Real Estate "As-Is" Clauses: Beyond the Boilerplate

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Both residential and commercial real estate sales agreements typically include "as-is" provisions purporting to limit liability for apparent and latent defects. The form real estate sales agreement usually contains an "as-is" clause similar to the following:

> Except for Seller's express written agreements and written representations contained herein, and Seller's Property Disclosure, if any, Buyer is purchasing the Property "AS-IS," in its present condition and with all defects apparent or not apparent.

Additionally, these agreements usually include a professional inspection clause. This clause provides the right to have a professional inspection of the property and the right to terminate the sale upon discovery of a materially defective condition in the property.

Although there are no Oregon appellate cases that have expressly considered whether a seller can avoid liability through reliance on "as-is" language, the Oregon Supreme Court has recognized a seller's ability to limit a purchaser's remedies through the use of an "as-is" clause. In *Wilkinson v. Carpenter,* 276 Or 311, 554 P2d 512 (1976), the court considered whether the purchaser of a restaurant and lounge could

rescind the sale based on alleged misrepresentations regarding the building's air conditioning, heating and roof. The court held that the clause in the sales agreement, which stated the property was sold "as is" and that there had been no warranties or representations made which induced the purchasers to buy the property, limited the purchaser's ability to seek damages or rescission only to those instances involving fraudulent misrepresentations. *Id.* at 314. In so holding, the court reasoned that, "[i]n the absence of some countervailing policy, the parties to a contract should be allowed to allocate the actual risks of the venture as they see fit." *Id.* at 315.

The court's recognition of the "as-is" clause in *Wilkinson* is an important step in following the persuasive authority from courts of other jurisdictions that have already held that "as-is" language is sufficient to insulate the seller from liability. For example, in 2005 the Washington Court of Appeals held that a purchaser's implied warranty claims based on defective stucco installation were barred by the purchaser's acceptance of the property "in its present 'as is' condition." *Warner v. Design & Build Homes,* 114 P3d 664 (Wash App Div 2, 2005); *see also, Shapiro v. Hu,* 233 Cal Rptr 470 (Cal App 1 Dist, 1986) (describing "as-is" clauses as a kind of "red flag warning" that put "potential buyers on notice that the seller makes no warranties about the quality or condition of the thing sold"). Other courts dismissing claims have focused on the apparent lack of causation of damages when a property is purchased "as-is." *See, e.g., Prudential Ins. Co. of America v. Jefferson Assoc.,* 896 SW2d 156 (Tex 1995).

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An Oregon court's willingness to take the next step toward a pure "as-is" defense will likely depend on its reading of *Wilkinson* and other Oregon "as-is" rescission cases.[1] Although there are no Oregon appellate decisions expressly considering the issue, there is a colorable argument to be made for broad recognition and enforcement of "as-is" language. For instance, it is worth noting that the *Wilkinson* court's enforcement of the "as-is" language in the sales agreement rested, in part, on the freedom of parties to contractually allocate business risk as they see fit. *See also, Finch v. Andrews,* 124 Or App 558, 560, 863 P2d 496 (1993) (a public policy must be "overpowering" before a court will interfere with the parties' freedom to contract). Other Oregon appellate decisions have employed similar reasoning in harmonizing principles of contractual autonomy with the doctrine of contractual assumption of risk. *See, e.g., C.H. Savage Co. v. Multnomah County,* 57 Or App 735, 738-39, 646 P2d 641 (1982) (holding that contractual assumption of risk is a proper affirmative defense).

Thus, the Oregon Supreme Court's enforcement of "as-is" language and its continued recognition of parties' freedom to contractually allocate risk, when coupled with a professional inspection clause, should provide substantive precedent for an "as-is" acceptance defense.

In theory, it seems simple to conclude a party agreeing to accept a building "as-is, including latent defects" must be held to the benefit of its bargain. In practice, however, it may prove difficult to convince a judge that a three-line "as-is" clause in a multi-page form real estate agreement should preclude all of a purchaser's claims as a matter of law. This is particularly so when you are defending against a purchaser with limited or no business sophistication. Advocating an "as-is" acceptance defense will ordinarily require some preparation to address the rule that exculpatory or limitation of liability provisions must be part of the parties' bargain-in-fact. *Atlas Mut. Ins. Co. v. Moore Dry Kiln Co.,* 38 Or App 111, 114, 589 P2d 1134 (1979). Ordinarily, a bargain-in-fact means that the provision must be bargained for, must be conspicuous, or must be brought to the buyer's attention. *Id.*

In focusing on whether a disclaimer has been "bargained for," the Oregon Supreme Court has looked to whether the party seeking enforcement had a "[r]easonable expectation that the buyer understood that his remedies were being restricted * * *." *K-Lines, Inc. v. Roberts Motor Co.,* 273 Or 242, 254, 541 P2d 1378 (1975). In determining whether a limitation of liability clause is conspicuous, courts have generally relied on the following factors: (1) the location, size, color and font of the clause relevant to the rest of the document; (2) the conspicuousness of the clause's "heading"; and (3) whether the heading would put a reasonable business person on notice of a potential waiver of legal rights. *See generally, Young v. Continental Crane & Rigging Co.,* 183 Or App 563, 53 P3d 465 (2002) (cataloging cases discussing a variety of factors in the conspicuousness inquiry).

Though it will undoubtedly be more difficult to prevail when relying on an "as-is" clause contained in a form real estate sales agreement, sellers should still argue that an "as-is" clause is part of the parties' bargain-in-fact. Many of the conspicuousness difficulties can be avoided by taking the time to carefully draft the "as-is" provision. Finally, the "bargained for" problems can arguably be overcome by ensuring that the purchaser initials are shown next to the clause, or otherwise signals assent to the provision. ✪

Endnote

[1] *See also Hoover v. Hegewald,* 70 Or App 223, 689 P2d 965 (1984) (relying on disclaimer provision in contract in denying a claim for rescission for seller's non-fraudulent misrepresentations).