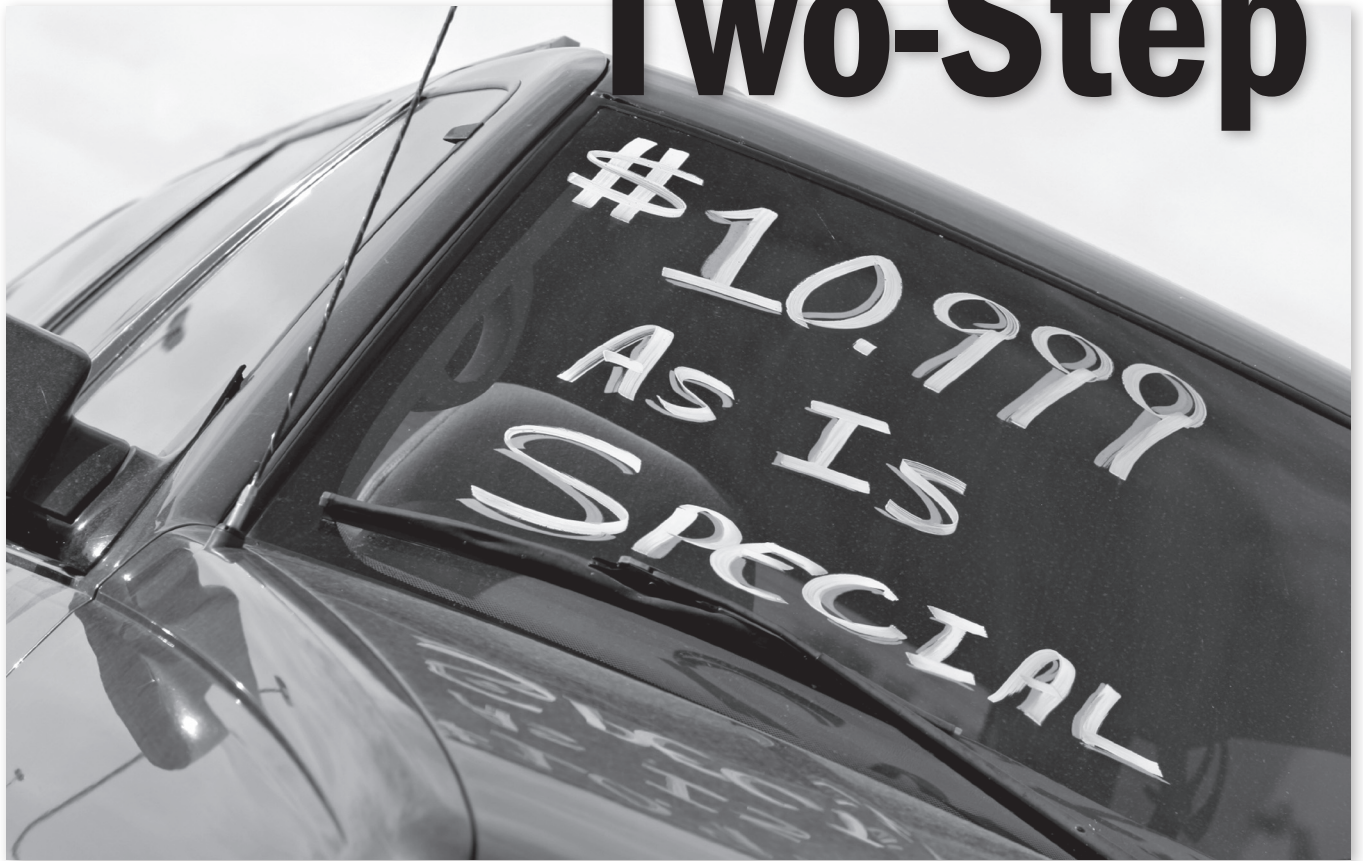


The Texas Two-Step



By Jason B. Melvin*

Mitigating the Effect of “As Is” Clauses In Consumer Warranty Claims under the Uniform Commercial Code and the Texas Deceptive Trade Practices Act

I. INTRODUCTION & SCOPE

Many traditional consumer purchases involve goods, often second-hand goods, bought on an “as is” basis.¹ Some of these purchases do not involve large amounts of money, and, with little at stake, it can be extremely difficult for consumers to obtain judicial relief for damages flowing from defects. This unfavorable economic situation provides a strong incentive for zealous practitioners to attempt to bring a client’s warranty claims under the Texas Deceptive Trade Practices Act (“DTPA”).² While the spoils of a successful DTPA claim can be significant, with possible treble economic and mental anguish damages, success requires the crossing of several fairly unfriendly hurdles.³

When a party brings a warranty claim in conjunction with the DTPA, an “as is” clause has a double-whammy effect. The “as is” clause disclaims implied warranties under the Uniform Commercial Code (“UCC”), *and* “no-reliance” language within the clause may also negate producing cause, a necessary element of any DTPA claim. In this context, there is a distinct “two-step” process that mitigates the effects of an “as is” clause. This article discusses this process, focusing on the development of two separate bodies of law, their interaction, and whether some claims fare better as “bare” warranty claims, rather than warranty claims brought in conjunction with the DTPA.

This article focuses primarily on employing the “unless the circumstances indicate otherwise” language of UCC § 2-316(3) (a) and certain provisions of the Texas Deceptive Trade Practices Act.⁴ For purposes of discussion, it will be assumed there are no issues with the conspicuousness of the “as is” disclaimer. Finally, while this paper spawned from an interest in obtaining relief for traditional consumers, the principles discussed may apply in a broader commercial context.

II. DEVELOPMENT OF IMPLIED WARRANTIES & THEIR EXCLUSION

An attack on an “as is” warranty disclaimer begins with UCC § 2-316(3)(a) and the “unless the circumstances indicate otherwise” language. In order to better understand how an implied warranty disclaimer operates, it is necessary to discuss the history and development of this section.

Implied warranties in the sale of goods, and the exclusion of those warranties, have a long history and firm roots in United States jurisprudence.

A. The Uniform Sales Act (1909)

As early as 1909, the law of the United States provided buyers of goods with the benefit of implied warranties in two situations. First, an implied warranty attached when the buyer made the seller aware of a particular purpose for which the goods would be used and the buyer relied upon the seller’s expertise in making the decision to purchase the goods. Second, an implied warranty attached when the seller dealt in goods of the type purchased. The Uniform Sales Act of 1909 codified these provisions under § 15:

Subject to the provisions of this act. . . there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller’s skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of a merchantable quality.⁵

While the Uniform Sales Act of 1909 provided these limited warranties to buyers, sellers were allowed to disclaim them and limit their liability. To that end, sellers used section 71 of the Uniform Sales Act to give effect to disclaiming language contained in contracts:

Where any right, duty or liability would arise under a contract to sell or a sale of implication of law, it may be negated or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale.⁶

Marshall Milling Company provides an early example of section 71’s disclaiming power. In *Marshall*, the Minnesota Supreme Court enforced a disclaimer because the contract specifically provided that it “contain[ed] the whole agreement; and that there [were] no representations, guaranties or warranties except such as may be written on the face hereof.”⁷ The contract gave the buyer thirty days in which to reject the goods (flour) and further provided that keeping a shipment beyond thirty days estopped the buyer from claiming breach of warranty.⁸ The court stated that the contract provided the buyer a reasonable time to reject the goods, and “having failed to report within the prescribed time,” the buyer could not claim a breach of warranty, citing section 71 of the Uniform Sales Act.⁹

Similarly, in *Minneapolis Threshing*, the North Dakota Supreme Court enforced a disclaimer in the sale of farm machinery.¹⁰ The sales contract stated, “it is agreed as a condition precedent to the warranties and agreements herein contained, and of the acceptance of the order and delivery of the machinery, that in no event shall the company be subject to any other or further liability... contract, or otherwise.”¹¹ The court held this provision sufficient to exclude the implied warranty of fitness for a particular purpose (the only implied warranty at issue) and consistent with section 71 of the Uniform Sales Act.¹² The court further stated that the Uniform Sales Act does not “prohibit the inclusion of any lawful term that the parties may desire in a contract for sale, nor [does it allow the parties to] avoid any lawful term or provision that may be thus mutually agreed upon.”¹³

While the now commonly-used “as is” clause is not involved in the cases above, these cases clearly demonstrate that courts have long allowed sellers to limit their contractual liability by excluding implied warranties by the addition of disclaiming language in the sales contract.

B. The Revised Uniform Sales Act (1941)

As the United States infrastructure developed, leading to more interstate business, the need for consistent state-to-state commercial law became increasingly important. To help facilitate the movement toward uniform commercial law, the American Legal Institute (“ALI”) came into the picture around 1940.¹⁴ The ALI tried to achieve uniformity with the Revised Uniform Sales Act. Section 15 of the Revised Act continued the tradition of providing buyers with implied warranties and took a pro-buyer approach to disclaiming these warranties by introducing the concept of the “reasonable person”:

(6) The [implied] warranties... are not negated or modified by general language of a contract . . . if the circumstances indicate that a reasonable person in the position of the buyer would, despite such general language, be in fact relying on the merchantable quality of the goods or on their fitness for a particular purpose.¹⁵

This language allowed courts to go beyond the four-corners of a contract and look very broadly at all the circumstances surrounding a transaction. The provision was favorable to the buyer, and created an uncertain “reasonable person” standard. If a “reasonable person” in the buyer’s shoes would ignore a warranty disclaimer and continue to rely on the goods’ merchantable quality or fitness for a particular purpose, then the disclaimer would have no legal effect. Thus, even if the sales contract contained a disclaimer, the buyer could always challenge the clause, and perhaps render it ineffective, if courts believed that a “reasonable person” would have continued to rely on the implied warranties.

Interestingly, Comment 7 to section 15 of the Revised Act spoke directly to “as is” sales:

“As is” and second hand sales. It needs no statement that in “as is” sales subsection 6 would have no application; and the cases have shown a very healthy caution in finding any kind of reliance or of merchantability-warranty in second-hand sales. The subsection would not affect these, in any ordinary circumstances.¹⁶

Comment 7 is at odds with the language in the UCC, by making a distinction between new and used goods. The comment purports to make the Revised Act’s disclaimer provision far less friendly to buyers by allowing sellers to effectively exclude through a general disclaimer (including “as is”) in the sale of used goods, because courts have been reluctant to extend the implied warranty of merchantability to used goods. More importantly

Comment 7 completely ignores the concept of reliance. Both the implied warranty of fitness for a particular purpose and the warranty of merchantability take reliance into consideration, either by clearly requiring reliance (fitness for a particular purpose), or by presuming a buyer will rely on the skill or judgment of a seller who deals in goods of the kind being sold (merchantability). The comment removes reliance from the equation, effectively taking an “anything goes” stance in the sale of used goods. This comment would have left unprotected those who need these warranties the most, because lower income consumers may only be able to afford used goods. As a side note, while most Texas courts of appeals have held that the implied warranty of merchantability does not attach to the sale of a known second-hand good, these cases may have been rendered ineffective by the decision in *Mid Continent Aircraft Corp. v. Curry County Spraying Service, Inc.* In *Mid Continent Aircraft*, the Texas Supreme Court held that the seller of a used aircraft had properly disclaimed both implied warranties in an “as is” sale.¹⁷ This decision appears to imply that without the disclaimer, such warranties would exist. Furthermore, at least one other jurisdiction, Florida, has held that implied warranties attach to the sale of used goods.¹⁸

C. The Revised Uniform Sales Act (1944)

As the movement toward uniform commercial law continued, implied warranties, and the corresponding methods of exclusion, continued to undergo changes. By 1944, separate sections of the Revised Uniform Sales Act were dedicated to implied warranties of merchantability and fitness for a particular purpose.¹⁹ As before, sellers continued to have an option to exclude these implied warranties. Section 41 of the 1944 Revised Act contained the disclaimer provision, which allowed sellers to disclaim one, or both, of the implied warranties. This version of the Revised Act’s disclaimer provision was pro-seller, allowing very general language to effectively disclaim the implied warranties as a matter-of-law:

Section 41. Exclusion or Modification of Warranties.
(2)(a) all implied warranties are excluded by general language like “as is”, “as they stand”, “with all faults” or other terms which in common understanding call the buyers attention to the exclusion of warranties and make plain that there is no implied warranty...²⁰

This version of the exclusion provision, which was much more friendly to the seller, allowed general disclaiming language (“as is”) absolute effectiveness against the buyer. There was no longer qualifying language concerning the circumstances under which the parties entered the contract or whether a reasonable person in the position of the buyer relied on the merchantable quality of the goods or their fitness for a particular purpose.²¹ Historically, the “rule” had been that implied warranties attached to the sale of goods. The 1944 version of the Revised Act departed from prior law by allowing two simple words (“as is”) to completely shift the balance, putting the onus on the buyer. This version of the Revised Act became the proposed UCC, and it met with criticism from the New York Commission in its 1955 report. The report criticized the absolute nature the UCC conferred upon “as is” warranty disclaimers and prompted changes to the implied warranty disclaimer language.

The New York Commission was concerned that sellers could dupe an unsuspecting buyer by including certain “magic words” that had significant legal consequences, of which the buyer was unaware.

D. The New York Law Revision Commission Report

The New York Law Revision Commission (“Commission”) is a state entity, legislatively created in 1934, and purports to be the oldest such group in the common-law world.²² It is specifically charged with receiving and considering “proposed changes in the law recommended by the American Law Institute.”²³ The Commission studied the first proposed UCC and issued a report in 1955 entitled, “Report of the New York Law Revision Commission for 1955: Study of the Uniform Commercial Code.” The multi-

volume report commented on many provisions of the proposed UCC, and criticized the implied warranty disclaimer provision, which had been re-codified as Section 2-316. The Commission feared the UCC would make general trade disclaimers effective against buyers not familiar with the terminology or the effects of such a disclaimer. As a direct result of this report, this section of the UCC was revised to include the now familiar provision, “unless the circumstances indicate otherwise.” The report contained the following statements regarding Section 2-316:

[2-316(3)(a)] [Formerly Section 41(2)(a)] “[R]aises a problem of construction. Will the inclusion of the term “as is”, “as they stand”, or the like in a contract necessarily negate implied warranties, or must it also be shown that this language is such as to call “the buyer’s attention to the exclusion of warranties and make plain that there is no implied warranty?” This question would be presented by the inclusion of the terms listed in [(3)(a)] in a contract of sale with a non-mercantile buyer who is unacquainted with the trade understanding of these terms. The language of the subsection lends itself to a holding that the specified phrases necessarily exclude implied warranties; this consequence would lead to results inconsistent with reasonable intention of the parties, and may not have been intended by the draftsmen.”²⁴

The New York Commission was concerned that sellers could dupe an unsuspecting buyer by including certain “magic words” that had significant legal consequences, of which the buyer was unaware. The proposed UCC listed three specific terms to exclude the implied warranties: “as is”, “as they stand”, and “with all faults”. It also included an additional generic method to disclaim the implied warranties through any other language that makes plain that there are no implied warranties. This created a presumption, perhaps even an operation of law, that the use of “as is”, “as they stand”, and “with all faults” made plain there were no implied warranties. Buyers were presumed to understand those terms as an absolute exclusion of the implied warranties – a departure from the tradition of implied warranties in the sale of goods. While the law had long allowed disclaimer of implied warranties, the presumption was that any disclaimer was a bargained-for part of the contract and that the buyer fully understand the disclaimer. The proposed UCC allowed sellers to disclaim the implied warranties by employing “as is”, “as they stand,” or “with all faults,” without considering whether, and to what extent, the buyer may have relied upon other information conveyed by the seller.

The ALI took the New York Commission criticism to heart. In its 1956 recommended changes, the ALI changed the implied warranty exclusion language to include the provision, “unless the circumstances indicate otherwise.” As discussed in more detail

below, this language served as a mechanism to keep “as is” disclaimers from operating as a matter of law when facts show some other understanding exists as to the intended effect of those disclaiming terms. The revised Section 2-316 provided, in relevant part:

Section 2-316. Exclusion or Modification of Warranties.

(3)(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like “as is”, “with all faults” or other language which in common understanding calls the buyers attention to the exclusion of warranties and makes plain that there is no implied warranty....²⁵

The ALI’s comments leave little doubt as to why the changes were made. The ALI explained the “[r]eason . . . subsections (3)(a) and (3)(b) [were] changed for clarification and to meet criticism by the New York Commission.”

Thus, the ALI agreed with the New York Commission that unknowing buyers should not be penalized by the exclusion of the implied warranties as a matter of law in every situation. The addition of the qualifying language, “unless the circumstances indicate otherwise,” acknowledged that facts can exist that indicate the buyer did not understand that “as is”, “with all faults” or other language actually operated to exclude the implied warranties of merchantability and fitness for a particular purpose.

E. Current Uniform Commercial Code § 2-316 (1978)

The disclaimer provision ultimately adopted the 1956 recommendation language, set out above, which included “unless the circumstances indicate otherwise.” In addition, the relevant official comments to Section 2-316 added context to the disclaimer provision, clearly stating that the entirety of the circumstances must indicate that a buyer understands no implied warranties are to attach to the sale and that “as is”, “as they stand,” and “with all faults” are *commercial* terms, not consumer terms. The relevant comments are as follows:

6. The exceptions . . . set forth. . . in . . . subsection (3) are common factual situations in which the circumstances surrounding the transaction are in themselves sufficient to call the buyer’s attention to the fact that no implied warranties are made or that a certain implied warranty is excluded.

7. Paragraph (a) of subsection (3) deals with general terms such as “as is,” “as they stand,” “with all faults,” and the like. Such terms in ordinary commercial usage are understood to mean that the buyer takes the entire risk as to the quality of the goods involved....

Nothing in these two comments suggests that “as is” clauses operate to absolutely disclaim the implied warranties in every situation. For example, Comment 6 states that Section 2-316(3) only applies in situations where the buyer knew there were no implied warranties for the sale. This comment acknowledges that in certain circumstances, a bona fide question will exist as to what a buyer, namely a relatively unsophisticated buyer, thought the disclaiming language really meant and whether such a buyer knew that implied warranties were excluded. Further, Comment 7 plainly states that terms like “as is,” “as they stand,” and “with all faults” are terms of commercial usage. The com-

ment does not suggest that these terms have significant meaning outside of a commercial transaction context and, as such, does not impute knowledge of a commercial trade term to an unsuspecting consumer.

F. Proposed Changes to UCC 2-316 (2003)

Keeping true to its stated purpose of promoting clarification and simplification of the law, the ALI issued proposed amendments to the Uniform Commercial Code in 2003, including changes to the text of Section 2-316 and its accompanying comments.²⁶ While the proposed Code and Official Comments have not been adopted in any jurisdiction, they do provide additional direction and context for consumer transactions. The amended code provision takes extra steps to protect consumers by requiring that, in written consumer contracts, the warranty disclaimer provisions be conspicuously set out in the document. This amendment prohibits a seller from effectively using an “as is” sales sticker attached to the good as a disclaimer, while failing to include disclaiming language in the final sales contract. The proposal, in relevant part, is as follows:

(3)(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like “as is”, “with all faults” or other language that in common understanding calls the buyer’s attention to the exclusion of warranties, makes plain that there is no implied warranty, and, in a consumer contract evidenced by a record, is set forth conspicuously in the record²⁷

In addition to amending the text of the Code, the official comments were reworked to read:

3. Subsection (2) distinguishes between commercial and consumer contracts. In a commercial contract, language that disclaims the implied warranty of merchantability need not be in a record, but if it is in a record it must be conspicuous. Under this subsection, a conspicuous record is required to disclaim the implied warranty of merchantability in a consumer contract and to disclaim the implied warranty of fitness in any contract. Use of the language required by this subsection for consumer contracts satisfies the language requirements for other contracts governed by this subsection.

This amended comment does provide some helpful insight, and reinforces the Code text, by plainly requiring a conspicuous record to effectively disclaim implied warranties in a consumer contract.²⁸

G. Summary of Implied Warranty Disclaimers And the Uniform Commercial Code

As shown above, the implied warranties of merchantability and fitness for a particular purpose have a long history in the United States. Since 1909, the law imposed these implied warranties on sellers of goods, but allowed sellers to limit their liability by disclaiming these warranties. In the early 1900’s, the law seemed not only to assume that virtually any disclaimer would eliminate the implied warranties, but also that implied warranty disclaimers would be a bargained-for provision of the contract between two equally positioned parties.²⁹ Had the original proposed language of Section 2-316(3)(a) been adopted, virtually any disclaimer would have been effective against a buyer as a matter of law.³⁰ As this area of law developed, largely due to the efforts to establish the UCC, implied warranties continued to be imposed on the seller, but the disclaimer provision shifted from pro-seller to pro-buyer. When the New York Law Revision Commission issued its report criticizing Section 2-316(3)(a) and

other sections of the UCC, the balance of the disclaimer provision shifted to a more neutral stance.³¹ The current language of Section 2-316(3)(a) allows a buyer an opportunity to defeat an “as is” disclaimer by showing facts that prove the “circumstances indicate” that the disclaimer was not a bargained for part of the contract.

III. BREACH OF WARRANTY CLAIMS & “AS IS” CLAUSES

This section reviews cases applying and interpreting the UCC’s disclaimer language contained in Section 2-316(3)(a). The claims in these cases may be thought of as “bare warranty claims,” as opposed to warranty claims brought in conjunction with the DTPA. These cases demonstrate that the key to successfully employing the “unless the circumstances indicate otherwise” language in UCC § 2-316(3)(a) is to show facts that establish the clause were a surprise, an unbargained for provision, or that some misunderstanding exists as to the scope or intended effect of the clause. The ultimate goal of challenging a warranty disclaimer is to keep the disclaimer from operating as a matter of law, thus allowing a plaintiff to survive a summary judgment and have the opportunity to argue the merits of the underlying warranty claim.

A. *Tibbits v. Openshaw (Utah)*

The Tibbits entered into a real estate contract with the Openshaws to sell two homes that Mr. Tibbits constructed.³² The Openshaws paid all but \$4,400 of the original \$45,000 contract price, at which time the Tibbits secured a judgment for the deficiency.³³ The Openshaws counter-claimed that the Tibbits breached the implied warranty of good and workmanlike manner and that the homes were not constructed in compliance with the local building codes.³⁴ The trial court dismissed the buyer’s breach of implied warranty counter claim, partly because the underlying contract contained a warranty disclaimer, which stated, “Buyer accepts the property in its present condition and that there are no representations, covenants or agreements between the parties hereto... except as herein specifically set forth.”³⁵ The trial court ruled that the disclaimer was effective because the buyers failed to show evidence that “such was not the understanding of the parties at the time the contract was executed,” which was affirmed by the Supreme Court of Utah.³⁶ The record contained no evidence to show that a misunderstanding existed as to the warranties that were part of this sale. While the court recognized that Article 2 of the Uniform Commercial Code did not apply to this case because no goods were involved, the court found article 2 was “appropriate precedence” to apply in this contract action.³⁷ This case demonstrates that if a buyer cannot show evidence of some alternative “understanding of the parties” regarding the disclaimer, an “as is” disclaimer is sufficient to exclude implied warranties.

B. *Knipp v. Weinbaum & Its Progeny (Florida)*

Knipp demonstrates usage of the “unless the circumstances indicate otherwise” language in Section 2-316, and addresses both the effectiveness of an “as is” disclaimer and the attachment of implied warranties to the sale of used goods.³⁸ In this case, Knipp purchased a “trike” (three wheeled motorcycle) from Weinbaum. The trike was constructed two years earlier and, prior to the transaction at issue, the bike had changed hands on three separate occasions.³⁹ Concurrent with the sale, the buyer signed a

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bill of sale that stated, “CYCLE SOLD AS IS ONE CUSTOM TRIKE HONDA THREE WHEELER.”⁴⁰ Within a few hours of the purchase, the buyer sustained severe injuries alleged to be the result of a defective weld on the rear axle of the trike.⁴¹

The buyer brought an action against the seller, with claims that included breach of express and implied warranties and the trial court granted summary judgment in favor of the defendant-seller.⁴² In appeal, the buyer argued that the record clearly established that neither the buyer nor the seller, intended the “as is” clause to disclaim the implied warranties provided

by the Uniform Commercial Code, but rather, the clause was intended to relate only to certain physical defects of the trike.⁴³ The Third District Court of Appeals of Florida first addressed whether implied warranties attach to used goods. Citing a pre-UCC Florida case, the court found that the implied warranties of merchantability and fitness for a particular purpose attach to the sale of used goods.⁴⁴ Next, the court stated that the language of Section 2-316(3)(a) “precludes a finding that automatic absolute can be achieved in the sale of used consumer goods merely by the inclusion of the magic words “as is.”⁴⁵ In *Knipp*, there was no doubt the “circumstances indicated” confusion among the parties as to the meaning of the “as is” clause, because even the seller testified that the clause related only to minor defects and not warranties.⁴⁶ The court found that an issue of material fact existed as to the intended meaning of the disclaimer and, as such, summary judgment on the issue was improper.⁴⁷ The opinion was not unbalanced in favor of buyers, because the court plainly states that a seller may effectively limit liability by including a disclaimer as part of the basis of the bargain that both buyer and seller fully comprehend.⁴⁸

Knipp is an excellent example of the application of Section 2-316(3)(a)’s “unless the circumstances indicate otherwise” language in operation. The plaintiff-buyer was able to create a fact question as to the understanding of the “as is” disclaimer and survive summary judgment on the issue. Two Florida cases following *Knipp* merit further discussion.

C. *McNamara Pontiac, Inc. v. Sanchez (Florida)*

The *McNamara* opinion contains a fact pattern that could be particularly relevant in many states today. Mr. Sanchez, as described by the court, was “English illitera[te].”⁴⁹ Sanchez purchased a used car from McNamara Pontiac and, as part of the sale, signed a “Dealer Warranty Disclaimer” which presumably contained an “as is” clause that purported to disclaim all warranties.⁵⁰ The salesman represented to Sanchez that the car was covered by a General Motors warranty for two years or 24,000 miles.⁵¹ Shortly after purchase, the car caught fire and was destroyed. Sanchez brought suit against the seller, and the trial court ruled for Sanchez, finding the disclaimer ineffective. The dealership sought an appeal.⁵² The Third District Court of Appeals denied certiorari, and affirmed the lower court, relying heavily on *Knipp v. Weinbaum*.⁵³ The court found the evidence sufficient to support the trial court’s finding that Mr. Sanchez did not understand the disclaimer he signed, and thus, it was not part of the bargained agreement.⁵⁴ The court found that the buyer could not have understood the effect of the disclaimer because of his inability to read English, and that the “circumstances indicated” that the disclaimer should not be effective.

D. Masker v. Smith (Florida)

Also in the lineage of *Knipp*, *Masker* demonstrates the necessity to assert facts that indicate a disputed understanding of the disclaimer. Mr. Masker purchased a used car from Smith. Soon after the purchase, the brakes failed and Mr. Masker was injured in the resulting crash.⁵⁵ It was an undisputed fact that the sales contract contained an implied warranty disclaimer. The court referred to this as an “as is” sale.⁵⁶ The buyer filed suit, including claims of breach of the implied warranty of fitness for a particular purpose.⁵⁷ The trial court awarded summary judgment to the seller and the buyer appealed.⁵⁸ In the appeal, the buyer asserted that Section 2-316(3)(a) prevented the disclaimer from being effective; however, the record contained nothing to suggest a misunderstanding existed as to the intended meaning or scope of the disclaimer.⁵⁹ The court stated, “Without more, we are constrained to give the intended effect to the disclaimer as required by the statute, because there is nothing in the record to create an issue of fact that ‘the circumstances indicate otherwise.’”⁶⁰

This case demonstrates the need to assert facts that allege a disagreement regarding the parties understanding of the disclaimer. Absent facts suggesting such a misunderstanding, courts will almost certainly consider the disclaimer effective.⁶¹

D. Mid Continent Aircraft v. Curry County Spraying Service, (Texas)

Mid Continent Aircraft is another example of the importance of presenting facts that establish some disagreement or misunderstanding about the intended effect of the disclaimer. If a fact question is created about the scope of the disclaimer, it can prohibit the disclaimer from operating as a matter of law, thus giving the buyer an opportunity to argue the merits of the underlying warranty claim, rather than be faced with an unfavorable summary judgment.

Curry County Spraying purchased a used airplane from Mid Continent for use in crop-dusting. The sales contract contained an “as is” disclaimer.⁶² Soon after the purchase, the engine failed, resulting in an off-airport landing and damage to the aircraft.⁶³ Curry County brought actions against Mid Continent, and others, for breach of warranty, negligence, and strict product liability, and the trial court found all defendants liable in tort; Mid Continent was the only defendant to appeal.⁶⁴ One of the main questions was whether the action “sounded” in contract or tort. The issue was complicated because the buyer sustained only economic damages. Importantly, the court determined that the action was based in contract law, controlled by the UCC.⁶⁵ Next, the court made quick work of finding the disclaimer effective, noting that the buyer knowingly bought the aircraft on an “as is” basis.⁶⁶ Perhaps the most fatal issue for Curry County was that the record contained no evidence of a disagreement about the meaning or scope of the disclaimer.⁶⁷ The Court stated, “Curry County does not argue that the “as is” disclaimer in this case is invalid for any reason under the Uniform Commercial Code . . . [which] has effectively eliminated the implied warranties involved in the sale of the airplane.”⁶⁸

E. Summary of Breach of Warranty & “As Is” Clause Cases

The cases discuss above demonstrate that to defeat an “as is” disclaimer, it is necessary to present facts that demonstrate some level of surprise or misunderstanding as to the meaning or scope of the implied warranty disclaimer. Failure to establish these facts allows a disclaimer to operate as a matter of law, negating the implied warranties and defeating the claim. As these cases show, “as is” clauses, and other similar warranty disclaimers are not always effective. Whether this is good or bad news depends

on which side of the buyer-seller fence you happen to be standing. Both sides have important issues to consider. At a minimum, the buyer must be aware of the practical effects of such a disclaimer. Further, the seller should ensure the buyer knows the clause is in the contract, and ensure that the buyer does not rely upon any other information conveyed by the seller.

While some may consider the UCC warranty disclaimer provision friendly to the seller and harsh to the buyer, particularly to a buyer not “savvy” to the trade, nothing in the cases above or the history and development of the implied warranty disclaimer provision suggest an intentional or “as administered” discrimination against the buyer. In reality, the history and development of the UCC supports the opposite position, that the field can be leveled by a fairly minimal showing of evidence by the buyer that the “circumstances indicate otherwise.”

IV. THE TEXAS DECEPTIVE TRADE PRACTICES ACT OVERVIEW

While the DTPA does not provide an independent statutory warranty, it does provide a procedural mechanism for bringing a breach of warranty claim, when one exists, through Article 2 of the UCC.⁶⁹ To bring a successful warranty claim under the DTPA, the plaintiff is required to satisfy not only the elements of the underlying warranty claim, but also elements that relate only to the DTPA. In all claims under the DTPA, the element of producing cause must be satisfied. Producing cause is defined as the “cause of economic damages or damages for mental anguish.”⁷⁰ Because an “as is” clause can both negate implied warranties *and* producing cause as a matter of law, an “as is” clause has an unfriendly double-whammy effect for warranty claims brought in conjunction with the DTPA.

The Texas Legislature enacted the Texas DTPA, fully titled, the Texas Deceptive Trade Practices-Consumer Protection Act, in 1973.⁷¹ The underlying purpose of the Act is to “protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection.”⁷² While the DTPA focuses on “consumers,” that term is defined very broadly in Texas, including “an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services, except that the term does not include a business consumer that has assets of \$25 million or more, or that is owned or controlled by a corporation or entity with assets of \$25 million or more.”⁷³ The remedies provided by the DTPA are cumulative, in addition to contract, tort, or other remedies.⁷⁴ The monetary remedies available under the DTPA include actual economic damages, and, if the trier of fact finds the defendant acted knowingly or intentionally, treble economic damages are available along with mental anguish damages and attorneys’ fees and costs.⁷⁵

V. THE TEXAS DTPA & “AS IS” DISCLAIMERS

When bringing a warranty claim under the DTPA, there are two distinct bodies of law at work, the UCC and the DTPA, and the plaintiff must satisfy the elements of both. When the plaintiff’s claim is based on an implied warranty, the same “as is” clause affects elements of the DTPA *and* elements of the warranty claim. An effective “as is” clause will negate the existence of an implied warranty under the UCC *and* negate producing cause, a necessary element of any DTPA claim. Thus, unless the clause is attacked successfully, *on both levels*, a defendant can be awarded summary judgment on either issue.

The following section focuses on “step two” of the process, and specifically, the landmark Texas Supreme Court opin-

ion, *Prudential Insurance Company v. Jefferson Associates*.⁷⁶ This case has been widely followed in Texas, and has changed the way courts address “as is” clauses in consumer warranty claims.

A. Prudential and Its Texas Progeny

1. *Prudential Insurance Company of America v. Jefferson Associates, Limited*

Prudential is an exciting case by all accounts, with a large commercial building in Austin, an “as is” disclaimer, asbestos fireproofing, and last, but not least, a trial court judgment of over \$25 million.⁷⁷ Though no warranty claims were at issue, the Texas Supreme Court found section 2-316 relevant, because an “as is” clause was at issue.⁷⁸ This opinion conferred super-power upon an “as is” clause, allowing the clause to both negate the DTPA element of producing cause and the implied warranties under Article 2 of the UCC.

The pertinent facts of *Prudential* are relatively straightforward. The plaintiff-buyer, Jefferson Associates (Goldman), bought an office building in Austin, Texas from Prudential Insurance Company of America.⁷⁹ The sales contract contained an “as is” disclaimer, as did several “big ticket” real estate contracts signed by Goldman in the past.⁸⁰ The “as is” disclaimer also stated that the buyer was not “relying” on any representation of the seller. Approximately two to three years after the purchase, in an effort to refinance the building, Goldman discovered asbestos fireproofing.⁸¹ Subsequently, Goldman brought claims of fraud, negligence, and breach of the duty of good faith and fair dealing against Prudential under the Texas DTPA.⁸² Like any good jurisprudence mystery, even though the evidence established that the asbestos posed no health hazard, did not need to be removed, and could be “managed in place” for \$61,000, the jury returned a verdict in favor of the buyer for over \$25.6 million dollars (the buyer paid \$7.15 million for the building).⁸³

The Texas Supreme Court quickly set out that proof of producing cause “must be shown” to recover on all DTPA claims, and further that, producing cause is “proof that an act or omission was a substantial factor in bringing about injury which would not otherwise have occurred.”⁸⁴ Relying on *Mid Continent*, discussed above, the court affirmatively stated that when a buyer agrees to “purchase something ‘as is,’ the buyer agrees to make his own appraisal of the bargain and to accept the risk that he may be wrong.”⁸⁵ Even though no warranty claims were at issue, the court cited section 2-316(3)(a) when it stated, “Goldman’s ‘as is’ agreement negates his claim that any action by Prudential caused his injury . . . [h]is contractual disavowal of reliance upon any representation by Prudential . . . negates causation essential to recovery on . . . DTPA violations.”⁸⁶ Further, the Court asserted that, when a valid “as is” clause such as this one exists, the buyer agrees that he did not rely on anything the seller has said or done, thus, the “sole cause of a buyer’s injury in such circumstances . . . is the buyer himself.”⁸⁷

While the majority opinion is certainly friendly to “as is” disclaimers from the sellers’ standpoint, the opinion did recognize that such disclaimers will not be effective in every situation. The court created three important exceptions, in which, “as is” disclaimers will be ineffective. First, the court stated, “we do not suggest that an ‘as is’ agreement can have this determinative effect in every circumstance . . . [a] buyer is not bound by an agreement to purchase something ‘as is’ . . . [when] he is induced to make [the purchase] because of a fraudulent representation or concealment of information by the seller.”⁸⁸ The second exception operates when a buyer is entitled to inspect “what is being sold but is impaired by the seller’s conduct.”⁸⁹ Thus, active concealment of a defect by the seller will render an “as is” clause ineffective. The final exception, giving lower courts great latitude,

is the ability to consider “[t]he nature of the transaction and the totality of the circumstances surrounding the agreement.”⁹⁰ This third exception focuses on “boiler-plate” contract clauses used when parties have relatively unequal bargaining positions.⁹¹ The court held Goldman, the plaintiff, to his “as is” agreement, having satisfied none of these exceptions.⁹²

The concurring opinion written by Justice Cornyn, and joined by Justices Gammage and Spector, realized the serious impact the majority opinion would have on the more typical consumer transaction, one that involves substantially less than \$25 million dollars. The concurring opinion recognized that anyone bringing a DTPA claim will now be required to prove fraud, or inequity of bargaining power in the “totality of the circumstances” to defeat an “as is” disclaimer as it relates to producing cause.⁹³ If the plaintiff-buyer fails to satisfy one of the exceptions, he will be met with an unfavorable summary judgment, never having the opportunity to argue the merits of the underlying claim. While the concurring Justices agreed in the ultimate outcome of *Prudential*, they believed an “as is” clause should present a question of fact, rather than operate as a matter-of-law, with only three narrow exceptions.⁹⁴

The practical effect of the majority opinion in *Prudential* is that an “as is” disclaimer containing a “no reliance” clause will defeat *any* Texas DTPA claim by negating producing cause as a matter of law, unless the plaintiff is able to satisfy one of the three exceptions. This is an important matter to consider in warranty claims brought in conjunction with the DTPA, because such an “as is” clause has an adverse affect on *both* the underlying warranty claim *and* the necessary DTPA element of producing cause.

The following cases illustrate how *Prudential* has been applied in Texas, and demonstrate that, in some situations, *Prudential* operated just as the concurring opinion feared it would, particularly in cases involving small-dollar consumer transactions. Lower courts have treated *Prudential* as granting a license for summary judgment to the defendant-seller by allowing an “as is” clause to negate producing cause and disclaim implied warranties.

2. *Smith v. Radam*

Smith truly embodies the “traditional” consumer transaction. The plaintiff, Smith, bought a pickup truck from defendant Radam, and the sales contract contained an “as is” warranty disclaimer.⁹⁵ Only two days after the sale, Smith noticed the truck had problems when driven at high speeds.⁹⁶ One week after the sale, the truck would not start.⁹⁷ Smith had a tow truck return the pickup to the defendant’s car lot.⁹⁸ Over the next several months, the defendant-seller continued to assert no liability to repair the pickup because of the “as is” warranty disclaimer.⁹⁹ Over one year later, the defendant sold the vehicle at an auction.¹⁰⁰ Subsequently, Smith brought DTPA actions against the defendant for breach of implied and express warranties and fraud.¹⁰¹ The trial court issued a summary judgment in favor of the seller and the buyer appealed.¹⁰² The Houston First District Court of Appeals made quick work of the consumer’s warranty claims, finding the “as is” clause disclaimed all implied warranties.¹⁰³ The court devoted a substantial part of the opinion to discussing *Prudential*, noting that even if the consumer established that certain warranties were made, the “as is” clause negated the element of producing cause, thus defeating any possible recovery under the DTPA.¹⁰⁴

To be fair, this case may not have presented ideal facts. For example, when asked in a deposition if he understood the “as is” clause, the buyer-plaintiff stated, “In a way, I did.”¹⁰⁵ Regardless of the facts, this case shows that courts are looking to *Prudential* in DTPA cases, and the results can be harsh. Even if these facts were more favorable, the plaintiff-buyer would still be required to satisfy one of the *Prudential* exceptions in order to

establish producing cause, or face summary judgment on the DTPA claims, having no opportunity to address the underlying warranty claim.

3. *Broomfield v. Parker*

Broomfield demonstrates how an “as is” disclaimer in a more typical consumer transaction can both negate producing cause and disclaim the implied warranties.¹⁰⁶ The plaintiff-buyer, Parker, bought a used car from the defendant-seller, Broomfield.¹⁰⁷ While negotiating, the seller told the buyer that the car had no warranty, and the buyer signed both an “as is” warranty disclaimer and an installment sales contract that contained another disclaimer of all warranties (implied and express).¹⁰⁸ During the following days, the buyer experienced problems with the vehicle, ultimately returning the car and demanding a return of her down payment of \$1,000 plus the tax, title, and license cost.¹⁰⁹ The seller refused to comply, and instead, repaired the car and sold it at auction.¹¹⁰ The buyer, acting pro-se, brought suit, and the trial court found the seller violated the Texas DTPA and entered judgment for the buyer to recover \$1,421; the seller appealed.¹¹¹ The Tyler Court of Appeals reversed, relying on the “as is” clause and the installment sales contract provision to effectively disclaim all implied and express warranties.¹¹² This comes at no surprise, as the evidence as presented in the opinion certainly suggests that the buyer was told the vehicle had no warranty, and even signed two documents disclaiming all warranties. Following *Prudential* and *Smith*, the court found the “as is” clause served the dual purpose of negating producing cause for the DTPA claim and negated the UCC implied warranties.¹¹³ The court believed that because the buyer “purchased the vehicle ‘as is’, she was precluded from proving that *any* acts by the [sellers] were a producing cause of her damages.”¹¹⁴ Again, this demonstrates an “as is” clause serving to disclaim implied warranties and negate producing cause.

4. *Kane v. Nxcross Motorcars*

Kane shows that, in the right situation, a consumer can successfully overcome an “as is” clause as it relates to producing cause and have the opportunity to argue the merits of the underlying claims. In *Kane*, a Tennessee resident purchased a luxury car for \$42,000 from a Houston, Texas car dealer.¹¹⁵ The vehicle was advertised on Ebay, along with the following statements: “there are no imperfections,” “EXCELLENT!!! condition”, and “[w]e have 12 of the . . . best qualified salesmen . . . anywhere in Houston.”¹¹⁶ In phone conversations with the salesman, the buyer asked several times about the condition of the car — specifically, if the car had been repainted.¹¹⁷ The salesman and his manager knew a portion of the car had been repainted, but chose not to disclose this to the buyer.¹¹⁸ The buyer decided to proceed with the purchase, signing an “as is” warranty disclaimer.¹¹⁹ Upon delivery of the car to Tennessee, the buyer found that a portion of the car had been repainted.¹²⁰ Subsequently, the buyer returned the car to the seller’s lot and asked for a refund of the purchase price and his costs.¹²¹ The dealership refused, relying on the “as is” provision in the contract.¹²² After a period of approximately fifteen months, the car was sold for \$37,000 and the proceeds offered to the buyer.¹²³ The buyer refused, and filed suit for fraud and other violations of the Texas DTPA.¹²⁴ The trial court entered a summary judgment in favor of the seller, and the buyer appealed.¹²⁵

The Houston First District Court of Appeals reversed the trial court, remanding for further proceedings.¹²⁶ The court initially noted that the buyer must show proof of producing cause

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to prevail on the DTPA claims.¹²⁷ The court agreed that *Prudential* was sound precedent, but believed the circumstances of this case fell squarely into one of the exceptions set out by the Texas Supreme Court. The court stated, “[T]he validity of an ‘as is’ agreement is determined by (1) the relative sophistication of the parties; (2) whether the agreement was freely negotiated; and (3) whether there was knowing misrepresentation or concealment of a known fact.”¹²⁸ Looking to the first exception, the court noted that Nxcross sold approximately 150-200 cars per month via the internet, while Kane, the buyer, had purchased approximately fifteen luxury cars in the last several years, but only this car via the internet.¹²⁹ Ultimately, Kane’s education served to “tie” the first factor; he held Bachelor of Science degrees in both finance and economics.¹³⁰ Because of the buyer’s level of sophistication, the court believed that no great “disparity in bargaining power” existed.¹³¹ Second, the court looked to whether the “as is” clause was a freely negotiated term between the parties.¹³² It was easy to see that it was not; the contract was faxed to the buyer some three days after the buyer funded the sale.¹³³ Further, the record was devoid of any evidence that the parties discussed the provision during negotiation.¹³⁴ The third prong was the proverbial “nail in the coffin” for this “as is” clause.¹³⁵ The evidence clearly established that the salesman and manager knew the car had been repainted, yet chose not to disclose this information to the buyer, even when specifically asked.¹³⁶ The court stated, “[B]ecause evidence exists that knowing misrepresentations were made, we conclude that the ‘as is’ clause may not preclude Kane’s recovery on his claims as a matter of law.”¹³⁷

This case demonstrates *Prudential* in action. The lower court found the “as is” clause operated as a bar to the buyers DTPA claims, as a matter of law, while the court of appeals recognized that one of the *Prudential* exclusions applied to this situation. The court of appeals undertook a thorough analysis, ultimately finding the “as is” clause to be inoperative, allowing the buyer to survive summary judgment and litigate the underlying claims.

B. Summary of Texas DTPA Cases and “As Is” Clauses

The cases above clearly show that an “as is” clause operates on a completely different level when DTPA claims are at issue, even when the clause was not intended to do so, by negating the necessary element of producing cause. This is a particularly harsh result for the “traditional consumer,” and is likely not the intended result of the Texas Supreme Court’s *Prudential* opinion. While the *Prudential* court did create exceptions, they are narrow, and require the consumer-plaintiff to show fraud or some other “naughtiness” in the totality of the circumstances. It is interesting to note that *Prudential*, as applied, imposes a higher burden on the consumer-plaintiff, by requiring the consumer to address the “as is” clause on two levels, even though the underlying purpose of the DTPA is to protect consumers.

VI. CONCLUSION

When a warranty claim is brought under the Texas DTPA, and an “as is” clause is involved, the DTPA shifts from consumer advocate to consumer foe. In this context, the DTPA does less than was intended, and may do just the opposite of what

was intended, by posing insurmountable hurdles for the consumer struggling to recover damages. This situation sets up an interesting dilemma for the attorney advocating for a consumer. If the attorney attempts to recover the possible enhanced damages under the DTPA, the attorney *must* show fraud or severe unfairness in order to establish producing cause. Failing to satisfy this burden and *Prudential* will negate a necessary element of the consumer's DTPA claim. When it is obvious from the outset that the facts are unfriendly to satisfying one of the *Prudential* exceptions, the consumer's DTPA claim is essentially eliminated, leaving only the "bare warranty" claim under the UCC, and no enhanced damage recovery. While, initially, this may appear to be an acceptable alternative, it is not. Because so little money is at stake in many traditional consumer transactions, the economic situation makes it impossible for the consumer to pursue judicial relief. The consumer is unlikely to be able to afford attorney's fees, and any "actual damage" award will unlikely be large enough for a contingency arrangement. The legal and economic reality simply leaves many consumers with no option for recovery.

If the facts favor coupling the warranty claim with the DTPA, mitigating the effects of the "as is" clause is truly a two-step process. First, one must address UCC in regards to disclaiming the implied warranties. Second, one must address the DTPA in regards to producing cause.

For the first step, while the UCC allows the implied warranties to be disclaimed, the UCC language has shifted over time from seller-friendly to buyer-friendly. Importantly, nothing in the development of the Code suggests that "as is" disclaimers are effective, as a matter of law in every instance. In fact, the history and development of the UCC suggests a friendly stance toward consumers, especially since the mid 1950's, when "unless the circumstances indicate otherwise" was added to Section 2-316. This language serves as a qualifier to the entire "as is" disclaimer provision.¹³⁸ Moreover, the official comments imply that disclaimer terms such as, "as is," "with all faults," and "as they stand" are terms of commercial use, rather than terms to be understood by, and effective against, the average consumer.¹³⁹ The cases interpreting and applying Section 2-316(3)(a) also show that an "as is" clause can be overcome, particularly when a misunderstanding exists as to the intended effect or scope of the disclaimer, or when one party is incapable of understanding the disclaimer due to a language barrier.¹⁴⁰ The Texas Supreme Court has even spoken on the matter, giving an affirmative nod to Section 2-316(3)(a)'s "unless the circumstances indicate otherwise" language. The court noted, in *Mid Continent*, that the plaintiff-buyer "does not argue that the "as is" disclaimer in this case is invalid for any reason under the Uniform Commercial Code."¹⁴¹ Clearly the court recognized that the UCC contemplates circumstances will exist that render an "as is" disclaimer invalid.

For the second step, an "as is" clause must also be addressed at the DTPA level, by satisfying one of the *Prudential* exceptions.¹⁴² If none of the exceptions are satisfied, an "as is" clause will negate producing cause as a matter of law.¹⁴³ This creates an extra hurdle for the consumer bringing a warranty claim under the DTPA when an "as is" clause is involved. The hurdle is clearly evident in the Texas Appellate Court cases applying *Prudential*, which have demonstrated that an "as is" clause can have a double-whammy effect, negating producing cause *and* disclaiming implied warranties.¹⁴⁴ While the *Prudential* majority likely never intended its holding to operate so harshly for the more traditional consumer, one with less than \$25,000,000 at stake, the lower court cases clearly demonstrate that is has done so.

1. * Mr. Melvin is a December 2008 J.D. candidate at Southern Methodist University Dedman School of Law. He thanks Professor Mary Spector for her guidance and direction. In this context, a consumer purchase means goods purchased for primarily household use, but the Texas DTPA defines consumer much broader, *See* TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon 2007).
2. TEX. BUS. & COM. CODE ANN. § 17.41, *et. seq.* (Vernon 2008).
3. *See id.* § 17.50 (outlining damages allowed).
4. Please note that citations refer to UCC 2-316 and its subsections rather than the Texas Business & Commerce Code Section 2.316 and its subsections.
5. Uniform Sales Act of 1909 § 15, <http://www.drbilllong.com/HistSales/USAI.html> (this language should seem familiar; it was apparently the basis for what would eventually become the current Uniform Commercial Code sections 2-314 and 2-315, the Implied Warranties of Merchantability and Fitness for a Particular Purpose)(emphasis added).
6. Uniform Sales Act of 1909 § 71, <http://www.drbilllong.com/HistSales/USAI.html> (emphasis added).
7. *Marshall Milling Co. v. Hintz-Cameron Co.*, 194 N.W. 772, 774 (Minn. 1923).
8. *Id.*
9. *Id.*
10. *Minneapolis Threshing Mach. Co. v. Hocking*, 209 N.W. 996 (N.D. 1926).
11. *Id.* at 998.
12. *Id.* at 1000.
13. *Id.*
14. The American Law Institute, Names and Years of All ALI Projects, Past and Present, http://www.ali.org/doc/past_present_ALIprojects.pdf.
15. Uniform Revised Sales Act § 15, *reprinted in* Elizabeth Slusser Kelly, UNIFORM COMMERCIAL CODE DRAFTS 389-90 (1984)(emphasis added).
16. Uniform Revised Sales Act § 15, Comment 7, *reprinted in* Elizabeth Slusser Kelly, UNIFORM COMMERCIAL CODE DRAFTS 389-94 (1984)(emphasis in original and added).
17. *See* *Chaq Oil Co. v. Gardner Mach. Corp.*, 500 S.W.2d 877, 878 (Tex. App.—Houston [14th Dist.] 1973); *Contra* *Mid Continent Aircraft Corp. v. Curry County Spraying Service, Inc.*, 572 S.W.2d 308 (Tex. 1978).
18. *Knipp v. Weinbaum*, 351 So.2d 1081, 1084 (Fla. Dist. Ct. App. 1977).
19. Uniform Revised Sales Act § 38, 39, *reprinted in* Elizabeth Slusser Kelly, UNIFORM COMMERCIAL CODE DRAFTS 31-32 (1984).
20. Uniform Revised Sales Act § 41, *reprinted in* Elizabeth Slusser Kelly, UNIFORM COMMERCIAL CODE DRAFTS 32 (1984)(emphasis added).
21. *See* Uniform Revised Sales Act § 15, *reprinted in* Elizabeth Slusser Kelly, UNIFORM COMMERCIAL CODE DRAFTS 389-90 (1984).
22. New York State Law Revision Commission, About the Commission, <http://www.lawrevision.state.ny.us/index.php>.
23. *Id.*
24. New York Law Revision Commission, Report of the New York Law Revision Commission for 1955: Study of the Uniform Commercial Code at 409 (1955), *as reprinted in* R.J. Robertson, Jr., *A Modest Proposal Regarding The Enforceability Of "As Is" Disclaimers Of Implied Warranties: What The Buyer Doesn't Know Shouldn't Hurt Him*, 99 Com. L.J. 1 (1994).
25. 1956 Recommendations to Uniform Commercial Code § 2-316(3)(a), *reprinted in* Elizabeth Slusser Kelly, UNIFORM COM-

MERCIAL CODE DRAFTS 63-64 (1984)(emphasis added).

26. The American Law Institute, ALI Brochure, <http://www.ali.org/doc/thisIsALI.pdf>.

27. U.C.C. § 2-316 (2003).

28. Note that the UCC definition of “consumer” is the more traditional “primarily for personal, family, or household purposes,” and not the broader Texas Deceptive Trade Practices Act definition, which includes “an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services, except that the term does not include a business consumer that has assets of \$25 million or more, or that is owned or controlled by a corporation or entity with assets of \$25 million or more.”

29. Uniform Sales Act of 1909 § 71, <http://www.drbilllong.com/HistSales/USAI.html> (where any right, duty or liability would arise under a contract to sell or a sale of implication of law, *it may be negated or varied by express agreement or by the course of dealing between the parties*, or by custom, if the custom be such as to bind both parties to the contract or the sale).

30. Revised Uniform Sales Act § 41(2)(a), *reprinted in* Elizabeth Slusser Kelly, UNIFORM COMMERCIAL CODE DRAFTS 32 (1984) (all implied warranties are excluded by general language like “as is”, “as they stand”, “with all faults” or other terms which in common understanding call the buyers attention to the exclusion of warranties and make plain that there is no implied warranty).

31. New York Law Revision Commission, Report of the New York Law Revision Commission for 1955 Study of the Uniform Commercial Code at 409 (1955), *as reprinted in* R.J. Robertson, Jr., *A Modest Proposal Regarding The Enforceability Of “As Is” Disclaimers Of Implied Warranties: What The Buyer Doesn’t Know Shouldn’t Hurt Him*, 99 Com. L.J. 1 (1994) ([2-316(3)(a)] [Formerly Section 41(2)(a)] “[R]aises a problem of construction. *Will the inclusion of the term “as is”, “as they stand”, or the like in a contract necessarily negate implied warranties, or must it also be shown that this language is such as to call “the buyer’s attention to the exclusion of warranties and make plain that there is no implied warranty”?* This question would be presented by the inclusion of the terms listed in [(3)(a)] in a contract of sale with a non-mercantile buyer who is unacquainted with the trade understanding of these terms. *The language of the subsection lends itself to a holding that the specified phrases necessarily exclude implied warranties; this consequence would lead to results inconsistent with reasonable intention of the parties, and may not have been intended by the draftsmen.*

32. *Tibbits v. Openshaw*, 425 P.2d 160, 161 (Utah 1967).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 162.

37. *Id.*

38. *Knipp v. Weinbaum*, 351 So.2d 1081 (Fla. Dist. Ct. App. 1977).

39. *Id.* at 1083.

40. *Id.* at 1083 (bold in original).

41. *Id.* at 1081.

42. *Id.* at 1083.

43. *Id.*

44. *Id.*

45. *Id.* (referring to “unless the circumstances indicate otherwise”).

46. *Id.* at 1085.

47. *Id.*

48. *Id.*

49. *McNamara Pontiac Inc. v. Sanchez*, 388 So.2d 620, 620-21 (Fla. Dist. Ct. App. 1980).

50. *Id.* at 621.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Masker v. Smith*, 405 So.2d 432, 432-33 (Fla. Dist. Ct. App. 1981).

56. *Id.* at 434.

57. *Id.* at 432-33.

58. *Id.* at 432.

59. *Id.* at 434.

60. *Id.* (comparing *McNamara*).

61. *See Knipp*, 351 So.2d 1081 and *McNamara*, 388 So.2d 620.

62. *Mid Continent Aircraft Corp. v. Curry County Spraying Service, Inc.*, 572 S.W.2d 308, 309-13 (Tex. 1978).

63. *Id.* at 310.

64. *Id.*

65. *Id.* at 310-13.

66. *Id.* at 313.

67. *Id.*

68. *Id.*

69. *Southwestern Bell Telephone Co. v. FDP Corp.*, 811 S.W.2d 572, 576 (Tex. 1991)(action for breach of warranty is not created by the DTPA), also TEX. BUS. & COM. CODE ANN. § 17.50(a)(2) (Vernon 2008).

70. *Id.* at § 17.50(a), (a)(2) (Vernon 2008).

71. Section 1 of Acts 1973, 63rd Legislature, p. 322, ch. 143.

72. TEX. BUS. & COM. CODE ANN. § 17.44 (Vernon 2008).

73. *Id.* at § 17.45(4).

74. *Id.* at § 17.43.

75. *Id.* at § 17.450(b)(1), (d).

76. *Prudential Ins. Co. v. Jefferson Associates, Ltd.*, 896 S.W.2d 156 (Tex. 1995).

77. *Id.* at 160.

78. *See Id.* at 161.

79. *Id.* at 159.

80. *Id.*

81. *Id.* at 160.

82. *Id.*

83. *Id.*

84. *Id.* at 160-61.

85. *Id.* at 161(citing *Mid Continent Aircraft Corp.*).

86. *Id.* at 161.

87. *Id.*

88. *Id.* at 162.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 163.

93. *Id.* at 165-66.

94. *Id.* at 166-67.

95. *Smith v. Radam*, 51 S.W.3d 413 (Tex. App.—Houston [1st Dist.] 2001, no pet. h.).

96. *Id.* at 414.

97. *Id.* at 415.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 416-17.

105. *Id.* at 417.

106. *Broomfield v. Parker*, 2007 WL 677819 (Tex. App.—Tyler 2007, no pet. h.)(not reported in S.W.3d).

107. *Id.* at 1.

108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 2.
113. *Id.* at 3.
114. *Id.*
115. *Kane v. Nxcess Motorcars, Inc.*, 2005 WL 497484 (Tex. Civ. App.—Houston [1st Dist.] 2005, no pet. h.)(not reported in S.W.3d).
116. *Id.* at 1.
117. *Id.* at 5.
118. *Id.* at 4-5.
119. *Id.* at 1-2.
120. *Id.* at 2.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 1.
126. *Id.* at 8.
127. *Id.* at 4.
128. *Id.* at 6.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 7.
137. *Id.*
138. U.C.C. § 2-316(3)(a) (2003).
139. *Id.* Official Comment 6 and 7.
140. *See Knipp*, 351 So.2d 1081 and *McNamara*, 388 So.2d 620.
141. *Mid Continent Aircraft Corp.*, 572 S.W.2d at 313.
142. TEX. BUS. & COM. CODE ANN. § 17.50(a), (a)(2)(Vernon 2008).
143. *Prudential*, 896 S.W.2d at 161.
144. *Smith*, 51 S.W.3d 413; *Broomfield*, 2007 WL 677819; *Kane*, 2005 WL 497484.