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 Gym-N-I's agreement to accept the premises "as is" superceded any fault of Snider's.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

> to arbitration in another state, the provisions must be set out conspicuously in print, type, or other form of writing that is bold-faced, capitalized, underlined, or otherwise set out in such a manner that a reasonable person against whom the provision may operate would notice. If the provision is not set out as provided by this subsection, the provision is voidable by a party against whom it is sought to be enforced.

The court noted that application of this provision of the Code is contingent upon meeting the requirements of section 35.53(a). One of these requirements is that former section 1.105 of the Code (currently renumbered as section 1.301) not be applicable to the agreement in question. Thus, if section 1.105 applies to the agreement, then section 35.53 does not.

Section 1.105 provides that when transactions bear a reasonable relation to Texas and also to another state or nation the parties may agree that the law of either Texas or the other state or nation shall govern

Section 1.105 provides that when transactions bear a reasonable relation to Texas and also to another state or nation the parties may agree that the law of either Texas or the other state or nation shall govern their rights and duties. The court found that the plain language of section 1.105 appears to conflict with the plain language of at least part of section 35.53. Specifically, section 35.53 applies to contracts that involve goods worth $50,000 or less, wherein at least one party is a Texas resident or business. By contrast, section 1.105 applies when a transaction involves consideration under $1,000,000 and the transaction bears a reasonable relation to Texas and also to another state. Since application of section 1.105 precludes application of section 35.53, a literal reading of both provisions would produce the anomalous result of only applying 35.53 to the situation where two parties in Texas negotiated an agreement that provided that the law of another state applied, even though the other state had no reasonable relationship with the transaction (a position advocated by BSN). The court found this construction unreasonable, as it would render section 35.53 superfluous.

The court instead held that the only reasonable reading of the two provisions was that the section 1.105 exclusion of section 35.53 only referred to the exclusionary provisions contained within 1.105(b). These exclusionary provisions refer to certain specified commercial transactions that have their own choice-of-law rules. The court reviewed the legislative history of both sections of the Code and concluded that the section 1.105 exclusion within section 35.53 was added as part of a broader collection of modifications to the statutory scheme. These modifications were relevant to choice-of-law and choice-of-venue provisions in multi-state contracts, and indicated a legislative intent to maintain the various components of this statutory scheme, including the conspicuousness requirement of section 35.53(b).

Because the transaction between Drug Test and BSN was not one of the transactions specifically enumerated in section 1.105(b), and because BSN did not dispute that the contract involved goods valued at $50,000 or less, the court held that section 35.53(b) was applicable to the agreement in dispute. Since the agreement failed to meet the conspicuousness requirements with regard to the choice-of-venue provision, the court held that the provision was voidable.

MISCELLANEOUS

U.S. SUPREME COURT RULES THAT CONTINGENT FEES PAID TO AN ATTORNEY CONSTITUTE INCOME TO THE PLAINTIFF UNDER THE INTERNAL REVENUE CODE

Commissioner of Internal Revenue v. Banks, 125 S.Ct. 826 (2005).

FACTS: In separate actions, taxpayers petitioned for redetermination of taxability of litigation settlement proceeds. In 1986, John Banks sued his former employer and hired an attorney on a contingent fee basis. The parties settled for $464,000. Banks paid $150,000 of this amount to his attorney. Banks did not include any of the settlement in his federal tax return and the Internal Revenue Commissioner issued Banks a deficiency notice. The Tax Court upheld the Commissioner's determination, finding all of the settlement, including the part that went to his attorney as a contingency fee, was gross income that should have been included on the tax return. On appeal, the Sixth Circuit held that the amount paid to the attorney was not part of Banks's taxable gross income.

In 1987, Sigitas Banaitis also sued his former employer and hired an attorney on a contingent fee basis. The parties settled for a total of approximately $8.72 million, about forty percent of which went to his attorney. Banaitis did not claim the amount paid to his attorney on his tax return and the IRS issued a deficiency notice. The Tax Court upheld the Commissioner's determination. On appeal, the Ninth Circuit held that under state law, the contingency fee was not part of Banaitis' taxable gross income.

HOLDING: Reversed.

REASONING: Contingent-fee arrangements are an anticipatory assignment of income to the attorney. The IRS Code states gross income includes all gains that are not otherwise exempted, regardless of the source. 6 U.S.C. §61(a). The anticipatory assignment of income doctrine states a taxpayer cannot exclude economic gain from gross income by assigning it to a third party. Contingent fee agreements act as