



# Drafting a Clear As-Is Agreement

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# Topics

- 1-What as-is means
- 2-Case law
- 3-Elements of an as-is clause
- 4-Drafting tips



1-What does as-is mean?



# What does as-is mean to:

- Seller: I don't have to do anything
- Buyer: The seller must know something
- Courts: See cases
- FAR and Bar: See forms



## The as-is seller thinks:

- I don't have to fix: appliances, roof,...
- I don't have to check for: termites, zoning,...
- I don't have to pay for:  
title defects, encroachments,...
- I just want to sign a deed & cash a check
- I never want to hear from the buyer again



## The as-is buyer thinks:

- There must be something wrong
- Let's hire inspectors to find out
- I want to cancel if I find something
- This should not take much time or money



2-What does case law say about as-is contracts?



## *Johnson v. Davis*

480 So.2d 625 (Fla.1985)

- Where the seller of a home knows of facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer. This duty is equally applicable to all forms of real property, new and used.
- Said goodbye to caveat emptor...





## *Casey v. Cohan*

740 So.2d 59

(Fla. 4th DCA 1999)

- Johnson's application is limited to non-commercial real property transactions.
- Caveat emptor remains for commercial.



## *Solorzano v. First Union*

896 So.2d 847

(Fla.App. 4<sup>th</sup> DCA 2005)

- Inclusion of an “as is” clause in a contract for the sale of residential real property does not waive the duty imposed upon a seller under *Johnson*.
- An “as is” clause in a contract for sale of real property cannot be relied upon to bar a claim for fraudulent misrepresentation or fraudulent nondisclosure.
- As-is does not mean fraud is ok.




## *Pick Kwik v. Tenser*

407 So.2d 216

(Fla.App. 2d DCA 1981)

- If one party has the unrestricted right to terminate the contract at any time, that party makes no promise at all and there is not sufficient consideration for the promise of the other.
- A bilateral contract terminable at the will of one party is not binding, and may be terminated by either party without liability for payment of damages.
- Illusory contract = unrestricted right to cancel



# Warehouse Assoc. v. Celotex

## 192 S.W.3d 225

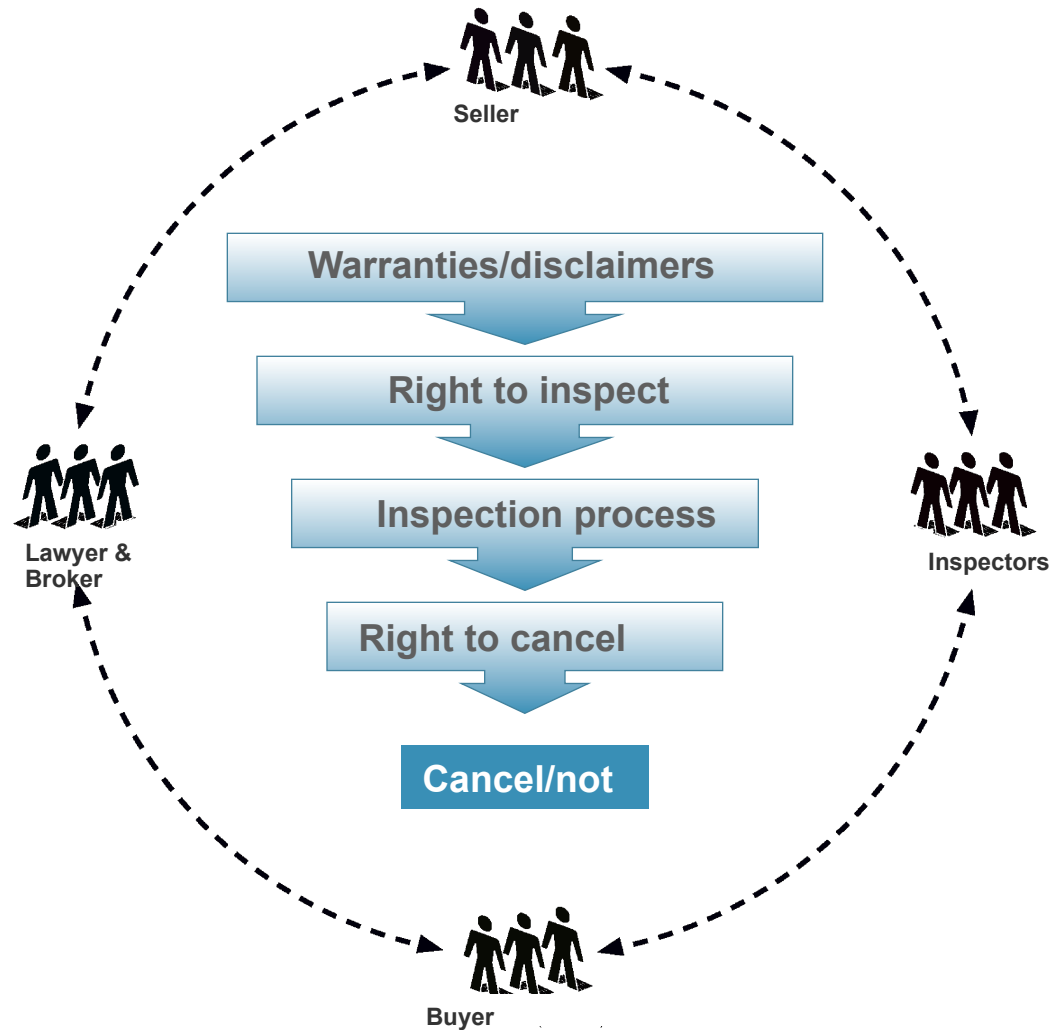
### (Tex. App. Ct. 2006)

- OTHER THAN THE WARRANTIES OF TITLE CONTAINED IN THE DEED, PURCHASER ACKNOWLEDGES AND AGREES THAT **SELLER HAS NOT MADE, DOES NOT MAKE AND SPECIFICALLY DISCLAIMS** ANY REPRESENTATIONS, WARRANTIES, PROMISES, COVENANTS, AGREEMENTS OR GUARANTIES OF ANY KIND OR CHARACTER WHATSOEVER, WHETHER EXPRESS OR IMPLIED, ORAL OR WRITTEN, PAST, PRESENT OR FUTURE, OF, AS TO, CONCERNING OR WITH RESPECT TO **(A) THE NATURE, QUALITY OR CONDITION OF THE PROPERTY, INCLUDING WITHOUT LIMITATION, THE WATER, SOIL AND GEOLOGY**, (B) THE INCOME TO BE DERIVED FROM THE PROPERTY, (C) THE SUITABILITY OF THE PROPERTY FOR ANY AND ALL ACTIVITIES AND USES WHICH PURCHASER MAY CONDUCT THEREON, (D) THE COMPLIANCE OF OR BY THE PROPERTY OR ITS OPERATION WITH ANY LAWS, RULES, ORDINANCES OR REGULATIONS OF ANY APPLICABLE GOVERNMENTAL AUTHORITY OR BODY INCLUDING WITHOUT LIMITATION, THE AMERICANS WITH DISABILITIES ACT AND ANY RULES AND REGULATIONS PROMULGATED THEREUNDER OR IN CONNECTION THEREWITH, AND THE TEXAS ARCHITECTURAL BARRIERS ACT AND ANY RULES AND REGULATIONS PROMULGATED THEREUNDER OR IN CONNECTION THEREWITH, (E) THE HABITABILITY, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OF THE PROPERTY, OR (F) ANY OTHER MATTER WITH RESPECT TO THE PROPERTY, AND SPECIFICALLY THAT SELLER HAS NOT MADE, DOES NOT MAKE AND SPECIFICALLY DISCLAIMS ANY REPRESENTATIONS REGARDING SOLID WASTE AS DEFINED BY THE U.S. ENVIRONMENTAL PROTECTION AGENCY REGULATIONS AT 40 C.F.R., PART 261 **OR THE DISPOSAL OR EXISTENCE, IN OR ON THE PROPERTY, OF ANY HAZARDOUS SUBSTANCE, AS DEFINED BY THE COMPREHENSIVE ENVIRONMENTAL RESPONSE COMPENSATION AND LIABILITY ACT OF 1980, AS AMENDED, AND APPLICABLE STATE LAWS, AND REGULATIONS PROMULGATED THEREUNDER. PURCHASER FURTHER ACKNOWLEDGES AND AGREES THAT HAVING BEEN GIVEN THE OPPORTUNITY TO INSPECT THE PROPERTY, PURCHASER IS RELYING SOLELY ON ITS OWN INVESTIGATION OF THE PROPERTY AND NOT ON ANY INFORMATION PROVIDED OR TO BE PROVIDED BY SELLER.** PURCHASER FURTHER ACKNOWLEDGES AND AGREES THAT ANY INFORMATION PROVIDED OR TO BE PROVIDED WITH RESPECT TO THE PROPERTY WAS OBTAINED FROM A VARIETY OF SOURCES AND THAT SELLER HAS NOT MADE ANY INDEPENDENT INVESTIGATION OR VERIFICATION OF SUCH INFORMATION. PURCHASER FURTHER ACKNOWLEDGES AND AGREES THAT THE **SALE OF THE PROPERTY AT CLOSING SHALL BE MADE ON AN "AS IS, WHERE IS" CONDITION AND BASIS "WITH ALL FAULTS"**.
- Now on appeal to Texas Supreme Court
- Fraud in inducement claim might get around this clause



3-What are the elements of an as-is clause?

# As-is clause elements





# A-Warranties or disclaimers

- **As Is.** This sale is “as is”. Buyer hereby waives any and all rights and claims against Seller and its predecessors in title as a result of the condition of the Property. Seller specifically disclaims, and Buyer hereby waives, any and all express or implied warranties, representations, and liability regarding the following, and Seller has not made and does not make any representations, warranties or statements of any kind regarding the following: the condition, quality or fitness of the Property; the past, present or future use of the Property; the Property's compliance or noncompliance with codes, laws or regulations; the past, present or future zoning of the Property; the feasibility or fitness of the Property for Buyer's intended use of the Property; surface, subsurface, air, water, waste, and environmental matters of any kind pertaining to the Property; claims, demands and liability under federal, state and local environmental laws, rules and regulations. The Inspection Period is being provided so that Buyer can fully investigate the Property because no representations, statements, assurances, guarantees, warranties or other encouragement are being given by Seller in any way with regard to the Property. Any statements that are not written in this Contract, whether such statements were made by Seller or by others, are hereby disclaimed, and Buyer hereby agrees that it is not relying upon any such statements in executing this Contract. Seller shall not be responsible to replace, remedy, mitigate, correct, cure or repair any matters found by Buyer to be deficient. Seller has not made and will not make an investigation of the Property. Buyer agrees that Seller has no duty to undertake an investigation to discover defects, conditions or other physical matters. This paragraph survives the closing.



# B-Right to inspect

- **Buyer's Right to Inspect Property.** Buyer may have the Property inspected by Buyer and by such licensed contractors, pest control operators, architects, geologists, engineers, and consultants as Buyer chooses in order to make such inspections of the Property as Buyer deems necessary or appropriate in determining, among other things, whether the Property has any physical condition which precludes Buyer from using the Property for its intended purpose. All such inspections shall take place between the Date of this Contract and \_\_\_\_\_, 20\_\_\_\_ (“Inspection Period”). Buyer shall pay for all such inspections and for any damage caused by such inspections. Buyer shall arrange in advance with Seller for inspection times that are convenient for all parties, and the inspections shall be conducted in a manner that does not disturb Buyer's peaceful possession of the Property. Buyer shall furnish Seller, upon reimbursement of the exact cost of said copies, copies of all reports and data collected during the Inspection Period. Buyer and the persons who perform this work for Buyer shall comply with any and all laws, rules, orders, permits and ordinances of federal, state, county, city and other agencies in doing this inspection work, including but not limited to environmental laws. Buyer hereby agrees to indemnify, defend and hold Seller harmless from any and all claims, demands, damages, fees and expenses arising from the inspections and other work on the Property performed by or at the request of Buyer.





# C-Inspection Process

- **No Construction Liens Through Buyer.** Buyer shall have no power or authority to permit construction, mechanics' or materialmen's liens to be placed upon the Property in connection with its inspections or otherwise. The interest of the Seller in the Property shall not be subject to liens for work done by or for Buyer. Seller shall not be liable for any work, labor or materials furnished to the Property by or through Buyer or anyone claiming through Buyer. No construction or mechanics liens or other liens for any such work, labor or materials shall attach or affect the interest of the Seller in and to the Property.
- **Environmental Investigation.** If Buyer undertakes an investigation of the environmental conditions of the Property, Buyer agrees to provide Seller, upon reimbursement of the exact cost of said copies, copies of all reports and analyses resulting from such investigation. Buyer further agrees that any and all information obtained from such investigation shall remain confidential and shall not be disclosed to government agencies or other third parties without the express written authorization of Seller, except as otherwise expressly required by federal or state law, statutes, rules or regulations or by final court order binding on Seller.



# C-Inspection Process

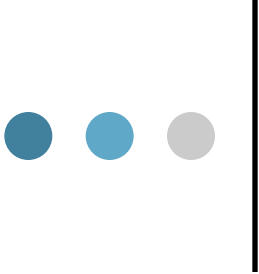
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- **No Wells by Buyer.** No wells shall be drilled, installed, constructed, closed or abandoned on the Property by or at the direction of Buyer before closing without Seller's express prior written consent and without complying with all applicable permits, orders, rules and laws. No soil or samples shall be removed from the Property without Seller's express prior written consent. If Buyer requests any such consent, Buyer must state what type of drilling will be done, what type of samples will be taken, and who will do said work. If Seller consents to any such work, Buyer will for pay for such work and for restoring the Property. Seller has the right to approve or disapprove the location of all wells and samples, and Buyer must provide Seller a survey designating the location of all wells and samples. Seller may add additional conditions to its consent.
- **Cooperation by Seller.** Seller shall provide a reasonable amount of cooperation to Buyer during the Inspection Period. Buyer shall reimburse any reasonable expenses incurred by Seller in providing such cooperation. Seller shall not be required to do anything that would affect title, use or interest in the Property or that would affect the present or future use, value, permitting, zoning, land use, or regulation of the Property, and Buyer shall not do any of these things, either. Buyer has no right to apply for any change in zoning, land use, permit or otherwise with respect to the Property prior to closing.



# D-Right to Cancel

- **Buyer's Right to Cancel During Inspection Period.** If Buyer, in its sole discretion, determines that the Property, for any reason, is unsuitable for Buyer's purposes or that the Property is not feasible for Buyer's intended use or that the appropriate government agencies are not likely to approve the Buyer's proposed site plan for its intended use of the Property or that the Buyer's intended project is not financially feasible for Buyer, then Buyer may cancel this Contract by delivering written notice to Seller on or before the last day of the Inspection Period (\_\_\_\_\_, 20\_\_), in which case the Escrow Deposit shall be refunded to the Buyer and this Contract shall be null and void. Buyer may not cancel the Contract under this paragraph after the last day of the Inspection Period. Seller shall not be liable for any defects. Buyer's only remedy shall be cancellation of the Contract during the Inspection Period.



4-What are some drafting tips for an as-is clause?



# Drafting Tip #1: Talk to your client

- Seller or Buyer
- Risk-taker or risk averse
- Sophisticated or naïve
- Patent defects
- Latent defects



# Drafting Tip #2: Know your “standard” forms

- FAR/Bar-7s Rev.7/04 Standards:
  - A: Seller cures title defects
  - B: Seller cures survey defects
  - N: Seller warranty; buyer inspection
  - O: Seller restores fire damage
  - W: No facts known to seller materially affecting value of property which are not readily observable by buyer or have not been disclosed to buyer
  - X: Seller maintain property



# Drafting Tip #2:

## Know your “standard” forms

[CONTINUED]

- FAR/Bar Asls-1 Rev.7/04 Standards:
  - A: Seller cures title defects
  - B: Seller cures survey defects
  - N: Seller warranty deleted; buyer inspection in XIV
  - O: Seller restores fire damage
  - W: No facts known to seller materially affecting value of property which are not readily observable by buyer or have not been disclosed to buyer; no warranty; no govt notice
  - X: Seller maintain property
  - Z: Buyer waives claims



# Drafting Tip #2:

## Know your “standard” forms

[CONTINUED]

- FAR-8 Rev. 10/04:
  - 10(a): Seller cures title defects
  - 10(b): Seller cures survey defects
  - 8(a): Seller warranty; buyer inspection
  - 9: Seller restores fire damage
  - 7: No facts known to seller materially affecting value of property which are not readily observable by buyer or have not been disclosed to buyer
  - 8: Seller maintain property



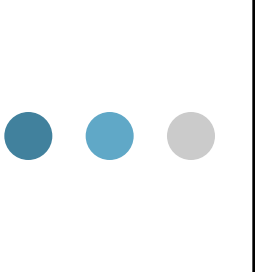


# Drafting Tip #2:

## Know your “standard” forms

[CONTINUED]

- FAR ASIS-8 Rev. 10/04 Standards:
  - 10(a): Seller cures title defects
  - 10(b): Seller cures survey defects
  - 8(a): **Seller warranty deleted**; buyer inspection remains
  - 9: Seller restores fire damage
  - 7: No facts known to seller materially affecting value of property which are not readily observable by buyer or have not been disclosed to buyer
  - 8: Seller maintain property



## Drafting Tip #3: Outline the as-is clause

- Include all 4 elements
- Include special elements for your deal
- Think about your client
- Review forms books, online forms and past deals



# Drafting Tip #4: Avoid repetition of concepts

- Repeat yourself only when repetition is necessary to improve clarity.
- Ambiguity is created by saying the same thing more than once; it is almost impossible to say it twice without creating ambiguity. Only if the concept is a difficult one should you write it in more than one way.
- If you use an example to clarify a difficult concept or formula, be sure that all possible meanings are considered and that the example is accurate and consistent with the concept as worded.



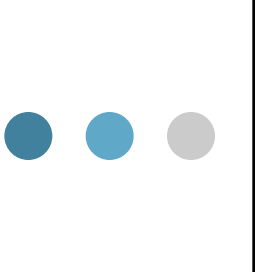
## Drafting Tip #5: Repeat words for consistency

- Using words that are similar but not the same creates ambiguity
- Repeating the same idea differs from repeating the same word



## Drafting Tip #6: Use dates, not days

- Dates are clear and direct
- Days requiring counting, computing, and thinking



# Drafting Tips #7-10: Use clear writing technique

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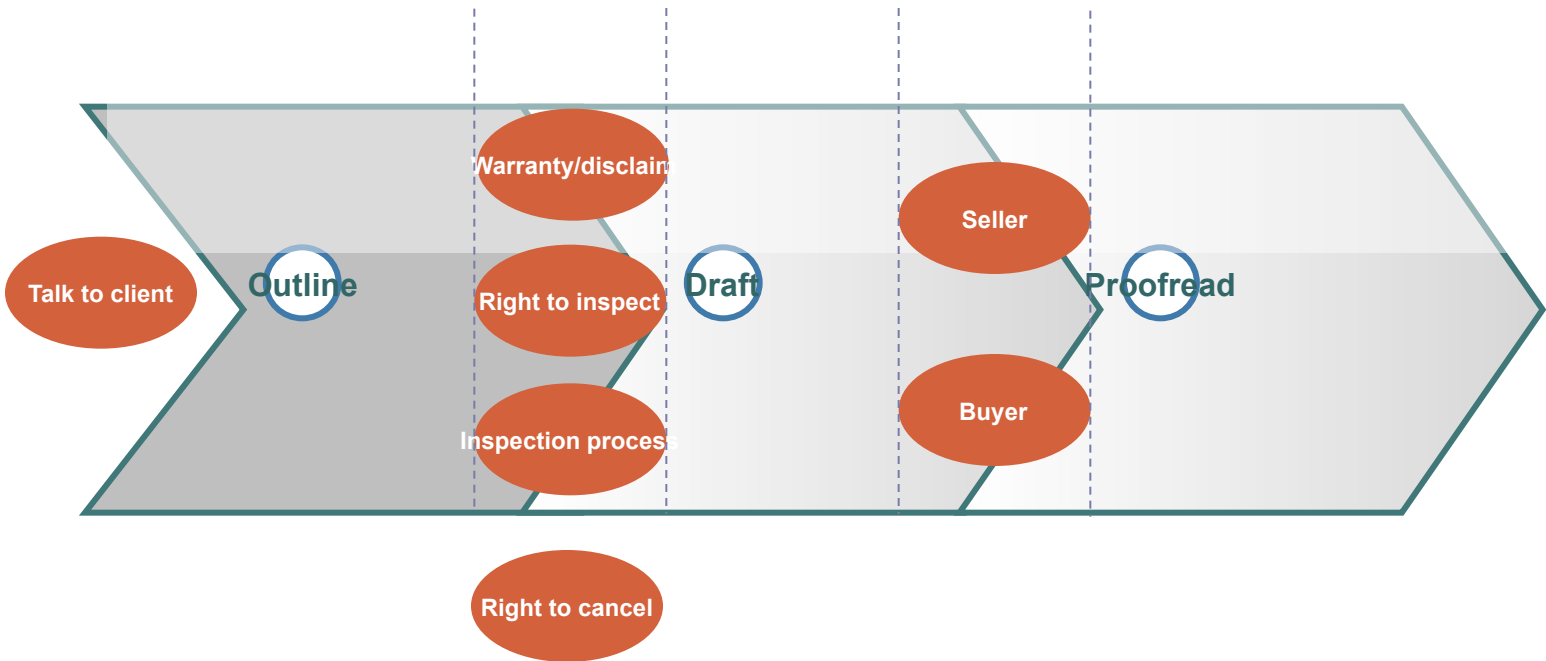
- Short**      ➤ Buyer must cancel the contract, if at all, by May 1, 2007.
  - Direct**      ➤ Buyer shall not install wells under any circumstances.
  - Active tense**      ➤ Seller warrants nothing.
  - Avoid ambiguity**      ➤ “Infestation” means there are active termites and active organisms.
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# Topics covered

- 1-What as-is means
- 2-Case law
- 3-Elements of an as-is clause
- 4-Drafting tips

# Nail your as-is clause







# Contracts Articles & Books

by Jim Martin

at [www.jamesmartinpa.com](http://www.jamesmartinpa.com)

- **Fifty Tips for Writing the Contract That Stays Out of Court** (ALI-ABA Practical Real Estate Lawyer 2000; Fla Bar Journal 2000)
- **West's Florida Legal Forms: Real Estate, Business Organizations, and Specialized Forms** (West Publishing 1991-1995)
- **Florida Jur Forms** (West Supplement Editor 1998, 1999)
- **Be Careful Using Form Real Estate Contracts** (Fla Bar News 2004)
- **Execution of Florida Legal Documents: The Requirements for Recording and Notarizing Documents in Florida** (West 1999)
- **A Ban on "Adult Only" Communities and Much More: The Fair Housing Amendments Act of 1988** (ABA Probate & Property 1989)
- **Drafting the Contract or Settlement Agreement That Stays Out of Court** (ABA The Brief, Best Articles Published by ABA 2003)
- **The Lawyer's Conscience: Professionalism in Writing Contracts and Wills for a Mechanistic World** (ALI-ABA Practical Real Estate Lawyer 1999)