive closing.

Sometimes, a separate document is prepared, acknowledging that the sale is made on an as-is basis. This merely reinforces that the buyer is aware of the provision and that it was a bargained-for term.

As-is clauses in contracts are not just lawyer-ese. They are important provisions that allocate risk between buyers and sellers. Texas courts have generally shown a commitment to freedom of contract and judicial restraint. They will usually give effect to the contractual agreements of competent parties, even if it sometimes yields harsh results. However, they will not endorse fraud or deception. This balance means that sellers should be honest, and buyers should be diligent. **TG**



*Rusty Adams, J.D. (r\_adams@tamu.edu) is a member of the State Bar of Texas and a research attorney for the Texas Real Estate Research Center.*

### Citations:

*Prudential Ins. Co. of Am. v. Jefferson Associates, Ltd.*, 896 S.W.2d 156 (Tex. 1995).

*Pairett v. Gutierrez*, 969 S.W.2d 512 (Tex. App.—Austin 1998, pet. denied).

*Van Duren v. Chife*, 569 S.W.3d 176 (Tex. App.—Houston [1st Dist.] 2018, no pet.), *disapproved on other grounds*, *Sealy Emergency Room, L.L.C. v. Free Standing Emergency Room Managers of Am., L.L.C.*, 685 S.W.3d 816 (Tex. 2024).

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