OF LIES AND DISCLAIMERS—CONTRACTING AROUND FRAUD UNDER TEXAS LAW

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I. INTRODUCTION

A dissatisfied contracting party often seeks to extricate itself from its contractual obligations by claiming that it was fraudulently induced into entering the contract. A fraudulent-inducement claim has serious consequences for the alleged fraudster. Unlike a party that breaches a contract and is liable for direct and consequential damages only,[1] a fraudster is also liable for

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1. *See* Phillips v. Phillips, 820 S.W.2d 785, 788 (Tex. 1991) ("The universal rule for measuring damages for the breach of a contract is just compensation for the loss or

exemplary damages.[2] Moreover, corporate officers and employees are personally liable for fraudulent conduct in which they participate on their employer's behalf.[3] Just as important, even

damage actually sustained."). The damages recoverable in a contract action are: (1) direct (or general) damages, and (2) special (or consequential) damages. Baylor Univ. v. Sonnichsen, 221 S.W.3d 632, 636 (Tex. 2007). Direct damages represent the compensation for losses that naturally and necessarily result from the contract's breach. *Id.*; Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 816 (Tex. 1997). Special or consequential damages repay losses that follow naturally, but not necessarily, from the breach; therefore, they are recoverable only if the breaching party had notice or could have foreseen that the non-breaching party would suffer the loss from the contract's breach. *Baylor*, 221 S.W.3d at 636; *Arthur Andersen*, 945 S.W.2d at 816. Direct damages in a contract action are measured by the loss of the expected "benefit of the bargain," the "out of pocket" loss of funds, the value expended in reliance on the breaching party's performance, or the amount set forth in the contract as liquidated damages. 2 WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE § 21.02[2], at 21–17 (2009); *see* RESTATEMENT (SECOND) OF CONTRACTS §§ 347, 349, 356 (1979) (outlining damages based on breach of contract); 24 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS §§ 64:1, 64:2 (4th ed. 2002) (same).

Tort damages compensate an injured party for the loss caused by the tort. Smith v. Nelson, 53 S.W.3d 792, 795 (Tex. App.—Austin 2001, pet. denied). The damages recoverable in a fraudulent-inducement action also are: (1) direct (or general) damages, and (2) special (or consequential) damages. *Baylor*, 221 S.W.3d at 636; *see Arthur Andersen*, 945 S.W.2d at 816 (defining direct and consequential damages). "'Texas recognizes two measures of direct damages for common-law fraud:' out-of-pocket and benefit-of-the-bargain." *Baylor*, 221 S.W.3d at 636 (quoting Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc., 960 S.W.2d 41, 49 (Tex. 1998)). Benefit-of-the-bargain damages, however, are not recoverable for a fraudulent-inducement claim when there is no enforceable contract. Haase v. Glazner, 62 S.W.3d 795, 799–800 (Tex. 2001).

2. *Compare*, *e.g.*, Tony Gullo Motors I, L.P. v. Chapa, 212 S.W.3d 299, 306 n.26 (Tex. 2006) (exemplary damages are recoverable for fraud), *and* TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(a)(1) (Vernon 2008 & Supp. 2009) (authorizing exemplary damages for fraud so long as there is clear and convincing evidence), *with*, *e.g.*, Jim Walter Homes, Inc. v. Reed, 711 S.W.2d 617, 618 (Tex. 1986) (holding that exemplary damages are not recoverable in a contract action even if the breach is intentional or malicious); RESTATEMENT (SECOND) OF CONTRACTS § 355 (1979) (stating that punitive damages are not recoverable for a contract breach).

3. *See* Kingston v. Helm, 82 S.W.3d 755, 759 (Tex. App.—Corpus Christi 2002, pet. denied) ("The law is well-settled that a corporate agent can be held individually liable for fraudulent statements or knowing misrepresentations even when they are made in the capacity of the representative of the corporation."); Leyendecker & Assocs., Inc. v. Wechter, 683 S.W.2d 369, 375 (Tex. 1984) ("A corporation's employee is personally liable for tortious acts which he directs or participates in during his employment."); RESTATEMENT (SECOND) OF AGENCY §§ 343, 348 (1957) ("An agent who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal . . . ."). In contrast, corporate officers and employees generally are not liable for a corporation's contract breach, even when they induced it. Holloway v. Skinner, 898 S.W.2d 793, 795 (Tex. 1995); Maxey v. Citizens Nat'l Bank, 507 S.W.2d 722, 726 (Tex. 1974); *Kingston*, 82 S.W.3d at 762; RESTATEMENT (SECOND) OF TORTS § 772 cmt. c (1977).

when a court rejects a fraudulent-inducement claim, the vindicated contracting party does not obtain the full benefit of its bargain because the full cost of the litigation is rarely shifted to a losing tort plaintiff.[4]

Contracting parties often attempt to immunize themselves from liability for false statements made during negotiations and due diligence not set forth in the written contract by including a "reliance disclaimer" that (1) disclaims all extra-contractual representations, and (2) provides that the contracting parties are not relying on any such representations.[5] Because fraudulent inducement requires proof that the plaintiff justifiably relied on the alleged misrepresentation or non-disclosure,[6] the Texas Supreme Court has twice held that such disclaimers can, in certain circumstances, defeat the reliance element as a matter of law.[7]

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4. *E.g.*, *Tony Gullo Motors*, 212 S.W.3d at 310–11 ("For more than a century, Texas law has not allowed recovery of attorney's fees unless authorized by statute or contract. This rule is so venerable and ubiquitous in American courts it is known as the 'American Rule.' Absent a contract or statute, trial courts do not have inherent authority to require a losing party to pay the prevailing party's fees." (footnotes omitted)); Hammonds v. Hammonds, 313 S.W.2d 603, 605 (Tex. 1958) ("Pecuniary loss sustained by a party in the defense of a lawsuit does not constitute damage for which he may recover.").

5. Such provisions are also referred to as "anti-reliance," "non-reliance," "waiver-of-reliance," and "no-reliance" provisions. They are defined and discussed in more detail *infra* Section II.A.1.

6. *Formosa*, 960 S.W.2d at 47 (quoting Sears, Roebuck & Co. v. Meadows, 877 S.W. 2d 281, 282 (Tex. 1994)); Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 181 (Tex. 1997); Prudential Ins. Co. of Am. v. Italian Cowboy Partners, Ltd., 270 S.W.3d 192, 197 (Tex. App.—Eastland 2008, no pet.).

As explained by the *Haase* court:

> [Fraudulent inducement] is a particular species of fraud that arises only in the context of a contract and requires the existence of a contract as part of its proof. That is, with a fraudulent inducement claim, the elements of fraud must be established as they relate to an agreement between the parties.

Haase, 62 S.W.3d at 798–99; *accord* Cell Comp, L.L.C. v. Sw. Bell Wireless, L.L.C., No. 13-07-00120-CV, 2008 WL 2454250, at *3 (Tex. App.—Corpus Christi June 19, 2008, no pet.) (mem. op.) ("Fraudulent inducement claims include fraud elements in addition to proof that one entered into a binding agreement as a result of the misrepresentation."). In addition to justifiable reliance, the elements of fraud and fraudulent inducement under Texas law are: (1) a material misrepresentation of existing fact, (2) which was false, (3) which was either known to be false when made or was recklessly made without truth of the matter asserted, (4) which was intended to be acted upon, and (5) which caused injury. *Formosa*, 960 S.W.2d at 47; DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 688 (Tex. 1990); *Cell Comp*, 2008 WL 2454250, at *3.

7. Forest Oil Corp. v. McAllen, 268 S.W.3d 51, 52, 60 (Tex. 2008); *Schlumberger*, 959 S.W.2d at 179, 181.

Perhaps one of the most confusing and nebulous areas of Texas law relates to the enforceability of reliance disclaimers. Although such disclaimers can be enforceable,[8] the Texas Supreme Court has failed to provide a bright-line test for determining when they are enforceable.[9] This Article's purpose is to predict when Texas courts will enforce reliance disclaimers. Section II discusses the conflicting policies militating in favor of and against the enforcement of reliance disclaimers and the evolution of Texas case law leading up to the modern rule enforcing them in certain circumstances. Section III enumerates recent refinements in Texas jurisprudence regarding reliance disclaimers and, thus, the circumstances in which a reliance disclaimer will likely be enforced. Finally, Section IV discusses significant procedural and substantive issues involved in litigation regarding a reliance disclaimer's enforceability.

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8. *Forest Oil*, 268 S.W.3d at 52–53, 60; *Schlumberger*, 959 S.W.2d at 179–181; *see also* cases cited in note 71 *infra*.

Other jurisdictions have split on the issue. Cases that have refused to enforce reliance disclaimers include: Nw. Bank & Trust Co. v. First Ill. Nat'l Bank, 354 F.3d 721, 725–26 (8th Cir. 2003) (applying Iowa law); RepublicBank Dallas, N.A. v. First Wis. Nat'l Bank, 636 F. Supp. 1470, 1473–74 (E.D. Wis. 1986) (applying Wisconsin law); Oak Indus., Inc. v. Foxboro Co., 596 F. Supp. 601, 608 (S.D. Cal. 1984) (applying California law); Slack v. James, 614 S.E.2d 636, 640–41 (S.C. 2005) (applying South Carolina law); Lusk Corp. v. Burgess, 332 P.2d 493, 495 (Ariz. 1958) (applying Arizona law). *See* RESTATEMENT (SECOND) OF CONTRACTS § 195 (1979) (providing that a contractual "term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy").

Cases that follow the Texas approach include: MBIA Ins. Corp. v. Royal Indem. Co., 426 F.3d 204, 218 (3d Cir. 2005) (applying Delaware law); Rissman v. Rissman, 213 F.3d 381, 383–84 (7th Cir. 2000) (applying Illinois and federal-securities law); Harsco Corp. v. Segui, 91 F.3d 337, 345 (2d Cir. 1996) (applying New York and federal-securities law); Jackvony v. RIHT Fin. Corp., 873 F.2d 411, 416–17 (1st Cir. 1989) (applying Rhode Island and federal-securities law); One-O-One Enters., Inc. v. Caruso, 848 F.2d 1283, 1287 (D.C. Cir. 1988) (applying District of Columbia and Maryland law); ABRY Partners V, L.P. v. F & W Acquisitions, L.L.C., 891 A.2d 1032, 1056 & n.50 (Del. Ch. 2006) (applying Delaware law); W.R. Grace & Co. v. Taco Tico Acquisition Corp., 454 S.E.2d 789, 791 (Ga. Ct. App. 1995) (applying Georgia law); Superior Tech. Res., Inc. v. Lawson Software, Inc., No. 2003-10104, 2007 WL 4291575, at *10–11 (N.Y. Sup. Ct. Dec. 7, 2007) (applying New York law).

In some jurisdictions, the cases conflict on the issue. *Compare*, *e.g.*, Ron Greenspan Volkswagen, Inc. v. Ford Motor Land Dev. Corp., 38 Cal. Rptr. 2d 783, 790 (Cal. Ct. App. 1995) (refusing to enforce a reliance disclaimer), *with* Banco Do Brasil, S.A. v. Latian, Inc., 285 Cal. Rptr. 870, 893 (Cal. Ct. App. 1991) (noting the possibility that a reliance disclaimer could be enforced).

9. *See infra* Sections II.B.1 and 3.

II. DISCLAIMING EXTRA-CONTRACTUAL MISREPRESENTATIONS

In allowing contracting parties to use reliance disclaimers to exculpate themselves from tort liability for extra-contractual misrepresentations, Texas courts have confronted a basic dilemma resulting from two opposing public policies. On one hand, Texas has a strong public policy favoring freedom of contract.[10] "Freedom of contract allows parties to bargain for mutually agreeable terms and allocate risks as they see fit."[11] Accordingly, Texas courts typically enforce contracts as written and do not second-guess the wisdom of specific contractual provisions.[12] Under freedom-of-contract principles, if a contracting party clearly and unambiguously promises not to rely on the other party's extra-contractual statements and all the requirements of a binding contract are met, then a court should hold the party to its word and bar any claim based on alleged extra-contractual misrepresentations. To do otherwise would sanction a "double-liar" scenario that rewards a plaintiff, who claims to be a victim of a lie, but who itself is a liar by virtue of its contractual promise not to rely on extra-contractual statements.[13]

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10. Fortis Benefits v. Cantu, 234 S.W.3d 642, 649 (Tex. 2007); Gym-N-I Playgrounds, Inc. v. Snider, 220 S.W.3d 905, 912 (Tex. 2007); Lawrence v. CDB Servs., Inc., 44 S.W.3d 544, 553 (Tex. 2001). As explained by the Texas Supreme Court:

> [P]ublic policy requires . . . that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily should be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.

BMG Direct Mktg., Inc. v. Peake, 178 S.W.3d 763, 767 (Tex. 2005) (quoting Wood Motor Co. v. Nebel, 238 S.W.2d 181, 185 (Tex. 1951)).

11. *Gym-N-I Playgrounds*, 220 S.W.3d at 912.

12. *Fortis Benefits*, 234 S.W.3d at 649 n.41 ("As a rule, a court should not by judicial fiat insert non-existent language into statutes or into parties' agreed-to contracts, or delete existent language from them either. Our confined duty is to construe the contract as is . . . ."); Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 180 (Tex. 1997) ("[C]ourts are to assume that the parties intended every contractual provision to have some meaning.").

13. The Delaware Court of Chancery succinctly described the "double-liar" scenario as follows:

> To fail to enforce non-reliance clauses is not to promote a public policy against lying. Rather, it is to excuse a lie made by one contracting party in writing—the lie that it was relying only on contractual representations and that no other representations had been made—to enable it to prove that another party lied orally or in a writing outside the contract's four corners. For the plaintiff in such a situation

On the other hand, fraud is indisputably contrary to public policy,[14] and "[n]o one seems to debate that lying is almost always morally indefensible."[15] As noted by the Texas Supreme Court:

> Texas law has long imposed a duty to abstain from inducing another to enter into a contract through the use of fraudulent misrepresentations. . . . Moreover, it is well established that the legal duty not to fraudulently procure a contract is separate and independent from the duties established by the contract itself.[16]

From this perspective, fraud vitiates mutual consent,[17] and the contract is unenforceable by the fraudster irrespective of its provisions.[18]

> to prove its fraudulent inducement claim, it proves itself not only a liar, but a liar in the most inexcusable of commercial circumstances: in a freely negotiated written contract.

ABRY Partners, 891 A.2d at 1058; *accord* Forest Oil Corp. v. McAllen, 268 S.W.3d 51, 60 (Tex. 2008) ("Parties should not sign contracts while crossing their fingers behind their backs.").

14. Dallas Farm Mach. Co. v. Reaves, 307 S.W.2d 233, 239–40 (Tex. 1957); *cf.* RESTATEMENT (SECOND) OF CONTRACTS § 195(1) (1981) ("A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy.").

15. Kevin Davis, *Licensing Lies: Merger Clauses, the Parol Evidence Rule and Pre-Contractual Misrepresentations*, 33 VAL. U. L. REV. 485, 494 (1999); *accord id*. at 485 ("Not even in the business world—that one area of social life where the 'battle of wits' competitive-game model is most persuasive, and people match the shrewdness of their judgments and the cleverness of their strateg[ies] for getting the better of one another—not even here do rivals voluntarily assume the risk that the other party to an agreement is an outright liar, getting the better of one by plain deceit." (quoting 3 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF 285 (1984))). *See generally* CHARLES FRIED, RIGHT & WRONG 54–78 (Harvard Univ. Press 1978) (discussing the notion of lying and opining that lying is intuitively wrong).

16. Formosa Plastics Corp. v. Presidio Eng'rs & Contractors, Inc., 960 S.W.2d 41, 46 (Tex. 1998).

17. *E.g.*, Dunbar Med. Sys. Inc. v. Gammex, Inc., 216 F.3d 441, 454 (5th Cir. 2000) (["Under Texas law,] a party is not bound by a fraudulently induced contract. Underlying this rule is the notion that a party induced by fraud to enter into an agreement has not provided the assent necessary to make a binding contract. One who is entitled to avoid an entire written contract because it lacked his assent can no longer be held bound by any of its stipulations . . . ." (citations omitted)); 26 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 69:1, at 486 (4th ed. 2003) ("When one pleads that he or she entered into a contract as a result of the fraud of another, the plea goes to a fundamental issue in contract actions, whether there is an enforceable agreement. One who has been fraudulently induced to enter into a contract has not assented to the agreement since the fraudulent conduct precludes the requisite mutual assent.").

18. *See Dunbar*, 216 F.3d at 454 ("In general, a party is not bound by a fraudulently

The United States District Court for the Northern District of Texas recently described the dilemma created by these conflicting public policies as follows:

> Texas law recognizes a power of contracting parties to create contractual provisions that disclaim reliance on prior representations or promises. . . . A potentially conflicting doctrine holds that fraud in the inducement prevents a contract, including merger clauses and disclaimers of reliance, from coming into being, and that parol evidence is admissible to demonstrate fraud. . . . The juxtaposition of these doctrines leads to disputes like that presently before the Court, where one party claims that the contractually embodied intent of the parties was to disclaim reliance, and the other complains he would not have signed the contract except for a particular misrepresentation.[19]

The compelling public policies favoring freedom of contract and rejecting fraud inform the debate over the merits of enforcing reliance disclaimers. There are multiple reasons favoring their enforcement. First, the enforcement of reliance disclaimers protects freedom of contract.[20] As noted by one commentator:

> Those who choose to enter into contracts must be willing to accept the possibility of a loss along with the potential for a gain. They should be free to take the risk, if they so desire, that they have been fraudulently induced to enter into the transaction. In other words, they should be free to contract and allowed to "make [their]

induced contract."); *Formosa*, 960 S.W.2d at 46 ("As a rule, a party is not bound by a contract procured by fraud."); San Antonio Props., L.P. v. PSRA Invs., Inc., 255 S.W.3d 255, 261–62 (Tex. App.—San Antonio 2008, pet. granted, judgm't vacated by agr.) ("[I]f SAP fraudulently induced PSRA to enter into the Contract for Deed, then that fraud vitiates the entire contract.").

19. Steinberg v. Brennan, No. 3:03-CV-0562, 2005 WL 1837961, at *3 (N.D. Tex. July 29, 2005); *see* 7 ARTHUR LINTON CORBIN & JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 28:21, at 96 (rev. ed. 2002) ("There is tension between two seemingly reasonable propositions: the proposition that parties by agreement ought to be able to provide that a purchaser is relying solely on the purchaser's inspection; and the proposition that a party ought not by the use of magic words to exorcise fraud."); *see also* *Dunbar*, 216 F.3d at 449 ("In *Schlumberger*, the Texas Supreme Court recognized the inherent tension between the principle that the '[p]arties should be able to bargain for and execute a release barring all further dispute,' and prior authority holding that clauses in contracts, including merger and disclaimer provisions, need not bar subsequent claims of fraudulent inducement." (citation omitted)).

20. Forest Oil Corp. v. McAllen, 268 S.W.3d 51, 61 (Tex. 2008); Megan R. Comport, Comment, *Enforcing Contractual Waivers of a Claim for Fraud in the Inducement*, 37 SANTA CLARA L. REV. 1031, 1032 (1997).

> own bed and lie in it." Freedom of contract is a recognized principle; however, freedom from contract, in the sense of allowing individuals to free themselves from the contractual obligations to which they consented for example by claiming fraud, must cease to be the automatic flip-side of that notion.[21]

Second, the enforcement of reliance disclaimers fosters legal certainty and predictability in commercial transactions by ensuring that clear and unambiguous contractual terms are enforced as written.[22]

Third, "[a]fter-the-fact protests of misrepresentation are easily lodged"[23] and courts often have difficulty distinguishing meritorious from non-meritorious fraud claims.[24] Permitting fraudulent-inducement claims based on statements on which a contracting party promised in writing not to rely can subject an honest contracting party to liability for representations it did not make, particularly because the alleged misrepresentations often are oral ones that create a fact issue regarding whether they were ever uttered.[25] In other words, the failure to enforce a reliance disclaimer often gives an honest contracting party "no protection against plausible liars and gullible jurors."[26]

Finally, and perhaps most importantly, courts are wary of the "double-liar" scenario discussed above, which potentially sanctions a contract breach, rewards a lie, and provides the plaintiff with a windfall.[27] A plaintiff who clearly and unambiguously promises

21. Megan R. Comport, Comment, *Enforcing Contractual Waivers of a Claim for Fraud in the Inducement*, 37 SANTA CLARA L. REV. 1031, 1032 (1997) (quoting E. Allan Farnsworth, *Contracts is not Dead*, 77 CORNELL L. REV. 1021, 1034 (1992) (footnotes omitted)).

22. Banco Do Brasil, S.A. v. Latian, Inc., 285 Cal. Rptr. 870, 893 (Cal. Ct. App. 1991); ABRY Partners V, L.P. v. F & W Acquisitions L.L.C., 891 A.2d 1032, 1057 (Del. Ch. 2006); Megan R. Comport, Comment, *Enforcing Contractual Waivers of a Claim for Fraud in the Inducement*, 37 SANTA CLARA L. REV. 1031, 1031–32, 1049 (1997).

23. *Forest Oil*, 268 S.W.3d at 60.

24. *ABRY Partners*, 891 A.2d at 1058; *see* Kevin Davis, *Licensing Lies: Merger Clauses, the Parol Evidence Rule and Pre-Contractual Misrepresentations*, 33 VAL. U. L. REV. 485, 502–03 (1999) ("[P]arties . . . might fear that courts are unable to determine accurately whether parties have behaved negligently or fraudulently.").

25. *ABRY Partners*, 891 A.2d at 1058 (noting that non-meritorious fraud claims impose both direct and indirect costs).

26. Carr v. CIGNA Sec., Inc., 95 F.3d 544, 547 (7th Cir. 1996).

27. For example, an allegedly defrauded plaintiff may have obtained a lower price because certain warranties were excluded from the contract, causing the alleged fraudster to believe that the plaintiff assumed the risk as to those subject matters. Just as important, the alleged fraudster may have been unwilling to bear the risk of liability for alleged extra-

not to rely on extra-contractual statements should not be allowed to shirk its bargain in favor of a "but I did rely on them" fraudulent-inducement claim.[28]

> If there is a public policy interest in truthfulness, then that interest applies with more force, not less, to contractual representations of fact. Contractually binding, written representations of fact ought to be the most reliable of representations, and a law intolerant of fraud should abhor parties that make such representations knowing they are false.[29]

The countervailing arguments against the enforcement of reliance disclaimers are equally valid. At the outset, enforcing such provisions is contrary to the public policy against fraud discussed above. Under that public policy, a party should always bear the consequences of its intentional misrepresentations. After all, fraud has no moral justifications,[30] and the threat of legal sanctions might deter pre-contractual fraudulent conduct.

Also, there are the dual concerns that (1) any fraudster who can lie convincingly enough to persuade another person to enter into a contract in the first instance can also lie convincingly enough to induce that person to include a representation in the contract that the lies were never made or relied upon,[31] and (2) if fraudsters are

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contractual representations and would not have entered into the contract had it known that it could be sued for them.

28. *ABRY Partners*, 891 A.2d at 1057.

29. *Id.*; *accord* MBIA Ins. Corp. v. Royal Indem. Co., 426 F.3d 204, 218 (3d Cir. 2005) (recognizing that the "danger" from the non-enforcement of reliance disclaimers "is that a contracting party may accept additional compensation for a risk that it has no intention of actually bearing. This prevarication may amount to a fraud all its own. . . . [T]he safer route is to leave parties that can protect themselves to their own devices, enforcing the agreement they actually fashion."); Forest Oil Corp. v. McAllen, 268 S.W.3d 51, 61–62 (Tex. 2008) ("[P]arties who contractually promise not to rely on extra-contractual statements—*more than that, promise that they have in fact not relied upon such statements*—should be held to their word. Parties should not sign contracts while crossing their fingers behind their backs. . . . It is not asking too much that parties not rely on extra-contractual statements that they contract not to rely on (or else set forth the relied-upon representations in the contract or except them from the disclaimer). If disclaimers of reliance cannot ensure finality and preclude post-deal claims for fraudulent inducement, then freedom of contract, even among the most knowledgeable parties advised by the most knowledgeable legal counsel, is grievously impaired.").

30. Kevin Davis, *Licensing Lies: Merger Clauses, the Parol Evidence Rule and Pre-Contractual Misrepresentations*, 33 VAL. U. L. REV. 485, 494 (1999).

31. Robert Prentice, *Contract-Based Defenses in Securities Fraud Litigation: A Behavioral Analysis*, 2003 U. ILL. L. REV. 337, 357 (2003) ("Just as a party who can extort money from another can just as easily also extort from the victim a waiver of the right to

allowed to escape liability by drafting a contract in a certain way, they inevitably will draft the contract in that way. As Judge Augustus Hand observed long ago:

> It is worth remembering that the ingenuity of draftsmen is sure to keep pace with the demands of wrongdoers, and if a deliberate fraud may be shielded by a clause in a contract that the writing contains every representation made by way of inducement, or that utterances shown to be untrue were not an inducement to the agreement, sellers of bogus securities may defraud the public with impunity, through the simple expedient of placing such a clause in the prospectus which they put out, or in the contracts which their dupes are asked to sign.[32]

The Texas Supreme Court, first in *Schlumberger Technology Corp. v. Swanson*,[33] and then more recently in *Forest Oil Corp. v. McAllen*,[34] has responded to the tension between the public policies in favor of contractual freedom and against fraud by holding that reliance disclaimers are enforceable in limited circumstances.[35] As discussed in detail below, neither decision, nor those of Texas courts of appeals or the federal courts applying them, has provided a bright-line test for determining when such provisions are enforceable.

A. *Representations, Warranties, Reliance Disclaimers, and Merger Clauses Defined*

Before discussing *Schlumberger, Forest Oil,* and their progeny, an understanding of the pertinent contractual provisions in issue—representations, warranties, reliance disclaimers, and merger clauses—is needed.

The subject of contracts is about the enforcement of promises.[36]

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complain about the extortion, a party who can induce another to enter into a fraudulent transaction can easily induce the victim to waive his rights to complain about the fraud. . . . [A] very simple, very basic, very sensible principle of the practice of fraud is that if your lies can convince an investor to purchase bogus stock, they can convince the investor to sign a contract representing that the lies were never made or not relied upon." (internal quotations and footnote omitted)).

32. Arnold v. Nat'l Aniline & Chem. Co., 20 F.2d 364, 369 (2d Cir. 1927).

33. Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171 (Tex. 1997).

34. Forest Oil Corp. v. McAllen, 268 S.W.3d 51 (Tex. 2008).

35. *Id.* at 60–61; *Schlumberger*, 959 S.W.2d at 179–81.

36. 24 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 64:1, at 11–12 (4th ed. 2002).

Contractual promises include warranties,[37] which are promises that a past or existing fact is true.[38] A representation is a "presentation of fact . . . made to induce someone to act, esp[ecially] to enter into a contract."[39] Representations and warranties communicate information and induce others into contracting.[40] Accordingly, their type and scope typically are

37. Daugherty v. Am. Honda Motor Co., 51 Cal. Rptr. 3d 118, 122 (Cal. Ct. App. 2006) ("A warranty is a contractual promise . . . ."); 1 ARTHUR LINTON CORBIN & JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 1.14, at 38 (rev. ed. 1993) ("A promise may be expressed in the form of a warranty . . . .").

38. 1 ARTHUR LINTON CORBIN & JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 1.14, at 38 (rev. ed. 1993). As noted in Professor Corbin's leading treatise on contract law:

> A warranty is an assurance by one party to a contract of the existence of a fact upon which the other party may rely. It is intended precisely to relieve the promisee of any duty to ascertain the fact . . . ; it amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue . . . .

Id. at 39 (alteration in original) (quoting Metro. Coal Co. v. Howard, 155 F.2d 780, 784 (2d Cir. 1946)); *see* Bank of the W. v. Estate of Leo, 231 F.R.D. 386, 390 (D. Ariz. 2005) ("'A warranty is an assurance by one party to a contract of the existence of a fact upon which the other party may rely.'" (quoting Hoover v. Nielson, 510 P.2d 760, 763 (Ariz. Ct. App. 1973))); Hecht v. Components Int'l, Inc., 867 N.Y.S.2d 889, 895 (N.Y. Sup. Ct. 2008) ("A warranty constitutes 'an assurance by one party to a contract of the existence of a fact upon which the other party may rely. It is intended precisely to relieve the promisee of any duty to ascertain the fact for himself; it amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue, for obviously the promisor cannot control what is already in the past.'" (quoting CBS Inc. v. Ziff-Davis Pub. Co., 553 N.E.2d 997, 1000 (N.Y. 1990))); Church v. Ortho Diagnostic Sys., Inc., 694 S.W.2d 552, 555 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.) ("'[W]arranty' contemplates that a sale or contract has been made and the seller, to induce the sale, undertakes to vouch for the condition, quality, quantity, or title of the thing sold."); BLACK'S LAW DICTIONARY 1618 (8th ed. 2004) (defining "warranty" as "[a]n express or implied promise that something in furtherance of the contract is guaranteed by one of the contracting parties; esp., a seller's promise that the thing being sold is as represented or promised").

In contracts, the terms "warranty" and "representations" are often used interchangeably. *See* A.B.A., MODEL STOCK PURCHASE AGREEMENT 46 (1995) ("The technical difference between representations and warranties . . . has proven unimportant in acquisition practice.").

39. Steinberg v. Brennan, No. 3:03-CV-0562, 2005 WL 1837961, at *8 (N.D. Tex. July 29, 2005) (alteration in original) (quoting BLACK'S LAW DICTIONARY 1327 (8th ed. 2004)); *accord* Rutherford v. Standard Eng'g Corp., 199 P.2d 354, 361 (Cal. Ct. App. 1948) ("[A] fraudulent representation is an antecedent statement made as an inducement to enter into [a contract]."); Kensair Corp. v. Peltier, 472 P.2d 700, 700 (Colo. Ct. App. 1970) (same).

40. *See* Claire A. Hill, *A Comment on Language and Norms in Complex Business Contracting*, 77 CHI.-KENT L. REV. 29, 42 (2001) (observing that representations and warranties "credibly communicate information, chiefly to rebut the presumption of undesirable attributes which divergent interests inspire and information asymmetry makes

negotiated by the parties and set forth in the final written contract.[41]

Contracts frequently contain reliance disclaimers to clarify and limit what representations and warranties have been made, and can be relied on, by the parties. Typically, such a provision consists of a representation disclaimer (e.g., "seller disclaims all warranties and representations not expressly set forth in this agreement") and a "no-reliance" clause (e.g., "buyer acknowledges that it is not relying on any representation or statement of defendant or its agents not set forth in this agreement").[42] The reliance disclaimer is almost always buttressed by a "merger" or "integration" clause providing that there are no representations, promises, understandings, or agreements between the parties except those found in the writing.[43] Together, these provisions literally provide that no oral or written representations (other than those in the contract) made during negotiations or due diligence are actionable, irrespective of their importance and even if they induced the other party to enter into the contract.

Fundamentally, representations and warranties are about risk allocation and bargaining power. Contracting parties necessarily must allocate transaction risks. A rational contracting party will

possible").

41. *Id*. at 44–45.

42. Even though reliance disclaimers have a common purpose, their language varies widely. *See* cases cited *infra* note 71.

43. *See* San Antonio Props., L.P. v. PSRA Invs., Inc., 255 S.W.3d 255, 260–62 (Tex. App.—San Antonio 2008, pet. granted, judgm't vacated by agr.) ("A 'merger clause' is a contractual provision to the effect that the written terms of the contract may not be varied by prior agreements because all such agreements have been merged into the written document."); Springs Window Fashions Div., Inc. v. Blind Maker, Inc., 184 S.W.3d 840, 869 (Tex. App.—Austin 2006, pet. granted & remanded by agr.) ("In general, a 'merger clause' is a contractual provision to the effect that the written terms of the contract may not be varied by prior agreements because all such agreements have been merged into the written document."); RESTATEMENT (SECOND) OF CONTRACTS § 216 cmt. e (1981) ("Written agreements often contain clauses stating that there are no representations, promises, or agreements between the parties except those found in the writing."); 7 ARTHUR LINTON CORBIN & JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 28:21, at 96 (rev. ed. 2002) ("Written contracts frequently contain merger clauses stating that the writing contains the entire contract and that no representations other than those contained in the writing have been made."); 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 33:21, at 661 (4th ed. 1999) ("Recitations to the effect that a written contract is integrated, that all conditions, promises, or representations are contained in the writing and that the parties are not to be bound except by the writing, are commonly known as merger or integration clauses.").

enter into a contract only if the party believes that its risk of loss, discounted by the probability of its occurrence, is outweighed by the expected gain from the transaction. In making this decision, a party must decide how much due diligence to conduct and how to minimize its risk of loss, such as by purchasing insurance or by obtaining warranties from the other party. In the face of a reliance disclaimer, a contracting party must negotiate for sufficient warranties to induce it to enter into the contract, knowing that it assumes the risk associated with any subject matter not covered by the written contract. Texas courts seem to view this as a duty of a rational contracting party. As stated by the Texas Supreme Court in *Forest Oil*, "It is not asking too much that parties not rely on extra-contractual statements that they contract not to rely on (or else set forth the relied-upon representations in the contract or except them from the disclaimer)."[44]

B. *Texas Case Law on the Enforceability of Reliance Disclaimers*

Because the rules of contract interpretation require a court to apply a contract's plain language and to give effect to every contractual provision,[45] it seems counterintuitive to suggest that a clear and unequivocal reliance disclaimer may not be enforceable. The debate about such provisions' enforceability is a product of the fraud exception to the parol evidence rule.

The parol evidence rule provides that when contracting parties intend their written agreement to be the final and complete expression of their understanding, the writing is deemed integrated and cannot be contradicted by evidence of prior or contemporaneous oral or written agreements.[46] In other words, the

44. Forest Oil Corp. v. McAllen, 268 S.W.3d 51, 60 (Tex. 2008). Other Texas decisions have suggested a similar duty to negotiate for warranties. *E.g.*, Gym-N-I Playgrounds, Inc. v. Snider, 220 S.W.3d 905, 912–13 (Tex. 2007) (reasoning that the implied warranty of suitability in a commercial lease can be waived because "[a] lessee may wish to make her own determination of the commercial suitability of premises for her intended purposes. By assuming the risk that the premises may be unsuitable, she may negotiate a lower lease price that reflects that risk allocation. Alternatively, the lessee is free to rely on the lessor's assurances and negotiate a contract that leaves the implied warranty of suitability intact.").

45. Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 180 (Tex. 1997); Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983).

46. Hubacek v. Ennis State Bank, 317 S.W.2d 30, 32 (Tex. 1958); *see Springs Window*, 184 S.W.3d at 869 (noting that a merger clause, which prevents prior agreements from affecting a contract, "is an adjunct of the parol-evidence rule"); Boy Scouts of Am. v.

existence of an integrated agreement operates to limit the scope of the parties' contractual obligations to those set forth in the written agreement,[47] thereby precluding admission of extrinsic evidence to vary, add to, or contradict the written agreement's terms.[48]

In Texas, an agreement that has been reduced to writing is presumed to be integrated.[49] To remove any doubt regarding whether the writing is, in fact, integrated, parties often include a merger clause.[50]

Under the parol evidence rule's fraud exception, however, extrinsic evidence is admissible to show fraud as a ground for rescission, reformation, or a tort action for damages even if the contract contains a standard merger clause. This was made clear by the Texas Supreme Court in *Dallas Farm Machinery Co. v. Reaves*,[51] in which it resolved a conflict among Texas cases

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Responsive Terminal Sys., Inc., 790 S.W.2d 738, 745 (Tex. App.—Dallas 1990, writ denied) (holding that a valid integrated agreement prevents the enforcement of any alleged oral agreements); RESTATEMENT (SECOND) OF CONTRACTS §§ 213, 215 (1981) (providing that a "binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them" and extraneous evidence that contradicts the integrated contractual terms is not admissible).

47. *Hubacek*, 317 S.W.2d at 32; Burleson State Bank v. Plunkett, 27 S.W.3d 605, 615 (Tex. App.—Waco 2000, pet. denied); Maginn v. Norwest Mortgage, Inc., 919 S.W.2d 164, 168 (Tex. App.—Austin 1996, no writ).

48. Nat'l Union Fire Ins. Co. v. CBI Indus., Inc., 907 S.W.2d 517, 521 (Tex. 1995); *Hubacek*, 317 S.W.2d at 33; *Burleson State Bank*, 27 S.W.3d at 615.

49. *Hubacek*, 317 S.W.2d at 32; Muhm v. Davis, 580 S.W.2d 98, 101 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.). Whether the written agreement is integrated is a question of law for the court. Delta Brands, Inc. v. Wysong & Miles Co., No. CA 3:97-CV-1935-BC, 1998 U.S. Dist. LEXIS 14768, at *16–17 (N.D. Tex. Sept. 14, 1998), *aff'd*, 203 F.3d 828 (5th Cir. 1999); Morgan Bldgs. & Spas, Inc. v. Humane Soc'y of Se. Tex., 249 S.W.3d 480, 486 (Tex. App.—Beaumont 2008, no pet.); RESTATEMENT (SECOND) OF CONTRACTS § 209(2) (1981).

50. *E.g.*, *Springs Window*, 184 S.W.3d at 869 ("[Merger] clauses emphasize the parties' intent to invoke the 'merger doctrine.'"); *Burleson State Bank*, 27 S.W.3d at 615 (stating that the purpose of a "merger clause in a written contract is to invoke the parol evidence rule which excludes proof of extrinsic agreements"); *Maginn*, 919 S.W.2d at 168 (explaining that under the Texas Business and Commerce Code, unless a merger clause is present, parol evidence concerning the parties' agreements may be used to controvert the contract); RESTATEMENT (SECOND) OF CONTRACTS § 216 cmt. e (acknowledging that a merger clause "is likely to conclude the issue whether the agreement is completely integrated"); 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 33:21, at 661–62 (4th ed. 1999) ("By stipulating to the fact of integration, [merger] clauses purport to contractually require the application of the parol evidence rule to the parties' agreement.").

51. Dallas Farm Mach. Co. v. Reaves, 307 S.W.2d 233 (Tex. 1957).

regarding whether a merger clause could be avoided by fraud.[52] The court held that, as a matter of public policy, such a clause was voidable and that the parol evidence rule did not bar proof of such fraud.[53] In so holding, the court relied primarily on the reasoning of a decision of the Supreme Judicial Court of Massachusetts, which had resolved the same conflict among Massachusetts cases in the same manner:

> The Massachusetts court chose to resolve the conflict by adopting the rule that a written contract containing a merger clause can be avoided for antecedent fraud or fraud in its inducement and that the parol evidence rule does not stand in the way of proof of such fraud[.] The court's opinion . . . predicates the decision on sound public policy, as follows:
>
> > As a matter of principle it is necessary to weigh the advantages of certainty in contractual relations against the harm and injustice that result from fraud. In obedience to the demands of a larger public policy, the law long ago abandoned the position that a contract must be held sacred regardless of the fraud of one of the parties in procuring it. No one advocates a return to outworn conceptions. *The same public policy that in general sanctions the avoidance of a promise obtained by deceit strikes down all attempts to circumvent that policy by means of contractual devices.* In the realm of fact, it is entirely possible for a party knowingly to agree that no representations have been made to him, while at the same time believing and relying upon representations which in fact have been made and in fact are false but for which he would not have made the agreement. To deny this possibility is to ignore the frequent instances in everyday experience where parties accept, often without critical examination, and act upon agreements containing somewhere within their four corners exculpatory clauses in one form or another, but where they do so, nevertheless, in reliance upon the honesty of supposed friends, the plausible and disarming statements of salesman, or the customary course of business. To refuse relief would result in opening the door to a multitude of frauds and in thwarting the general policy of the law.
>
> We make the same choice made by the Massachusetts court, and in so doing we bring the law on the subject in this state into harmony

52. *Id.* at 239.
53. *Id.* at 239–40.

with the great weight of authority.[54]

Because the language in *Dallas Farm Machinery* is so broad—stating that the "'policy [against fraud] . . . strikes down *all attempts to circumvent that policy by means of contractual devices*'"[55]—and because the effect of reliance disclaimers and merger clauses are similar,[56] it appeared after *Dallas Farm Machinery* that a reliance

54. *Id.* at 239 (emphasis added) (citations omitted) (quoting Bates v. Southgate, 31 N.E.2d 551, 558 (Mass. 1941)); *accord* Gen. Retail Servs., Inc. v. Wireless Toyz Franchise, L.L.C., 255 F. App'x 775, 790 (5th Cir. 2007) ("As a general rule, Texas law does not permit parties to avoid fraud claims based on the existence of a merger clause in a related contract."); Mansfield Heliflight, Inc. v. Bell/Agusta Aerospace Co., 507 F. Supp. 2d 638, 649 (N.D. Tex. 2007) ("[Under Texas law] a claim for fraudulent inducement can be brought even though the contract . . . contains a merger clause."); RESTATEMENT (SECOND) OF CONTRACTS § 214 cmt. c ("What appears to be a complete and binding integrated agreement may be . . . voidable for fraud . . . . Such invalidating causes need not and commonly do not appear on the face of the writing. They are not affected even by a 'merger' clause."); 7 ARTHUR LINTON CORBIN & JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 28:21, at 96 (rev. ed. 2002) ("Despite the existence of a merger clause, parol evidence is admissible for purposes of demonstrating that the agreement is void or voidable or for proving an action for deceit."); 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 33:21, at 670–71 (4th ed. 1999) ("Just as is the case with the parol evidence rule itself, a merger or integration clause is ineffectual to exclude evidence of prior or contemporaneous extrinsic representations for the purpose of showing fraud . . . ." (footnotes omitted)).

As Professor Corbin observed many years ago: "A statement in the writing that it contains all terms agreed upon and that there are no promises, warranties, or other extrinsic provisions, is a statement of fact that may actually be untrue." Arthur Corbin, *The Parol Evidence Rule*, 53 YALE L.J. 603, 621 (1944).

The fraud exception also applies to other types of misrepresentation claims, including false, misleading, and deceptive acts or practices in violation of the Texas Consumer Protection–Texas Deceptive Trade Practices Act (the DTPA), TEX. BUS. & COM. CODE ANN. § 17.50(a)(1)(B) (Vernon 2002 & Supp. 2009), and negligent misrepresentation. *E.g.*, Bakhico Co. v. Shasta Beverages, Inc., No. 3:94-CV-1780-H, 1998 WL 25772, at *7 (N.D. Tex. Jan. 15, 1998) (holding that merger clauses do not bar a DTPA claim); Sergeant Oil & Gas Co. v. Nat'l Maint. & Repair, Inc., 861 F. Supp. 1351, 1364–65 (S.D. Tex. 1994) (holding that common law defenses, such as merger clauses, do not apply to DTPA claims); Carousel's Creamery, L.L.C. v. Marble Slab Creamery, Inc., 134 S.W.3d 385, 395 (Tex. App.—Houston [1st Dist.] 2004, pet. dism'd by agr.) (holding that a merger clause does not bar a negligent-misrepresentation claim); 2 RONALD A. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-202:54, at 286 (3d rev. ed. 1997) ("An integration clause does not bar claims for negligent misrepresentation and fraudulent inducement.").

55. *Dallas Farm*, 307 S.W.2d at 239.

56. *See In re* Heritage Org., L.L.C., 375 B.R. 230, 263 (Bankr. N.D. Tex. 2007) ("[T]he general rule in Texas is that waiver/release/merger/reliance disclaimer clauses . . . can be avoided by proof of fraud in the inducement, and the parol evidence rule does not bar proof of such fraud."); Burleson State Bank v. Plunkett, 27 S.W.3d 605, 616 (Tex. App.—Waco 2000, pet. denied) ("[I]t follows that fraud, if admissible to vitiate a contract in its entirety, should also operate to vitiate the disclaiming clause, since the clause is but a

disclaimer was subject to the parol evidence rule's fraud exception in Texas.[57]

1. *Schlumberger Technology Corp. v. Swanson*: The Texas Supreme Court Enforces a Reliance Disclaimer

The Texas Supreme Court first considered the question of a reliance disclaimer's enforceability in *Schlumberger Technology Corp. v. Swanson*.[58] There, the Swansons and Schlumberger entered into a joint venture to mine diamonds from the ocean floor off the South African coast.[59] After becoming embroiled in a dispute regarding the project's feasibility and value, they entered into a settlement agreement pursuant to which the Swansons sold their interest in the venture to Schlumberger for a little under $1 million.[60] The agreement contained the following reliance disclaimer:

> [E]ach of [the Swansons] expressly warrants and represents and does hereby state . . . and represent . . . that no promise or agreement which is not herein expressed has been made to him or her in executing this release, and that none of [the Swansons are] relying upon any statement or representation of any agent of the parties being released hereby. Each of [the Swansons are] relying on his or her own judgment and each has been represented by Hubert Johnson as legal counsel in this matter. The aforesaid legal counsel has read and explained to each of [the Swansons] the entire contents of this Release in Full, as well as the legal consequences of this Release . . . .[61]

After learning that Schlumberger later sold the entire venture to DeBeers for about $4,000,000, the Swansons sued, claiming that Schlumberger had fraudulently induced them to sell their interest

part of the contract.").

57. *Schlumberger* recognized this confusion, observing that earlier decisions on the issue were "not entirely consistent." Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 178 (Tex. 1997); *accord* Prudential Ins. Co. of Am. v. Italian Cowboy Partners, Ltd., 270 S.W.3d 192, 198 (Tex. App.—Eastland 2008, no pet.) (referring to *Schlumberger*'s observation that earlier decisions on the subject lacked consistency). Many courts from other jurisdictions refuse to enforce reliance disclaimers because they violate the public policy against fraud and fall within the parol evidence rule's fraud exception. *See* cases cited *supra* note 8.

58. *Schlumberger*, 959 S.W.2d 171.

59. *Id*. at 173.

60. *Id*. at 174.

61. *Id*. at 180.

in the venture by misrepresenting its value.[62]

In deciding the case, the supreme court assumed that Schlumberger knew during the negotiations that it was misrepresenting the value of the Swansons' interest in the venture and that the misrepresentations were made to induce the Swansons to settle.[63] Notwithstanding those assumptions, the court held that, as a matter of law, the reliance disclaimer was binding on the parties and precluded the Swansons' fraudulent-inducement claim.[64] In doing so, the court first declared that "[t]he contract and the circumstances surrounding its formation determine whether the disclaimer of reliance is binding."[65] The court then proceeded to examine the settlement agreement's language and the circumstances surrounding its negotiation.[66] Holding that the release "in clear language . . . unequivocally disclaimed reliance upon representations by Schlumberger about the project's feasibility and value" by stating that "none of [the Swansons are] relying upon any statement or representation of any agent of [Schlumberger],"[67] the court found the following facts to be significant: (1) the parties were represented by "highly competent and able legal counsel" in drafting the release, (2) the parties were "knowledgeable and sophisticated business players," (3) the parties dealt at arm's length, (4) the release's sole purpose was to end the dispute "once and for all" and to terminate the parties' business relationship, and (5) the Swansons, throughout the negotiations, specifically disagreed with Schlumberger about the project's feasibility and value.[68]

Significantly, the court did not indicate whether the foregoing factors were the only ones to be considered in determining a reliance disclaimer's enforceability or whether all of them had to be present and, if not, the weight to be given to each.[69] The court

62. *Id*. at 174.

63. *Schlumberger*, 959 S.W.2d at 178. The supreme court assumed these facts because the jury found in the Swansons' favor. *Id*.

64. *Id.* at 180–81.

65. Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 179 (Tex. 1997).

66. *Id.* at 179–81.

67. *Id.* at 180.

68. *Id.*

69. The court made clear that the mere fact the parties were represented by counsel is not always sufficient to ensure a reliance disclaimer's enforceability: "Schlumberger asks us to adopt a *per se* rule that the presence of independent legal counsel always precludes a claim that a party fraudulently induced a release. Texas law does not support such a rule."

also never set forth the minimum requisite language needed to "clearly" and "unequivocally" disclaim reliance, nor did it define what constitutes "arm's-length" dealings, "knowledgeable and sophisticated business players," or "highly competent and able legal counsel." The court, however, was careful to point out that its enforcement of the reliance disclaimer was based *solely* on the facts before it.

> In sum, we hold that 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, can preclude a claim of fraudulent inducement. We emphasize that a disclaimer of reliance or merger clause will not always bar a fraudulent inducement claim. *We conclude only that on this record*, the disclaimer of reliance conclusively negates as a matter of law the element of reliance on representations about the feasibility and value of the sea-diamond mining project needed to support the Swansons' claim of fraudulent inducement.[70]

2. Post-*Schlumberger* Cases Struggle with the Circumstances in Which Reliance Disclaimers Are Enforceable

Due to *Schlumberger*'s failure to delineate the minimum language needed for an enforceable reliance disclaimer and the factors governing when such a disclaimer is enforceable or their weight, "[b]oth the state and federal courts in Texas . . . have struggled with the circumstances under which [reliance disclaimers] will or will not be binding, and will or will not negate the reliance element of a fraudulent inducement claim."[71]

Id. at 178.

70. *Schlumberger*, 959 S.W.2d at 181 (emphasis added). In *Schlumberger*, the supreme court, in holding that not all reliance disclaimers are enforceable, cited *Prudential Insurance Co. of America*, which uses the same criteria to establish the enforceability of an "as is" clause. *Id.* at 179–81 (citing Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd., 896 S.W.2d 156 (Tex. 1995)). Thus, cases ruling on the enforceability of "as is" clauses are persuasive authority in determining the enforceability of reliance disclaimers.

71. *In re* Heritage Org., L.L.C., 375 B.R. 230, 264 (Bankr. N.D. Tex. 2007); *see* Steinberg v. Brennan, No. 3:03-CV-0562, 2005 WL 1837961, at *4 (N.D. Tex. July 29, 2005) ("*Schlumberger* is open to different interpretations . . . .").

The following cases have considered a reliance disclaimer's enforceability under Texas law since *Schlumberger*: Gen. Retail Servs., Inc. v. Wireless Toyz Franchise, L.L.C., 255 F. App'x 775, 790 (5th Cir. 2007) (remanding the question of a reliance disclaimer's enforceability); K3C Inc. v. Bank of Am., N.A., 204 F. App'x 455, 462–63 (5th Cir. 2006) (enforcing reliance disclaimer); Armstrong v. Am. Home Shield Corp., 333 F.3d 566, 571 (5th Cir. 2003) (enforcing reliance disclaimer); U.S. Quest Ltd. v. Kimmons, 228 F.3d 399,

403 (5th Cir. 2000) (enforcing reliance disclaimer); Dunbar Med. Sys. Inc. v. Gammex Inc., 216 F.3d 441, 454 (5th Cir. 2000) (refusing to treat merger clause as a reliance disclaimer); Berry v. Indianapolis Life Ins. Co., No. 3:08-CV-0248-B, 2009 U.S. Dist. LEXIS 24951, at *72–74 (N.D. Tex. Mar. 26, 2009) (declining to enforce the reliance disclaimer); Nichols v. YJ USA Corp., No. 3:06-CV-02366-L, 2009 U.S. Dist. LEXIS 22450, at *59–61 (N.D. Tex. Mar. 18, 2009) (refusing to treat merger clause as a reliance disclaimer); Solutions & Specialized Innovations, Ltd. v. Six Flags, Inc., No. H-07-2355, 2008 WL 5435561, at *1 (S.D. Tex. Dec. 31, 2008) (declining to decide enforceability of reliance disclaimer because "a well-founded judgment on this point must await the development of a full record at trial"); Jacuzzi, Inc. v. Franklin Elec. Co., No. 3:07-CV-1090-D, 2008 U.S. Dist. LEXIS 42187, at *8–9 (N.D. Tex. May 27, 2008) (enforcing reliance disclaimer); Farnham v. Electrolux Home Care Prods., Ltd., 527 F. Supp. 2d 584, 588 (W.D. Tex. Dec. 21, 2007) (not enforcing reliance disclaimer); Whitney Nat'l Bank v. Air Ambulance by B&C Flight Mgmt., Inc., No. H-04-2220, 2007 U.S. Dist. LEXIS 79144, at *25–27 (S.D. Tex. Oct. 25, 2007) (treating merger clause as reliance disclaimer); Mansfield Heliflight, Inc. v. Bell/Agusta Aerospace Co., 507 F. Supp. 2d 638, 649 (N.D. Tex. Sept. 6, 2007) (refusing to treat merger clause as a reliance disclaimer); Chesson v. Hall, No. H-01 315, 2007 WL 1964538, at *20 (S.D. Tex. July 3, 2007) (enforcing reliance disclaimer and "as is" clause); Netknowledge Techs., L.L.C. v. Rapid Transmit Techs., Inc., No. 3:02-CV-2406-M, 2007 WL 518548, at *5 (N.D. Tex. Feb, 20, 2007) (upholding arbitration award not enforcing reliance disclaimer), *aff'd*, 269 F. App'x 443 (5th Cir. 2008); Escopeta Oil & Gas Corp. v. Songa Mgmt., Inc., No. 1:06-CV-386, 2007 WL 171721, at *9–12 (E.D. Tex. Jan. 17, 2007) (declining to enforce the reliance disclaimer); Nutrasep, L.L.C. v. TOPC Tex., L.L.C., No. A-05-CA-523 LY, 2006 U.S. Dist. LEXIS 78375, at *23–25 (W.D. Tex. Oct. 27, 2006) (declining to enforce the reliance disclaimer); Fair Isaac Corp. v. Tex. Mut. Ins. Co., No. H-05-3007, 2006 WL 2022894, at *2–3 (S.D. Tex. July 17, 2006) (enforcing reliance disclaimer); Girma v. Compass Bank, No. 3:05-CV-0961-D, 2006 U.S. Dist. LEXIS 35231, at *17 (N.D. Tex. May 31, 2006) (enforcing reliance disclaimer); Tex. Motor Coach, L.C., v. Blue Bird Body Co., No. 4:05-CV-34, 2005 WL 3132482, at *8 (E.D. Tex. Nov. 22, 2005) (enforcing reliance disclaimer); Steinberg v. Brennan, No. 3:03-CV-0562, 2005 WL 1837961, at *4–8 (N.D. Tex. July 29, 2005) (enforcing reliance disclaimer); Corp. Link, Inc. v. Fairbanks Capital Corp., No. 3:03-CV-0506-B, 2005 U.S. Dist. LEXIS 5699, at *28–29 (N.D. Tex. Apr. 4, 2005) (enforcing a merger clause as a reliance disclaimer); Cronus Offshore, Inc. v. Kerr McGee Oil & Gas Corp., 369 F. Supp. 2d 848, 857 (E.D. Tex. Feb. 9, 2004) (enforcing reliance disclaimer), *aff'd*, 133 F. App'x 944 (5th Cir. 2005); DCRI, L.P. v. Bank One, No. 03-1828-M, 2003 U.S. Dist. LEXIS 19896, at *8–9 (N.D. Tex. Nov. 5, 2003) (enforcing reliance disclaimer); i2 Techs., Inc. v. DARC Corp., No. 3:02-CV-0327-H, 2003 U.S. Dist. LEXIS 16655, at *14–18 (N.D. Tex. Sept. 23, 2003) (enforcing reliance disclaimer); *In re* Heritage Org., L.L.C., 375 B.R. 230, 263–68 (Bankr. N.D. Tex. 2007) (declining to enforce the reliance disclaimer); Prudential Ins. Co. of Am. v. Italian Cowboy Partners, Ltd., 270 S.W.3d 192, 197–201 (Tex. App.—Eastland 2008, no pet.) (enforcing reliance disclaimer); Royce Bane Invs., Inc. v. McGinn, No. 12-07-00262-CV, 2008 Tex. App. LEXIS 7090, at *10–11 (Tex. App.—Tyler Sept. 24, 2008, no pet.) (mem. op.) (enforcing merger clause as a reliance disclaimer); Cell Comp, L.L.C. v. Sw. Bell Wireless, L.L.C., No. 13-07-00120-CV, 2008 WL 2454250, at *5 (Tex. App.—Corpus Christi June 19, 2008, no pet.) (mem. op.) (declining to enforce the reliance disclaimer); Biosilk Spa, L.P. v. HG Shopping Ctrs., L.P., No. 14-06-00986-CV, 2008 Tex. App. LEXIS 3361, at *7 (Tex. App.—Houston [14th Dist.] May 8, 2008, pet. denied) (mem. op.) (enforcing reliance disclaimer); San Antonio Props., L.P. v. PSRA Invs., Inc., 255 S.W.3d 255, 260–62 (Tex. App.—San Antonio 2008, pet. granted, judgm't vacated by agr.) (refusing to treat merger clause as a reliance disclaimer); IFC Credit Corp. v. Specialty

Optical Sys., Inc., 252 S.W.3d 761, 769–70 (Tex. App.—Dallas 2008, pet. denied) (declining to enforce the reliance disclaimer); Morgan Bldgs. & Spas, Inc. v. Humane Soc'y of Se. Tex., 249 S.W.3d 480, 489–90 (Tex. App.—Beaumont 2008, no pet.) (enforcing reliance disclaimer); ISG State Operations, Inc. v. Nat'l Heritage Ins. Co., 234 S.W.3d 711, 721–22 (Tex. App.—Eastland 2007, pet. denied) (enforcing reliance disclaimer); Residencial Santa Rita, Inc. v. Colonia Santa Rita, Inc., No. 04-06-00778-CV, 2007 Tex. App. LEXIS 7426, at *10–11 (Tex. App.—San Antonio Sept. 12, 2007, no pet.) (mem. op.) (declining to enforce the reliance disclaimer); Garza v. State & County Mut. Fire Ins. Co., No. 2-06-202-CV, 2007 Tex. App. LEXIS 3070, at *20–22 (Tex. App.—Fort Worth Apr. 19, 2007, pet. denied) (mem. op.) (enforcing reliance disclaimer); Langguth v. JAT Enters., Ltd., No. 03-06-00240-CV, 2007 Tex. App. LEXIS 983, at *13–14 (Tex. App.—Austin Feb. 6, 2007, no pet.) (mem. op.) (enforcing reliance disclaimer); Playboy Enters., Inc. v. Editorial Caballero, S.A. de C.V., 202 S.W.3d 250, 257–58 (Tex. App.—Corpus Christi 2006, pet. denied) (enforcing reliance disclaimer); Warehouse Assocs. Corp. Ctr. II, Inc. v. Celotex Corp., 192 S.W.3d 225, 234 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (declining to enforce the reliance disclaimer); Sims v. Century 21 Capital Team, Inc., No. 03-05-00461-CV, 2006 WL 2589358, at *3 (Tex. App.—Austin Sept. 8, 2006, no pet.) (mem. op.) (enforcing reliance disclaimer); Bounds v. Cole & Ashcroft, No. 14-05-00064-CV, 2006 Tex. App. LEXIS 5559, at *8–10 (Tex. App.—Houston [14th Dist.] June 22, 2006, no pet.) (mem. op.) (enforcing merger clause as a reliance disclaimer); Marrot Commc'ns, Inc. v. Spring Branch Med. Ctr., Inc., No. 14-04-00462-CV, 2006 Tex. App. LEXIS 1401, at *11 n.4 (Tex. App.—Houston [14th Dist.] Feb. 21, 2006, pet. denied) (mem. op.) (refusing to treat merger clause as a reliance disclaimer); Springs Window Fashions Div., Inc. v. Blind Maker, Inc., 184 S.W.3d 840, 874–76 (Tex. App.—Austin 2006, pet. granted & remanded by agr.) (enforcing reliance disclaimer); Stark v. Benckenstein, 156 S.W.3d 112, 122 (Tex. App.—Beaumont 2004, pet. denied) (enforcing reliance disclaimer); Simpson v. Woodbridge Props., L.L.C., 153 S.W.3d 682, 684 (Tex. App.—Dallas 2004, no pet.) (enforcing reliance disclaimer); E.R. Dupuis Concrete Co. v. Penn Mut. Life Ins. Co., 137 S.W.3d 311, 320 (Tex. App.—Beaumont 2004, no pet.) (enforcing reliance disclaimer); Atl. Lloyds Ins. Co. v. Butler, 137 S.W.3d 199, 216–18 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (enforcing reliance disclaimer); Coastal Bank SSB v. Chase Bank of Tex., N.A., 135 S.W.3d 840, 844 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (enforcing reliance disclaimer); Carousel's Creamery, L.L.C. v. Marble Slab Creamery, Inc., 134 S.W.3d 385, 394 (Tex. App.—Houston [1st Dist.] 2004, pet. dism'd by agr.) (not enforcing reliance disclaimer); *In re* GTE Mobilnet of S. Tex., L.P., 123 S.W.3d 795, 798–99 (Tex. App.—Beaumont 2003, no pet.) (upholding arbitration award enforcing reliance disclaimer); IKON Office Solutions, Inc. v. Eifert, 125 S.W.3d 113, 127–28 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (enforcing reliance disclaimer); John v. Marshall Health Servs., Inc., 91 S.W.3d 446, 449–50 (Tex. App.—Texarkana 2002, pet. denied) (declining to enforce the reliance disclaimer); Oakwood Mobile Homes, Inc. v. Cabler, 73 S.W.3d 363, 372 (Tex. App.—El Paso 2002, pet. denied) (declining to enforce the reliance disclaimer); Woodlands Land Dev. Co. v. Jenkins, 48 S.W.3d 415, 422 (Tex. App.—Beaumont 2001, no pet.) (declining to enforce the reliance disclaimer); Yzaguirre v. KCS Res., Inc., 47 S.W.3d 532, 542 (Tex. App.—Dallas 2000, pet. granted) (enforcing reliance disclaimer), *aff'd*, 53 S.W.3d 368 (Tex. 2001); Fletcher v. Edwards, 26 S.W.3d 66, 76–77 (Tex. App.—Waco 2000, pet. denied) (declining to enforce the reliance disclaimer); De Los Santos v. Coastal Oil & Gas Co., No. 05-97-00029-CV, 1999 Tex. App. LEXIS 6100, at *16–17 (Tex. App.—Dallas Aug. 17, 1999, pet. denied) (not designated for publication) (enforcing merger clause as a reliance disclaimer); Gigout v. C & L Constructors, Inc., No 01-96-01109-CV, 1999 WL 191324, at *2 (Tex. App.—Houston [14th Dist.] Apr. 8, 1999, pet. denied) (not designated for publication) (enforcing

For example, some courts have held that *Schlumberger* applies only when there is general congruity to *Schlumberger*'s facts.[72]

reliance disclaimer); B.J. Aviation, Inc. v. City of Galveston, No. 14-96-01480-CV, 1999 Tex. App. LEXIS 1233, at *9–11 (Tex. App.—Houston [14th Dist.] Feb. 25, 1999, pet. denied) (not designated for publication) (declining to enforce the reliance disclaimer), *superseded by statute on other grounds*, TEX. GOV'T CODE ANN. § 311.034 (Vernon Supp. 2004); Starlight, L.P. v. Xarin Austin I, Ltd., No. 03-97-00747-CV, 1999 WL 11213, at *9 (Tex. App.—Austin Jan. 14, 1999, no pet.) (not designated for publication) (enforcing reliance disclaimer); Johnson v. Perry Homes, No. 14-96-01391-CV, 1998 Tex. App. LEXIS 6749, at *26–29 (Tex. App.—Houston [14th Dist.] Oct. 29, 1998, pet. denied) (not designated for publication) (refusing to treat merger clause as a reliance disclaimer); Automaker, Inc. v. C.C.R.T. Co., No. 01-95-01223-CV, 1998 Tex. App. LEXIS 3086, at *14–16 (Tex. App.—Houston [1st Dist.] May 21, 1998, no pet.) (not designated for publication) (enforcing reliance disclaimer); 1900 SJ, Inc. v. Wash. Nat'l Ins. Co., No. 01-97-00493-CV, 1998 Tex. App. LEXIS 3059, at *14–15 (Tex. App.—Houston [1st Dist.] May 21, 1998, pet. denied) (not designated for publication) (enforcing reliance disclaimer).

72. *Nutrasep*, 2006 U.S. Dist. LEXIS 78375, at *23–25; *i2 Techs.*, 2003 U.S. Dist. LEXIS 16655, at *14–17; *Heritage*, 375 B.R. at 264–65 & n.50; *San Antonio Props.*, 255 S.W.3d at 261–62; *Carousel's Creamery*, 134 S.W.3d at 394 & n.4; *John*, 91 S.W.3d at 449–50; *Woodlands*, 48 S.W.3d at 422; *Fletcher*, 26 S.W.3d at 76–77.

The Texas Supreme Court, in *Forest Oil*, recognized that courts "seem to disagree over which *Schlumberger* facts were most relevant . . . ." Forest Oil Corp. v. McAllen, 268 S.W.3d 51, 60 (Tex. 2008). *Contra Tex. Motor Coach*, 2005 WL 3132482, at *7 ("Among the factors considered [in *Schlumberger*] was whether counsel represented the parties, whether the agreement was negotiated at arm's length, and whether the parties were sophisticated business individuals."); *Heritage*, 375 B.R. at 263 ("Briefly, the *Schlumberger* court put particular emphasis on the following facts: the parties before it were dealing at arm's length. Both were equally sophisticated in the relevant subject matter in dispute (there, diamond mining). The party asserting the fraudulent inducement claim had competent (and presumably independent) legal counsel representing it in drafting the agreement which contained the contractual language alleged to bar the subsequent fraudulent inducement claim. And, significantly, the contractual language which was alleged to preclude the fraudulent inducement claim was contained in a document (there, a settlement agreement and release), the very purpose of which was to end the parties' dispute about the (mis)representations which allegedly formed the basis of the fraudulent inducement claim."); *IKON*, 125 S.W.3d at 125 (noting that in *Schlumberger*, "the parties (1) were attempting to end their relationship, (2) were 'embroiled in a dispute,' (3) were dealing at arm's length, (4) were represented by highly competent and able legal counsel during the negotiations over the terms of the release itself, (5) were knowledgeable and sophisticated business players, and (6) the terms of the release 'in clear language' . . . 'unequivocally disclaimed reliance' on the specific representations . . . which . . . were the basis for the . . . lawsuit"); *IFC Credit*, 252 S.W.3d at 769 ("[The *Schlumberger*] [f]actors to consider include: (1) the terms of the contract; (2) the circumstances surrounding formation; (3) whether the parties are represented by counsel; and (4) whether the parties negotiated at arm's length . . . ."); Prudential Ins. Co. v. Italian Cowboy Partners, Ltd., 270 S.W.3d 192, 199 (Tex. App.—Eastland 2008, pet. filed) ("In *Schlumberger*, the court found these factors to be important to its decision that the fraudulent-inducement claim was foreclosed: (1) the parties were attempting to end a situation in which they had become embroiled in a dispute over the value and feasibility of the subject project, (2) highly competent and able legal counsel were involved in negotiating the release, (3) the parties

Other courts have rejected this principle and have looked primarily to the contract's specific language, holding that if it clearly and equivocally disclaims reliance on extra-contractual representations and statements, reliance is disclaimed:

> Accordingly, the Court must determine whether, under *Schlumberger*, the structure and language of a contract may demonstrate a sophisticated party's clear and unequivocal intent to disclaim reliance on prior representations, when central facts of *Schlumberger*—e.g., assistance of counsel, prior dispute, and tailored drafting—are absent. Although *Schlumberger* is not completely clear on this question, the Court concludes based on Fifth Circuit precedent that the answer is yes. While the Fifth Circuit has sometimes described *Schlumberger* in narrow terms, Fifth Circuit opinions have consistently looked to the structure and terms of contracts in order to determine whether clear and unequivocal intent to disclaim reliance exists under *Schlumberger*. They have implicitly rejected any requirement of emphatic tailored drafting, or general factual congruity with *Schlumberger*.[73]

A second major area of disagreement that has arisen among courts applying *Schlumberger* relates to whether the reliance disclaimer must be in an agreement, typically a release or settlement agreement, whose sole purpose is to resolve the dispute at issue in the fraudulent-inducement lawsuit. Some courts have refused to enforce a reliance disclaimer because the parties' agreement was not intended as such a final resolution. For example, in *Warehouse Associates Corporate Center II, Inc. v. Celotex Corp.*,[74] the Houston Court of Appeals for the Fourteenth District of Texas held:

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were negotiating at arm's length, and (4) the parties were knowledgeable and sophisticated in business.").

73. Steinberg v. Brennan, No. 3:03-CV-0562, 2005 WL 1837961, at *4 (N.D. Tex. July 29, 2005); *accord* Gen. Retail Servs., Inc. v. Wireless Toyz Franchise, L.L.C., 255 F. App'x 775, 791 (5th Cir. 2007); Armstrong v. Am. Home Shield Corp., 333 F.3d 566, 571 (5th Cir. 2003); Whitney Nat'l Bank v. Air Ambulance by B & C Flight Mgmt., Inc., No. H-04-2220, 2007 U.S. Dist. LEXIS 79144, at *29–41 (S.D. Tex. Oct. 25, 2007) (mem. op.); Langguth v. JAT Enters., Ltd., No. 03-06-00240-CV, 2007 Tex. App. LEXIS 983, at *13–14 (Tex. App.—Austin Feb. 6, 2007, no pet.) (mem. op.); Coastal Bank SSB v. Chase Bank of Tex., N.A., 135 S.W.3d 840, 844–45 (Tex. App.—Houston [1st Dist.] 2004, no pet.); Starlight, L.P. v. Xarin Austin I, Ltd., No. 03-97-00747-CV, 1999 WL 11213, at *9 (Tex. App.—Austin Jan. 14, 1999, no pet.) (not designated for publication).

74. Warehouse Assocs. Corporate Ctr. II v. Celotex Corp., 192 S.W.3d 225 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

> Upon careful consideration of the entire opinion in *Schlumberger*, we conclude that the decisive factor in the case was the contracting parties' mutual intent to definitively resolve a long-running dispute in which they had been embroiled . . . . Because the [c]ontract's purpose was not to definitively end a dispute in which Celotex and Warehouse Associates had been embroiled, this case does not fall within the scope of *Schlumberger* . . . .[75]

The majority of cases, however, have held the opposite—enforcing reliance disclaimers in a wide variety of contracts is not intended to resolve a dispute. For example, in *ISG State Operations, Inc. v. National Heritage Insurance Co.*,[76] the Eastland Court of Appeals, in enforcing a reliance disclaimer in a contract for processing Medicaid claims, held that:

> [n]othing in the [*Schlumberger*] court's opinion suggests its analysis is limited to settlement agreements. The [*Schlumberger*] court did spend considerable time discussing the parties' dispute and settlement, but it did so in light of the requirement that '[t]he contract and *the circumstances surrounding its formation* determine whether the disclaimer of reliance is binding.'[77]

75. *Id.* at 234; *see* Dunbar Med. Sys., Inc. v. Gammex Inc., 216 F.3d 441, 454 (5th Cir. 2000) (declining to enforce the reliance disclaimer); Nutrasep, L.L.C. v. TOPC Tex., L.L.C., No. A-05-CA-523 LY, 2006 U.S. Dist. LEXIS 78375, at *24–25 (W.D. Tex. Oct. 27, 2006) (same); *In re* Heritage Org., L.L.C., 375 B.R. 230, 263–68 (Bankr. N.D. Tex. 2007) (refusing to enforce the reliance disclaimer); San Antonio Props., L.P. v. PSRA Invs., Inc., 255 S.W.3d 255, 260–62 (Tex. App.—San Antonio 2008, pet. granted, judgm't vacated by agr.) (same); Residencial Santa Rita, Inc. v. Colonia Santa Rita, Inc., No. 04-06-00778-CV, 2007 Tex. App. LEXIS 7426, at *10–11 (Tex. App.—San Antonio Sept. 12, 2007, no pet.) (mem. op.) (same); Carousel's Creamery, L.L.C. v. Marble Slab Creamery, Inc., 134 S.W.3d 385, 394 (Tex. App.—Houston [1st Dist.] 2004, pet. dism'd by agr.) (same); John v. Marshall Health Servs., Inc., 91 S.W.3d 446, 449 (Tex. App.—Texarkana 2002, pet. denied) (same); Woodlands Land Dev. Co. v. Jenkins, 48 S.W.3d 415, 422 (Tex. App.—Beaumont 2001, no pet.) (same); Fletcher v. Edwards, 26 S.W.3d 66, 77 (Tex. App.—Waco 2000, pet. denied) (same); *see also* Yzaguirre v. KCS Res., Inc., 47 S.W.3d 532, 542 (Tex. App.—Dallas 2000, pet. granted) ("A significant fact in *Schlumberger* is the disclaimer went to the heart of the dispute they were settling.").

76. ISG State Operations, Inc. v. Nat'l Heritage Ins. Co., 234 S.W.3d 711 (Tex. App.—Eastland 2007, pet. denied).

77. *Id.* at 721–22 (quoting Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 179 (Tex. 1997)); *accord* Armstrong v. Am. Home Shield Corp., 333 F.3d 566, 571 (5th Cir. 2003) (enforcing a reliance disclaimer in an employment contract); U.S. Quest Ltd. v. Kimmons, 228 F.3d 399, 403 (5th Cir. 2000) (enforcing a reliance disclaimer in a consulting contract); Jacuzzi, Inc. v. Franklin Elec. Co., No. 3:07-CV-1090-D, 2008 U.S. Dist. LEXIS 4414, at *11, *14 n.5, *18 (N.D. Tex. May 27, 2008) (enforcing a reliance disclaimer in a license agreement); Chesson v. Hall, No. H-01 315, 2007 WL 1964538, at *19 (S.D. Tex. July 3, 2007) (enforcing a reliance disclaimer in a residential real estate contract); *Whitney*

A third major area of judicial disagreement in *Schlumberger*'s aftermath is whether a standard merger clause (i.e., one which merely states that there are no representations besides those set forth in the written agreement) or a representation disclaimer unaccompanied by a "no-reliance" clause can be sufficiently "clear" to disclaim reliance. Again, the cases are split, with some holding that standard merger clauses or representation disclaimers, standing alone, are insufficient to disclaim reliance[78] and others holding that they are sufficient.[79]

Nat'l Bank, 2007 U.S. Dist. LEXIS 31482, at *40 (enforcing a reliance disclaimer in a loan agreement); Fair Isaac Corp. v. Tex. Mut. Ins. Co., No. H-05-3007, 2006 WL 2022894, at *2–3 (S.D. Tex. July 17, 2006) (enforcing a reliance disclaimer in a contract for billing review software); *Steinberg*, 2005 WL 1837961, at *6 (enforcing a reliance disclaimer in a stock purchase agreement); Cronus Offshore, Inc. v. Kerr McGee Oil & Gas Corp., 369 F. Supp. 2d 848, 857–60 (E.D. Tex. Feb. 9, 2004) (enforcing a reliance disclaimer in a contract for the sale of an oil and gas lease); *Italian Cowboy*, 270 S.W.3d at 198–201 (enforcing a reliance disclaimer in a restaurant lease); *i2 Techs.*, 2003 U.S. Dist. LEXIS 16655, at *13–16 (enforcing a reliance disclaimer in a "Software License and Maintenance Agreement"); Biosilk Spa, L.P. v. HG Shopping Ctrs., L.P., No. 14-06-00986-CV, 2008 Tex. App. LEXIS 3361, at *7–9 (Tex. App.—Houston [14th Dist.] May 8, 2008, pet. denied) (mem. op.) (enforcing a reliance disclaimer in a shopping-center lease); Morgan Bldgs. & Spas, Inc. v. Humane Soc'y of Se. Tex., 249 S.W.3d 480, 490 (Tex. App.—Beaumont 2008, no pet.) (enforcing a reliance disclaimer in a contract for the sale of a steel building); Springs Window Fashions Div., Inc. v. Blind Maker, Inc., 184 S.W.3d 840, 869–72 (Tex. App.—Austin 2006, pet. granted & remanded by agr.) (enforcing a reliance disclaimer in a distributorship agreement); Simpson v. Woodbridge Props., L.L.C., 153 S.W.3d 682, 684 (Tex. App.—Dallas 2004, no pet.) (enforcing a reliance disclaimer in a residential real estate sales contract); E.R. Dupuis Concrete Co. v. Penn Mut. Life Ins. Co., 137 S.W.3d 311, 320–21 (Tex. App.—Beaumont 2004, no pet.) (enforcing a reliance disclaimer in a variable life insurance policy); Coastal Bank SSB v. Chase Bank of Tex., N.A., 135 S.W.3d 840, 843–45 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (enforcing a reliance disclaimer in a loan participation agreement); IKON Office Solutions, Inc. v. Eifert, 125 S.W.3d 113, 127–28 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (enforcing a reliance disclaimer in acquisition and employment agreements).

78. *Dunbar*, 216 F.3d at 450–51; Nichols v. YJ USA Corp., No. 3:06-CV-02366-L, 2009 U.S. Dist. LEXIS 22450, at *60–61 (N.D. Tex. Mar. 18, 2009); Mansfield Heliflight, Inc. v. Bell/Agusta Aerospace Co., 507 F. Supp. 2d 638, 649 (N.D. Tex. 2007); Escopeta Oil & Gas Corp. v. Songa Mgmt., Inc., No. 1:06-CV-386, 2007 WL 171721, at *10–12 (E.D. Tex. Jan. 17, 2007); *Nutrasep*, 2006 U.S. Dist. LEXIS 78375, at *24; *San Antonio Props.*, 255 S.W.3d at 262; Marrot Commc'ns, Inc. v. Spring Branch Med. Ctr., Inc., No. 14-04-00462-CV, 2006 Tex. App. LEXIS 1401, at *11 n.4 (Tex. App.—Houston [14th Dist.] Feb. 21, 2006, pet. denied) (mem. op.); Johnson v. Perry Homes, No. 1496-01391-CV, 1998 Tex. App. LEXIS 6749, at *26–29 (Tex. App.—Houston [14th Dist.] Oct. 29, 1998, pet. denied) (not designated for publication).

79. Armstrong v. Am. Home Shield Corp., 333 F.3d 566, 571 (5th Cir. 2003); *U.S. Quest*, 228 F.3d at 403; Whitney Nat'l Bank v. Air Ambulance by B&C Flight Mgmt., Inc., No. H-04-2220, 2007 U.S. Dist. LEXIS 79144, at *35–36 (S.D. Tex. Oct. 25, 2007); Tex. Motor Coach, L.C., v. Blue Bird Body Co., No. 4:05-CV-34, 2005 WL 3132482, at *8 (E.D.

Finally, post-*Schlumberger* decisions disagree as to whether the reliance disclaimer has to be specifically negotiated and unique to the contract containing it. Some courts, primarily federal, "have implicitly rejected any requirement of emphatic, tailored drafting[,]"[80] whereas other courts, primarily state ones, have refused to enforce reliance disclaimers that were not negotiated or that were in form or standardized contracts.[81]

Tex. Nov. 22, 2005); Corp. Link, Inc. v. Fairbanks Cap. Corp., No. 3:03-CV-0506-B, 2005 U.S. Dist. LEXIS 5699, at *28 (N.D. Tex. Apr. 4, 2005); Royce Bane Invs., Inc. v. McGinn, No. 12-07-00262-CV, 2008 Tex. App. LEXIS 7090, at *10–11 (Tex. App.—Tyler Sept. 24, 2008, no pet) (mem. op.); *ISG State Operations*, 234 S.W.3d at 721–22; Langguth v. JAT Enters., Ltd., No. 03-06-00240-CV, 2007 Tex. App. LEXIS 983, at *11–13 (Tex. App.—Austin Feb. 6, 2007, no pet.) (mem. op.); Bounds v. Cole & Ashcroft, No. 14-05-00064-CV, 2006 Tex. App. LEXIS 5559, at *8–10 (Tex. App.—Houston [14th Dist.] June 22, 2006, no pet.) (mem. op.); Playboy Enters., Inc. v. Editorial Caballero, S.A. de C.V., 202 S.W.3d 250, 257–58 (Tex. App.—Corpus Christi 2006, pet. denied); *Springs Window*, 184 S.W.3d at 869–70; *IKON*, 125 S.W.3d at 127–28; De Los Santos v. Coastal Oil & Gas Co., No. 05-97-00029-CV, 1999 Tex. App. LEXIS 6100, at *16–17 (Tex. App.—Dallas Aug. 17, 1999, pet. denied) (not designated for publication); Starlight, L.P. v. Xarin Austin I, Ltd., No. 03-97-00747-CV, 1999 WL 11213, at *9 (Tex. App.—Austin Jan. 14, 1999, no pet.) (not designated for publication).

80. *Whitney Nat'l Bank*, 2007 U.S. Dist. LEXIS 31482, at *27 (quoting Steinberg v. Brennan, No. 3:03-CV-0562, 2005 WL 1837961, at *7 (N.D. Tex. July 29, 2005)); *accord* K3C Inc. v. Bank of Am., N.A., 204 F. App'x 455, 462–63 (5th Cir. 2006); *Steinberg*, 2005 WL 1837961, at *7; *Langguth*, 2007 Tex. App. LEXIS 983, at *13; *see Biosilk*, 2008 Tex. App. LEXIS 3361, at *7–8 (enforcing reliance disclaimer in shopping mall's form lease); *Morgan Bldgs.*, 249 S.W.3d at 489–90 (enforcing reliance disclaimer in form contract because the parties were sophisticated).

81. Berry v. Indianapolis Life Ins. Co., No. 3:08-CV-0248-B, 2009 U.S. Dist. LEXIS 24951, at *72–73 (N.D. Tex. Mar. 26, 2009); Farnham v. Electrolux Home Care Prods., Ltd., 527 F. Supp. 2d 584, 588–89 (W.D. Tex. 2007); *Nutrasep*, 2006 U.S. Dist. LEXIS 78375, at *24; Cell Comp, L.L.C. v. Sw. Bell Wireless, L.L.C., No. 13-07-00120-CV, 2008 WL 2454250, at *3 (Tex. App.—Corpus Christi June 19, 2008, no pet.) (mem. op.); IFC Credit Corp. v. Specialty Optical Sys., Inc., 252 S.W.3d 761, 770 (Tex. App.—Dallas 2008, pet. denied); *San Antonio Props.*, 255 S.W.3d at 262; Carousel's Creamery, L.L.C. v. Marble Slab Creamery, Inc., 134 S.W.3d 385, 394 (Tex. App.—Houston [1st Dist.] 2004, pet. dism'd by agr.); John v. Marshall Health Servs., Inc., 91 S.W.3d 446, 450 (Tex. App.—Texarkana 2002, pet. denied); Woodlands Land Dev. Co. v. Jenkins, 48 S.W.3d 415, 422 (Tex. App.—Beaumont 2001, no pet.); *Johnson*, 1998 Tex. App. LEXIS 6749, at *26–29; *cf.* Kupchynsky v. Nardiello, 230 S.W.3d 685, 690–91 (Tex. App.—Dallas 2007, pet. denied).

3. *Forest Oil Corporation v. McAllen*: The Texas Supreme Court Confirms the *Schlumberger* Exception and Clarifies Its Applicability but Still Refrains From Establishing a Bright-Line Test for Determining the Enforceability of Reliance Disclaimers

The supreme court considered the enforceability of reliance disclaimers for a second time in its recent decision of *Forest Oil Corp. v. McAllen*.[82] There, the plaintiffs leased their ranch, the McAllen Ranch in South Texas, to Forest Oil for oil and gas exploration.[83] After becoming embroiled in a lawsuit over royalties and leasehold development, the parties successfully mediated their dispute and entered into a settlement agreement.[84] In addition to resolving the royalty and nondevelopment disputes, the agreement provided for the arbitration of any claims "for environmental liability, surface damages, personal injury, or wrongful death occurring at any time and relating to the McAllen Ranch Leases."[85]

In the settlement agreement, the plaintiffs specifically disclaimed reliance "upon any statement or any representation of any agent of the parties" and represented that they were "relying on [their] own judgment" and have "been represented by . . . legal counsel in this matter[,]" who has "read and explained to each of the [p]laintiffs the entire contents of the releases contained in this Agreement as well as the legal consequences of the releases . . . ."[86]

Five years later, the plaintiffs sued Forest Oil to recover for environmental damage to the McAllen Ranch after discovering that Forest Oil allegedly had buried highly toxic mercury-contaminated material on the ranch and had moved oilfield drilling pipe contaminated with radioactive material from the ranch to a nearby property.[87] The plaintiffs responded to Forest Oil's motion to compel arbitration under the settlement agreement by arguing that the arbitration provision was unenforceable because it was fraudulently induced by Forest Oil's misrepre-

82. Forest Oil Corp. v. McAllen, 268 S.W.3d 51 (Tex. 2008).
83. *Id*. at 53.
84. *Id*.
85. *Id*. at 53–54.
86. *Id*. at 54 & n.4.
87. *Forest Oil*, 268 S.W.3d at 54.

sentation during the settlement negotiations that there were no environmental issues of concern with respect to the McAllen Ranch.[88]

In an interlocutory appeal to the Texas Supreme Court of the trial court's refusal to compel arbitration, Forest Oil contended that the settlement agreement's reliance disclaimer "precludes as a matter of law [plaintiffs'] ability to show the reliance element of fraudulent inducement."[89] The supreme court agreed.[90] In doing so, the court first made clear that *Schlumberger* "applies broadly to contracts generally" and not only to disclaimers intended to resolve the issue in dispute.[91] In this regard, the court reasoned:

> McAllen stresses that the parties' settlement agreement in *Schlumberger* definitively ended their valuation dispute. McAllen points out that the settled dispute was the only dispute, meaning that the agreed-to disclaimer was sufficiently specific to bar a later fraudulent-inducement suit alleging one side misled the other about valuation. By contrast, in this case, ending the royalty underpayment and mineral underdevelopment dispute was not the sole purpose of the settlement agreement, McAllen argues, making the disclaimer insufficiently specific to be applied to every representation made by Forest Oil.
>
> McAllen identifies a valid factual distinction, but we fail to see how the disclaimer's preclusive effect should be different where, as here, the parties agreed to resolve litigated claims and arbitrate future ones. Although we noted in *Schlumberger* that the company's representations about the project's value and feasibility led to "the very dispute that the release was supposed to resolve," this language is more accurately interpreted as emphatic language, not limiting language. Our analysis in *Schlumberger* rested on the paramount principle that Texas courts should uphold contracts negotiated at arm's length by "knowledgeable and sophisticated business players" represented by "highly competent and able legal counsel," a principle that applies with equal force to contracts that reserve future claims as to contracts that settle all claims. Essentially, *Schlumberger* holds that when knowledgeable parties expressly discuss material issues during contract negotiations but nevertheless elect to include waiver-of-reliance and release-of-

88. *Id*. at 54–55.
89. *Id*. at 56.
90. *Id*. at 58–61.
91. Forest Oil Corp. v. McAllen, 268 S.W.3d 51, 58 n.25 (Tex. 2008).

> claims provisions, the Court will generally uphold the contract. An all-embracing disclaimer of any and all representations, as here, shows the parties' clear intent. A "once and for all" settlement may constitute an *additional* factor urging rejection of fraud-based claims, but a freely negotiated agreement to settle present disputes and arbitrate future ones should also be enforceable.[92]

Second, the court, as in *Schlumberger*, pointed out that the reliance disclaimer's enforcement was based *solely* on the facts at issue in the case:

> Today's holding should not be construed to mean that a mere disclaimer standing alone will forgive intentional lies regardless of context. We decline to adopt a *per se* rule that a [reliance] disclaimer automatically precludes a fraudulent-inducement claim, but we hold today, as in *Schlumberger*, that "on this record," the disclaimer of reliance refutes the required element of reliance.[93]

Third, the court reiterated its holding in *Schlumberger* that "[c]ourts must always examine the contract itself and the totality of the surrounding circumstances when determining if a waiver-of-reliance provision is binding"[94] and the court identified the following "*Schlumberger* facts" as the most relevant ones:

> (1) the terms of the contract were negotiated, rather than boiler-plate, and during negotiations the parties specifically discussed the issue which has become the topic of the subsequent dispute; (2) the complaining party was represented by counsel; (3) the parties dealt with each other in an arm's length transaction; (4) the parties were knowledgeable in business matters; and (5) the release language was clear.[95]

Although *Forest Oil* makes clear that reliance disclaimers in *all* types of contracts are enforceable and that such disclaimers will be enforced in cases whose facts are congruent with those in *Forest Oil*,[96] the opinion fails to provide a bright-line test for determining a reliance disclaimer's enforceability. For example, *Forest Oil* does not identify all factors that can be considered or how its five enumerated factors are to be balanced. Moreover, *Forest Oil*, like *Schlumberger*, also fails to set forth the minimum requisite

92. *Id.* at 57–58 (footnotes omitted).
93. *Id*. at 61.
94. *Id*. at 60.
95. *Forest Oil*, 268 S.W.3d at 60.
96. *Id.* at 60–61.

language needed to "clearly" disclaim reliance or explain what constitutes a "boilerplate" disclaimer, "arm's-length" dealings, or parties "knowledgeable in business matters."

III. THE BOUNDARIES ON CONTRACTING AROUND FRAUD

Forest Oil and cases applying *Schlumberger* have done much to clarify certain of the gray areas surrounding the contours of Texas reliance-disclaimer law. This section identifies recent refinements in this jurisprudence and thus the greater definition courts have recently given to the circumstances in which a reliance disclaimer will be enforced.

A. Forest Oil*'s Five Factors Are Not Exclusive and All Do Not Have to Be Met for a Reliance Disclaimer to Be Enforceable*

Forest Oil confirms that its five factors are *not* the only ones a court can consider in determining a reliance disclaimer's enforceability. This is made clear by the fact that (1) the supreme court, as in *Schlumberger*, held that "[c]ourts must always examine . . . the totality of the surrounding circumstances[,]"[97] (2) the court did not specifically hold that the factors were exclusive but rather described them as the "most relevant" ones,[98] and (3) the court even identified another relevant factor—whether the agreement containing the reliance disclaimer was a "'once and for all' settlement."[99] In fact, the only cases applying *Forest Oil* to reliance disclaimers have held that its factors are the most significant ones but not the only ones that can be considered.[100] Thus, a court, in addition to the five *Forest Oil* factors, also might consider whether the agreement was a "once and for all" settlement, custom and usage in the particular industry, or the parties' course of dealing in determining whether a reliance

97. *Id.* at 60; *see* Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 179 (Tex. 1997) ("The contract and the circumstances surrounding its formation determine whether the disclaimer of reliance is binding."); *cf.* Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd., 896 S.W.2d 156, 162 (Tex. 1995) ("We also recognize that other aspects of a transaction may make an 'as is' agreement unenforceable. The nature of the transaction and the totality of the circumstances surrounding the agreement must be considered.").

98. *Forest Oil Corp.*, 268 S.W.3d at 60.

99. *Id*. at 57–58.

100. Berry v. Indianapolis Life Ins. Co., No. 3:08-CV-0248-B, 2009 U.S. Dist. LEXIS 24951, at *46, *71 (N.D. Tex. Mar. 26, 2009); Solutions & Specialized Innovations, Ltd. v. Six Flags, Inc., No. H-07-2355, 2008 WL 5435561, at *1 (S.D. Tex. Dec. 31, 2008).

disclaimer is enforceable.

Moreover, not all of *Forest Oil*'s five factors have to be met for a reliance disclaimer to be enforceable. This is made clear by the fact that those factors are not exclusive and nothing in *Forest Oil* indicates that all five of them have to be satisfied. Presumably, if all five factors had to be met, the court would have held so.

Having determined that the *Forest Oil* factors are not exclusive and that not all of them have to be met for a reliance disclaimer's enforcement, this Article next examines those factual scenarios when a reliance disclaimer will likely be enforced, using the five *Forest Oil* factors as an analytical framework.

B. *Clear Language*

Forest Oil's fifth factor—"clear" disclaimer language[101]—is perhaps the most important one because, unless the contract contains a provision clearly and unequivocally disclaiming reliance, a plaintiff's fraudulent-inducement claim will not be barred by the *Forest Oil/Schlumberger* exception.[102] The principal question that arises with respect to this factor is whether either a standard merger clause or a representation disclaimer, standing alone, can be sufficiently "clear." The answer is "no," despite some post-*Schlumberger*, but pre-*Forest Oil*, cases that suggest that such provisions unaccompanied by a "no-reliance" clause can constitute a "clear and unequivocal" reliance disclaimer.[103] These cases conclude that, because such clauses state that "no representations" exist or have been made other than those in the written contract, a plaintiff could not have reasonably relied on extra-contractual representations or statements.[104]

There are three fundamental problems with this conclusion.

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101. *Forest Oil*, 268 S.W.3d at 60.

102. The existence of a reliance disclaimer is not the only way to defeat fraudulent inducement's reliance element. For example, the facts may show that the plaintiff did not rely on the alleged misrepresentation or that its reliance was unreasonable because "reliance upon an oral representation that is directly contradicted by the express, unambiguous terms of a written agreement between the parties is not justified as a matter of law." Playboy Enters., Inc. v. Editorial Caballero, S.A. de C.V., 202 S.W.3d 250, 258 (Tex. App.—Corpus Christi 2006, pet. denied); *accord* DRC Parts & Accessories, L.L.C. v. VM Motori, S.P.A., 112 S.W.3d 854, 858–59 (Tex. App.—Houston [14th Dist.] 2003, pet. denied); Airborne Freight Corp., Inc. v. C.R. Lee Enters., Inc., 847 S.W.2d 289, 297 (Tex. App.—El Paso 1992, writ denied).

103. *See* cases cited *supra* note 79.

104. *See* cases cited *supra* note 79.

First, it contravenes Texas jurisprudence on standard merger clauses and representation disclaimers. Historically, Texas courts have construed such clauses as simply preventing an agreement's variance by parol evidence, and not disclaiming reliance on extra-contractual misrepresentations.[105] In fact, case law holds, and commentary concludes, that such provisions are ineffective to bar fraudulent-inducement claims.[106] Thus, a standard merger clause or representation disclaimer, standing alone, should not provide the requisite "clear and unequivocal" language required by *Forest Oil* and *Schlumberger*.[107] The United States District Court for the Northern District of Texas recently agreed when it refused to apply *Schlumberger* to a standard merger clause:

> The exception expressed by the Texas Supreme [C]ourt in *Schlumberger* exists only if the contract document 'clearly expresses the parties' intent to waive fraudulent inducement claims' or 'disclaims reliance on representations about specific matters in dispute.' There is no language in the Purchase Agreement that qualifies it for the *Schlumberger* exception to the *Dallas Farm Machinery* rule. The language in Article 2 and 17, do not begin to

105. "[A]n integration clause in an agreement did not preclude liability for a negligent misrepresentation claim because the integration clause contemplated only contractual obligations, and not tort liability." Carousel's Creamery, L.L.C. v. Marble Slab Creamery, Inc., 134 S.W.3d 385, 395 (Tex. App.—Houston [1st Dist.] 2004, pet. dism'd by agr.); *see also supra* text accompanying notes 51–57.

106. *See supra* text accompanying notes 51–57.

107. *E.g.*, Dunbar Med. Sys. Inc. v. Gammex, Inc., 216 F.3d 441, 450–51 (5th Cir. 2000) (ruling that the "as is" clause was not sufficient to disclaim reliance or waive fraudulent-inducement claims); Nichols v. YJ USA Corp., No. 3:06-CV-02366-L, 2009 U.S. Dist. LEXIS 22450, at *60–61 (N.D. Tex. Mar. 18, 2009) (concluding that an agreement claiming to contain the entire understanding of obligations between the parties is not "tantamount to a clear expression of the parties' intent" to disclaim reliance); Mansfield Heliflight, Inc. v. Bell/Augusta Aerospace Co., 507 F. Supp. 2d 638, 649 (N.D. Tex. 2007) (holding the merger clause lacks the specificity required to meet the *Schlumberger* exception); Escopeta Oil & Gas Corp. v. Songa Mgmt., Inc., No. 1:06-CV-386, 2007 WL 171721, at *10–12 (E.D. Tex. Jan. 17, 2007) (denying claim that the merger clause was comprehensive or unambiguous like that of *Schlumberger*); Nutrasep, LLC v. TOPC Tex. LLC, No. A-05-CA-523 LY, 2006 U.S. Dist. LEXIS 78375, at *24 (W.D. Tex. Oct. 27, 2006) (clarifying that the standard boilerplate language in this case did not "clearly and unequivocally disclaim reliance"); San Antonio Props., L.P. v. PSRA Invs., Inc., 255 S.W.3d 255, 262 (Tex. App.—San Antonio 2008, pet. granted, judgm't vacated by agr.) (stressing the merger clause did not meet the requirements set out in *Schlumberger*); Johnson v. Perry Homes, No. 1496-01391-CV, 1998 Tex. App. LEXIS 6749, at *26–29 (Tex. App.—Houston [14th Dist.] Oct. 29, 1998, pet. denied) (not designated for publication) (indicating standard boilerplate provisions not bargained for are not sufficient disclaimers of reliance).

> satisfy the *Schlumberger* standard for an exception. While the language in Article 19, which is the merger clause, contains the word 'representations,' it does not have the specificity essential to the *Schlumberger* exception—it does not clearly express an intent to waive fraudulent inducement claims and does not expressly disclaim reliance on representations about specific matters in dispute.[108]

Second, both *Forest Oil* and *Schlumberger* require "clear" reliance disclaimer language,[109] and reading a standard merger clause or representation disclaimer to constitute such language would effectively allow the *Forest Oil/Schlumberger* exception to swallow the parol evidence rule's fraud exception.[110] As discussed above, the parol evidence rule's fraud exception arose in the context of standard merger clauses.[111] By holding such clauses or a reliance disclaimer to be sufficiently "clear," a court

108. *Mansfield Heliflight*, 507 F. Supp. 2d at 649 (citations omitted); *accord Dunbar*, 216 F.3d at 450–51 ("The merger clause, on its face, represents a closer question. . . . Again . . . we find that the language of the clause is [insufficient] to bar [Dunbar's] fraudulent inducement claim. . . . [It] does not reflect the 'requisite clear and unequivocal expression of intent necessary to disclaim reliance on the [] specific representations' by Gammex."); *Nichols*, 2009 U.S. Dist. LEXIS 22450, at *60–61 (holding that the language of a standard merger clause "is not tantamount to a clear expression of the parties' intent to waive a fraudulent inducement claim or to disclaim reliance on representations about specific matters in dispute"); *San Antonio Props.*, 255 S.W.3d at 262 (refusing to enforce standard merger clause because, among other reasons, it did "not specifically and expressly disclaim reliance on any representations regarding the subject matter of the [agreement]. . . . If SAP is correct in its argument that the merger clause precludes PSRA's fraud claims because it negates the element of reliance, 'there could never be a cause of action for fraud in the sale of real estate unless the misrepresentation were contained in the deed itself.'" (quoting ECC Parkway Joint Venture v. Baldwin, 765 S.W.2d 504, 512 (Tex. App.—Dallas 1989, writ denied)); Marrot Commc'ns, Inc. v. Spring Branch Med. Ctr., Inc., No. 14-04-00462-CV, 2006 Tex. App. LEXIS 1401, at *11 n.4 (Tex. App.—Houston [14th Dist.] Feb. 21, 2006, pet. denied) (mem. op.) (refusing to treat a standard merger clause as a reliance disclaimer).

109. Forest Oil Corp. v. McAllen, 268 S.W.3d 51, 60 (Tex. 2008); Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 180 (Tex. 1997); *see Dunbar*, 216 F.3d at 450–51 (deciding that the merger clause's "language [is insufficient] to bar Dunbar's fraudulent inducement claim [under *Schlumberger* because it] does not reflect the 'requisite clear and unequivocal expression of intent to disclaim reliance on the specific [] representations' by Gammex"); *Mansfield Heliflight*, 507 F. Supp. 2d at 649 (pointing out the exception expressed in *Schlumberger* exists only if the contract document '"clearly expresses the parties' intent to waive fraudulent inducement claims' or 'disclaims reliance on representations about specific matters in dispute.'" (quoting *Schlumberger*, 959 S.W.2d at 181)).

110. *See* Solutions & Specialized Innovations, Ltd. v. Six Flags, Inc., No. H-07-2355, 2008 WL 5435561, at *1 (S.D. Tex. Dec. 31, 2008) ("It is arguable that the exception carved out in *Schlumberger* may be swallowing the rule itself.").

111. *See supra* text accompanying notes 51–57.

would effectively negate decades of uniform Texas judicial holdings entrenching the parol evidence rule's fraud exception and countermand Texas public policy against fraud.[112]

Third, and perhaps most importantly, a conclusion that neither a standard merger clause nor a representation disclaimer is sufficient to disclaim reliance balances fairness and efficiency. Parties who wish to protect themselves against fraudulent-inducement claims can easily include explicit no-reliance language in their written agreement. If they fail to do so, however, they should not be allowed to escape tort liability by latching on to a possible reading of a standard merger clause or representation disclaimer that traditionally has not been construed to bar fraud claims.

If a standard merger clause or representation disclaimer standing alone is insufficient to clearly disclaim reliance, what language is needed to do so? The answer is simple: a no-reliance clause that clearly and unequivocally provides that the plaintiff is not relying on extra-contractual representations in entering into the contract coupled with a representation disclaimer disclaiming all representations not expressly set forth in the contract.

In sum, for a contract to clearly disclaim reliance, it must contain language that can be said to add up to a clear and unequivocal statement that the contract contains all the parties' representations and that the plaintiff has not relied on extra-contractual ones. The presence of a standard merger clause or representation disclaimer that lacks explicit no-reliance language is insufficient to defeat reliance. Rather, in such circumstances, a defendant will remain at risk if the plaintiff can prove fraudulent inducement.

C. *A Negotiated, Not Boilerplate, Reliance Disclaimer*

Forest Oil's first factor—whether "the terms of the contract were negotiated, rather than boilerplate, and during the negotiations [whether] the parties specifically discussed the issue which has become the topic of the subsequent dispute"[113]—raises two questions. First, what constitutes a "boilerplate" reliance disclaimer? Second, can a reliance disclaimer bar a fraudulent-inducement claim based on non-disclosures?

112. *See supra* text accompanying notes 14–18.
113. *Forest Oil*, 268 S.W.3d at 60.

1. A Reliance Disclaimer, Even If Not Specifically Negotiated, in a Contract Specifically Tailored for the Transaction Is Not Boilerplate

It is clear that a boilerplate reliance disclaimer, for purposes of the *Forest Oil*/*Schlumberger* exception, is one that is in a form or standardized contract.[114] A reliance disclaimer in such contracts should almost never be enforced because these provisions generally are not read or understood by the party on whom it is imposed.[115] There are, however, exceptions to this rule. For

114. Such contracts include those for (1) the purchase of consumer goods or services, (2) insurance, and (3) franchises. They also include receipts or manuals accompanying delivered goods. Although no Texas case has been found that defines "boilerplate," the commentary has defined the term as follows:

> The word "boilerplate" has two senses, a wider and a narrower one. The broad "boilerplate" refers to any standardized term in a contract. But the word can also be used to refer to provisions that typically are found at the end of a contract and deal with recurring matters like assignment and delegation, successors and assigns, third-party beneficiaries, governing law and forum selection, waiver of jury trial, arbitration, remedies, indemnities, force majeure, transaction costs, confidentiality, announcements and notices, amendment and waiver, severability, merger, and captions.

Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175, 1191 (2006); *see* BLACK'S LAW DICTIONARY 185 (8th ed. 2004) (defining "boilerplate" as "1. Ready-made or all-purpose language that will fit in a variety of documents. . . . 2. Fixed or standardized contractual language that the proposing party views as relatively nonnegotiable").

115. *E.g.*, A&M Produce Co. v. FMC Corp., 186 Cal. Rptr. 114, 125 (Cal. Ct. App. 1982) ("[O]ne suspects that the length, complexity and obtuseness of most form contracts may be due at least in part to the seller's preference that the buyer will be dissuaded from reading that to which he is supposedly agreeing."); RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981) ("A party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even to read the standard terms."); W. DAVID SLAWSON, BINDING PROMISES: THE LATE 20TH-CENTURY REFORMATION OF CONTRACT LAW 32 (1996) ("Consumers so regularly fail to read standard contracts that in industries with especially long and complicated contracts, producers often dispense even with the formality of showing the contract to the consumer or having him or her sign it."); Donald B. King, *Standard Form Contracts: A Call for Reality*, 44 ST. LOUIS U. L.J. 114, 125 (2000) ("[I]n the standard form contract setting, one party drafts and prints the contract and imposes it on the other. There is no negotiation or assertion to these printed terms and often the party on whom they are imposed never reads them."); Robert Prentice, *Contract-Based Defenses in Securities Fraud Litigation: A Behavioral Analysis*, 2003 U. ILL. L. REV. 337, 386 (2003) ("The fact is that most contractual terms are not given much thought by consumers and/or investors. They do not read the form contracts, do not know which seller's form might be better than another's, and therefore do not generate demand that might move sellers to alter their forms in a pro-consumer/investor direction."). For cases refusing to enforce boilerplate reliance disclaimers see those cited *supra* note 81.

example, a reliance disclaimer in a form or standard contract should be enforced (1) when the contract is between parties who regularly deal in the type of goods or services in dispute and there is a custom or usage in the industry to include a reliance disclaimer in contracts for such goods or services, or (2) when the parties have a long-standing course-of-performance pursuant to which disclaimers traditionally have been included in their contracts. In such cases, the plaintiff clearly is, or should be, fully aware of the disclaimer and its effect.

The fact that the reliance disclaimer was not discussed during negotiations, however, should not make it unenforceable if the contract was tailored and negotiated specifically for a particular transaction. In such circumstances, it should not matter whether the disclaimer was specifically negotiated because a court safely can assume that the parties (or their attorneys and other advisors) carefully reviewed and understood the entire contract, including the disclaimer, before signing it.[116] In concluding that idiosyncratic drafting is not required to make a reliance disclaimer enforceable, the United States District Court for the Northern District of Texas noted that:

116. *See, e.g.*, K3C Inc. v. Bank of Am., N.A., 204 F. App'x 455, 462–63 (5th Cir. 2006) (enforcing clear and unequivocal reliance disclaimer in ISDA Master Agreement for interest rate swaps because the plaintiffs were sophisticated and "capable of understanding the nature and effect of the disclaimer provisions in the Master Agreement"); Prudential Ins. Co. of Am. v. Italian Cowboy Partners, Ltd., 270 S.W.3d 192, 200 (Tex. App.—Eastland 2008, pet. filed) ("In the negotiations for this lease and guaranty, . . . [t]here were at least seven drafts containing negotiated revisions of the lease that were circulated over five months during the negotiations."); ISG State Operations, Inc. v. Nat'l Heritage Ins. Co., 234 S.W.3d 711, 722 (Tex. App.—Eastland 2007, pet. denied) (noting that "[m]ultiple drafts of the agreement were prepared, and changes were made until just before the Subcontract's execution"); Langguth v. JAT Enters., Ltd., No. 03-06-00240-CV, 2007 Tex. App. LEXIS 983, at *13–14 (Tex. App.—Austin Feb. 6, 2007, no pet.) (mem. op.) (enforcing clear and unequivocal reliance disclaimer because "[t]he record reflects that the Langguths could have requested appellees to modify th[e reliance disclaimer]. Although the Langguths did request changes to the contract, they did not request modification of this provision."); Gigout v. C&L Constructors, Inc., No. 01-96-01109-CV, 1999 WL 191324, at *3 (Tex. App.—Houston [1st Dist.] Apr. 8, 1999, pet. denied) (not designated for publication) (enforcing reliance disclaimer in a release because "the Gigouts' attorney accompanied them to the office where the parties signed the release. He reviewed the release, and recommended changes that were incorporated into the release."); 1900 SJ, Inc. v. Wash. Nat'l Ins. Co., No. 01-97-00493-CV, 1998 Tex. App. LEXIS 3059, at *16 (Tex. App.—Houston [1st Dist.] May 21, 1998, pet. denied) (not designated for publication) (concluding the contract was not boilerplate because "[t]he Purchase and Sale Agreement was a custom-drafted 16-page document").

> Steinberg argues, however, that the disclaimer of reliance does not bind him because he asserts it is 'boilerplate.' The Court has already rejected Steinberg's contention that Texas law requires disclaimers of reliance to be individually drafted. . . . The doctrine of *Schlumberger* and *Prudential* is not that disclaimers of reliance must be distinctively phrased. It is that the language and structure of the contract, considered in light of any relevant facts surrounding its formation, must evince intent to disclaim reliance on past representations . . . .[117]

2. A Reliance Disclaimer Will Bar a Fraudulent-Inducement Claim Based on a Non-Disclosure Only If the Subject Matter of the Non-Disclosure Was Discussed During the Contract's Negotiation

The second part of *Forest Oil*'s first factor—whether during the negotiations the parties specifically discussed the issue that is the subject of the negligent-misrepresentation action—relates to the issue of whether a reliance disclaimer bars a fraudulent-inducement claim based on a non-disclosure.

Most reliance disclaimers mention only extra-contractual representations and not non-disclosures.[118] In such a case, the plaintiff may argue that the disclaimer is irrelevant and does not apply to the defendant's failure to disclose a material fact[119] because non-

117. Steinberg v. Brennan, No. 3:03-CV-0562, 2005 WL 1837961, at *7 (N.D. Tex. July 29, 2005).

118. If the disclaimer "clearly" and "unequivocally" provides that the plaintiff is not relying on non-disclosures, it should be enforced if the requisite *Forest Oil* factors are present.

119. "Fraud by non-disclosure is simply a subcategory of fraud because, where a party has a duty to disclose, the non-disclosure may be as misleading as a positive misrepresentation of facts." Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 181 (Tex. 1997). Reliance is an element of a claim of fraud by non-disclosure. *Id.*; Jacuzzi, Inc. v. Franklin Elec. Co., No. 3:07-CV-1090-D, 2008 U.S. Dist. LEXIS 4414, at *19 (N.D. Tex. Jan. 22, 2008).

For there to be actionable fraud based on a non-disclosure, the defendant must have a duty to disclose the information. Cronus Offshore, Inc. v. Kerr McGee Oil & Gas Corp., 369 F. Supp. 2d 848, 858 (E.D. Tex. 2004); *Schlumberger*, 959 S.W.2d at 181. "'Thus, silence may be equivalent to a false representation only when the particular circumstances impose a duty on the party to speak and he deliberately remains silent.'" *Cronus*, 369 F. Supp. 2d at 858 (quoting Bradford v. Vento, 48 S.W.3d 749, 755 (Tex. 2001)). The existence of such a duty is a question of law. *Id.*; *Bradford*, 48 S.W.3d at 755. "A duty to disclose 'may arise in four situations: (1) when there is a fiduciary relationship; (2) when one voluntarily discloses information, the whole truth must be disclosed; (3) when one makes a representation, new information must be disclosed when that new information makes the earlier representation misleading or untrue; and (4) when one makes a partial

disclosures literally are not covered by the disclaimer's language.[120] Very few cases have considered the applicability of a reliance disclaimer to non-disclosures, and those that have done so have considered them only in the context of an action in which the plaintiff alleges both affirmative misrepre-sentations and non-disclosures that are the mirror-image of each other.

For example, in *Schlumberger*, the Swansons claimed that (1) Schlumberger not only misrepresented the sea-diamond project's economic and technical feasibility but it also failed to disclose a report that positively assessed these facts, and (2) "[h]ad Schlumberger disclosed the geological, economic, and technical data available to it," the Swansons would have known that the project was technologically and commercially feasible and that their interest in the project was worth more than the $1 million they were paid for it.[121] Thus, the Swansons argued that the reliance disclaimer was "immaterial because it does not disclaim reliance on Schlumberger's non-disclosures; it does not say, for example, that 'none of us is relying on Schlumberger for accurate reports about the project.'"[122]

After assuming that Schlumberger had a duty to disclose the report's information, the Texas Supreme Court rejected the Swansons' argument because the "non-disclosure allegations are simply the converse of Schlumberger's affirmative misrepre-sentations and are covered by the disclaimer of reliance."[123] Since *Schlumberger*, courts have uniformly rejected non-disclosure

disclosure and conveys a false impression.'" *Cronus*, 369 F. Supp. 2d at 858 (quoting Alcan Aluminum Corp. v. BASF Corp., 133 F. Supp. 2d 482, 488–89 (N.D. Tex. 2001), *aff'd*, 51 F. App'x 482 (5th Cir. 2002)); *accord* Hoggett v. Brown, 971 S.W.2d 472, 487 (Tex. App.—Houston [14th Dist.] 1997, pet. denied). *See generally* Robert K. Wise & Heather E. Poole, *Negligent Misrepresentation in Texas: The Misunderstood Tort*, 40 TEX. TECH. L. REV. 845, 891 (2008) (discussing non-disclosures in the context of negligent misrepresentation).

120. Jacuzzi, Inc. v. Franklin Elec. Co., No. 3:07-CV-1090-D, 2008 U.S. Dist. LEXIS 42187, at *5 (N.D. Tex. May 27, 2008); Jacuzzi, Inc., v. Franklin Elec. Co., No. 3:07-CV-1090-D, 2008 U.S. Dist. LEXIS 4414, at *20–21 (N.D. Tex. Jan. 22, 2008); *Schlumberger*, 959 S.W.2d at 181; Springs Window Fashions Div., Inc. v. Blind Maker, Inc., 184 S.W.3d 840, 876 (Tex. App.—Austin 2006, judgm't vacated w.r.m.); Atl. Lloyds Ins. Co. v. Butler, 137 S.W.3d 199, 218 n.17 (Tex. App.—Houston [1st Dist.] 2004, pet. denied); Starlight, L.P. v. Xarin Austin I, Ltd., No. 03-97-00747-CV, 1999 WL 11213, at *9 (Tex. App.—Austin Jan. 14, 1999, no pet.) (not designated for publication).

121. *Schlumberger*, 959 S.W.2d at 181–82.

122. *Id*. at 181.

123. *Id*. at 182.

claims where the alleged non-disclosure is the converse of an alleged misrepresentation.[124]

No Texas case, however, has considered the question of whether a reliance disclaimer is effective against a non-disclosure that is not the converse of an alleged misrepresentation in a situation in which the contract fails to clearly and unequivocally disclaim reliance on non-disclosures. In such a case, however, the reliance disclaimer should be ineffective if the non-disclosure's subject matter was not discussed by the parties during the contract's negotiation.

At the outset, the supreme court would not have included among the factors in *Forest Oil* whether the subject matter of the issue in dispute was specifically discussed in the contract negotiations if it did not consider non-disclosures to be outside the typical reliance disclaimer's scope. More importantly, a contrary conclusion would require a court to ignore the disclaimer's plain language and the distinction between a misrepresentation and a non-disclosure.

This is not to say, however, that a plaintiff can avoid a reliance disclaimer simply by alleging a non-disclosure. To the contrary, as the supreme court has made clear in *Forest Oil* and *Schlumberger*, a court, in determining whether the reliance disclaimer covers non-disclosures, must examine the contract's negotiation to determine whether the non-disclosure's subject matter was discussed. If it was, a fraudulent-inducement claim based on a non-disclosure should be barred by the disclaimer.

D. *Arm's-Length Transaction*

No court applying Texas law, either in the context of a reliance disclaimer's enforceability or otherwise, has fully defined what constitutes an "arm's-length transaction."[125] Nonetheless, courts

124. Cronus Offshore, Inc. v. Kerr-McGee Oil & Gas Corp., 133 F. App'x 944, 945 (5th Cir. 2005); *Jacuzzi*, 2008 U.S. Dist. LEXIS 4414, at *21; *Springs Window*, 184 S.W.3d at 876; *Atl. Lloyds Ins.*, 137 S.W.3d at 218 n.17; *Starlight*, 1999 WL 11213, at *9.

125. *See*, *e.g.*, Farnham v. Electrolux Home Care Prods., Ltd., 527 F. Supp. 2d 584, 588 (W.D. Tex. 2007) (refusing to enforce a reliance disclaimer in a severance agreement because, among other reasons, "there is no evidence that [the parties] dealt at 'arm's length' as part of on-going negotiations[,]" but failing to define "arm's-length dealings" or explaining the basis for its conclusion); *see also* Berry v. Indianapolis Life Ins. Co., No. 3:08-CV-0248-B, 2009 U.S. Dist. LEXIS 24951, at *46, *74 (N.D. Tex. Mar. 26, 2009) (characterizing a transaction as arm's-length but failing to define the term).

from other jurisdictions have done so outside the non-reliance disclaimer context. For example, the United States Bankruptcy Court for the Northern District of Ohio has defined an "arm's-length transaction" as one "characterized by the following elements: it is voluntary, i.e., without compulsion or duress; it generally takes place in an open market; and the parties act in their own self-interest."[126]

It is difficult to imagine a scenario in which a court would enforce a reliance disclaimer in a contract between parties who did not deal at arm's length, and no case has been found enforcing one in a contract that was not negotiated at arm's length between parties with relatively equal bargaining power. Thus, it appears that the "arm's-length" transaction factor *must* be met before a reliance disclaimer will be enforced.

E. *Representation by Counsel*

Forest Oil's second factor—whether the plaintiff was represented by counsel in the transaction[127]—raises the following question: Must the plaintiff have been represented by an attorney

126. Cedar View, Ltd. v. Colpetzer, No. 5:05-CV-00782, 2006 WL 456482, at *2 (N.D. Ohio Feb. 24, 2006) (citations omitted) (applying Ohio law); *accord* Crème Mfg. Co. v. United States, 492 F.2d 515, 520 (5th Cir. 1974) (holding that to be at "arm's length" under the manufacturer's excise statute, "a transaction must be between parties with adverse economic interests. Each party to the transaction must be in a position to distinguish his economic interest from that of the other party and, where they conflict, always choose that to his individual benefit." (citation and internal quotation marks omitted)).

An arm's-length transaction necessarily assumes that the parties had relatively equal bargaining power. *E.g.*, Allegheny Ludlum Corp. v. United States, 367 F.3d 1339, 1348 (Fed. Cir. 2004) (opining that when a negotiation or transaction is conducted at "arm's length" if it is "between two parties who are not related or not on close terms and who are presumed to have roughly equal bargaining power" (citing BLACK'S LAW DICTIONARY 103 (7th ed. 1999))); *see also* Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd., 896 S.W.2d 156, 162 (Tex. 1995) (referring to "parties of relatively equal bargaining position" when considering the enforceability of an "as is" clause).

A party seeking to avoid a reliance disclaimer, however, should not rely too heavily on a "relatively equal bargaining position" requirement. Recent case law suggests that the Texas Supreme Court considers there to be an actionable disparity in bargaining power only "when one party has no choice but to accept an agreement limiting the liability of another. . . . [A] bargain is not negated because one party may have been in a more advantageous bargaining position. Rather, we consider whether a contract results in unfair surprise or oppression." *In re* Lyon Fin. Servs., Inc., 257 S.W.3d 228, 232–33 (Tex. 2008) (rejecting the argument that a forum-selection clause was unenforceable because, among other reasons, it was contained in a lease offered to the plaintiff on a "take-it-or-leave-it" basis).

127. Forest Oil Corp. v. McAllen, 268 S.W.3d 51, 60 (Tex. 2008).

in the transaction for a reliance disclaimer to be enforceable? The answer to this question is "no."[128]

A clear and unequivocal reliance disclaimer in a contract negotiated at arm's length is enforceable even if the plaintiff was not represented by counsel, provided that the plaintiff was either sophisticated or was represented by an agent, broker, or other type of professional or intermediary who has knowledge or skill peculiar to the practices, goods, or services involved in the transaction (or similar transactions) in dispute.[129] For example, a

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128. As pointed out above in note 69, the fact that the plaintiff was represented by an attorney is not dispositive.

129. *E.g.*, K3C Inc. v. Bank of Am., N.A., 204 F. App'x 455, 463 (5th Cir. 2006) (enforcing a reliance disclaimer in an ISDA Master Agreement for interest rate swaps because, among other reasons, "[t]hough the Companies lacked the level of financial knowledge possessed by [the bank], the district court found that 'the Companies routinely enter sophisticated transactions and use contracts in conducting their business' and that 'the Companies have entered contracts on numerous occasions that limit or disclaim warranties and remedies, clarify the status of the relationship between the parties, and ensure that agreements are limited to terms specified in written contracts'"); Chesson v. Hall, No. H-01 315, 2007 WL 1964538, at *20 (S.D. Tex. July 3, 2007) ("[The plaintiff] has an engineering degree and fifteen years of experience in the civil engineering industry. The law does not require a person to be a lawyer or a sophisticated negotiator for a contract to be binding. The present record does not raise a fact issue as to whether [the plaintiff's] lack of legal knowledge makes the "as is" clause [in a residential real estate contract] unenforceable." (citations omitted)); Langguth v. JAT Enters., Ltd., No. 03-06-00240-CV, 2007 Tex. App. LEXIS 983, at *11–12 (Tex. App.—Austin Feb. 6, 2007, no pet.) (mem. op.) ("The record reflects that Mr. Langguth had extensive experience buying and selling real estate. He had previously purchased commercial real estate as well as ongoing commercial businesses. Mr. Langguth had experience evaluating business financial statements and assessing the value of business operations, and the summary judgment evidence shows that he had purchased real estate under terms similar to those at issue here."); Bounds v. Cole & Ashcroft, No. 14-05-00064-CV, 2006 Tex. App. LEXIS 5559, at *8–10 (Tex. App.—Houston [14th Dist.] June 22, 2006, no pet.) (mem. op.) (enforcing merger clause in an agreement for the purchase of the assets of a gift-basket supply and packaging business as reliance disclaimer because, among other reasons, the plaintiff-purchaser was represented by an attorney); *see* Whitney Nat'l Bank v. Air Ambulance by B&C Flight Mgmt., Inc., No. H-04-2220, 2007 U.S. Dist. LEXIS 31482, at *31–36 (S.D. Tex. Apr. 30, 2007) (applying a reliance disclaimer against a bank that was not represented by counsel); Steinberg v. Brennan, No. 3:03-CV-0562, 2005 WL 1837961, at *4–8 (N.D. Tex. July 29, 2005) (upholding a reliance disclaimer in a stock purchase agreement against an "accredited investor" who was not represented by counsel); Sims v. Century 21 Capital Team, Inc., No. 03-05-00461-CV, 2006 WL 2589358, at *3 (Tex. App.—Austin Sept. 8, 2006, no pet.) (mem. op.) (enforcing a reliance disclaimer in a contract to purchase a house where unsophisticated purchaser was represented by real estate agent); 1900 SJ, Inc. v. Wash. Nat'l Ins. Co., No. 01-97-00493-CV, 1998 Tex. App. LEXIS 3059, at *16 (Tex. App.—Houston [1st Dist.] May 21, 1998, pet. denied) (not designated for publication) ("[A]ll terms of this contract [including the reliance disclaimer] were freely negotiated by the parties of equal

clear and unequivocal reliance disclaimer in a contract to purchase real estate has been enforced against unsophisticated purchasers when they were represented by an experienced real estate agent.[130]

Of course, a clear and unequivocal reliance disclaimer in a contract negotiated at arm's length will almost always be enforceable if the plaintiff, in connection with the contract's negotiation and drafting, either was represented by an attorney or agent, broker, or other professional or intermediary who has knowledge or skill peculiar to the practices, goods, or services involved in the transaction (or similar transaction) in dispute.[131] Although not

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bargaining strength in an arm's-length transaction."); *cf.* Bynum v. Prudential Residential Servs., Ltd., 129 S.W.3d 781, 789, 796 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (deciding an "as is" clause was enforceable against home buyers because, among other reasons, they were represented by a real estate agent); Larsen v. Carlene Langford & Assocs., Inc., 41 S.W.3d 245, 252 (Tex. App.—Waco 2001, no pet.) (holding an "as is" clause enforceable in residential real estate contract because husband was licensed real estate broker). *But see* John v. Marshall Health Servs., Inc., 91 S.W.3d 446, 449–50 (Tex. App.—Texarkana 2002, pet. denied) (refusing to enforce reliance disclaimer in a contract between a doctor and a hospital).

130. Royce Bane Invs., Inc. v. McGinn, No. 12-07-00262-CV, 2008 Tex. App. LEXIS 7090, at *10 (Tex. App.—Tyler Sept. 24, 2008, no pet.) (mem. op.); *Sims*, 2006 WL 2589358, at *3; *Bynum*, 129 S.W.3d at 796; *Larsen*, 41 S.W.3d at 252.

131. Fair Isaac Corp. v. Tex. Mut. Ins. Co., No. H-05-3007, 2006 WL 2022894, at *2–3 (S.D. Tex. July 17, 2006) (enforcing reliance disclaimer because plaintiff, among other things, was represented by an attorney in the contract's negotiation); Tex. Motor Coach, L.C., v. Blue Bird Body Co., No. 4:05-CV-34, 2005 WL 3132482, at *8 (E.D. Tex. Nov. 22, 2005) (declaring the reliance disclaimer is enforceable against the parties who were "sophisticated business persons represented by counsel"); *Royce Bane*, 2008 Tex. App. LEXIS 7090, at *10–11 (holding merger clause enforceable in contract for purchase of a sawmill as a reliance disclaimer because, among other reasons, the plaintiff-purchaser was represented by an attorney); Garza v. State & County Mut. Fire Ins. Co., No. 2-06-202-CV, 2007 Tex. App. LEXIS 3070, at *20–22 (Tex. App.—Fort Worth Apr. 19, 2007, pet. denied) (mem. op.) (enforcing reliance disclaimer in a release settling an insurance claim because, among other reasons, the plaintiff-claimant was represented by an attorney); *Bounds*, 2006 Tex. App. LEXIS 5559, at *8–10 (enforcing merger clause in an agreement for the purchase of the assets of a gift-basket supply and packaging business as reliance disclaimer because, among other reasons, the plaintiff-purchaser was represented by an attorney); Stark v. Benckenstein, 156 S.W.3d 112, 122–23 (Tex. App.—Beaumont 2004, pet. denied) (holding that even if the plaintiff's were not "knowledgeable and sophisticated," the fact that the plaintiffs were represented by counsel is dispositive); Atl. Lloyds Ins. Co. v. Butler, 137 S.W.3d 199, 217 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) ("[A]lthough there is no evidence that the individual plaintiffs were themselves 'knowledgeable and sophisticated' concerning the issues raised in the underlying litigation, there is no dispute that the plaintiffs were represented by 'highly competent and able legal counsel' who negotiated at arm's length with counsel for HRM."); Gigout v. C&L Constructors, Inc., No 01-96-01109-CV, 1999 WL 191324, at *3

stated in case law, a reason strongly favoring this conclusion is that the complaining contracting party can seek redress against the attorney or agent, broker, or other professional or intermediary for malpractice, negligence, or negligent misrepresentation if the contract did not contain the necessary warranties and representations or if the attorney or other professional did not adequately explain the reliance disclaimer's effect.

In contrast, a reliance disclaimer in a contract involving an unsophisticated plaintiff,[132] who was neither represented by counsel nor a qualified agent, broker, or other type of professional or intermediary rarely, if ever, will be enforced.[133]

(Tex. App.—Houston [14th Dist.] Apr. 8, 1999, pet. denied) (not designated for publication) (enforcing reliance disclaimer in a release because, among other reasons, "the Gigouts' attorney accompanied them to the office where the parties signed the release. He reviewed the release, and recommended changes that were incorporated into the release."); *cf. Bynum*, 129 S.W.3d at 796 (enforcing "as is" clause against home buyers because, among other reasons, they were represented by real estate broker); *Larsen*, 41 S.W.3d at 252 (holding "as is" clause enforceable in residential real estate contract because husband was a licensed real estate broker); Automaker, Inc. v. C.C.R.T. Co. Ltd., No. 01-95-01223-CV, 1998 Tex. App. LEXIS 3086, at *15 (Tex. App.—Houston [1st Dist.] May 21, 1998, no pet.) (not designated for publication) (enforcing reliance disclaimer in a settlement agreement because, among other reasons, the plaintiff was represented by an attorney).

Of course, the attorney or other advisor must be independent, that is, he or she must not have represented both sides in the transaction.

132. What constitutes a "sophisticated" plaintiff is discussed *infra* Section III.F.

133. Farnham v. Electrolux Home Care Prods., Ltd., 527 F. Supp. 2d 584, 588 (W.D. Tex. 2007) (declining to enforce reliance disclaimer in severance agreement because, among other reasons, the plaintiff-former employee was not sophisticated and knowledgeable or represented by an attorney); Cell Comp, L.L.C. v. Sw. Bell Wireless, L.L.C., No. 13-07-00120-CV, 2008 WL 2454250, at *5 (Tex. App.—Corpus Christi June 19, 2008, no pet.) (mem. op.) (declining to enforce reliance disclaimer in "authorized agency agreement" for the sale of wireless phone service and products because, among other reasons, the plaintiff-agent had no prior significant business experience); Carousel's Creamery, L.L.C. v. Marble Slab Creamery, Inc., 134 S.W.3d 385, 394 & n.4 (Tex. App.—Houston [1st Dist.] 2004, pet. dism'd by agr.) (declining to enforce reliance disclaimer in a form franchise agreement because, among other reasons, the franchisee was not represented by counsel and there was no evidence that franchisee was sophisticated); Oakwood Mobile Homes, Inc. v. Cabler, 73 S.W.3d 363, 372 (Tex. App.—El Paso 2002, pet. denied) (declining to enforce reliance disclaimer in contract for purchase of a manufactured home because purchasers were unsophisticated—the husband had a tenth-grade education and the wife had one year of college and neither had ever purchased a manufactured home—and were not represented by counsel); Fletcher v. Edwards, 26 S.W.3d 66, 77 (Tex. App.—Waco 2000, pet. denied) (declining to enforce reliance disclaimer in residential real estate contract because purchaser was neither sophisticated nor represented by attorney or real estate agent); *cf.* Woodlands Land Dev. Co. v. Jenkins, 48 S.W.3d 415, 422 (Tex. App.—Beaumont 2001, no pet.) (declining to enforce "as is"

F. *A Knowledgeable/Sophisticated Plaintiff*

Forest Oil's fourth factor—whether "the parties were knowledgeable in business matters"[134]—is somewhat overstated because it suggests that both parties must be "knowledgeable/ sophisticated" when in reality the focus should be, and almost always is, on the plaintiff.[135] The obvious question that arises from this requirement is: What constitutes a knowledgeable/ sophisticated plaintiff?

Unfortunately, the knowledgeable/sophistication requirement has not been explored in detail by the cases, and consequently, they do not clearly define what constitutes a knowledgeable/ sophisticated plaintiff or state just how knowledgeable/ sophisticated a plaintiff must be. The knowledge/sophistication inquiry, however, surely requires a review of the plaintiff's education, business savvy, and transactional experience.[136]

clause in residential real estate contract because the plaintiff was neither an experienced real estate investor nor represented by attorney or real estate agent); B.J. Aviation, Inc. v. City of Galveston, No. 14-96-01480-CV, 1999 Tex. App. LEXIS 1233, at *9–11 (Tex. App.—Houston [14th Dist.] Feb. 25, 1999, no pet.) (not designated for publication) (declining to enforce reliance disclaimer in contract with a city for a "fixed-base operation" at the city's municipal airport because, among other reasons, plaintiff was neither sophisticated nor represented by an attorney), *superseded by statute on other grounds*, TEX. GOV'T CODE ANN. § 311.034 (Vernon Supp. 2004).

134. Forest Oil Corp. v. McAllen, 268 S.W.3d 51, 60 (Tex. 2008). In *Schlumberger*, the supreme court used the phrase "knowledgeable and sophisticated business players." Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 179, 181 (Tex. 1997).

135. *See* K3C Inc. v. Bank of Am., N.A., 204 F. App'x 455, 462–63 (5th Cir. 2006) (focusing on the plaintiff's sophistication); Chesson v. Hall, No. H-01 315, 2007 WL 1964538, at *19, *24 (S.D. Tex. July 3, 2007) (same); Steinberg v. Brennan, No. 3:03-CV-0562, 2005 WL 1837961, at *4–8 (N.D. Tex. July 29, 2005) (same); *Carousel's Creamery*, 134 S.W.3d at 394 n.4 (same); IKON Office Solutions, Inc. v. Eifert, 125 S.W.3d 113, 126 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (same); *Oakwood*, 73 S.W.3d at 372 (same); *Fletcher*, 26 S.W.3d at 76 (same); *B.J. Aviation*, 1999 Tex. App. LEXIS 1233, at *9–11; *cf.* Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd., 896 S.W.2d 156, 159 (Tex. 1995) (focusing on the plaintiff's sophistication in determining whether an "as is" clause was enforceable); *Woodlands*, 48 S.W.3d at 422 (same); Smith v. Levine, 911 S.W.2d 427, 432 (Tex. App.—San Antonio 1995, writ denied) (same).

136. *See Jefferson Assocs.*, 896 S.W.2d at 159 (enforcing "as is" clause in commercial real estate contract because, among other reasons, "[the plaintiff] was a knowledgeable real estate investor who owned an interest in at least thirty commercial buildings. He was president of Transland Management Company, a commercial property management firm in Dallas that had developed, built, rehabilitated, owned or managed properties valued altogether at about $100 million. He had bought and sold several large investment properties on an 'as is' basis."); Bynum v. Prudential Residential Servs., Ltd., 129 S.W.3d 781, 789 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (enforcing "as is" clause against homebuyers because, among other reasons, the husband had purchased other

properties, including properties that were purchased "as is"); *Woodlands*, 48 S.W.3d at 422 (refusing to enforce "as is" clause in residential real estate contract because the plaintiff was not an experienced real estate investor); Larsen v. Carlene Langford & Assocs., Inc., 41 S.W.3d 245, 252 (Tex. App.—Waco 2001, no pet.) (enforcing "as is" clause in residential real estate contract because husband was licensed real estate broker). *Compare*, *e.g.*, *K3C*, 204 F. App'x at 463 (enforcing reliance disclaimer in ISDA Master Agreement for interest rate swaps because, among other reasons, "[t]hough the Companies lacked the level of financial knowledge possessed by [the bank], the district court found that 'the Companies routinely enter sophisticated transactions and use contracts in conducting their business' and that 'the Companies have entered contracts on numerous occasions that limit or disclaim warranties and remedies, clarify the status of the relationship between the parties, and ensure that agreements are limited to terms specified in written contracts'"), *and* Escopeta Oil & Gas Corp. v. Songa Mgmt., Inc., No. 1:06-CV-386, 2007 WL 171721, at *11 (E.D. Tex. Jan. 17, 2007) ("Some evidence, however, militates in favor of enforcing the merger clause to defeat Escopeta's fraudulent inducement claim. Davis is a sophisticated individual with extensive business experience."), *and* Tex. Motor Coach, L.C. v. Blue Bird Body Co., No. 4:05-CV-34, 2005 WL 3132482, at *8 (E.D. Tex. Nov. 22, 2005) (enforcing reliance disclaimer in contract for a dealership for the sale of recreational vehicles because, among other reasons, the plaintiffs were sophisticated in that they owned an automobile dealership), *and Steinberg*, 2005 WL 1837961, at *6 (holding reliance disclaimer enforceable in stock purchase agreement because, among other reasons, the plaintiff "represent[ed] and warrant[ed] in Paragraph 4 [of the agreement], entitled 'Accredited Investor,' 'that he is a knowledgeable and experienced investor,' and that he qualifies as an accredited investor under SEC rules"), *and* i2 Techs., Inc. v. DARC Corp., No. 3:02-CV-0327-H, 2003 U.S. Dist. LEXIS 16655, at *16 (N.D. Tex. Sept. 23, 2003) (enforcing reliance disclaimer in "Software License and Maintenance Agreement" because "[b]oth i2 and DARC are sophisticated business entities, familiar with the sale of software and consultation services"), *and Schlumberger*, 959 S.W.2d at 180 (enforcing reliance disclaimer in settlement agreement in which the plaintiffs sold their interest in a sea-diamond mining venture because, among other reasons, the plaintiffs "have been involved in traditional diamond mining in South Africa for several decades"), *and* Prudential Ins. Co. of Am. v. Italian Cowboy Partners, Ltd., 270 S.W.3d 192, 199–200 (Tex. App.—Eastland 2008, no pet.) (enforcing reliance disclaimer in a restaurant lease because, among other reasons, the plaintiffs "were successful restaurateurs. They were operating two other restaurants profitably at the time of the negotiations for the Keystone Park location. They had negotiated three separate leases on three separate locations for Ferrari's and one lease for Il Grano. . . . [The plaintiffs] had partners who were attorneys . . . ."), *and* Langguth v. JAT Enters., Ltd., No. 03-06-00240-CV, 2007 Tex. App. LEXIS 983, at *11–12 (Tex. App.—Austin Feb. 6, 2007, no pet.) (mem. op.) (enforcing reliance disclaimer because "[t]he record reflects that Mr. Langguth had extensive experience buying and selling real estate. He had previously purchased commercial real estate as well as ongoing commercial businesses. Mr. Langguth had experience evaluating business financial statements and assessing the value of business operations, and the summary judgment evidence shows that he had purchased real estate under terms similar to those at issue here."), *and* Bounds v. Cole & Ashcroft, No. 14-05-00064-CV, 2006 Tex. App. LEXIS 5559, at *8–10 (Tex. App.—Houston [14th Dist.] June 22, 2006, no pet.) (mem. op.) (enforcing merger clause in an agreement for the purchase of the assets of a gift-basket supply and packaging business as reliance disclaimer because, among other reasons, the plaintiff-purchaser was "an experienced businessman who had operated several independent marketing businesses, including the gift basket supply business"), *with Cell Comp*, 2008 WL 2454250, at *3 (refusing to enforce reliance

At the extremes, the answer to the question of whether a plaintiff is knowledgeable/sophisticated is obvious. Large businesses with access to topflight advisors are knowledgeable and sophisticated.[137] Conversely, an ordinary consumer generally is not.[138]

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disclaimer in "authorized agency agreement" for the sale of wireless phone service and products because, among other reasons, the plaintiff-agent had no prior business experience), *and Oakwood*, 73 S.W.3d at 372 (denying enforcement of reliance disclaimer in contract for purchase of a manufactured home because purchasers were unsophisticated—the husband had a tenth-grade education and the wife had one year of college and neither had ever purchased a manufactured home), *and Carousel's Creamery*, 134 S.W.3d at 394 n.4 (refusing to enforce reliance disclaimer in form franchise agreement for ice cream store because, among other reasons, there was no evidence that franchisee had prior business experience), *and B.J. Aviation*, 1999 Tex. App. LEXIS 1233, at *10–11 (declining to enforce reliance disclaimer in a contract with a city for a "fixed base operation" at the city's municipal airport because "Brown had not operated a fixed base operation prior to beginning B.J. Aviation, and he experienced significant failures as a businessman, such as a bankruptcy and the failure of his shoe sales businesses. Consequently, we cannot say Brown was as knowledgeable and sophisticated a businessman as the plaintiffs in *Schlumberger*.").

137. *See K3C*, 204 F. App'x at 463 (determining the plaintiff was sophisticated and had entered into many sophisticated transactions); Fair Isaac Corp. v. Tex. Mut. Ins. Co., No. H-05-3007, 2006 WL 2022894, at *3 (S.D. Tex. July 17, 2006) ("Both parties are sophisticated, knowledgeable business entities."); *i2 Techs.*, 2003 U.S. Dist. LEXIS 16655, at *16 ("Both i2 and DARC are sophisticated business entities, familiar with the sale of software and consultation services."); ISG State Operations, Inc. v. Nat'l Heritage Ins. Co., 234 S.W.3d 711, 722 (Tex. App.—Eastland 2007, pet. denied) (determining the plaintiff was a sophisticated business entity); Playboy Enters., Inc. v. Editorial Caballero, S.A. de C.V., 202 S.W.3d 250, 257–59 (Tex. App.—Corpus Christi 2006, pet. denied) (comparing the plaintiff to sophisticated businessmen); Coastal Bank SSB v. Chase Bank of Tex., N.A., 135 S.W.3d 840, 842 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (determining that the plaintiff was a "sophisticated financial institution"); *cf. Jefferson Assocs.*, 896 S.W.2d at 159 (upholding "as is" clause in contract for sale of office building because, among other reasons, the plaintiff was a large real estate company).

138. *E.g.*, Oakwood Mobile Homes, Inc. v. Cabler, 73 S.W.3d 363, 372 (Tex. App.—El Paso 2002, pet. denied) (refusing to enforce reliance disclaimer in contract for purchase of a manufactured home because purchasers were unsophisticated—the husband had a tenth-grade education and the wife had one year of college and neither had ever purchased a manufactured home).

The mere fact, however, that the transaction is a consumer transaction is not dispositive. If the plaintiff truly is sophisticated by reason of his education or business experience, he should be found to be knowledgeable/sophisticated within the meaning of *Forest Oil* and *Schlumberger*, even if the transaction is a consumer one, such as the purchase of a house or an automobile. *See Chesson*, 2007 WL 1964538, at *19 (enforcing reliance disclaimer and "as is" clause in a residential real estate contract against the plaintiff who had a college degree in mechanical engineering and who worked for the defendant in the residential construction industry); *Bynum*, 129 S.W.3d at 796 (enforcing "as is" clause against homebuyers because, among other reasons, the husband had purchased other properties, including properties that were purchased "as is"); *Larsen*, 41

The more difficult question is under what circumstances a small business entity or an experienced or well-educated individual is knowledgeable/sophisticated in a non-consumer transaction. A small business entity or individual should always be found to be knowledgeable/sophisticated if it, he, or she has knowledge or skill peculiar to the same or similar practices, goods, or services involved in the transaction in dispute.[139] Thus, for example, a plaintiff who regularly invests in real estate or who is a real estate agent is knowledgeable/sophisticated in connection with a real estate transaction.[140] Similarly, an "accredited investor" is knowledgeable/sophisticated in connection with a purchase of stocks or bonds.[141] Further, a restaurateur who operates multiple restaurants at leased locations is knowledgeable/sophisticated in connection with a restaurant lease.[142] Finally, an automobile dealer is knowledgeable/sophisticated in connection with the purchase of a mobile-home dealership.[143]

S.W.3d at 252 (enforcing "as is" clause in residential real estate contract because husband was licensed real estate broker).

139. The Uniform Commercial Code, found in the Texas Business and Commerce Code, provides a useful guide in its Article 2 definition of "merchant":

> "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

TEX. BUS. & COM. CODE ANN. § 2.104(a) (Vernon 2009).

140. *Langguth*, 2007 Tex. App. LEXIS 983, at *11–12 ("Here, as in *Schlumberger*, both parties to the agreement were sophisticated business persons and possessed relatively equal bargaining power. The record reflects that Mr. Langguth had extensive experience buying and selling real estate. He had previously purchased commercial real estate as well as ongoing commercial businesses. Mr. Langguth had experience evaluating business financial statements and assessing the value of business operations, and the summary judgment evidence shows that he had purchased real estate under terms similar to those at issue here."); *cf. Jefferson Assocs.*, 896 S.W.2d at 159 (upholding "as is" clause in contract for sale of an office building because, among other reasons, the plaintiff was a large real estate company); *Bynum*, 129 S.W.3d at 796 (enforcing "as is" clause against homebuyers because, among other reasons, the husband had purchased other properties including those that were "as is"); *Larsen*, 41 S.W.3d at 253 (enforcing "as is" clause in residential real estate contract because husband was a licensed real estate broker).

141. *Steinberg*, 2005 WL 1837961, at *7–8.

142. *Italian Cowboy*, 270 S.W.3d at 200–01.

143. Tex. Motor Coach, L.C. v. Blue Bird Body Co., No. 4:05-CV-34, 2005 WL 3132482, at *8 (E.D. Tex. Nov. 22, 2005); *cf.* IKON Office Solutions, Inc. v. Eifert, 125 S.W.3d 113, 126 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (holding that a seller of a business, who had previously purchased four other identical businesses, was

On the other hand, an unadvised small business or an individual without significant prior business experience who purchases a franchise or insurance or enters into a lease is *not* knowledgeable/ sophisticated.[144] Nor is the typical home purchaser, who is *not* represented by an attorney or a real estate agent.[145] But an individual who has extensive business experience or who is highly educated may be found to be knowledgeable/sophisticated even if he or she lacks prior experience with the type of transaction involved in the dispute, if the transaction or the contract is not one that is so unusual, complex, or specialized that a layman, irrespective of his or her business knowledge, education, or intelligence, would ordinarily seek representation.[146] For example, a

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sophisticated).

However, the mere fact that an individual has been involved in a number of businesses does not necessarily make him or her knowledgeable/sophisticated. For example, in *B.J. Aviation, Inc. v. City of Galveston*, the court held that a plaintiff, who had been involved in a number of prior, unrelated businesses, was not "knowledgeable and sophisticated" because those businesses had been failures:

> Brown had not operated a fixed base operation prior to beginning B.J. Aviation, and he experienced significant failures as a businessman, such as a bankruptcy and the failure of his shoe sales businesses. Consequently, we cannot say Brown was as knowledgeable and sophisticated a businessman as the plaintiffs in *Schlumberger*.

B.J. Aviation, Inc. v. City of Galveston, No. 14-96-01480-CV, 1999 Tex. App. LEXIS 1233, at *10–11 (Tex. App.—Houston [14th Dist.] Feb. 25, 1999, no pet.) (not designated for publication), *superseded by statute on other grounds*, TEX. GOV'T CODE ANN. § 311.034 (Vernon Supp. 2004).

144. *See* Cell Comp, LLC v. Sw. Bell Wireless, No. 13-07-00120-CV, 2008 WL 2454250, at *5 (Tex. App.—Corpus Christi June 19, 2008, no pet.) (mem. op.) (refusing to enforce reliance disclaimer in "authorized agency agreement" for the sale of wireless phone service and products because, among other reasons, the plaintiff-agent was not advised by counsel regarding the agreement); Carousel's Creamery, L.L.C. v. Marble Slab Creamery, Inc., 134 S.W.3d 385, 394 n.4 (Tex. App.—Houston [1st Dist.] 2004, pet. dism'd by agr.) (refusing to enforce reliance disclaimer in standard form franchise agreement for ice cream store because, among other reasons, there was no evidence that franchisee had prior business experience). *But see* Biosilk Spa, L.P. v. HG Shopping Ctrs., L.P., No. 14-06-00986-CV, 2008 Tex. App. LEXIS 3361, at *9 (Tex. App.—Houston [14th Dist.] May 8, 2008, pet denied) (mem. op.) (enforcing disclaimer in shopping-center lease for a hair salon).

145. *E.g.*, Oakwood Mobile Homes, Inc. v. Cabler, 73 S.W.3d 363, 372 (Tex. App.—El Paso 2002, pet. denied) (finding that buyers were unsophisticated when purchasing, for the first time, a manufactured home); Woodlands Land Dev. Co. v. Jenkins, 48 S.W.3d 415, 422 (Tex. App.—Beaumont 2001, no pet.) (finding that buyer was not sophisticated in commercial building construction contracts); Fletcher v. Edwards, 26 S.W.3d 66, 76 (Tex. App.—Waco 2000, no pet.) (refusing to enforce an "as is" clause in real estate contract).

146. *E.g.*, Chesson v. Hall, No. H-01-315, 2007 WL 1964538, at *19–20 (S.D. Tex. July 3, 2007) (enforcing the "as is" clause of a real estate contract because plaintiffs were

business executive or professional who purchases a house or franchise should be found to be knowledgeable/ sophisticated even if he or she had never purchased a house or franchise before.[147] But, a business executive or professional who purchases a complex insurance product without representation should not be found to be knowledgeable/sophisticated.[148]

G. *Summary*

The following rules regarding the enforceability of reliance disclaimers can be distilled from a review of the *Forest Oil* factors and the cases considering them. A court should review the contract and the circumstances surrounding its negotiation first.

- The reliance disclaimer must clearly and unequivocally disclaim reliance on extra-contractual representations. To do so, it should consist of (1) a "no-reliance" clause clearly and unequivocally providing that the plaintiff is not relying on any

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businessmen).

147. *E.g.*, *id.* at *20 ("[The plaintiff] has an engineering degree and fifteen years of experience in the civil engineering industry. The law does not require a person to be a lawyer or a sophisticated negotiator for a contract to be binding. The present record does not raise a fact issue with respect to whether the plaintiff's lack of legal knowledge makes the "as is" clause [in a residential real estate contract] unenforceable."); *Tex. Motor Coach*, 2005 WL 3132482, at *7–8 (enforcing reliance disclaimer in motor-home dealership contract against the plaintiffs who owned an automobile dealership); Langguth v. JAT Enters., Ltd., No. 03-06-00240-CV, 2007 Tex. App. LEXIS 983, at *11–12 (Tex. App.—Austin Feb. 6, 2007, no pet.) (mem. op.) ("Here, as in *Schlumberger*, both parties to the agreement were sophisticated business persons and possessed relatively equal bargaining power. The record reflects that Mr. Langguth had extensive experience buying and selling real estate. He had previously purchased commercial real estate as well as ongoing commercial businesses. Mr. Langguth had experience evaluating business financial statements and assessing the value of business operations, and the summary judgment evidence shows that he had purchased real estate under terms similar to those at issue here."). *But see Woodlands*, 48 S.W.3d at 422 ("As to whether the agreement was negotiated by 'similarly sophisticated parties as part of an arm's length transaction,' Woodlands argues that Jenkins is a sophisticated businessman. While Jenkins, being the general manager and founder of a business, is familiar with contracts, his primary duties are on the technology side of his microprocessor product design firm. Jenkins is not a structural engineer and does not normally read building construction plans. Certainly, Jenkins was not a 'knowledgeable real estate investor who owned an interest in at least thirty commercial buildings,' nor was he president of a commercial management firm, and neither 'has [he] bought and sold several large investment properties on an "as is" basis,' as had the buyer in *Prudential*.").

148. *E.g.*, Berry v. Indianapolis Life Ins. Co., No. 3:08-CV-0248-B, 2009 U.S. Dist. LEXIS 24951, at *46, *73–75 (N.D. Tex. Mar. 26, 2009) (refusing to enforce an insurance contract's reliance disclaimer against a dentist and the owner of a construction company because of the transaction's complexity).

statement not expressly set forth in the contract, and (2) a disclaimer clearly and unequivocally disclaiming all representations not expressly set forth in the contract.

- The contract in dispute must be in an arm's-length transaction.
- The contract in dispute must be a negotiated one, specifically tailored for the transaction. It cannot be a standard or form contract that was offered on a take-it-or-leave-it basis, unless (a) there is a custom or usage in the industry to include a reliance disclaimer in contracts for the goods or services involved, or (b) the parties have a long-standing course-of-performance pursuant to which disclaimers traditionally have been included in their contracts. The reliance disclaimer, however, need not be specifically negotiated or even discussed.

If the preceding three factors are present, the court should then review the plaintiff's knowledge/sophistication and find that the reliance disclaimer defeats reliance when the plaintiff is either:

- A large business with access to topflight attorneys and other advisors, even if the attorneys or other advisors were not consulted in connection with the contract's negotiation or drafting.
- A small business that or individual who (1) has the knowledge or skill peculiar to the practices, goods, or services (or similar goods or services) involved in the transaction in dispute, or (2) is represented by an attorney or agent, a broker or another professional or intermediary who holds himself or herself out as having such skill or knowledge, or (3) has extensive business experience or is highly educated and the transaction or the contract is not one that is so unusual, complex, or specialized that a layman, irrespective of his or her business knowledge, education, or intelligence, would ordinarily seek representation.

Such a reliance disclaimer in a contract signed by such a plaintiff should be effective to defeat reliance on (1) an alleged extra-contractual representation that conflicts with a contractual representation, (2) an alleged extra-contractual representation about which the contract is wholly silent, or (3) an alleged non-disclosure relating to a subject matter that either was discussed by the parties during the negotiations or could have been discovered through due

diligence leading to the contract's execution.[149]

IV. PROCEDURAL AND SUBSTANTIVE ISSUES IN LITIGATION REGARDING A RELIANCE DISCLAIMER'S ENFORCEABILITY

The following are important procedural and substantive questions that arise in litigation involving a reliance disclaimer's enforceability. Is the *Forest Oil/Schlumberger* exception applicable to causes of actions or affirmative defenses besides fraudulent inducement? Is a reliance disclaimer's enforceability a fact issue decided by the trier of fact or a mixed question of law and fact decided by the court? What is the burden of proof on the party seeking to enforce a reliance disclaimer (typically, the defendant) and on the party seeking to avoid one (typically, the plaintiff)? Does a reliance disclaimer protect the corporate officers, employees, representatives, or agents who allegedly made the misrepresentation or non-disclosure from liability? Each question is addressed below.

A. *A Clear and Unequivocal Reliance Disclaimer Can Bar Any Cause of Action or Defense That Has Reliance As an Element*

Reliance is an element of many causes of action and affirmative defenses besides fraudulent inducement. Among them are common-law fraud,[150] statutory fraud under section 27.01 of the Texas Business & Commerce Code,[151] negligent misrepresen-

149. To defeat reliance on a non-disclosure that was not discussed during pre-contract negotiations, the reliance disclaimer must specifically disclaim reliance on non-disclosures. For an example of such a disclaimer, see p. 177–78 *infra*.

150. K3C Inc. v. Bank of Am., N.A., 204 F. App'x 455, 463 (5th Cir. 2006); Cronus Offshore, Inc. v. Kerr McGee Oil & Gas Corp., 369 F. Supp. 2d 848, 857 (E.D. Tex. 2004), *aff'd*, 133 F. App'x 944 (5th Cir. 2005); Steinberg v. Brennan, No. 3:03-CV-0562, 2005 WL 1837961, at *2 (N.D. Tex. July 29, 2005); Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co., 51 S.W.3d 573, 577 (Tex. 2001); Prudential Ins. Co. of Am. v. Italian Cowboy Partners, Ltd., 270 S.W.3d 192, 197 (Tex. App.—Eastland 2008, no pet.); Coastal Bank SSB v. Chase Bank of Tex., N.A., 135 S.W.3d 840, 843 (Tex. App.—Houston [1st Dist.] 2004, no pet.); Procter v. RMC Capital Corp., 47 S.W.3d 828, 834–35 (Tex. App.—Beaumont 2001, no pet.); Fletcher v. Edwards, 26 S.W.3d 66, 77 (Tex. App.—Waco 2000, pet. denied); Starlight, L.P. v. Xarin Austin I, Ltd., No. 03-97-00747-CV, 1999 WL 11213, at *9 (Tex. App.—Austin Jan. 14, 1999, no pet.) (not designated for publication); Robert K. Wise et al., *Negligent Misrepresentation in Texas: The Misunderstood Tort*, 40 TEX. TECH. L. REV. 848, 899 (2008). *See also* cases cited *supra* note 6.

151. TEX. BUS. & COM. CODE ANN. § 27.01(a)(1)(B) (Vernon 2009); Girma v. Compass Bank, No. 3:05-CV-0961-D, 2006 U.S. Dist. LEXIS 35231, at *14 n.5 (N.D. Tex. May 31, 2006); Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 182 (Tex. 1997);

tation,[152] false and misleading acts and practices in violation of section 17.50(a)(1)(B) of the Deceptive Trade Practices Act,[153] promissory estoppel,[154] and equitable estoppel.[155] The *Forest Oil/Schlumberger* exception is applicable to all of these claims,[156] as well as any other cause of action or defense that has reliance as an element.

B. *The Court Determines Whether a Reliance Disclaimer Is Enforceable*

The Texas Supreme Court has not decided whether a reliance

Italian Cowboy, 270 S.W.3d at 197; *Fletcher*, 26 S.W.3d at 76; *Starlight*, 1999 WL 11213, at *9.

152. *K3C*, 204 F. App'x at 462; *Italian Cowboy*, 270 S.W.3d at 197; Biosilk Spa, L.P. v. HG Shopping Ctrs., L.P., No. 14-06-00986-CV, 2008 Tex. App. LEXIS 3361, at *7 (Tex. App.—Houston [14th Dist.] May 8, 2008, pet. denied) (mem. op.); Ortiz v. Collins, 203 S.W.3d 414, 431 (Tex. App.—Houston [14th Dist.] 2006, pet. denied); Simpson v. Woodbridge Props., L.L.C., 153 S.W.3d 682, 684 (Tex. App.—Dallas 2004, no pet.); Atl. Lloyds Ins. Co. v. Butler, 137 S.W.3d 199, 215 (Tex. App.—Houston [1st Dist.] 2004, pet. denied); *Coastal Bank*, 135 S.W.3d at 842; Carousel's Creamery, L.L.C. v. Marble Slab Creamery, Inc., 134 S.W.3d 385, 391 (Tex. App.—Houston [1st Dist.] 2004, pet. dism'd by agr.); Robert K. Wise et al., *Negligent Misrepresentation in Texas: The Misunderstood Tort*, 40 TEX. TECH. L. REV. 848, 899 (2008).

153. TEX. BUS. & COM. CODE ANN. § 17.50(a)(1)(B) (Vernon 2002 & Supp. 2009); Morgan Bldgs. & Spas, Inc. v. Humane Soc'y of Se. Tex., 249 S.W.3d 480, 489 (Tex. App.—Beaumont 2008, no pet.); Cell Comp, L.L.C. v. Sw. Bell Wireless, L.L.C., No. 13-07-00120-CV, 2008 WL 2454250, at *2 n.2 (Tex. App.—Corpus Christi June 19, 2008, no pet.) (mem. op.); *Simpson*, 153 S.W.3d at 684; *Starlight*, 1999 WL 11213, at *9.

154. Nagle v. Nagle, 633 S.W.2d 796, 800 (Tex. 1982); *Biosilk*, 2008 Tex. App. LEXIS 3361, at *7; *Ortiz*, 203 S.W.3d at 421; *Atl. Lloyds Ins.*, 137 S.W.3d at 215; Stanley v. CitiFinancial Mort. Co., 121 S.W.3d 811, 820 (Tex. App.—Beaumont 2003, pet. denied).

155. Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc., 962 S.W.2d 507, 515 (Tex. 1998); Sefzik v. City of McKinney, 198 S.W.3d 884, 895 (Tex. App.—Dallas 2006, no pet.).

156. K3C Inc. v. Bank of Am., N.A., 204 F. App'x 455, 462–63; Armstrong v. Am. Home Shield Corp., 333 F.3d 566, 571 (5th Cir. 2003); *Girma*, 2006 U.S. Dist. LEXIS 35231, at *17; Tex. Motor Coach, L.C. v. Blue Bird Body Co., No. 4:05-CV-34, 2005 WL 3132482, at *28 (E.D. Tex. Nov. 22, 2005); Steinberg v. Brennan, No. 3:03-CV-0562, 2005 WL 1837961, at *8 (N.D. Tex. July 29, 2005); *Schlumberger*, 959 S.W.2d at 181–82; *Italian Cowboy*, 270 S.W.3d at 200–01; *Morgan Bldgs.*, 249 S.W.3d at 489–90; *Biosilk*, 2008 Tex. App. LEXIS 3361, at *4, *7–8; *Simpson*, 153 S.W.3d at 684; *Atl. Lloyds Ins.*, 137 S.W.3d at 217–18; Coastal Bank SSB v. Chase Bank of Tex., N.A., 135 S.W.3d 840, 843–45 (Tex. App.—Houston [1st Dist.] 2004, no pet.); Yzaguirre v. KCS Res., Inc., 47 S.W.3d 532, 542 (Tex. App.—Dallas 2000), *aff'd*, 53 S.W.3d 368 (Tex. 2001); Starlight, L.P. v. Xarin Austin I, Ltd., No. 03-97-00747-CV, 1999 WL 11213, at *9 (Tex. App.—Austin Jan. 14, 1999, no pet.) (not designated for publication); 1900 SJ, Inc. v. Washington Nat'l Ins. Co., No. 01-97-00493-CV, 1998 Tex. App. LEXIS 3059, at *6 (Tex. App.—Houston [1st Dist.] May 21, 1998, pet. denied) (not designated for publication).

disclaimer's enforceability is a question of fact or a mixed question of law and fact for the court to decide. Nonetheless, courts repeatedly have assumed that the question is a mixed question of law and fact for the court[157] and have determined whether a reliance disclaimer is enforceable much like they determine whether a contract is ambiguous. That is, the courts consider the reliance disclaimer's plain language in light of the surrounding circumstances.[158] This does not mean, however, that the finder of fact will never consider a reliance disclaimer. If a court cannot conclude that a reliance disclaimer negates reliance as a matter of law, the party seeking to take advantage of the disclaimer should be able to offer it to the fact finder as evidence that reliance was not justifiable and actual.[159]

C. *The Plaintiff Has the Burden of Proving Why a Clear and Unequivocal Reliance Disclaimer Is Unenforceable*

The Texas Supreme Court has not decided the parties' burden of proof with respect to a reliance disclaimer's enforceability. Nonetheless, Texas Rule of Civil Procedure 94 requires a party to plead certain matters, including "any other matter constituting an avoidance or affirmative defense."[160] A contention that a fraudulent-inducement or other claim is barred by a reliance disclaimer clearly is a "matter constituting an avoidance or affirmative defense." Consequently, a defendant must raise a reliance disclaimer as a "defense" in its pleadings[161] and has the

157. *Armstrong*, 333 F.3d at 571; Forest Oil Corp. v. McAllen, 268 S.W.3d 51, 60 (Tex. 2008); Bounds v. Cole & Ashcroft, No. 14-05-00064-CV, 2006 Tex. App. LEXIS 5559, at *8–9 (Tex. App.—Houston [14th Dist.] June 22, 2006) (mem. op.).

158. *See Forest Oil*, 268 S.W.3d at 60 ("Courts must always examine the contract itself and the totality of the surrounding circumstances when determining if a waiver-of-reliance provision is binding."); Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd., 940 S.W.2d 587, 591 (Tex. 1996) ("In determining the parties' agreement, we are to examine all parts of the contract and the circumstances surrounding the formulation of the contract." (citing Nat'l Union Fire Ins. Co. v. CBI Indus., Inc., 907 S.W.2d 517 (Tex. 1995))).

159. *See* DRC Parts & Accessories, L.L.C. v. VM Motori, S.P.A., 112 S.W.3d 854, 865 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (Hudson, J., dissenting) ("[T]he terms of a contract may be utilized as persuasive evidence in rebutting an allegation of fraud in the inducement . . . .").

160. TEX. R. CIV. P. 94.

161. *Cf.* Owens v. Mercedes-Benz USA, LLC, 541 F. Supp. 2d 869, 871 (N.D. Tex. 2008) ("The Texas Supreme Court has not decided which party bears the burden of proof [on an 'as is' agreement]. . . . Intermediate Texas courts generally treat an 'as is'

burden of proving that the contract at issue clearly and unequivocally disclaims reliance on the alleged extra-contractual representations or non-disclosure.

But, once the defendant establishes the existence of such a reliance disclaimer, the plaintiff has the burden of proving the absence of one or more of the *Forest Oil* factors that make the disclaimer unenforceable.[162] This conclusion is supported by the

agreement as a 'defense' raised in the first place by a seller-defendant."); Larsen v. Carlene Langford & Assocs., 41 S.W.3d 245, 253 (Tex. App.—Waco 2001, pet. denied) (holding that an "as is" clause was a "defense raised by the seller").

162. *See* Jacuzzi, Inc. v. Franklin Elec. Co., Inc., No. 3:07-CV-1090-D, 2008 U.S. Dist. LEXIS 4414, at *15–16 (N.D. Tex. Jan. 22, 2008) ("When the contract on which a plaintiff's fraudulent inducement claim is based clearly and unequivocally disclaims reliance on extrinsic representations, the plaintiff's claim for relief is not facially plausible when the complaint fails to allege the factual basis for avoiding enforcement of the contract's reliance disclaimer. When the contract clearly and unequivocally disclaims reliance on the representations of which the plaintiff complains, the plaintiff must establish a factual basis to avoid enforcement of the reliance disclaimer."). "[P]laintiff must produce evidence of the *Schlumberger* factors that is sufficient to avoid enforcement of the reliance disclaimer. Thus when a plaintiff fails to present evidence that would render unenforceable a clear and unequivocal reliance disclaimer, it is proper to enter summary judgment dismissing the fraudulent-inducement claim." *Id.* at 15 n.6; *see also* Chesson v. Hall, No. H-01 315, 2007 WL 1964538, at *19 (S.D. Tex. July 3, 2007) ("'In the context of a summary judgment, a document containing the buyer's disclaimer of reliance conclusively negates the element of reliance.' To avoid summary judgment, the buyer 'must present some summary judgment evidence that "but for" the representations of the seller regarding the condition of the subject of the contract, the buyer would not have assented to the "as is" clause . . . .'" (quoting Savage v. Doyle, 153 S.W.3d 231, 236 (Tex. App.—Beaumont 2004, no pet.))); Steinberg v. Brennan, No. 3:03-CV-0562, 2005 WL 1837961, at *8 (N.D. Tex. July 29, 2005) (granting summary judgment on a fraudulent-inducement claim because the contract clearly and unequivocally disclaimed reliance on extra-contractual misrepresentations and the plaintiff failed to create a fact issue regarding the unenforceability of the disclaimer under *Schlumberger*); *cf. Owens*, 541 F. Supp. 2d at 871 ("Once the defendant has established such an ['as is'] agreement, the courts appear to place on the buyer-plaintiff the burden of proving that the agreement was invalid, whether due to 'fraudulent representation' . . . [or] other aspects of [the] transaction[] . . . ." (quoting Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd., 869 S.W.2d 156, 162 (Tex. 1995))); Wellwood v. Cypress Creek Estates, Inc., 205 S.W.3d 722, 727 (Tex. App.—Dallas 2006, no pet.) (affirming summary judgment against the plaintiff who "did not . . . present evidence that the 'as is' clause was not part of the basis of the bargain"); *Savage*, 153 S.W.3d at 236 ("In the context of a summary judgment, a document containing [an 'as is' clause] conclusively negates the element of reliance" and "[t]o avoid summary judgment . . . the buyer 'must present some summary judgment evidence . . . .'" (quoting Procter v. RMC Capital Corp., 47 S.W.3d 828, 834 (Tex. App.—Beaumont 2001, no pet.))); *Larsen*, 41 S.W.3d at 253 ("To successfully raise the counter-defense of fraudulent inducement [as a defense to an 'as is' clause,] the buyer must present some summary judgment evidence . . . ."); Rader v. Danny Darby Real Estate, Inc., No. 05-9701927-CV, 2001 WL 1029355, at *5 (Tex. App.—Dallas, Sept. 10, 2001, no pet.) (not designated for publication) (affirming summary judgment against the plaintiff where "responsive summary judgment evidence

fact that (1) Texas and federal courts have employed similar burden-shifting paradigms in the context of "as is" clauses,[163] and (2) the supreme court has employed a similar one in the limitations context.[164]

D. *A Reliance Disclaimer Protects the Disclaiming Party's Agents, Employers, and Representatives*

A disclaimer that meets *Forest Oil/Schlumberger*'s requirements and that clearly and unequivocally provides that the contracting parties are not relying on extra-contractual representations of the parties *or* their employees, agents, or representatives protects the defendant's employees, agents, or representatives from fraudulent inducement and other reliance-based claims and defenses.[165] This is true even if the disclaimer refers only to the parties.[166]

. . . failed to raise a material fact issue" regarding, among other things, whether the plaintiff's status as a layperson is a circumstance to consider); *Procter*, 47 S.W.3d at 837 (affirming summary judgment because the plaintiff's summary judgment evidence failed to raise a fact issue regarding whether the "as is" clause was fraudulently induced).

163. *E.g.*, *Owens*, 541 F. Supp. 2d at 872 ("Defendants have adduced undisputed evidence that [the plaintiff] signed a written agreement to lease the vehicle 'as is.' Therefore, the burden shifts to [the plaintiff] to produce evidence that, due to fraudulent inducement or some other circumstances, the agreement is not effective to negate causation."); *see also* "as is" cases cited *supra* note 156.

164. *See* Am. Petrofina, Inc. v. Allen, 887 S.W.2d 829, 830 (Tex. 1994) (holding that once defendant establishes that the claim has not been brought within the limitations period, the burden shifts to the plaintiff to prove an issue of fact concerning the counter-defense of fraudulent concealment (citing Nichols v. Smith, 507 S.W.2d 518, 521 (Tex. 1974))); Murray v. San Jacinto Agency, Inc., 800 S.W.2d 826, 830 (Tex. 1990) ("[W]hen a defendant . . . has affirmatively pleaded the defense of limitations, and when failure to timely serve the defendant has been shown, the burden shifts to the plaintiff . . . to explain the delay[,]" and thus, establish the counter-defense of due diligence).

165. Starlight, L.P. v. Xarin Austin I, Ltd., No. 03-97-00747-CV, 1999 WL 11213, at *9 (Tex. App.—Austin Jan. 14, 1999, no pet.) (not designated for publication); C & A Invests., Inc. v. Bonnet Res. Corp., 959 S.W.2d 258, 264–65 (Tex. App.—Dallas 1997, writ denied).

166. *See* Airborne Freight Corp., Inc. v. C.R. Lee Enters., Inc., 847 S.W.2d 289, 297 (Tex. App.—El Paso 1997, writ denied) (reversing judgment against employee for fraudulent inducement even though reliance disclaimer did not reference employees); *cf.* Fletcher v. Edwards, 26 S.W.3d 66, 76 (Tex. App.—Waco 2000, pet. denied) ("The agent of a party to an 'as is' agreement may rely on the agreement in defense of claims asserted . . . by the other party . . . because the agent's principal 'obviously included in the agreement contract terms intended to benefit its agent.'" (quoting *C & A Invests.*, 959 S.W.2d at 264–65)).

V. CONCLUSION

Texas law gives contracting parties broad, but not unlimited, freedom to contract around misrepresentation claims. In an arm's-length, non-consumer transaction, both a sophisticated party and an unsophisticated party (who was represented by an attorney or a qualified agent, broker, or another type of professional or intermediary) can bargain away his or her ability to assert claims or defenses based on extra-contractual misrepresentations and non-disclosures, even if the misrepresentations or non-disclosures were made with fraudulent intent, provided the reliance disclaimer is clear and unequivocal.

Texas case law provides an increasingly clear guide for contract drafters. These decisions suggest that a party can effectively bar misrepresentation and non-disclosures claims by including provisions similar to the following:

> Disclaimer. Except as expressly set forth in this Agreement, Seller makes no representation or warranty, express or implied, including without limitation any warranty with respect to merchantability, fitness for any particular or ordinary purpose, or any other matter, and any representation or warranty not expressly set forth in this Agreement is hereby expressly disclaimed.
>
> Full Disclosure. To its full satisfaction Buyer has been furnished all materials and information that Buyer has requested relating to this Agreement's subject matter and has been afforded the opportunity to ask questions of Seller, and its employees, representatives, and agents concerning this Agreement's subject matter and to obtain any information needed to verify the accuracy of any information, representation, or warranty set forth in this Agreement.
>
> Negotiation. Buyer acknowledges that extensive negotiations between itself and Seller preceded this Agreement's execution and that Buyer has been represented by [or been provided with the opportunity to consult with] an attorney of its choice concerning this Agreement and each of its provisions.
>
> No Reliance on Representations or Non-disclosures. Buyer represents, acknowledges, and agrees that in entering into this Agreement (a) it is not relying on (i) any written or oral communication with Seller or its employees, representatives, or agents about this Agreement's subject matter not expressly set forth in this Agreement, or (ii) any information, representation, or warranty by Seller or its employees, representatives, or agents

> regarding this Agreement's subject matter, except for the information, representations, and warranties expressly set forth in this Agreement, and (b) any failure to disclose any information or documents by Seller or its employees, representatives, or agents about this Agreement's subject matter are of no consequence or importance to Buyer's decision to enter into this Agreement. In making its decision to enter into this Agreement, Buyer agrees and represents that it has relied only on its own investigation regarding this Agreement's subject matter, the information, representation, and warranties contained in this Agreement, and the advice of its attorney or other advisors, none of whom is affiliated with Seller.[167]
>
> No Liability for Misrepresentation or Non-disclosure. Except as expressly provided by this Agreement, neither Seller nor its employees, representatives, or agents shall have, or be subject to, any liability to any person resulting from (a) the distribution to Buyer or its use of, or reliance on, any information, document, or material made available to Buyer in expectation of, or in connection with, this Agreement's subject matter, or (b) the failure to disclose to Buyer any information, documents, or material relating to, or in connection with, this Agreement's subject matter.

In addition, the contract's recitals should (1) detail the parties' arm's-length negotiations, including those negotiations relating to the reliance disclaimer, (2) stipulate to or describe the parties knowledge of, and sophistication in, business matters generally or with respect to the contract's subject matter, and (3) identify the types of advisors and professionals assisting the parties in the contract's negotiation and drafting, and stipulate to their competence. Finally, the above provisions should be conspicuous and initialed by the parties.

Perhaps the most important aspect of contract law is the judicial enforcement of contractual provisions as written. The foregoing provisions are consistent with relevant Texas precedent and, thus, in most cases, should preclude negligent, reckless, and intentional misrepresentation and non-disclosure claims and defenses under Texas law by either a sophisticated or an unsophisticated, but represented and advised, contracting party in a non-consumer transaction.

167. The last clause of this provision should be included only if the "Buyer" was represented by an attorney or other advisors.