

WHAT DOES “AS IS” MEAN?

Words in a contract intended to signify that no guarantees whatsoever are given regarding the subject property and that it is being purchased exactly as it is found. An "As Is" indicator is intended to be a disclaimer of warranties or representations. The recent trend in the courts to favor consumers tends to prevent sellers from using "As Is" wording in a contract to shield themselves from possible fraud charges brought by neglecting to disclose material defects in the property.

Even though an "As Is" clause may give some protection to the seller from unknown defects, the clause is inoperative when the seller actively misrepresents the condition of the property. It does not shield the seller who fails to repair a readily observable defect, basically saying "You take it as you see it." The idea is that the buyer takes the visible condition into account when making an offer and setting the purchase price. Therefore, if a buyer should be expected to discover a defect upon a reasonable inspection, the buyer will be charged with notice; otherwise, the broker and/or seller have the affirmative duty to inform the buyer of the defect, preferably in writing.

Sellers can protect themselves by being specific in the contract, for example, about recurring plumbing problems, a cracked foundation, leaky roof, den built without a building permit, all in "As-Is" condition. If for example, the roof defect was not obvious and the buyer did not know of this material defect, but the seller did know, then a general "As-Is" clause is probably worthless.

Many contracts contain standard language that must be evaluated in light of an "As-Is" clause. For example, the seller may still be required to provide a termite report even though the property is sold "As-Is". In such a case, the seller may want to affirmatively delete the standard termite clause. Also, "As Is" does not normally cover title encroachment matters unless specifically noted.

Even where an "As-Is" clause can protect a seller, many courts hold that a broker cannot use the "As-Is" clause to avoid liability for misrepresentation, because the broker is not a party to the contract in which the "As-Is" clause is contained.

In appraisals, "As Is" is an indication that the value estimate is made with the property in its current condition, which may not be the highest and best use or may include needed repairs.

Protecting the Seller in an “As Is” Sale

For those Sellers who desire to sell real estate "As Is," with no obligation to make any repairs to the property either before or after the closing. ("As Is" transactions tend to be prevalent in a resale of foreclosed properties, auctions, sales of commercial and industrial, sales of residential landlord properties and many seniors selling their residence.)

The following should occur in order to protect the Seller in an "As Is" Sale.

- The contract cannot state that the Seller has any obligation to make repairs, several contract drafting areas must be addressed.
- All warranty language and all provisions that may require the Seller to make repairs must be removed. The obvious "Seller warrants the condition" clauses must be deleted. Also any repair language clauses for termite, septic, and home inspections.
- Insert an omnibus disclaimer addendum to the contract such as the following in a conspicuous type font (bold/all caps):

“THIS SALE IS MADE AS IS WITH NO WARRANTIES EXPRESS, AND/OR IMPLIED, ALL OF WHICH ARE HEREBY DISCLAIMED. NOTWITHSTANDING ANY PROVISION IN THIS CONTRACT AND RELATED ADDENDUM TO THE CONTRARY, THE SELLER SHALL HAVE NO LIABILITY FOR PROPERTY CONDITION MATTERS AND/OR ANY REPAIR OBLIGATIONS OF ANY NATURE WHATSOEVER”.

- Always have your Principal Broker review the contract.

Protecting the Buyer in an "As Is" Sale

If the Buyer likes the location of the property and wants to proceed with caution on an "As Is" property, the contract must contain an inspection contingency that gives the Buyer a reasonable length of time to have the property inspected by qualified personnel and then allows the Buyer to "Opt Out" of the contract without liability if the condition of the property is not satisfactory to the Buyer.

"As Is" and the Tennessee Property Disclosure Law

If a Seller decides to sell a property "As Is", Agents still have to deal with all disclosures required under the Tennessee Property Condition Act. If the property is exempt under the Act, the Seller is not required to fill out a Property Disclosure Form. If the property is not exempt, the Seller has two options:

1. Fill out a Property Disclosure Form, and still sell the property "As Is" with an appropriate "As Is" contract. The Property Disclosure form is not a contract or a warranty and filling it out does not require the seller to make any repairs.
2. Sell the property by "disclaimer." The Property Disclosure Act allows the Seller to inform the buyer in writing that he does not intend to fill out a Property Disclosure Form. The Seller must secure the Buyer's signature on an appropriate disclaimer form.

Using an Appropriate Disclaimer to Disclaim any Uniform Commercial Code Warranties

The Uniform Commercial Code in Tennessee governs the sale of items of personal property in Tennessee and creates two types of implied warranties:

1. an implied warranty of fitness for a particular purpose
2. an implied warranty of merchantability.

The Uniform Commercial Code also governs disclaiming express warranties on the sale of personal property.

To the extent any personal property is being conveyed with a sale of real estate and/or the Uniform Commercial Code otherwise applies to a transaction, in order to have a true "As Is" sale the Uniform Commercial Code requires that any disclaimers or limitations of express and implied warranties must be in conspicuous type font and contain certain words. In an addendum to the contract the pertinent language must be in the contract, and be in "conspicuous" type font and size. (*See language example above.*)