Texas Purchase and Sale Issues for Buyers

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1. INTRODUCTION

Sales of Texas real estate are typically governed by Texas law and customs. Variances among states sometimes can be significant. Consequently, it is important to understand the local rules and to seek the advice of local experts to make an informed purchase. While not intended to be exhaustive, this article will highlight some of the local matters for buyers of commercial real estate to keep in mind when entering into a purchase and sale agreement and, by necessity, will address issues from both the buyer's and the seller's perspective, including many of the required statutory notices to be given by the seller in contracts of sale of commercial real estate. Note that this article focuses on commercial purchase agreements and does not include any of the required disclosures or notices for residential contracts. This article does not cover entitlements, permits or other possible land use matters. Although this article sets forth many of the Texas-specific doctrines related to purchase and sale agreements for commercial properties, the authors highly recommend engaging Texas counsel when drafting and negotiating Texas commercial real property purchase agreements.

2. TITLE WARRANTY

The typical warranty as to title that Sellers are willing to provide in Texas and what Texas title companies will insure is a different standard than in many other states. In Texas, the standard title warranty is "good and indefeasible" instead of "good and marketable" or "good and merchantable". The distinction originated during the Great Depression when many properties were sold at sheriff's sales. This raised questions of marketability and

led to Texas adopting the "good and indefeasible" title rule. A representation that the title to the property is "marketable" or "merchantable" title is not given by Sellers in Texas, and Texas rules related to title insurance provide for title companies insurance against the "lack of good and indefeasible title." *See* Texas Form of Owner's Title Insurance Policy (Form T-1), Covered Risks, Item 3. In contrast, the American Land Title Association (ALTA) Policy forms provide coverage against "unmarketable title." *See* ALTA Form of Owner's and Lender's Policy, Covered Risks, Item 3.

According to Texas courts, "merchantable" title is synonymous with "marketable" title. *Alling v. Vander Stucken*, 194 S.W. 443 (Tex.Civ.App.—San Antonio 1917, writ ref'd); *see also Lieb v. Roman Dev. Co.*, 716 S.W.2d 653 (Tex.App. —Corpus Christi 1986, writ ref'd n.r.e.). "Marketable" title (and, therefore, "merchantable" title) is defined by Texas courts as: "[A] title free from reasonable doubt as to matters of law and fact, such a title as a prudent man, advised of the facts and their legal significance, would willingly accept.... [I]t has been held that a title is not marketable if clouded by any outstanding contract, covenant, interest, lien, or mortgage sufficient to form a basis of litigation." *Lund v. Emerson*, 204 S.W.2d 639, 641 (Tex.Civ. App.—Amarillo 1947, no writ); s*ee also Texas Auto Co. v. Arbetter*, 1 S.W.2d 334 (Tex.Civ.App.—San Antonio 1927, writ dism'd w.o.j.); *Glens Falls Ins. Co. v. State Nat. Bank of El Paso*, 475 S.W.2d 386 (Tex.Civ.App.—El Paso, 1972, writ. ref'd n.r.e). Based upon the definition in *Lund*, most property today would not be marketable; thus, representing as to "indefeasible" title is an acceptable standard within the Texas marketplace.

3. TITLE INSURANCE, ESCROW AND SURVEY

3.1. Title Insurance.

Texas title insurance forms and rates are set by Texas statute and the Texas Land Title Association (TLTA) regulations and are much more regulated and limited than most other states, including states which have adopted the standard ALTA policies and forms. *See* Tex. Ins. Code Ann., Title 11. Title insurance pricing and rates are set by the TLTA regulations and are not negotiable. The TLTA Title Insurance Basic Manual, including forms, rate rules, procedural rules, and Title 11 of the Texas Insurance Code, can be found at: http://www.tdi.texas.gov/title/titleman.html. Because title insurance regulations in Texas are different than in any other state, the authors highly encourage any buyer to obtain local counsel in evaluating, reviewing and purchasing title insurance in Texas.

3.2. Escrow Procedures.

Texas commercial real estate transactions almost always involve an escrow both to hold the deposit and to consummate the Closing; although, sometimes the parties will meet face-to-face to close the transaction. Face-to-face closings are increasingly unusual given the current nature and extent of technology. Most transactions use the title company as the escrow agent. Attorneys typically do not act as escrow agents (other than relatively informal arrangements between counsel to hold signature pages while counterparts are collected pending delivery to the escrow agent).

3.3. Survey Requirements and Certification.

The survey requirements and certificate form in Texas are different than the standard ALTA requirements and form, and each Texas certification has a specific meaning as to what the survey covers. The Texas Society of Professional Surveying (TSPS) has published a Manual of Practice, which can be purchased on the TSPS website at: http://www.tsps.org/?page=eManualofPractice. The standard requirements and obligations related to a survey (and the corresponding certifications) are provided by TSPS licensed surveyors and are segregated into Categories and Conditions. Each Category is divided into four Conditions, and each Category and Condition has specific requirements, all of which are set forth in the Manual of Practice.

For example, a certificate by a TSPS licensed surveyor may be as follows:

> I, _____, a Registered Professional Land Surveyor of the State of Texas, do hereby certify to _____ that this map correctly represents a survey completed on the ground in accordance with the Texas Society of Professional Surveyors standards and specifications for a Category 1A, Condition II Survey.

In such example, a Category 1A, Condition II Survey means a survey of land located within the corporate limits of any city, town or village but not in the recognized downtown business district. In a Condition II survey, a surveyor may determine exterior boundaries, locate individual lots, subdivide property, and define routes or rights-of-way. A Condition II survey may be used for legal purposes, including title company insurance requirements for deletion of area and boundary exceptions. A Category 1A Survey has certain requirements for the surveyor to show on a map: boundary locations, rights-of-way and easement locations, perimeters, information regarding adjacent property owners, identification and location of visible improvements, location and placement of monuments, terrain features, north arrow, encroachments, water courses, etc. Therefore, the identification of the category and condition of the survey in the surveyor's certificate denotes that certain requirements have been satisfied, that certain tasks have been performed by the surveyor and that certain information is shown on the survey drawing. The listing of specific ALTA Table A items is not required for the issuance of title insurance or title endorsements; however, many purchasers and most lenders will require that the survey be an ALTA survey. Most Texas surveyors will certify as to specific ALTA Table A items, upon request. Note that the ALTA/NSPS Standard Requirements were revised, effective February 23, 2016.

4. CLOSING DOCUMENTS; TRANSFER TAXES

4.1. Forms of Documents.

There is no standard form of deed in Texas, although Texas Property Code § 5.022(a) offers a simple form that may be used for fee simple conveyances with a general warranty. A general warranty deed, which provides a full warranty of title for the entire history of the property, is typically not used in commercial transactions. Instead, special warranty deeds, which provide for a warranty from the Seller with respect to Seller's period of ownership only, are generally used in commercial transactions. Special warranty deeds in Texas do not warrant that the grantor has title to the property but merely assures the grantee against matters suffered or created by the grantor. In Texas, a Title Company will insure title based on conveyance by a special warranty deed or general warranty deed but might not for conveyances by quit-claim deed or any other deed of lesser warranty. In order to narrow a general warranty to the special warranty in a deed, the warranty language in the deed should include the clause: "by, through, or under Grantor, but not otherwise." The conveyance in deeds in commercial transactions include the real property, as well as all right, title, and interest of the grantor appurtenant to the real estate, including, without limitation, the grantor's interest, if any, in any and all improvements located on the real property, entitlements appurtenant to the real property and rights in adjacent streets, alleys, rights of way and any adjacent strips and gores. In addition, deeds often include restrictions, repurchase rights or rights of reverter.

Texas has certain rules that apply if a deed is to be valid. For instance, the parties should be named, the intent to convey property must be clear from the wording, the property must be sufficiently described, and the deed must be signed and acknowledged by the grantor. *Gordon v. W. Houston Trees, Ltd.,* 352 S.W.3d 32 (Tex. App.—Houston [1st Dist.] 2011, no pet.). The parties may insert any additional clauses into the deed, so long as such clauses are not in contravention of law. A covenant of warranty is not required for conveyance; however a conveyance by a quit-claim deed in Texas

establishes an automatic presumption of a title defect. Therefore, a Purchaser should be extremely cautious in accepting conveyance or transfer by a quit-claim. An instrument transferring real property (deeds and deeds of trust) must include a notice at the top of the first page in 12-point bold-faced type or 12-point uppercase letters as follows:

> NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL BORN PERSON, YOU MAY REMOVE OR STRIKE ANY OR ALL OF THE FOLLOWING INFORMATION FROM ANY INSTRUMENT THAT TRANSFERS AN INTEREST IN REAL PROPERTY BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER.

Tex. Prop. Code § 11.008.

The validity of an instrument is not affected by failure to include such notice, and the County Clerk cannot refuse to record an instrument that fails to include such notice. Thus, there is no practical consequence for failure to include this notice; however, the authors recommend including the notice at the top of the first page of any Texas deed or deed of trust.

Other conveyance and closing documents do not require a specific Texas form but will require an appropriate acknowledgment in order to file the document of record.

4.2. Transfer Taxes.

There are no transfer taxes, deed or mortgage taxes or stamp taxes in Texas. There will be nominal fees (typically per-page fees) for recordation of documents with County Clerks.

5. ROLL-BACK TAXES

5.1. Roll-Back Taxes General Overview.

Real property may be eligible for a tax reduction under Texas Tax Code if such property qualifies as (1) open space land (land currently devoted principally to agricultural use [defined below] to the degree of intensity generally accepted in the area and that has been devoted principally to agricultural use or to production of timber or forest products for five of the preceding seven years or land that is used principally as an ecological laboratory by a public or private college or university or land devoted principally to wildlife management to the degree of intensity generally accepted in the area) (Tex. Tax Code § 23.51); (2) land used for timber production (Tex. Tax Code § 23.71); (3) land used as a recreational, park or scenic use (land used for individual or group sporting activities, for park or camping activities, for development of historical, archaeological, or scientific sites or for the conservation and preservation of scenic areas) (Tex. Tax Code § 23.81); or (4) airport property (land that is designed to be used or is used for airport purposes, including the landing, parking, shelter or takeoff of aircraft and the accommodation of individuals engaged in the operation, maintenance or navigation of aircraft or of aircraft passengers in connection with their use of aircraft or of airport property) (Tex. Tax Code § 23.91). "Agriculture Use" is defined by statute as: cultivating the soil, producing crops for human food, animal feed, or planting seed or for the production of fibers; floriculture, viticulture and horticulture; raising or keeping livestock; raising or keeping exotic animals for the production of human food or of fiber, leather, pelts or other tangible products having a commercial value; planting cover crops or leaving land idle for the purpose of participating in a governmental program, provided the land is not used for residential purposes or a purpose inconsistent with agricultural use; and planting cover crops or leaving land idle in conjunction with normal crop or livestock rotation procedure; the use of land to

produce or harvest logs and posts for the use in constructing or repairing fences, pens, barns or other agricultural improvements on adjacent qualified open-space land having the same owner and devoted to a different agricultural use; the use of land for wildlife management; and, provided that the land used is not less than five or more than twenty acres, the use of land to raise or keep bees for pollination or for the production of human food or other tangible products having a commercial value. Tex. Tax Code § 23.51.

A change in use of property which had qualified under one of the uses set forth in clauses (1) – (4) above may trigger an additional tax being imposed on the property (Roll-Back Tax(es)), which is equal to the difference between the taxes imposed on the property for each of the five years preceding the year in which the change of use occurs and the tax that would have been imposed had the property been taxed on the basis of market value in each of those years, plus interest at an annual rate of seven percent calculated from the dates on which the differences would have become due. Tex. Tax Code §§ 23.55 23.76, 23.86, 23.96.

If the property which is the subject of the purchase agreement would qualify under the uses set forth in clauses (1) - (4) above and the Purchaser intends to change the use of the property after Closing, Purchaser and Seller will want to allocate the Roll-Back Taxes in the purchase agreement. This is a business decision, but often the Seller agrees to pay the portion of the Roll-Back Taxes assessed for the years prior to Closing and the Purchaser agrees to pay the Roll-Back Taxes assessed on the period after Closing. Often, the parties agree to place a portion of the purchase price, equal to the total estimated amount of Roll-Back Taxes, in an escrow account at the closing of the transaction. The parties should provide for the escrow to "burn-off" by authorizing periodic disbursements of the escrowed funds to the Seller if the use of the property has not been changed after a certain period of time after closing. In addition, the escrow agreement should provide for an adjustment or reconciliation of the amount in escrow at such time as the actual Roll-Back Taxes have been determined.

5.2. Roll-Back Taxes Statutory Notice (Tex. Prop. Code § 5.010).

If the subject property is vacant land, Texas statute requires that a notice regarding the possibility of Roll-Back Taxes be provided by the Seller in the purchase agreement. Tex. Prop. Code §§ 5.010(a). However, if the purchase agreement contains a separate paragraph which expressly provides for the payment of additional ad valorem taxes and interest that become due as a penalty because of the transfer of the land or a subsequent change in use of the land, no such notice is required. Tex. Prop. Code §§ 5.010(d). Note that notice is not required for certain transfers, such as: foreclosures or deeds in lieu of foreclosure; transfers in bankruptcy; estate-related transfers; leasehold interests; security interests; mineral interests; transfers to a governmental entity; transfers to co-owners of the property; or transfers to a spouse or person in the lineal line of consanguinity. Tex. Prop. Code §§ 5.010(b) and (c). In addition, if the purchase agreement expressly provides for the payment of the Roll-Back Taxes due to the transfer or the change in use, the notice is not required. Tex. Prop. Code §§ 5.010(e).

6. INDEPENDENT CONSIDERATION

One of the essential elements of an enforceable contract under Texas law is consideration. *See Roark v. Stallworth Oil and Gas Inc.*, 813 S.W.2d 492, 496 (Tex. 1991); *see also Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401,408 (Tex. 1997), *rehearing of cause overruled* (Oct. 2, 1997); *Smith v. Renz*, 840 S.W.2d 702, 704 (Tex. App.—Corpus Christi 1992, writ denied). If during a certain period set forth in the purchase agreement (such as an inspection period or feasibility period) the earnest money is fully-refundable to the Purchaser, then until such earnest money becomes non-refundable, no consideration has been provided, and the contract is unenforceable against the Seller. *See Culbertson v. Brodsky*, 788 S.W.2d 156, 157 (Tex.

App.—Fort Worth 1990, no writ). In addition, if Seller's only remedy under a contract for Purchaser's breach is retention of the earnest money, then no consideration has been provided, and the contract is an option contract. *Paramount Fire Ins. Co. v. Aetna Casualty & Surety Co.*, 353 S.W.2d 841, 843 (Tex. 1962); *Smith v. Hues*, 540 S.W.2d 485, 488 (Tex.Civ.App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.). A contract where the earnest money is fully refundable would not be enforceable and an option contract would be revocable by Seller at any time unless the contract is supported by consideration separate and independent from the purchase price. *See Culbertson,* supra, at 157. In 2004, the Texas courts adopted the concept from the Restatement (Second) of Contracts § 87(1)(a), providing that the recitation of purported nominal (independent) consideration is sufficient for consideration under an option contract even if such nominal consideration is not paid. *See 1464-Eight, Ltd. v. Joppich*, 154 S.W.3d 101 (Tex. 2004). Note that the consideration language in the contract in such case included language that the receipt and sufficiency of the consideration was acknowledged and received. It is not yet decided in Texas whether the recitation that independent consideration is due without language acknowledging that the consideration was received is sufficient to make the option enforceable if such consideration is not actually paid. Although a contract which recites the receipt of nominal consideration is most likely enforceable notwithstanding the absence of the actual payment or receipt of the nominal consideration, the better practice in Texas is for the purchaser to actually deliver the consideration. Thus, to ensure that the contract is enforceable and cannot be revoked by Seller, it has become common practice for the purchase and sale agreement to recite an option fee or independent consideration and for Purchaser to pay the independent consideration. This is ordinarily a nominal amount of $100-$1,000 and is often a part of the earnest money (such that if the earnest money is returned to Purchaser, it is returned less the independent consideration, which is retained by Seller).

7. MINERAL RIGHTS

In certain areas in Texas, it is common for the mineral estate to be severed from the surface estate. Mineral estates in Texas are superior to the rights of the surface estate. *See Humble Oil & Refining Co. v. Williams*, 420 S.W.2d 133 (Tex. 1967); *see also Ball v. Dillard*, 602 S.W.2d 521 (Tex. 1980). Even absent an express agreement between the mineral estate owner and the surface estate owner limiting the mineral owner's rights to use the surface, the surface owner has some comfort regarding the right to use the surface based on the Accommodation Doctrine. The Accommodation Doctrine provides that the owner of the mineral estate has the right to use as much of the surface and subsurface of the land as *reasonably necessary* to enjoy the mineral estate, but such right must be exercised with "due regard" to the rights of the surface owner. *Humble Oil & Refining Co. v. West*, 508 S.W.2d 812, 815 (Tex. 1974), *cert. denied,* 434 U.S. 875 (1977). In addition, surface owners may use the surface of the land in any manner that is not inconsistent with the mineral owner's use of its estate, and mineral owners may only use the surface as is reasonably necessary. Under the Accommodation Doctrine, a mineral owner must use a reasonable alternative for its activities related to the minerals if the planned activity would impair or preclude an existing use by the surface owner. *See Getty Oil v. Jones*, 470 S.W.2d 618 (Tex. 1971). Even with the relative assurance provided by the Accommodation Doctrine, there are many issues associated with mineral rights and the fact that the mineral estate is the dominant estate, including, but not limited to, title insurance coverage and endorsements, affidavits of non-production, oil and gas leases and lessee rights, drilling sites, surface waivers and no-drilling ordinances. The authors recommend that any seller or purchaser of property located in an area where the mineral estate is commonly severed from the surface estate engage experienced oil and gas counsel and/or a certified landman.

8. CERTAIN REMEDIES AND DEFENSES

8.1. Liquidated Damages and Specific Performance

8.1.1. Liquidated Damages.

Contracts for the purchase of real property typically include provisions for liquidated damages if a party fails to timely close the transaction or timely provide certain items. In order to enforce a liquidated damage provision in a real estate contract, the Court must find that the harm caused by the breach is incapable or difficult of estimation and that the amount of liquidated damages called for is a reasonable estimate of just compensation. *Phillips v. Phillips,* 820 S.W.2d 785, 788 (Tex. 1991). The party claiming the liquidated damages provision is unenforceable has the burden to prove that the provision is unenforceable as an affirmative defense. Urban TV Network Corp. v. *Creditor Liquidity Solutions, L.P.,* 277 S.W.3d 917, 919 (Tex. App.—Dallas 2009, no pet.) A party can show that a liquidated damages provision is unreasonable by proving that the actual damages incurred were much less than the amount of the sales price. *Garden Ridge, L.P. v. Advance Int'l, Inc.,* 403 S.W.3d 432, 438 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). Liquidated damages clauses must attempt to quantify the actual damages that would be caused by a failure to release the earnest money and not merely assume the earnest money should be increased by some multiple even though the parties agreed in the contract that the earnest money represents the actual damages caused by the breach of the agreement. *Magill v. Watson,* 409 S.W.3d 673, 681 (Tex. App.—Houston [1st Dist.] 2013, no pet.). Importantly, parties to a contract are allowed to stipulate to the amount of damages to be recovered in the event of a breach (i.e. the earnest money). See *Birdwell v. Ferrell,* 746 S.W.2d 338, 340 (Tex. App.—Austin 1988, no writ). Thus, a stipulated damage clause is enforceable whereas a liquidated damage clause may not be, especially where the liquidated damages are a multiple of the stipulated damages. As a result, it is important to draft a purchase agreement for real estate to establish either stipulated damages or an agreement by all parties as to a liquidated damage formula indicating that actual damages would be difficult or impossible to calculate and that the formula represents a reasonable estimate of actual damages in the event of a breach.

8.1.2. Damages or Specific Performance.

Another common provision in real estate purchase contracts relates to the non-breaching party's option to sue for damages or for specific performance. In the context of a real estate transaction, an order requiring the breaching party to proceed with the transaction is an ordinary result because each piece of real estate is presumed to be unique such that money damages may be difficult or impossible to calculate. *See, e.g. Scott v. Sebree,* 986 S.W.2d 364, 370 (Tex. App.—Austin 1999, pet. denied); *Thanksgiving Tower Partners v. Anros Thanksgiving Partners,* 64 F.3d 227, 232 (5th Cir. 1995). Specific performance is both an equitable remedy that may be awarded for a breach of contract and an alternative remedy to damages. *Goldman v. Olmstead,* 414 S.W.3d 346, 361 (Tex. App.—Dallas 2013, pet. denied). A party suing for breach of contract involving the sale of real estate must elect to sue for either money damages or specific performance. *Id.* If a party sues for damages, it has elected to treat the contract as terminated by the breach and to seek compensation for that breach. *Id.* On the other hand, if the party sues for specific performance, it affirms the contract and seeks assistance from the trial court in effectuating the contract. *Id.* In narrow circumstances, the relief associated with specific performance may include monetary compensation as well, where the compensation is incident to a decree for specific performance and does not amount to legal damages but is necessary to place the parties in the same position as though the contract had been fully performed. *Id.* at 361-62. The trial court has great discretion in making an equitable decision to equalize any losses occasioned by the delay caused by the breach by offsetting such losses with monetary payments. *Id.* at 362. These incidental damages may include

things like lost rents, profits, delay costs and similar items. *Id.* A party seeking specific performance must plead and prove compliance with the contract, including tender of performance and that it was ready, willing and able to perform the contract. See *Chevron Phillips Chem. Co. LP v. Kingwood Crossroads, L.P.,* 346 S.W.3d 37, 61 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). Specific performance is generally not allowed if the party seeking specific performance has committed a material breach of the contract. *Aguiar v. Segal,* 167 S.W.3d 443, 450 (Tex. App.—Houston [14th Dist.] 2005, pet. denied).

8.2. Limitation on Survival Periods.

The Texas Civil Practices and Remedies Code limits the period of time for which parties can mutually agree to limit the survival of claims. The Statute states, "[A] person may not enter a stipulation, contract, or agreement that purports to limit the time in which to bring suit on the stipulation, contract, or agreement to a period shorter than two years." Tex. Civ. Prac. & Rem. Code § 16.070(a). Any clause that establishes a shorter period is void. If the clause limiting the survivability of the representations or other matters in the contract is determined to be void under the Statute, the statute of limitations of four years for breach of contract will apply. Tex. Civ. Prac. & Rem. Code, § 16.004.

Practice Tip. Make sure that the survival period for representations and warranties in the purchase agreement is not limited to less than two years and a day. If the survival period is shorter than two years and a day, make sure that the contract contains a provision regarding severability of provisions, such that if the limitation of survival is found to be invalid, the contract will be construed as if that provision had never been contained in the contract. The provision may also include a notice period that is shorter than the two-year time period for bringing suit, such that the purchaser must notify the seller of a claim within a shorter period (e.g. six months after closing) but may bring suit for any claim for which purchaser has provided notice at any time prior to the two-year period. If purchaser fails to timely provide such notice, then the argument is that the purchaser failed to give notice and, thus, does not have a claim.

8.3. Attorneys' Fees.

In a recent case from the Fourteenth Court of Appeals in Houston, *Alta Mesa Holdings, L.P. v. Ives*, 488 S.W.3d 438 (Tex. App.—Houston [14th Dist.] 2016, pet. denied), the Court decided that a limited liability company is not an "individual" or "corporation" for the purposes of recovery of attorneys' fees under Texas Civil Practice and Remedies Code § 38.001. This is following a case in 2014 where Texas Courts came to a similar conclusion for partnerships. *See Fleming & Assocs., L.L.P. v. Barton*, 425 S.W.3d 560 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). For years, Texas businesses have entered contracts that are silent on attorneys' fees, relying on the premise that the Court would award fees under the Texas Civil Practice and Remedies Code § 38.001. The plain language of the Statute allows for fees against "an individual or corporation." The Court applied a strict interpretation of the language that attorneys' fees are not recoverable by the prevailing plaintiff in a breach of contract action against a limited liability company because neither a limited liability company nor partnership is an individual or corporation. Therefore, it is strongly recommended to include express provisions for recovering attorneys' fees in a contract for sale when one of the parties is a partnership or a limited liability company.

8.4. Waiver of Jury Trial.

Since 2004, the Texas Supreme Court endorsed and expressly authorized waivers of a jury trial. *In re Prudential Ins. Co. of Am.,* 148 S.W.3d 124 (Tex. 2004). As long as the waiver is voluntary, knowing and intelligent, with full awareness of the legal consequences, a jury waiver will be enforced. *Id.* at 132.

There is no presumption against jury waivers. Therefore, the party seeking to enforce the contractual waiver does not have the burden to show the opposing party knowingly and voluntarily agreed to waive its right to a jury. *In re Bank of Am., N.A.,* 278 S.W.3d 342, 343 (Tex. 2009). A conspicuous waiver is prima facie evidence that a party knowingly and voluntarily waived its constitutional right to a jury trial. *Id.* A claim of fraudulent inducement will not avoid the jury waiver unless the allegation relates to the waiver provision itself. *Id.* at 345.

Practice Tip. To avoid the expense and delay associated with a challenge to a jury waiver, make sure it is conspicuous in a purchase and sale agreement. Large font, bolded in all capital letters should suffice. The key is to make the waiver distinct and obvious from other standard provisions in the contract.

9. EXPRESS NEGLIGENCE RULE

A party's agreement to indemnify another party for such indemnified party's own negligence is unenforceable in Texas unless the indemnity for such negligence is expressly stated within the "four corners" of the contract. *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 708 (Tex. 1987). Indemnification language should provide, for example, "Seller indemnifies Purchaser for Purchaser's own negligence" as opposed to: "Seller indemnifies Purchaser for all matters occurring prior to Closing." The latter would not indemnify Purchaser if the damages to be indemnified were caused by Purchaser's negligence. In addition, the express negligence must be conspicuous, as measured by the standard set forth in Tex. Bus. & Com. Code § 1.201(b)(10): "so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it." A term may be conspicuous if: (a) the heading is in capital letters equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; (b) the language is in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size; or (c) the language is set off from surrounding text of the same size by symbols or other marks that call attention to the language. Tex. Bus. & Com. Code § 1.201(b)(10).

The following is a sample of language which should satisfy the express negligence rule, if such language is added in the appropriate place within the indemnity provision and such language is *conspicuous* (i.e., in a different or larger font, bold-face type, capital letters, italics or underlined):

> THE INDEMNITY SET FORTH ABOVE SHALL APPLY TO DAMAGES, LOSSES OR CLAIMS CAUSED BY THE NEGLIGENCE OF PURCHASER OR PURCHASER'S PARTNERS, MEMBERS, OFFICERS, DIRECTORS, EMPLOYEES OR AGENTS.

10. TEXAS DECEPTIVE TRADE PRACTICES-CONSUMER PROTECTION ACT

10.1. DTPA General Overview.

The Texas Deceptive Trade Practices-Consumer Protection Act (DTPA) protects consumers from false, misleading and deceptive business practices, unconscionable actions and breach of warranty and to provide efficient and economical procedures to secure such protection. The DTPA provides consumers with a cause of action for deceptive trade practices without the burden of proof required in common-law fraud or breach of warranty suits. Tex. Bus. & Com. Code § 17.41 et seq.

The DTPA does not apply to entities that have assets of $25,000,000 or more as the term "Consumer" (as defined in the DTPA) does not include a business consumer that has assets of, or that is owned or controlled by a corporation or entity with assets of, $25,000,000 or more. Tex. Bus. & Com. Code § 17.45(4). Thus, the DTPA does not apply to most commercial property transactions between

sophisticated parties represented by attorneys. In addition, the DTPA does not apply to a claim arising out of a written contract if: (1) (a) the contract relates to a transaction, a project, or a set of transactions related to the same project involving total consideration by the consumer of more than $100,000; (b) in negotiating the contract, the consumer is represented by legal counsel who is not directly or indirectly identified, suggested, or selected by the defendant or an agent of the defendant; and (c) the contract does not involve the consumer's residence; or (2) a project, or a set of transactions relating to the same project, involving total consideration by the consumer of more than $500,000, other than a cause of action involving a consumer's residence. Tex. Bus. & Com. Code §§ 17.49(f) and (g).

10.2. Waiver of DTPA.

Blanket attempts to waive the protections of DTPA are against public policy; however the DTPA states that a waiver is valid and enforceable if:

(1) the waiver is in writing and is signed by the consumer;

(2) the consumer is not in a significantly disparate bargaining position; and

(3) the consumer is represented by legal counsel in seeking or acquiring the goods or services. Tex. Bus. & Com. Code § 17.42(a).

Most commercial transactions will satisfy the criteria set forth above.

In addition the waiver must be:

(1) conspicuous and in bold-face type of at least 10 points in size;

(2) identified by the heading "Waiver of Consumer Rights," or words of similar meaning; and

(3) in substantially the same form as set forth in the statute. Tex. Bus. & Com. Code § 17.42(c).

11. WATER DISTRICTS

11.1. Water District General Overview.

Properties in Texas which are outside of municipal boundaries may be part of a Water District (pursuant to the Texas Water Code or the Texas Constitution, *See* Tex. Water Code § 49 and article III, or Section 59, article XVI of the Texas Constitution). Water Districts include municipal utility districts (MUDs), water control and improvement districts (WCIDs), special utility districts (SUDs) and river authorities. A Water District is a local, governmental entity that provides limited services to its customers and residents.

A general guide to Water Districts can be found on the website of the Texas Commission on Environmental Quality at: https://www.tceq.texas.gov/waterdistricts.

MUDs provide water, sewage, drainage and other services and are legally empowered to engage in conservation, irrigation, electrical generation, firefighting, solid waste collection and disposal (including recycling) and recreational activities (such as parks, swimming pools and sports courts). MUDs cannot issue bonds to pay for parks or recreational facilities but can charge user fees. WCIDs have broad authority to supply and store water for domestic, commercial and industrial use, to operate sanitary wastewater systems and to provide irrigation, drainage and water quality services. SUDs provide water, wastewater and firefighting services but are not authorized to levy taxes. River Authorities operate major reservoirs and sell untreated water on a wholesale basis, are responsible for flood control,

soil conservation and protecting water quality and may generate hydroelectric power, provide retail water and wastewater services and develop recreational facilities.

There are required statutory notices and other documentation related to Water Districts with respect to the transfer of any property which is located in a Water District. The authors recommend that the Seller of property located within a Water District engage specialized water district counsel.

11.2. Water District Statutory Notices (Tex. Water Code § 49.452).

Any person who proposes to sell or convey real property located in a district created under Chapter 49 of the Texas Water Code that is providing water, sanitary sewer, drainage and flood control or protection facilities or services, or any of these facilities or services that have been financed or are proposed to be financed with bonds of the Water District payable in whole or part from taxes of the Water District, or by imposition of a standby fee, is required to deliver, and the Purchaser is required to sign, one of three the statutory notices relating to the tax rate, bonded indebtedness, or standby fees of the Water District. This notice shall be given to the Purchaser *prior to execution of a binding contract* either separately or as an addendum or paragraph of a purchase contract. It may be argued that the execution of a binding contact does not occur until after all option and feasibility periods have expired. The proper notice form is based upon whether the property is within the City limits, outside the City limits but within the extraterritorial jurisdiction or home-rule municipality or outside the City limits and outside the extraterritorial jurisdiction or home-rule municipality. Notice is not required for transfers by foreclosure or deed in lieu of foreclosure, estate-related transfers or transfer to a governmental entity.

In the event a contract of purchase and sale is entered into without Seller providing the notice, Purchaser shall be entitled to terminate the contract at any time prior to the notice being given. Tex. Water Code §49.452(f). Purchaser shall sign the notice or purchase contract including such notice to evidence the receipt of notice.

In addition, at Closing, a separate copy of such notice with current information shall be executed and acknowledged by Seller and Purchaser and recorded in the deed records of the county in which the property is located. If a conveyance is made without the required notices, Purchaser may institute a suit for damages in the amount of all costs relative to the purchase of the property plus interest and reasonable attorneys' fees (in which case, upon payment of all damages to Purchaser, Purchaser shall reconvey the property to Seller) or for damages in an amount not to exceed $5,000, plus reasonable attorneys' fees. Tex. Water Code §§ 49.452(o) and (p).

Practice Tip. It is helpful to review a recent tax statement from the property or a prior title commitment (Schedule C) or tax certificate in order to determine if the property is located in a Water District. If the notice is not provided in the purchase agreement, itself, but the Seller or counsel determine after contract execution but prior to the expiration of the option period that the property is located within a Water District, notice should be provided to Purchaser before the expiration of the option period.

12. STATUTORY DISCLOSURES

Texas statutes have certain requirements regarding Seller disclosures in the purchase agreement and/or at Closing. Some of these are discussed above (see, e.g., Roll-Back Taxes and Water District disclosures). The following are additional required disclosures:

12.1. Annexation Notice (Tex. Prop. Code § 5.011).

Notice must be provided with respect to the transfer of any property located outside the boundaries of a municipality before the date the purchase agreement binds the Purchaser and may be given separately or as part of the contract. Notice is not required for transfers by foreclosures or deeds in lieu of foreclosure; transfers in bankruptcy; transfers pursuant to the probating of an estate; leasehold interests; security interests; mineral interests; transfers to a governmental entity; transfers to co-owners of the property; transfers to a spouse or person in the lineal line of consanguinity; or transfers of real property that is located wholly within the municipality's boundaries.

If the contract is entered into without Seller providing the notice, Purchaser may terminate the contract for any reason on or before the earlier of: (1) seven days after the date Purchaser receives the notice; or (2) the date the transfer occurs.

12.2. Water and Sewer Service Notice (Tex. Water Code § 13.257).

For property located within a certificated service area of a utility service provider (a retail public utility other than a Water District), Seller and Purchaser must execute a notice regarding the possible extension of water or sewer services. The notice must be executed prior to the date the purchase agreement binds Purchaser and may be completed as part of the purchase agreement or via a separate document. At Closing, Seller and Purchaser must execute and acknowledge a separate copy of the notice and record such notice in the real property records of the county in which the property is located.

Notice is not required for transfers by foreclosures or deeds in lieu of foreclosure; transfers in bankruptcy; transfers pursuant to the probating of an estate; leasehold interests; security interests; mineral interests; transfers to a governmental entity; transfers to co-owners of the property; transfers to a spouse or person in the lineal line of consanguinity; or transfers of real property that is located wholly within the municipality's boundaries or of real property that receives water or sewer service from a utility service provider on the closing date.

If Seller fails to provide the notice, Purchaser may terminate the contract; however, if Seller provides the notice at or before the Closing and Purchaser elects to close despite Seller's failure to provide the notice, Purchaser is deemed to have waived its right to terminate and recover damages. If a conveyance is made without the required notices, Purchaser may institute a suit for damages in the amount of all costs relative to the purchase of the property plus interest and reasonable attorneys' fees (in which case, upon payment of all damages to Purchaser, Purchaser shall reconvey the property to Seller) or for damages in an amount not to exceed $5,000, plus reasonable attorneys' fees.

12.3. Open Beaches Act Notice (Tex. Nat. Res. Code § 61.025).

A person who transfers property located seaward of the Gulf Intracoastal Waterway to its southernmost point and then seaward of the longitudinal line also known as 97 degrees, 12', 19" which runs southerly to the international boundary from the intersection of the centerline of the Gulf Intracoastal Waterway and the Brownsville Ship Channel must include in any contract for conveyance a statement in substantially the form set forth in the Texas Natural Resources Code. If the statement is not included in the contract, the statement must be delivered to, and receipt thereof acknowledged by, Purchaser not later than ten calendar days prior to Closing. Failure to provide such notice is grounds for Purchaser

to terminate the contract, and upon termination, any earnest money shall be returned to Purchaser. In addition, failure to provide such notice is deemed to be a deceptive trade under the DTPA.

Note that notice is not required for transfers of mineral, leasehold or security interests.

12.4. Coastal Area Property Notice (Tex. Nat. Res. Code § 33.135).

A person who transfers property adjoining and abutting the tidally influenced waters of the State of Texas must include a notice thereof as a part of the contract. If the statement is not included in the contract, the statement must be delivered to Purchaser for execution and acknowledgment of receipt before the conveyance instrument is recorded. Failure to provide such notice is grounds for Purchaser to terminate the contract, and upon termination any earnest money shall be returned to Purchaser. In addition, failure to provide such notice is deemed to be a deceptive trade under the DTPA.

Note that notice is not required for transfers of mineral, leasehold or security interests.

12.5. Underground and Aboveground Storage Tank Notice (Tex. Admin. Code § 334.9 of Title 30).

Any person who sells or otherwise legally conveys a tank (or tank system) which is designed or intended to be installed as an underground storage tank (UST) or an aboveground storage tank (AST) must provide Purchaser with written notification of a tank owner's obligations relative to the Texas Commission on Environmental Quality's (TCEQ) tank registration, compliance self-certification and construction/installation notification provisions under Tex. Admin. Code §§ 334.7, 334.127, 334.8, 334.6 and 334.126. The notice required pursuant to this statute applies to the transfer of real property where USTs or ASTs are located. The notice must be provided prior to the transfer of the Property.

The written notice must include the names and addresses of Seller and Purchaser, the number of tanks involved, a description of each tank (capacity, tank material and product stored, if applicable) and the TCEQ's designated facility identification number (if the entire facility is being conveyed). Please refer to Tex. Water Code § 26.346(a) for exceptions to registration.

12.6. Agricultural District Notice (Tex. Agric. Code § 60.063).

Any person who transfers property located in a Texas Agricultural Development created under the Agricultural Development District Act (an Agricultural District) must give written notice to Purchaser that the property is located in the Agricultural District. The notice must be given to Purchaser prior to execution of a binding contract of sale and purchase either as paragraph or addendum of a purchase contract or through a separate document, and Purchaser shall sign the notice as evidence of receipt. At Closing, Purchaser and Seller shall execute and acknowledge a separate copy of the notice with current information about the district and its right to impose assessments on land within its boundaries, and such notice shall be recorded in the deed records of the county in which the property is located.

The form of notice shall be prescribed by the board of the applicable Agricultural District.

Notice is not required if: (1) Seller is obligated under a written contract to furnish Purchaser with a title insurance commitment before Closing; and (2) Purchaser is entitled to terminate the contract

because the property is located in an Agricultural District. In addition, notice is not required if there is no notice creating the Agricultural District in the real property records.

12.7. Notice of Water Level Fluctuations (Tex. Prop. Code § 5.019).

A Seller of property adjoining an impoundment of water, including a reservoir or lake, constructed and maintained under Chapter 11 of the Texas Water Code, that has a storage capacity of at least 5,000 acre-feet at the impoundment's normal operating level shall provide a notice to Purchaser prior to the effective date of the purchase agreement binding the Purchaser to purchase the Property.

If the contract is entered into without the notice being provided, Purchaser may terminate the contract on or before seven days after Purchaser receives the notice from Seller or otherwise receives the information that would have been set forth in a notice. If Seller fails to provide the notice before Closing and Seller had actual knowledge that the water level fluctuates for various reasons, Purchaser may bring an action against Seller for misrepresentation.

12.8. Deed Restrictions Notice (Houston only).

Texas Local Government Code Section 212.155 provides that the governing body of the municipality may require, in the manner prescribed by law for official action of the municipality, any person who sells or conveys restricted property located inside the boundaries of the municipality, to give the Purchaser written notice of the restrictions and notice of the municipality's right to enforce compliance. Tex. Local Gov't. Code § 212.155. To the authors' knowledge, Houston is the only municipality in the State of Texas which has made such election.

The notice must be executed by both Purchaser and Seller and recorded in the real property records of the county in which the property is located. Tex. Local Gov't. Code § 212.155; *see also* Houston, Tex., Code of Ordinances ch. 10, art. XV, § 10-556(b). The notice must contain the following: (1) the name of each purchaser; (2) the name of each seller; (3) a legal description of the property; (4) the street address of the property; (5) a statement that the property is subject to deed restrictions and the municipality is authorized to enforce the restrictions; (6) a reference to the volume and page, clerk's file number, or film code number where the restrictions are recorded; and (7) a statement that provisions that restrict the sale, rental, or use of the real property on the basis of race, color, religion, sex or national origin are unenforceable. The form of the notice shall be as set forth in Exhibit A to Ordinance No. 89-1312. Houston, Tex., Code of Ordinances ch. 10, art. XV, § 10-556(b).

Notice is not required for conveyances with respect to foreclosures or deeds in lieu of foreclosure, deeds of trust, auction sales conducted by a public official pursuant to an order of a court of competent jurisdiction or sales to a governmental entity. Houston, Tex., Code of Ordinances ch. 10, art. XV, § 10-556(a).

Failure of Seller to deliver the notice is a misdemeanor punishable by up to a $500 fine; however, such failure does not affect the validity or enforceability of the sale or conveyance of the property or the validity or enforceability of restrictions covering the property. Houston, Tex., Code of Ordinances ch. 10, art. XV, § 10-556(c); *see also* Tex. Local Gov't. Code § 212.155(f).

Practice Tip. Request the title company to provide the then-current form of notice.