

**TOP 10 EMERGING ISSUES FACING TRIAL LAWYERS IN  
BUSINESS TORTS AND COMMERCIAL LITIGATION**

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**I. Can parties now contract away their own fraud? The enforceability of a waiver-of --reliance provision in agreements as conclusively negating a later raised claim for fraudulent inducement. *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51 (Tex. 2008)**

In its most recent decision on the enforceability of a waiver-of-reliance provision in an agreement, the Texas Supreme Court has made it clear that it is trending toward barring fraud claims where parties previously agreed in writing that they are not relying upon one another in the transaction at issue. If the parties are operating at arms length through their own lawyers, and a waiver-of-reliance provision is included in the agreement, it is now increasingly difficult to maintain a claim for fraud even if there are fact issues to the contrary. *See Forest Oil Corp. v. McAllen*, 268 S.W.3d 51 (Tex. 2008).

The line of cases preceding *Forest Oil* starts with *Prudential Insurance Co. of America v. Jefferson Associates, Ltd.*, 896 S.W.2d 156, 161-62 (Tex. 1995). In *Prudential*, Goldman purchased the Jefferson Building in Austin from The Prudential Insurance Company of America (“Prudential”). *Id.* at 159. Approximately two years later, Goldman discovered that the building

contained asbestos fireproofing. *Id.* Goldman sued Prudential. *Id.* It was Goldman’s contention that Prudential misrepresented the condition of the building and failed to disclose that it contained asbestos which undermined its value. *Id.* In response, Prudential argued that Goldman purchased the building “as is”; therefore, he could not recover damages. *Id.*

The Texas Supreme Court held that Goldman’s agreement to purchase the Jefferson Building “as is” precluded any argument that Prudential proximately caused any alleged damages. *Id.* at 161. *Prudential* reasoned that, where, as here, there is an agreement to purchase something “as is”, the buyer consents to making his own appraisal and accepts any risk that he may be incorrect. *Id.* [citations omitted]. Because Goldman acknowledged that he was not relying upon any representation with respect to the condition of the property, the “as is” agreement negated any claim that Prudential caused his injury. *Id.* But the Texas Supreme Court did hold that an “as is” agreement does not preclude a fraudulent inducement claim. *Id.* at 162. *Prudential* held:

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A seller cannot have it both ways: he cannot assure the buyer of the condition of a thing to obtain the buyer's agreement to purchase 'as is', and then disavow the assurance which procured the 'as is' agreement. Also, a buyer is not bound by an "as is" agreement if he is entitled to inspect the condition of what is being sold but is impaired by the seller's conduct. A seller cannot obstruct an inspection for defects in his property and still insist that the buyer take it 'as is'. In circumstances such as these an 'as is' agreement does not bar recovery against the seller.

*Id.* [citations omitted].

*Prudential* provided two noteworthy exceptions to the enforceability of as-is or a waiver-of-reliance provision in an agreement. *Id.* The first exception is the inducement of the injured party to execute an agreement by the concealment of information by the very party seeking to enforce the language in the agreement. *See id.* The second exception is that a purchaser is not bound by an "as is" agreement if he is entitled to inspect the condition of what is being sold but is impaired from doing so by the seller's conduct. *Id.* Thus, a seller cannot obstruct an inspection for defects in his property and still insist that the purchaser take it "as is". *Id.* In these two limited circumstances, an "as is"

agreement does not bar recovery against the purchaser. *Id.*

Two years after *Prudential* was decided, the Texas Supreme Court issued its opinion in *Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171, 179 (Tex. 1997). In *Schlumberger*, the Court reasoned that both exceptions carved out in *Prudential* are still legally enforceable, but held that under the fact pattern presented in *Schlumberger*, fraudulent inducement did not prevent the court from enforcing the waiver-of-reliance language in the release executed by the Swanson's. *See id.* at 179-81.

The issue in *Schlumberger* and its progeny was whether a contractual disclaimer precluded, as a matter of law, a claim that a party was fraudulently induced into executing the agreement. *See id.* at 173 ("The question is whether this disclaimer precludes, as a matter of law, the Swanson's from recovering damages against Schlumberger for fraudulently inducing them to settle."). There, Schlumberger Technology Corporation ("Schlumberger") sought to purchase the Swanson's interest in an underwater diamond mining operation. *Id.* at 173-174. After becoming embroiled in a dispute

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