

► CONSUMER LAW

Reviving Fraud in Residential Real Estate Transactions

By Edward L. Robinson



Ed Robinson is a trial lawyer with the firm of Joseph & Hollander, P.A., in Wichita, Kan. He practices in the areas of real estate, environmental and

consumer protection litigation. Mr. Robinson graduated magna cum laude from Wichita State University and with honors from the Washburn University School of Law, where he served on the Board of Editors of the Washburn Law Journal. He currently serves as the Consumer Law editor for the KsAJ Board of Editors. Mr. Robinson is also a Member of the Wichita and Kansas bar associations and the American Association for Justice.

After years of dishonest home sellers getting away with their fraud, it seems Kansas courts are saying, "Enough."

In the past several years, being a home buyer in Kansas has been a very risky proposition. Standard form purchase contracts, drafted by local real estate associations, have forced buyers to take arcane steps to hold sellers (and real estate agents) accountable for representations regarding the condition of the property.¹ Kansas courts have enforced these contracts, ruling that if buyers failed to follow the contract requirements, they had waived their right to rely on any representation a seller (or the agent) may have made regarding the property. Because sellers have been able to intentionally misrepresent the condition of the home with virtually no legal recourse, the law of fraud in residential real estate transactions was, for all intents and purposes, dead.

After years of dishonest home sellers getting away with their fraud, it seems Kansas courts are saying, "Enough." In recent decisions, Kansas appellate courts are reviving a home buyer's right to rely on a seller's written representations regarding the condition of the property. These decisions are breathing new life into the law of fraud and returning to home buyers some of the protections they always thought they had.

In making such a shift in jurisprudence, Kansas courts are faced with either reversing their previous decisions or reconciling the law in a way that respects those decisions. Unfortunately, Kansas appellate courts have chosen the latter. While these recent decisions begin to restore the law of fraud in residential real estate transactions, Kansas courts'

hesitance to state a clear rule of law may create an even more complex legal framework and spawn the next evolution of seller-friendly purchase contracts.

This article will review the history of fraud as it applies to residential real estate transactions, discuss the recent developments in the law, and offer a solution that would reduce litigation and provide much-needed clarification for home buyers, sellers, and real estate agents.

I. The Origins of Fraud in Residential Real Estate Transactions

"Glory days, well they'll pass you by..."
—Bruce Springsteen

A. Misrepresentations by Sellers.

Fraud in real estate transactions is likely as old as real estate transactions themselves. Nevertheless, the earliest reported case in Kansas between individuals appears to be the 1912 case of *Westerman v. Corder*.² Westerman purchased from Corder a tract of land in Thomas County, Kan. The deed to Westerman had the word "quitclaim" in it, but Corder had told Westerman the purchase would vest Westerman with fee simple title, less an outstanding interest Westerman would need to purchase from another party. Satisfied with the situation, Westerman purchased both interests for \$1,150.

Ten months later, Corder learned from an abstracter that a local title company held title to the tract of land (and

thus his “quitclaim” deed to Westerman was of no effect). Corder then purchased a quitclaim deed from the title company for \$2 and claimed title to the land against Westerman.

Affirming the district court’s decision to quiet title in Westerman through equitable estoppel, the Kansas Supreme Court stated that “one who, by false representations that a certain state of facts exists, has misled another, is precluded from denying the truth of such representations where such denial would result in loss to the other party and operate as a fraud upon him.”³ After reviewing similar cases from several different jurisdictions, the Court laid down the following rule in Kansas:

When a false representation is of a matter presumably within the knowledge of the party making it, not made in the way of commendation or as an opinion merely, but as a positive assertion of an existing fact to induce the other party to enter into the contract, such party, having no knowledge to the contrary, may if he act in good faith accept the representation as true, and is not bound to make inquiries or examination for himself. This rule accords with fair dealing and is sanctioned by authority.⁴

The decision in *Westerman* has never been overturned or even criticized by later Kansas appellate courts.

B. Misrepresentations by Agents.

The earliest reported case involving misrepresentations by an agent appears to be the 1914 case of *Hussey v. Michael*.⁵ Michael had listed a tract of land for sale with real estate agents Edwards and Melton and had given them a materially false description of the property. Hussey purchased the property through Edwards and Melton, who had used Michael’s property description and professed no personal knowledge regarding the property.

After learning of the misrepresentations, Hussey filed suit against Michael, Edwards and Melton. Affirming a judgment in favor of Edwards and Melton

(and against Michael), the Kansas Supreme Court held that Edwards and Melton were essentially a conduit for information from Michael to Hussey, and after reciting authority at length from other jurisdictions and treatises,⁶ held that under those facts Edwards and Melton should not be held liable for the fraud of Michael.

Just five years later, the Kansas Supreme Court decided *Bice v. Nelson*.⁷ Bice sold a tract of land in Phillips County, Kan., to a man named Klaes. Klaes offered to pay for the land with cash and the title to a specialized hauling truck. Bice was not interested in owning the truck, so he insisted on Klaes finding a buyer for the truck. Klaes found Nelson, a miner in Colorado, who needed a certain type of truck for his operations. Nelson met with Bice and Klaes, both of whom stated that the truck would be ideal for Nelson’s needs. Klaes sold the truck to Nelson and assigned his right to payment to Bice.

After Nelson purchased the truck through a note to Bice, he realized the representations of Klaes and Nelson were materially false, and stopped making payments on the note. Bice sued for breach of the note, and Nelson defended on the grounds of fraud. Affirming the district court’s cancellation of the note due to its procurement by false representations, the Kansas Supreme Court stated:

Where a sale of a chattel is made for the mutual benefit of the seller and another, and the sale is procured by false representations of one of them, active cooperation of the other, by means of statements tending to induce the buyer to accept and rely on the representations, constitutes collusion.⁸

Together, *Hussey v. Michael* and *Bice v. Nelson* formed the foundation of fraud against real estate agents. Along with *Westerman v. Corder*, these cases have never been reversed in nearly a century. Nevertheless, as we shall see, standard form contracts and property disclosures have essentially abrogated these decisions.

II. The Devolution of Fraud in Residential Real Estate Transactions

“And you want me to wait for you, till you decide to care.

Don’t you think that’s a little unfair?”

—Willie Nelson

Throughout most of the 20th century, Kansas courts continued to hold that those who misrepresent the facts of property to a buyer’s detriment could not enjoy protection from their misrepresentations.⁹ Courts also held that agents who act as innocent conduits for representations, without otherwise being involved in the representations themselves or knowing of their falsity, would not be held liable.¹⁰

This all began to change with the increasing use of standard form purchase contracts drafted by real estate associations. In most areas of Kansas, a residential property transaction includes two primary documents: a Contract for Purchase and Sale of Real Estate (“the Purchase Contract”) and a Seller’s Property Disclosure (“the Seller’s Disclosure”).

The Purchase Contract contains the material terms of the transaction such as price, closing date, quality of title conveyed, and other essentials. The Seller’s Disclosure contains a detailed checklist of items in the home, such as the roof, the foundation, and the plumbing, and requires the seller to check “yes” or “no” to indicate any problems with the property. It also contains a few all-encompassing questions to ensure that the seller discloses any negative information. The Purchase Contract incorporates the Seller’s Disclosure by reference as part of the terms of the transaction.

Before making an offer, buyers typically obtain the Seller’s Disclosure and often obtain a home inspection. If the buyers make an offer, their agent will generally supply a Purchase Contract drafted by the local real estate association. After reviewing the Seller’s Disclosure and home inspection report, many buyers believe they have adequate

information to know whether to buy the property and are relying on these documents when proceeding to closing.

Although they do not know it, buyers could not be more wrong. While the Purchase Contract language may vary somewhat by location, many of them contain a version of the following language:

18. REPRESENTATIONS AND RECOMMENDATIONS: It is hereby agreed and acknowledged by the parties hereto that *unless otherwise stated in paragraph 30 (Miscellaneous), neither the listing nor selling brokers, or their agents, employees, or associates have made, on their own behalf, any representations or warranties, expressed or implied, with respect to the Property.* Any information furnished to either party through the Multiple Listing Service or in any property condition report should be independently verified by that party before that party relies on such information. Any representations made herein have been made by the listing/selling brokers based on information supplied by sources believed to be reliable, and brokers and their associates have not assumed any responsibility, directly or indirectly, with respect to any representation or warranties which have been made. Since the selling/listing brokers are acting as brokers only, they shall, under no circumstances, be held liable to either Seller or Buyer for performance or lack of performance of any terms or conditions of this Contract. *Again, it is emphasized that if any party believes representations have been made, they must be set forth specifically and in writing in paragraph 30 (Miscellaneous) if they are to be effective or enforceable.*¹¹

...

20. INSPECTION: The Buyer has carefully examined the Property and the Improvements, and in making the decision to buy the Property, *the Buyer is relying wholly and completely upon Buyer's own judgment and the judgment of any contractors or inspectors Buyer may have selected.... Buyer agrees*

that the purchase price was negotiated after consideration of all defects in the Property of which Buyer was aware or reasonably should have been aware. Buyer hereby agrees that brokers are not responsible if Seller has failed to disclose any known defect or material fact regarding the Property.... These inspections are not intended to identify either cosmetic imperfections or other features of the Property which Buyer has already considered in determining the purchase price.... *The parties agree and the Buyer represents that once the Contract has in fact been closed, that Buyer in all respects again has acknowledged that Buyer has accepted the premises without condition or qualification.*¹²

The Seller's Disclosure, which is clearly designed to disclose the seller's knowledge regarding the property, nevertheless contains the following statement:

1. I personally have carefully inspected the property. I will rely upon the inspections encouraged under my contract with Seller. Subject to any inspections, *I agree to purchase the property in its present condition without representations or guarantees of any kind by the Seller or any REALTOR concerning the condition or value of the property.*

2. I agree to verify any of the above information that is important to me by an independent investigation of my own. I have been advised to have the property examined by professional inspectors.

3. I acknowledge that neither Seller nor any REALTOR involved in this transaction is an expert at detecting or repairing physical defects to the property. I state that no important representations concerning the condition of the property are being relied upon by me except as disclosed above or as fully set forth as follows...¹³

Language such as that above has

become common in Purchase Contracts and Seller's Disclosures, all drafted by real estate associations across Kansas. The clear intent of these documents is to immunize sellers and their agents from liability for fraudulently or negligently misrepresenting the condition of property, even when the agent is representing the buyer.

This language has been upheld in a host of published decisions. For example, in *Hamtil v. J.C. Nichols Real Estate*, the Kansas Court of Appeals held that "[r]eal estate brokers may protect themselves from negligent misrepresentation actions by disclaiming knowledge of the property's defects and having a buyer or seller acknowledge such disclaimer."¹⁴

In *Alires v. McGehee*, the Kansas Supreme Court held that buyers who fail to obtain a home inspection may not sue the seller for fraud if the home inspection would have revealed the seller's fraud.¹⁵ In *Phillips v. Tyler*, the Kansas Court of Appeals held that language similar to that above precluded a claim of negligent misrepresentation against a home seller.¹⁶ In *McLellan v. Raines*, the Kansas Court of Appeals held that similar language precluded a claim of fraud by silence against a home seller,¹⁷ and the court later repeated this holding in *Brennan v. Kunzle*.¹⁸

In *Crandall v. Grbic*, the Kansas Court of Appeals held that the above language precluded claims against a buyer's agent for breach of fiduciary duty, fraudulent misrepresentation, fraud by silence, and violation of the Kansas Consumer Protection Act.¹⁹ Finally, in *Katzenmeier v. Oppenlander*, the Kansas Court of Appeals held that similar language barred a buyer from relying on a seller's fraudulent statements if the buyer obtained a home inspection which revealed a defect.²⁰

This non-exhaustive list shows that the Purchase Contracts and Seller's Disclosures have repeatedly prevented buyers from relying on statements of the seller or agents unless the buyer takes specific steps (such as re-writing all the statements in the Property Disclosure in the Purchase Contract), which they generally do not know are necessary.

Even worse, the Purchase Contract and Seller's Disclosure create a Catch-22: if buyers fail to obtain a home inspection, they are bound by whatever a reasonable inspection would have revealed (and therefore cannot reasonably rely on the seller or the agent). If the buyers do get an inspection, they are deemed to rely only on the inspection, not the seller or agent.²¹ Because home inspectors are able to limit their liability for errors and omissions to \$2,000, this leaves home buyers with little to no remedy.²² In the end, home sellers can and do contract away liability for fraud without the buyer's knowledge and without independent consideration.

Purchase Contracts and Seller's Disclosures have created barriers to reliance that evade the attention or understanding of reasonable home buyers, and therefore have created an environment in which sellers and their agents may misrepresent the condition of the home without legal recourse. Perhaps the only remaining unexplored legal theory for buyers is to claim that recommending that the buyer present an offer using the forms drafted by the local real estate association without pointing out to the buyer the express requirements that exist for preserving the right to reasonably rely on the seller's (or seller's agent's) representations constitutes a violation of the agent's fiduciary duties; the Brokerage Responsibilities in Real Estate Transaction Act;²³ the Kansas Real Estate Brokers' and Salespersons' License Act;²⁴ or the Kansas Consumer Protection Act.²⁵

Besides the obvious benefit to shielding the real estate agent from any and all liability, it is unclear why local real estate associations have drafted the Purchase Contracts and Seller's Disclosures in a way that so explicitly favors sellers to the detriment of buyers, especially since buyers routinely retain real estate agents when purchasing property.²⁶ Considering that these documents have not been revised to correct the holdings shown above, one can only assume that the real estate associations that drafted these documents are achieving the results they intended.

III. Re-Leveling the Playing Field, Sort of...

"Why'd you have to go and make things so complicated?"

—Avril Levigne

The cases discussed above have severely restricted the ability of home buyers to obtain redress for damages caused by a seller's fraud. Nevertheless, some home buyers persisted in putting the issue before Kansas appellate court, and in 2008 a breakthrough occurred. In *Osterhaus v. Toth*,²⁷ the court considered a typical situation: a leaky basement the seller failed to disclose. The Property Disclosure contained the same language quoted above, and the district court granted summary judgment based on the established authorities.

On appeal, the Kansas Court of Appeals reversed. This time, it focused on another paragraph in the same Property Disclosure that previous panels had not discussed, which stated:

SELLER agrees to disclose to BUYER all material defects, conditions and facts known to SELLER which may materially affect the value of the property. This disclosure statement is designed to assist SELLER in making these disclosures. The listing broker, the selling broker and their respective agents will rely on this information when they evaluate, market and present the Seller's property to prospective Buyers.²⁸

Applying this language for the first time, the Kansas Court of Appeals held that the buyers did not waive their right to rely on the seller's statements. Specifically, the court stated:

If there are material misrepresentations by a seller of real property in its disclosure statement, without consideration of all the facts surrounding the sale, the buyer's signature alone does not constitute a waiver of seller's material misrepresentations.²⁹

The court further stated:

A seller of real property has an affirmative duty to be honest on its disclosure statement. When a seller is untruthful about material facts in its disclosure statement, the material fact is not discoverable in a reasonable inspection, and the seller does not correct the untruth before closing, the buyer's signature on the disclosure statement does not constitute a waiver of the seller's untruths and summary judgment should not be granted.³⁰

The Kansas Court of Appeal's ruling in *Osterhaus* represented a fundamental departure from previous rulings. Applying nearly identical language to cases other panels had discussed in recent years, the court ruled that *Osterhaus* did not waive his right to rely on *Toth*'s statement about the property, and reversed the district court's entry of summary judgment.

The Kansas Supreme Court granted review of *Osterhaus* in November 2008, and has not issued its ruling as of the date of this publication. Although the Court would have ample precedent to reverse the Court of Appeals, it appears the Kansas appellate courts are shifting directions in residential real estate fraud cases. On Jan. 8, 2010, anticipating the Court's ruling in *Osterhaus*, the Kansas Court of Appeals issued its unanimous opinion in *Steichschulte v. Jennings*.³¹ Like *Osterhaus*, *Jennings* involved a leaky basement that the sellers had failed to disclose. However, in *Jennings* the Seller's Disclosure had an additional paragraph that disclosures in previous cases appear to have lacked.³² It stated:

I specifically represent that there are no important representations concerning the condition or value of the property made by SELLER or BROKER on which I am relying except as may be fully set forth in writing and signed by them.³³

Construing this language for the first time on appeal, the court held the phrase "in writing and signed by them" referred to the seller and their agent,

and ruled that the Property Disclosure, which was in writing and signed by the seller (but not the agent) allowed the buyer to rely on the seller's representations in the Property Disclosure. The court's syllabus contained the following two statements:

Where a seller's representations within a disclosure statement are reduced to writing and signed by the seller, the buyers do not waive reliance on those disclosures by signing an acknowledgment representing that neither the seller nor the agent has made any important representations concerning the condition or value of the property on which the buyers relied, except as may be fully set forth in writing and signed by them.³⁴

And:

When a seller of residential real estate represents in the disclosure statement that seller will disclose to buyer all material defects, conditions, and facts of which seller is aware which may materially affect the value of the property and seller then fails to disclose information regarding material defects, conditions, or facts of which seller is aware which might materially affect the value of the home, the disclosure statement contains affirmative misrepresentations.³⁵

While the holdings in *Osterhaus* and *Jennings* are a step toward justice for home buyers, it is not the end of the road. The Kansas Supreme Court has yet to issue its opinion in *Osterhaus*, and until then the ability of home buyers to rely on a seller's representations will be an open question. In addition, *Jennings* was based on a certain phrase in the Seller's Disclosure, and other previously discussed rulings were based on a careful analysis of the Purchase Contract and Seller's Disclosure. Because real estate associations control the language in these documents, and depending on the Supreme Court's decision in *Osterhaus*, these associations may be able to skirt these recent decisions simply by chang-

ing the language of the documents and put *Osterhaus* and *Jennings* in the same category as *Westerman v. Corder*.

Perhaps the best way to resolve this issue once and for all is to declare as a matter of public policy that fraud waivers in consumer contracts are unenforceable. While the relationship between a home seller and buyer would not generally be considered a "consumer transaction" within the meaning of the Kansas Consumer Protection Act,³⁶ the typical home purchase does not involve a commercial buyer, so courts should not hold home buyers to the same level of sophistication.

Moreover, Kansas courts have long prohibited insuring against punitive damages,³⁷ so it seems inequitable that courts would allow Kansans to immunize themselves from liability for fraud through one type of contract when such immunity is against public policy through insurance contracts. In any event, home buyers would be well advised to keep up their guard and enlist the help of qualified legal counsel when negotiating the purchase of a home. ▲

Endnotes

- 1 While it is true a savvy buyer who thoroughly read the Contract for Purchase and Sale of Real Estate and the Seller's Property Disclosure may be able to understand and navigate these requirements, the author is unaware of any home buyer who was aware of these requirements or any buyer's agent who advised their client of these requirements during the transaction. Inexplicably, the real estate associations appear to have taken an institutional position that, even when the real estate agent is representing the buyer, a form contract should be used that gives the seller a license to commit fraud.
- 2 86 Kan. 239; 119 P. 868 (1912).
- 3 *Id.* at 243.
- 4 *Id.* at 244.
- 5 91 Kan. 542, 138 P. 596 (1914).
- 6 *See Id.* at 545-47.
- 7 105 Kan. 23; 180 P. 206 (1919), reh. denied 105 Kan. 27 (1919).
- 8 *Id.* at 25.
- 9 *See, e.g., Becker v. McKinnie*, 106 Kan. 426;

186 P. 496 (1920) (sale of water rights); *Dodd v. Boles*, 137 Kan. 600, 21 P.2d 364 (1933) (stock purchase); *Topinka v. Amer. Eagle Fire Ins. Co. of N.Y.*, 167 Kan. 181, 205 P.2d 991 (1949) (statements of insurance adjuster regarding reason for crop loss).

- 10 *See, e.g., Mahler v. Keenan Real Estate, Inc.*, 255 Kan. 593, 876 P.2d 609 (1994); *Nordstrom v. Miller*, 227 Kan. 59, 605 P.2d 545 (1980).
- 11 Paragraph 30 is the designated place in the contract for buyers to include all representations upon which they are relying, including the six to seven pages of representations in the Seller's Disclosure. Paragraph 30 consists of approximately 10 blank lines, giving seller's approximately one-fourth of one page to fit six to seven pages of representations in the Seller's Disclosure.
- 12 *Crandall v. Grbic*, 36 Kan. App. 2d 179, 188-89, 138 P.3d 365 (2006) (emphasis added).
- 13 *Id.* at 187-88.
- 14 22 Kan. App. 2d 809, Syl. ¶ 2, 923 P.2d 513 (1996).
- 15 277 Kan. 398, Syl. ¶5, 85 P.3d 1191 (2004) ("Under the facts of this case, the buyer of real estate could not reasonably rely upon representations of the seller when the truth or falsity of the representations would have been revealed by an inspection of the subject property and the misrepresentations were made prior to or as part of the contract in which the buyer contracted for the right to inspect, agreed that the statements of the seller were not warranties and should not replace the right of inspection, declined inspection, and waived any claims arising from defects which would have been revealed by an inspection."); *see also* Comment: Buyers Beware: Real Estate Sellers Can Misrepresent the Condition of Known Defects [*Alires v. McGehee*, 85 P.3d 1191 (Kan. 2004)], 44 Washburn L.J. 475 (2005).
- 16 35 Kan. App. 2d 256, Syl. ¶5, 129 P.3d 656, rev. denied 2006 Kan. LEXIS 416 (2006) ("Under the facts of this case, where the buyers of a house, by express contract provisions, agreed that the statements of the sellers were not warranties; the sellers were not experts concerning building defects; and the buyers were relying upon their own judgment and their own inspections of the property and not the statements of the sellers, the buyers cannot sustain a negligent misrepresentation claim against the sellers.

- Simply put, the buyers agreed that they did not rely upon any representations of the sellers in making the purchase of their house.”).
- 17 36 Kan. App. 2d 1, Syl. ¶2, 140 P.3d 1034 (2006) (“Under the facts of this case involving a real estate transaction, the language of the buyer’s acknowledgment in a disclosure statement was unambiguous and clearly directed the buyer to either indicate which representations she was relying on or agree to rely on none of them. When she did not so indicate, she waived her right to rely on the sellers’ representations in the disclosure statement.”).
 - 18 37 Kan. App. 2d 365, Syl. ¶12, 154 P.3d 1094, rev. denied 2007 Kan. LEXIS 629 (2007) (“In this case, the language of the buyers’ acknowledgment in the disclosure statement directed the buyers to either indicate which representations they were relying on or agree to rely on none of them. The buyers’ failure to specifically indicate the representations they were relying on precluded them from maintaining a cause of action based on affirmative or negligent misrepresentations.”).
 - 19 36 Kan. App. 2d 179, 188-89, 138 P.3d 365 (2006).
 - 20 39 Kan. App. 2d 259, Syl. ¶3, 178 P.3d 66, rev. denied 2008 Kan. LEXIS 377 (2008) (“Under the facts of this case, the right to rely on representations made in the disclosure statement does not exist where a purchaser chooses to inspect the property before purchase and, in making such inspection, learns of a defect.”); but see *White v. J.D. Reece Co.*, 29 Kan. App. 2d 226, 26 P.3d 701 (2001) (analyzing situation in which buyer’s agent failed to disclose known problems and holding that “when a real estate broker’s agent purposely injects himself or herself into the independent investigation of the property to the buyer’s detriment, the real estate broker and its agent cannot rely on the seller’s disclosure statement to shield themselves from liability”).
 - 21 Compare *Alires v. McGehee*, 277 Kan. 398, Syl. ¶5, 85 P.3d 1191 (2004), with *Katzenmeier v. Oppenlander*, 39 Kan. App. 2d 259, Syl. ¶3, 178 P.3d 66, rev. denied 2008 Kan. LEXIS 377 (2008).
 - 22 See S. Bill 377 (2010).
 - 23 K.S.A. 58-30101 *et seq.* Specifically, BRRETA states that “A buyer’s or tenants agent shall be a statutory agent with the duty and obligation to promote the interests of the client with the utmost good faith, loyalty and fidelity....” *Id.* § 58-30,107(a)(2). It is hard to fathom how a buyer’s agent would be complying with this section if the agent recommended that a buyer make an offer using a Purchase Contract that allowed the seller to intentionally misrepresent the condition of the property.
 - 24 K.S.A. 58-3034 *et seq.*; but see *Brunett v. Albrecht*, 248 Kan. 634, 641, 810 P.2d 276 (1991) (holding that statute did not establish a separate cause of action for negligent or fraudulent misrepresentation).
 - 25 K.S.A. 50-623 *et seq.* Compare also *Hoffman v. Haug*, 242 Kan. 867, 872, 752 P.2d 124 (1988) (holding that KCPA applies to real estate transactions), with *Johnson v. Geer Real Estate Co.*, 239 Kan. 324, 332, 720 P.2d 660 (1986) (holding KCPA did not apply when action was tried and judgment entered under Real Estate Brokers’ and Salespersons’ License Act).
 - 26 Indeed, considering the vast inequities in the Purchase Contracts and Seller’s Disclosures, it is unclear why any real estate agent representing a home buyer would ever let his client use the standard forms drafted by the local real estate association without modification.
 - 27 39 Kan. App. 2d 999, 187 P.3d 126, rev. granted Kan. LEXIS 603 (2008).
 - 28 *Id.* at 1002.
 - 29 39 Kan. App. 2d 999, Syl. ¶ 5.
 - 30 *Id.* at Syl. ¶ 6.
 - 31 2010 Kan. App. LEXIS 6 (Jan. 8, 2010).
 - 32 But see *Osterhaus*, 39 Kan. App. 2d 999, 1004 (containing an identical clause).
 - 33 2010 Kan. App. LEXIS 6, at *10.
 - 34 2010 Kan. App. LEXIS 6, at Syl. ¶ 2.
 - 35 *Id.* at Syl. ¶ 5.
 - 36 K.S.A. 50-623 *et seq.*
 - 37 See, e.g., *Hartford Accident & Indem. Co. v. American Red Ball Transit Co.*, 262 Kan. 570, 938 P.2d 1281 (1997) (holding that public policy generally prohibits insuring against punitive damages because those who act recklessly should be required to feel the “pecuniary punch,” not the “guiltless guarantor”).

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