

Waive Goodbye to Fraud Claims: Negotiating Commercial Real Estate Contracts with Intention

By Dallas Jagneaux Boyle

Whether you are drafting a purchase and sale agreement, a lease, or a loan agreement, the difference between preserving or waiving fraud claims can come down to a few sentences.

This brings us to the question at hand, what is fraud and why do we care? Fraud is the intentional misrepresentation or concealment of a material fact, made to induce another party's reliance, resulting in damages. As for why we care, in addition to the remedies available under the contract itself, Texas courts allow punitive damages for fraud, which can be as much as two times the amount of economic damages.¹

So how can real estate professionals protect themselves against fraud claims? Purchase sale agreements and leases often have provisions limiting the ability to sue for representations made during negotiations—these clauses regularly appear in the form of “no representations or warranties” or “as-is, where-is” clauses, but whether those magic words prevent a fraud claim varies.

The Texas Supreme Court provides instruction on when fraud claims may be waived. This article outlines (1) which provisions actually work and why, and (2) the five factors that Texas courts consider to decide whether fraud has been contractually waived.

Rely on “No-Reliance”

Because Texas courts highly favor freedom of contract, courts will enforce a well-drafted no-reliance or waiver-of-reliance clause when the language is clear and the circumstances surrounding the deal pass muster. However, a standard merger, “entire agreement,” “as-is,” or “no representations” clause will not waive a fraud claim because it does not unequivocally dispel the key element of fraud—reliance.

In one Texas Supreme Court case, a tenant signed a retail lease with standard “representations” and “entire agreement” provisions (“*[t]enant acknowledges that [l]andlord has made no representations ... except as expressly set forth herein*”; “*[t]his lease constitutes the entire agreement ...*”).² When a latent defect later surfaced, the landlord argued the above clauses barred the tenant’s fraud claim.³ The Texas Supreme Court held that generic merger or entire-agreement language does not clearly disclaim reliance and therefore does not negate the reliance element of a fraud claim because the language did not make clear that tenant did not rely on landlord’s representations.⁴

In another case, the Texas Supreme Court held the following provision waived fraud claims:

“... 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

¹ See Civ. Practice & Remedies Code Section 41.008

² See *Italian Cowboy Partners, Ltd. v. Prudential Insurance Co. of America*, 341 S.W.3d 327 (Tex. 2011).

³ *Id.*

⁴ *Id.*

her in executing this release, and that **none of us is relying upon any statement or representation** of any agent of the parties being released hereby. Each of us is relying on his or her own judgment. . .”⁵

A basic “entire agreement” or “no representations and warranties” provision will not eliminate the risk of a fraud claim. Therefore, if the intent is to waive fraud, the agreement must contain a carefully drafted disclaimer of reliance.

Factoring in the Nature of the Deal

Texas courts will also look beyond the plain language of a contract and consider the nature of the parties’ relationship and other facts surrounding the deal. In deciding whether fraud has been waived, courts look at the following five factors: ⁶

- 1) Was the “no-reliance” provision clear and unequivocal? If a party clearly states that it has disclaimed all reliance, Texas courts are inclined to apply the provision exactly and hold that the parties meant they didn’t rely.
- 2) Was the contract heavily negotiated? If the details of the agreement were mutually contemplated by the parties (ideally with track changes, drafts, and emails showing bargaining) and not merely boilerplate provisions, this factor weighs in favor of waiving fraud. Courts may assume that the parties had the opportunity to object to a disclaimer of reliance.
- 3) Were the parties represented by an attorney? If a party was not represented by counsel, a fraud claim might not be waived. Courts may assume that a party did not realize what it was agreeing to.
- 4) Was the transaction an arm’s-length deal between sophisticated business parties? If the parties to the deal are experienced in real estate transactions and therefore can be expected to know their way around a real estate contract, this factor weighs in favor of waiving fraud.
- 5) Does the disclaimer of reliance language go to the heart of the bargain? If the provision specifically addresses the subject matter of the alleged misrepresentation, this factor weighs in favor of waiving fraud.

Key Takeaways

In Texas commercial real estate contracts, the language and the surrounding circumstances determine whether fraud claims are waived. The Texas Supreme Court’s decisions illustrate that merger provisions standing alone do not accomplish waiver and that a clear and negotiated no-reliance clause reviewed by an attorney is generally required for a fraud waiver

⁵ *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 180 (Tex. 1997).

⁶ *See Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 175 (Tex. 1997); *See also Forest Oil Corp. v. McAllen*, 268 S.W.3d 60 (Tex. 2008).

to be effective. When contract drafting begins with the factors discussed above, the resulting agreement will either preserve fraud claims or disclaim them in a manner consistent with the intent of the drafters.

Always be sure to have a lawyer review your contracts to assess the language for potential risks.