which Siller told Reigelsperger he needed to sign for Siller's file. There was no discussion concerning further treatment.

The arbitration agreement required that the parties submit to arbitration "any dispute as to medical malpractice" and stated that "[t]his agreement is intended to bind the patient and the health care provider…who now or in the future treat[s] the patient…" Reigelsperger did not return to Siller for further treatment of his lower back, however, about two years later he again sought chiropractic treatment from Siller, this time for his cervical spine and shoulder. As a result of an injury incurred during that treatment, Reigelsperger and his wife filed a complaint against Siller for medical malpractice.

Siller filed a petition to compel arbitration. The trial court denied Siller's petition after finding there was no open-book account between Reigelsperger and Siller. Siller appealed, contending the trial court erred by ignoring the plain meaning of the arbitration agreement and by finding no open-book account existed within the meaning of section 1295 of the California Civil Procedure Code.

HOLDING: Affirmed.

REASONING: The court recognized that, generally speaking, written agreements to arbitrate medical malpractice claims are enforceable. Section 1295(c) of the California Civil Procedure Code states, "Once signed, such a contract governs all subsequent open-book account transactions for medical services for which the contract was signed, unless rescinded by written notice within 30 days." In *Gross v. Recabaren*, 206 Cal. App.3d 771 (1988), the court defined an open-book account to include an "account with one or more items unsettled" and an "account with dealings still continuing."

The court held there was no open-book account in the technical sense because there was no evidence of a permanent record evidencing an open account of debits and credits. The court also held that there was no expectation of future transactions between the parties as there was no continuing physician-patient relationship.

Regarding Siller's plain meaning argument, the court found the agreement silent on the duration of the contract. The court explained that the doctor-patient relationship gave rise to an implied-in-fact contract and that the court could imply the operative period of the arbitration agreement from the nature of the agreement establishing the doctor-patient relationship. The court assumed the parties intended the arbitration agreement to operate during the period the doctor-patient relationship existed and implied that period as specified in §1295, namely to "all subsequent open-book transactions…" The court also relied on the language of the accompanying informed consent agreement, which was part of the same contractual instrument. The informed consent agreement included the language "…for my present condition and for any future condition(s) for which I seek treatment." The court reasoned that if the parties had intended the arbitration agreement to apply to treatment of future conditions, they would have said so, as they did in the informed consent agreement. The court concluded that the trial court properly construed the contract and found the treatment in 2002 was not an open-book account transaction and the agreement did not require the Reigelspergers to arbitrate the claims.

LANDLORD TENANT

"AS IS" CLAUSE IN A COMMERCIAL LEASE MAY APPLY IN THE HOLDOVER PERIOD OF A LEASE

"AS IS" CLAUSE MAY NEGATE CAUSATION FOR CLAIMS REGARDING THE BUILDING'S PHYSICIAL CONDITION AND MAY WAIVE THE IMPLIED WARRANTY OF SUITABILITY

Gym-N-I Playgrounds, Inc. v. Snider, 158 S.W.3d 78 (Tex. App.—Austin 2005).

FACTS: Snider owned both Gym-N-I Playgrounds, Inc. ("Gym-N-I") and the building where the company operated. The fire marshal recommended Snider install a sprinkler system in his building, but since the building was only slightly over the square footage limit he did not require it. Later, Snider sold the Gym-N-I business to long-time employees of the company, Patrick Finn and Bonnie Caddell ("Tenants"), and agreed to lease the building to them. The lease agreement contained an "as is" clause which stated the tenant accepted the building "as is" with no warranties. Tenants were represented by counsel in the lease transaction and admitted to being aware of the "as is" provision and the fire marshal'ss sprinkler recommendation at the time they negotiated the lease. After the lease term expired, Tenants failed to renew the lease but continued leasing the building using the previous lease's holdover provision. Approximately four years after the lease expired, a fire destroyed the building and all its contents. Tenants asserted the "as is" clause did not carry over into the holdover period of the lease and sued Snider for negligence, violation of the Deceptive Trade Practices Act ("DTPA"), and breach of implied warranty of suitability. The district court granted summary judgment in favor of Snider.

HOLDING: Affirmed.

REASONING: The court found the plain, ordinary and generally accepted meaning of the holdover provision language in the original lease clearly stated that any subsequent holdover arrangement would be governed by the terms of the original lease. The lease hold over provision stated: "[a]ny holding over…shall constitute a lease from month-to-month, under the terms and conditions of this lease…" The court reasoned the "as is" clause was enforceable after applying five factors including: (1) the sophistication of the parties; (2) the terms of the "as is" agreement; (3) whether the "as is" clause was freely negotiated; (4) whether the agreement was an arm's length transaction; and (5) whether there was knowing misrepresentation or concealment of a known fact. Here, Tenants were familiar with the building space, were represented by counsel during

the lease negotiation, and knew of the sprinkler situation and the "as is" clause before signing the lease, therefore the court reasoned the "as is" clause applied.

For the claims related to the physical condition of the property, including negligence, breach of warranty, fraud under the DTPA and breach of duty of good faith and fair dealing, the "as is" clause served to negate the essential causation element necessary to prove each of these claims. Gym-N-I's agreement to accept the premises "as is" superceded any fault of Snider's.

The court also determined the implied warranty of suitability in the commercial setting could be waived by contract in more than one way depending on the circumstances. The lease stated, "Landlord makes no other warranties, express or implied, of merchantability, marketability, fitness or suitability for a [document not legible]. Any implied warranties are expressly disclaimed and excluded." The court reasoned this language adequately waived any implied warranty of suitability.

FOR THE PURPOSE OF A PETITION FOR FORCIBLE DETAINER, THE HOSPITAL WHERE THE TENANT WAS STAYING WAS CONSIDERED A "HOME ADDRESS"

Thomas v. Olympus/Nelson Prop. Mgmt., 148 S.W.3d 395 (Tex. App.—Houston [14th Dist.] 2004).

FACTS: Appellant resident, Roosevelt C. Thomas, sued appellee landlord for wrongful eviction. Thomas left his Houston apartment and checked into the Veterans Affairs Hospital ("VA Hospital") in Waco for treatment of posttraumatic stress disorder. Thomas notified the landlord of his whereabouts in a letter and sent it along with his rental payment to the landlord's post office box. The landlord subsequently evicted Thomas for non-monetary default under the lease. The landlord posted a notice to vacate on the door to Thomas' Houston apartment and sent a copy of the notice by certified mail to Thomas at his Houston apartment address.

The issue before the trial court was whether service on Thomas was proper under Texas Rules of Civil Procedure 742a. The rule states if the complaint lists all home and work addresses of the defendant which are known to the person filing the sworn complaint, and if it states such person knows of no other home or work addresses of the defendant in the county where the premises are located, service of citation may be by delivery to the premises in question. The trial court granted a directed verdict in favor of the landlord indicating even if the landlord knew Thomas was at the VA Hospital, service was still proper because the hospital address was not a home or work address. Thomas appealed.

HOLDING: Reversed and remanded.

REASONING: The court held the VA Hospital could not be considered Thomas' work address, but it could be his home address. Rule 742a expressly contemplates a defendant subject to service under its terms may have more than one home address. While no cases construe the term "home address" in the context of Rule 742a, the court found other cases construing similar terms in other statutes supported the conclusion the term could encompass the hospital where Thomas was being treated.

Service was not proper because the landlord knew Thomas was being treated at the VA Hospital at the time it instituted suit.

Service was not proper because the landlord knew Thomas was being treated at the VA Hospital at the time it instituted suit and did not list the hospital address in its complaint. Although there may be a policy in favor of prompt service and disposition of forcible-detainer actions, the court stated it is reasonable to require a plaintiff relying on Rule 742a to obtain service of citation to disclose to the justice court that it knows a defendant is currently living somewhere other than on the leased premises, before the plaintiff can obtain constructive service by delivery to the leased premises.

UNIFORM COMMERCIAL CODE

UNDER THE TEXAS BUSINESS AND COMMERCE CLAUSE, THE SECTION 35.53 CHOICE OF LAW PROVISIONS REFER ONLY TO THE EXCLUSION LIST IN SECTION 1.105

Drug Test USA v. Buyers Shopping Network, Inc., 154 S.W.3d 191 (Tex. App.—Waco 2004).

FACTS: Drug Test USA, a Texas company, signed a vendor participation agreement with Buyers Shopping Network ("BSN"), a Florida company, to market products sold by Drug Test USA. The agreement included a choice-of-venue provision specifying that Florida law applied to any action regarding the agreement, and that jurisdiction and venue would lie exclusively in the courts of Broward County, Florida. After a dispute arose between the parties, Drug Test USA filed suit against BSN in Texas state court for breach of contract. The trial court sustained BSN's special appearance based on the choice-of-venue provision of the agreement. BSN appealed the ruling, contending that the choice-of-venue provision was voidable because it did not satisfy the conspicuousness requirements of section 35.53(b) of the Texas Business and Commerce Code.

HOLDING: Reversed and remanded.

REASONING: Section 35.53(b) of the Texas Business and Commerce Code ("Code") provides:

> If a contract to which this section applies contains a provision making the contract or any conflict arising under the contract subject to the laws of another state, to litigation in the courts of another state, or