CLOSING THE DOOR ON FRAUD PLAINTIFFS: *CARDUCO*'S EFFECT ON CLAIMS FOR FRAUDULENT INDUCEMENT IN TEXAS

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INTRODUCTION

> *"Whoever commits a fraud is guilty not only of the particular injury to him who he deceives, but of the diminution of that confidence which constitutes not only the ease but the existence of society."*[1]

Can you always trust that the person on the other side of your contract is being honest with you? According to the Texas Supreme Court, "the law long ago abandoned the position that a contract must be held sacred regardless of the fraud of one of the parties in procuring it."[2] The court's recent decisions, however, indicate a growing yet uncertain trend away from this principle when a contract includes a disclaimer of reliance.[3] In February 2019, the court decided a precedent-setting case between Mercedes-Benz and Carduco, Inc. in which it could have settled Texas law on this issue.[4] Instead, it barred the plaintiff's claim for fraud due to different reasons, thus leaving Texas courts with unanswered questions and further closing the door on future fraud claims.[5]

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[1] 2 SAMUEL JOHNSON, THE RAMBLER, 147 (1709-1784).

[2] Dallas Farm Mach. Co. v. Reaves, 307 S.W.2d 233, 239 (Tex. 1957).

[3] *See* discussion *infra* at Section II.

[4] Texas Judicial Branch, *Orders on Cases Granted* (Aug. 31, 2018), http:////www.txcourts.gov//supreme//orders-opinions//2018//august//august-31-2018//; Michelle Casady, *Texas Justices To Hear $115M Mercedes Dealership Dispute*, LAW360 (Aug. 31, 2018), https:////www.law360.com//articles//1078750//texas-justices-to-hear-115m-mercedes-dealership-dispute.

[5] *See* discussion *infra* at Section III.

To set the scene—in 2009, Carduco purchased an existing Mercedes-Benz dealership in Harlingen, Texas.[6] Relying on over one year of negotiations and unwritten representations that Mercedes planned to move the Harlingen dealership to a more lucrative market in McAllen, Carduco was surprised when Mercedes rejected its request to relocate.[7] Mercedes knew that Carduco's overriding interest in the purchase was to relocate in McAllen.[8] As it turns out, the world-leading carmaker previously promised to place another dealer in McAllen without telling Carduco until after executing their agreement.[9] That scheme left Carduco in Harlingen and prevented it from entering into the more lucrative market in McAllen.[10]

Carduco sued Mercedes for fraudulently inducing it into the Harlingen purchase agreement . . . but the only problem? Hidden in the bottom of the standard form agreement was a disclaimer in which Carduco waived any reliance on representations not stated in the contract; and nowhere in the agreement did Mercedes agree to relocate Carduco to McAllen.[11] Under existing Texas law, any party to a contract may bring a cause of action for fraudulent inducement, but that party must prove it justifiably relied on extra-contractual misrepresentations.[12] However, unlike other jurisdictions that have conclusively decided whether disclaimers of reliance negate the element of justifiable reliance, Texas case law continues to evolve on this issue.[13] The answer so far seems to be "maybe," but the court's framework remains shaky, leading to inconsistent decisions among Texas courts of appeals.[14]

[6] Mercedes-Benz USA, LLC v. Carduco, Inc., 562 S.W.3d 451, 458 (Tex. App.—Corpus Christi-Edinburg 2016) (mem. op), *rev'd*, No. 16-0644, 2019 WL 847845 (Tex. Feb. 22, 2019).

[7] *Id*.

[8] *See id.*

[9] *Id*. at 469.

[10] *Id*.

[11] *Id*. at 476–77.

[12] Williams v. Glash, 789 S.W.2d 261, 264 (Tex. 1990). This cause of action is also referred to as "fraud in the inducement." *See*, *e.g.*, Formosa Plastics Corp. USA v. Presidio Eng'rs and Contractors, Inc., 960 S.W.2d 41, 54 (Tex. 1998) (Baker, J. dissenting).

[13] *Compare* Teer v. Johnston, 60 So. 3d 253, 257–58 (Ala. 2011) (conclusively establishing that Alabama law negates fraud claims when an agreement includes an "as is" clause) *with* Hinesley v. Oakshade Town Ctr., 135 Cal. App. 4th 289, 300–02 (2005) (explaining that California law neither bars fraud claims nor establishes that reliance is unjustified just because parties have contractually agreed to waive reliance).

[14] *See* Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am., 341 S.W.3d 323, 336–37, n.8 (Tex. 2011) (listing several factors that courts should consider upon concluding that a

Case law suggests that other jurisdictions fall into one of three basic categories: (1) jurisdictions that categorically refuse to enforce disclaimers of reliance; (2) jurisdictions that will enforce disclaimers of reliance only if certain conditions are met; or (3) jurisdictions that will typically enforce disclaimers of reliance as a matter of law.[15] Although Texas falls somewhere within the second category of jurisdictions, what those "certain conditions" are still remains unclear after this decision.

Out of the court's previous cases, its narrow holdings provide more confusion than clarity. In *Schlumberger*, for example, the court held that disclaimers of reliance can preclude claims for fraudulent inducement if they clearly and unequivocally express the parties' intent to disclaim reliance.[16] *Forest Oil* then set forth a number of factors surrounding the formation of agreements that courts may apply after determining that a disclaimer's intent is clear.[17] In *Italian Cowboy*, however, the court limited the scope of these decisions by holding that standard merger clauses do not negate justifiable reliance.[18] Although *Carduco* involves a disclaimer nearly identical to the *Schlumberger* and *Forest Oil* disclaimers, the circumstances surrounding the formation of this agreement present a more egregious case of fraudulent behavior that the court has not yet considered.[19] The question this case presented is whether Carduco could disclaim reliance on a material fact that Mercedes actively concealed for more than one year.[20]

This Note explains why the court's decision in *Carduco* extends its precedent of absolving fraud when it should have limited the circumstances in which parties to a contract can disclaim justifiable reliance.[21] Because *Carduco* did not fall neatly within a single line of the court's previous cases about disclaimers of reliance, this case presented the court with an

disclaimer's language is clear and unequivocal but failing to explain if all factors must be met or whether some weigh heavier than others).

[15] Allen Blair, *A Matter of Trust: Should No-Reliance Clauses Bar Claims for Fraudulent Inducement of Contract*, 92 MARQ. L. REV. 423, 439–40 (2009).

[16] 959 S.W.2d 171, 180 (Tex. 1997).

[17] 268 S.W.3d 51, 60 (Tex. 2008).

[18] 341 S.W.3d at 334*; see* discussion *infra* at Section II.B (Unlike a disclaimer of reliance, in which a party disclaims its reliance on extra-contractual representations, a merger clause typically states that the four corners of the document constitute the parties' entire agreement.).

[19] *See* discussion *infra* at Section IV.A.

[20] *See* Mercedes-Benz USA, LLC v. Carduco, Inc., 562 S.W.3d 451, 458 (Tex. App.—Corpus Christi-Edinburg 2016) (mem. op.), *rev'd*, No. 16-0644, 2019 WL 847845 (Tex. Feb. 22, 2019).

[21] *See* discussion *infra* at Section IV.A.

opportunity to settle Texas law on this issue. Once the court does address the issue, it should hold that parties to a contract may not disclaim justifiable reliance for fraudulent inducement claims unless: (1) the contractual disclaimer of reliance is clear and unequivocal; (2) the four *Forest Oil* factors are met; (3) there are "red flags" indicating the presence of fraud; and (4) the contract represents the end, rather than the beginning, of a business relationship.[22] Because the court's two guiding principles seem to be ascertaining the parties' true intentions and public policy considerations, these limitations reflect the most adequate compromise between freedom to contract and Texas' aversion to fraud.[23] The court, however, refused to address this urgent issue by negating Carduco's justifiable reliance on a different point: the terms of the actual dealer agreement.[24] In doing so, the court inched closer to absolving all fraudulent behavior committed behind the safeguard of craftily-worded contractual provisions in future cases.[25]

As an overarching policy matter, contracts should not enable parties to engage in fraudulent practices by automatically shielding them from liability based on artfully-worded provisions.[26] Freedom of contract, though undoubtedly a fundamental legal principle in Texas, is not an unfettered concept.[27] The oft-cited metaphor that parties to a contract should be allowed to "make their own bed and lie in it" ignores the possibility that one of those parties may have stuck a box of nails under the sheets while the other was not looking. Equally as strong as the freedom to contract is Texas' public policy

[22] *See* discussion *infra* at Section IV.A.

[23] *See Italian Cowboy*, 341 S.W.3d at 333 ("In construing a contract, a court must ascertain the true intentions of the parties as expressed in the writing itself."); *cf.* Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 180 (Tex. 1997) (where the parties negotiated the terms of the agreement, the agreement signaled the end of a longstanding dispute, and the complaining party had an independent basis for evaluating that which it eventually complained about).

[24] Mercedes-Benz USA, LLC v. Carduco, Inc., No. 16-0644, 2019 WL 847845, at *1 (Tex. Feb. 22, 2019).

[25] *See* discussion *infra* at Section IV.B.

[26] *See* Dallas Farm Mach. Co. v. Reaves, 307 S.W.2d 233, 239 (Tex. 1957) ("[T]o refuse relief would result in opening the door for a multitude of frauds and in thwarting the general policy of the law.").

[27] *See, e.g.*, Woolsey v. Panhandle Ref. Co., 116 S.W.2d 675, 678 (Tex. 1938) (stating Texas courts have "repeatedly refused to enforce contracts which are either expressly or impliedly prohibited by statutes or by public policy").

against fraud, but the court forgave "intentional lies regardless of context" by negating Carduco's justifiable reliance.[28]

This Note examines Texas' current legal landscape relating to disclaimers of reliance in cases for fraudulent inducement and *Carduco*'s inevitable effect in this area of the law. Section I discusses the facts of *Carduco* and its path to the Texas Supreme Court. Section II then explores the legal background surrounding disclaimers of reliance in Texas and their effects on claims for fraudulent inducement, including the uncertainties stemming from the court's previous decisions. Section III summarizes the court's decision in *Carduco* and highlights its problematic reasoning. Lastly, Section IV provides a guiding framework that the court should use to settle Texas law on this unresolved issue. Additionally, it discusses the effects *Carduco* will likely have for lawyers working in this area of the law.

I. *MERCEDES V. CARDUCO*

This first Section discusses the facts and circumstances of Carduco's lawsuit and subsequent appeals leading up to the Texas Supreme Court. In doing so, it places *Carduco*'s legal issues in their proper context to underscore the lasting impact of the court's decision.

A. The Facts

Although the facts of *Carduco* are as extensive as they are complex, the devil is in the details. Looking at these facts carefully illustrates why negating Carduco's justifiable reliance may provide security to any degree of fraud committed behind craftily-worded agreements. Starting around 2005, Mercedes began encouraging Rene Cardenas, owner of a Mercedes dealership in Harlingen, Texas, to relocate his dealership thirty-five miles west in McAllen.[29] According to market studies, McAllen provided a more profitable location to maximize sales in the Rio Grande Valley.[30] Although Mercedes had already approved Rene's move to McAllen, the only remaining issue was finding and approving a specific site in McAllen to plant the dealership.[31] Mercedes' employees admitted at trial that they would have

[28] *Italian Cowboy*, 341 S.W.3d at 333 (quoting Forest Oil Corp. v. McAllen, 268 S.W.3d 51, 61 (Tex. 2008)).

[29] Mercedes-Benz USA, LLC v. Carduco, Inc., 562 S.W.3d 451, 457 (Tex. App.—Corpus Christi-Edinburg 2016) (mem. op), *rev'd*, No. 16-0644, 2019 WL 847845 (Tex. Feb. 22, 2019).

[30] *Id*.

[31] *Id*.

approved Rene's request to relocate as soon as he sent them the proposed McAllen site information.[32]

The plan to relocate, however, fell through in early 2008 when Mercedes sent Rene a termination notice for not meeting performance standards and receiving a corporate felony conviction after not filing certain IRS forms.[33] This prompted Rene to reach out to his father and owner of Carduco, Renato Cardenas, to sell him the Harlingen dealership.[34] Renato, who passed away in April 2017, was in the car dealership business in South Texas for almost half a century and agreed to purchase the assets of his son's dealership in the hopes of relocating it to McAllen.[35] Mercedes' excitement at hearing that Rene decided to sell the dealership quickly turned to frustration upon learning that Rene's father was the intended buyer.[36]

Mercedes' response upon realizing that it did not have a right of first refusal of this son-to-father sale?[37] "There is no God."[38] But rather than object to Rene's intended sale, Mercedes initiated a scheme behind closed doors to find a way around the sale of the dealership.[39] Calling Rene's sale of the dealership a sham in an internal email thread, Mercedes proceeded to "work around" it and agreed they "need[ed] to find a new dealer for this area."[40] After meeting with Mercedes' CEO and general counsel, the issue was settled: Mercedes would place Ron Heller, a longtime friend of Mercedes'

[32] *Id*.

[33] *Id*. at 457–58.

[34] *Id*. at 458.

[35] *Id*.; Steve Clark, *Community leader Renato Cardenas dies at 86*, VALLEY MORNING STAR (Apr. 21, 2017), https:////www.valleymorningstar.com//news//local_news//community-leader-renato-cardenas-dies-at//article_c167de9a-2707-11e7-9767-97188f97eb97.html.

[36] *Carduco*, 562 S.W.3d at 461–62.

[37] Texas statutes give dealers the right to assign dealerships to qualified buyers. *See* TEX. OCC. CODE ANN. § 2301.359. Importantly, if Carduco had purchased the assets of the Harlingen dealership before Mercedes appointed the McAllen point to Heller-Bird, Mercedes could not have denied Carduco's request to relocate. *See* TEX. OCC. CODE ANN. § 2301.464 ("[A] manufacturer . . . may not deny or withhold approval of a written application relocate a franchise" without reasonable grounds.).

[38] *Carduco*, 562 S.W.3d at 462.

[39] *Id*. at 461.

[40] *Id*.; Although Mercedes' employees repeatedly called the sale a "sham" because Rene planned to sell the dealership to his father, they conceded at trial that it "turned out not to be a sham." *Id*. at 461 n.6.

then-CEO, of Heller-Bird Motors in McAllen and notify Carduco about its decision.[41] That notification never came.[42]

Between May 2008 when Mercedes' employees approached Heller about the McAllen open point and June 2009 when Carduco signed the dealer agreement for the Harlingen dealership, Mercedes engaged in a series of misleading representations to conceal the Heller-Bird deal.[43] In September 2008, for example, three of Mercedes' employees prepared for an upcoming meeting in Harlingen and specifically discussed the fact that Heller-Bird's appointment to McAllen would affect the sale between Rene and his father.[44] Despite questions from the Harlingen dealership's manager regarding the appointment of any new Mercedes dealers in McAllen, Mercedes' employees agreed to feign ignorance during their visit.[45]

Several months later, in May 2009, two Mercedes employees traveled with Rene to a few locations in McAllen that Carduco was considering as potential sites, not once mentioning the signed deal with Heller-Bird.[46] Rather than explain that Mercedes had no intention of granting Carduco's eventual request to relocate the Harlingen dealership to McAllen, Mercedes' employees simply said the sites "looked good."[47] Those employees met with Renato later that day to discuss the future of the Harlingen dealership and, after Renato told them about his wishes to move the dealership to McAllen, Mercedes' employees told him to submit two plans to Mercedes: an interim plan for Harlingen and another for a new facility in McAllen.[48] Mercedes claimed at trial that its decision to not disclose the Heller-Bird deal was due to privacy concerns, but one of its employees later conceded there was no

[41] *Id.* at 462.

[42] *Id.*

[43] *See id.* at 465.

[44] *Id.* at 464–65.

[45] *See id*. at 465. Chappell, the Harlingen dealership's sales manager, asked Mercedes' employees about their intentions of placing another dealer in McAllen after learning that San Juan's city council (San Juan is a "bedroom community" of McAllen) had approved tax incentives for a new Mercedes dealership. Brief for Respondent at *8, Mercedes-Benz USA, LLC v. Carduco, Inc., NO. 16-0644, *available at* http:////www.search.txcourts.gov//SearchMedia.aspx?MediaVersionID=225a5bd1-3dd2-4cd3-a118-3e0db45bff1e&coa=cossup&DT=BRIEFS&MediaID=da3550f4-bc76-40f6-9af3-0fd9e7273e25.

[46] *Carduco*, 562 S.W.3d at 465.

[47] Mercedes-Benz USA, LLC v. Carduco, Inc., No. 16-0644, 2019 WL 847845, at *2 (Tex. Feb. 22, 2019).

[48] *Id.*

reason not to tell Renato after Mercedes had executed the contract with Heller-Bird.[49]

Carduco's acquisition of the Harlingen dealership consisted of two agreements: the asset purchase agreement and the dealer agreement.[50] Rene and Renato were the parties to the asset purchase agreement, whereby Rene sold the entire assets of the Harlingen dealership to his father for $7 million.[51] In June 2009, after Mercedes approved Carduco's application to become a franchised Mercedes-Benz dealer, Carduco and Mercedes signed the dealer agreement, which included the disclaimer of reliance clause at issue.[52] The forty-four-page dealer agreement, which incorporated thirty-eight pages of boilerplate provisions, granted Carduco the right to buy and resell Mercedes-Benz vehicles.[53]

The dealer agreement's relevant provision in this case, titled "Sole Agreement of the Parties," included both a merger and disclaimer of reliance clause.[54] In its entirety, the provision read:

> This Agreement terminates and supersedes all prior agreements between the parties relating to the subject matters covered herein. There are no prior agreements or understandings, either oral or written, between the parties affecting this Agreement or relating to the sale or service of Mercedes-Benz Passenger Car Products, except as otherwise specifically provided for or referred to in this Agreement. Dealer acknowledges that *no representations or statements other than those expressly set forth therein were made* by MBUSA, or any officer, employee, agent, or representative

[49] *Carduco*, 562 S.W.3d at 468–69.

[50] *Id.* at 458.

[51] *Carduco*, 2019 WL 847845 at *4.

[52] *Carduco*, 562 S.W.3d at 458; Brief for Petitioner at *277, Mercedes-Benz USA, LLC v. Carduco, Inc., NO. 16-0644, *available at* http:////www.search.txcourts.gov//SearchMedia.aspx?MediaVersionID=4769274a-cbeb-4b02-952b-b83e0b719fdf&coa=cossup&DT=BRIEFS&MediaID=0333f157-642b-4724-b9b1-91cde43cc4a0.

[53] *See Carduco*, 562 S.W.3d at 458.

[54] A merger clause, also known as an integration clause, states that "the contract represents the parties' complete and final agreement and supersedes all informal understandings and oral agreements . . . ." *Integration clause*, BLACK'S LAW DICTIONARY (10th ed. 2015).

> thereof, *or were relied upon by Dealer* in entering into this Agreement.[55]

Finally, in August 2009, after Carduco purchased the Harlingen dealership and signed the dealer agreement, Mercedes announced to Renato that it had already awarded the McAllen-area point to Heller-Bird.[56] Angry and caught by surprise, Renato submitted a formal request to relocate to McAllen which, as was expected, Mercedes immediately denied without providing a justification.[57] Instead of a near-certain chance of relocating to McAllen as the negotiations with Mercedes indicated, Carduco actually had no chance of moving to McAllen.[58] To add insult to injury, within months of Heller-Bird's opening in McAllen, Mercedes realigned the areas of influence (AOI) for the region and awarded two-thirds of the existing market to Heller-Bird.[59] The same market studies that showed McAllen as the most profitable location in the area, however, indicated that the Rio Grande Valley could support only one Mercedes dealership.[60] If there is one thing that Mercedes did not lie to Carduco about, it was that the Rio Grande Valley could support only one Mercedes dealership.[61]

This was Mercedes' way of getting around the sale between Rene and Renato: award the McAllen point to Heller-Bird, give that dealership a greater share of the pie, and have it purchase the Harlingen dealership once it went out of business.[62] To work around this sale, it was necessary to not disclose Heller-Bird's appointment to McAllen because, as soon as Carduco became an authorized Mercedes-Benz dealer, it had a statutory right under

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[55] Brief for Petitioner at *324, Mercedes-Benz USA, LLC v. Carduco, Inc., NO. 16-0644, *available at* http:////www.search.txcourts.gov//SearchMedia.aspx?MediaVersionID=4769274a-cbeb-4b02-952b-b83e0b719fdf&coa=cossup&DT=BRIEFS&MediaID=0333f157-642b-4724-b9b1-91cde43cc4a0 (emphasis added).

[56] *Carduco*, 562 S.W.3d at 458.

[57] *Id.*

[58] *See id.*

[59] Apart from awarding to Heller-Bird 66.4% of the total Rio Grande population, two-thirds of the $100,000 plus income households were allocated to Heller-Bird's AOI. *Id*. at 466. Just nine months after the realignment, Carduco's sales fell by 20% although the market was performing better than the year before. *Id*. Carduco's service business declined by more than 51% during the same period. *Id*.

[60] *Id.* at 468–69.

[61] *Id.*

[62] *Id*. at 462 (Although not signed by Heller-Bird, Carduco admitted into evidence a July 2008 draft of a letter of intent stating, "Heller-Bird agrees to use its best efforts to *acquire* the Mercedes-Benz dealership in Harlingen" and "consolidate both . . . into one location . . . .") (emphasis added).

the Texas Occupations Code to relocate.[63] With no other dealer in McAllen, Carduco could have exercised this statutory right, but Mercedes created reasonable grounds to refuse Carduco's request by secretly placing Heller-Bird in the area. Once the Harlingen dealership's sales took a significant hit, Carduco sued Mercedes and three of its employees for fraudulent inducement and negligent misrepresentation.[64] A jury found Mercedes and the named employees liable, and it awarded Carduco $15,207,722 in benefit-of-the-bargain damages and $6,085,195 in out-of-pocket damages.[65] Additionally, the jury assessed punitive damages of $100 million against Mercedes, $10 million against one of the individual employees, and $2.5 million each for the two other employees.[66]

B. The Appeal

Mercedes raised nine points in its appeal to the Thirteenth District Court of Appeals of Texas, which affirmed the trial court's judgment as modified in a 2-1 decision.[67] The appellate court decided a fundamental threshold issue relating to the dealer agreement in favor of Carduco, an issue with which one judge—and later the Texas Supreme Court—disagreed.[68] Both Mercedes and

[63] *See* TEX. OCC. CODE ANN. § 2301.464 ("[A] manufacturer . . . may not deny or withhold approval of a written application relocate a franchise" without reasonable grounds.). By placing another dealer in the McAllen area, however, Mercedes now had "reasonable grounds" to deny Carduco's request.

[64] *Carduco*, 562 S.W.3d at 458.

[65] *Id.*at 459 (The jury found all named defendants liable for fraudulent inducement, but only two individual employees for negligent misrepresentation).

[66] *Id.*

[67] The most significant modification to the trial court's judgment was the remittitur of punitive damages from $115 million to $600,000. *Id.* at 495. After analyzing the assessed punitive damages under the *Gore* framework set by the Supreme Court of the United States, the court determined that $115 million was constitutionally excessive. *Id.* at 494. Regarding the reprehensibility of Mercedes' conduct, the court found that it: (1) caused purely economic, as opposed to physical, harm; (2) was an isolated, not a repeated, act; and, (3) did not show an "indifference to or reckless disregard for" the safety of others. *Id*. Although those factors weighed in favor of remitting punitive damages, the court also assumed that Mercedes' conduct was not accidental, but rather the fruit of intentional malice or deceit. *Id*.

[68] Justice Rodriguez wrote a dissenting memorandum opinion, in which she concluded that Mercedes' alleged oral representations about the Heller-Bird deal were "directly contradicted by the express, unambiguous terms of the Dealer Agreement." *Id*. at 496 (Rodriguez, J., dissenting). She reasoned that the dealer agreement expressly prohibited dealers from relocating without Mercedes' prior written consent. *Id.* at 499. Therefore, she would have held that Carduco's reliance was not

Carduco agreed that if the terms of the dealer agreement directly contradicted Mercedes' alleged oral representations, then Carduco could not rely on them as a matter of law.[69] According to Mercedes, its employees misrepresented only that Carduco had a right to relocate and a "right of exclusivity" in its then-AOI, which it later predominantly reassigned to Heller-Bird.[70] The dealer agreement stated, however, that Carduco neither had a right to relocate nor a "right of exclusivity" in its AOI.[71] Mercedes and Carduco disagreed, however, as to the proper meaning of "exclusivity" within the contract and whether it truly contradicted Carduco's basis for alleging fraud.[72] As this Note explains in further detail below, the Texas Supreme Court resolved the case by siding with Mercedes on this issue.[73]

In addition, the Thirteenth Court concluded that the jury's finding of fraud went beyond the two abovementioned misrepresentations.[74] According to the jury charge, the jury could base its findings of fraudulent inducement and negligent misrepresentation more broadly, encompassing the approximately fourteen months that Mercedes knew of Carduco's intentions of relocating to McAllen, a mistaken assumption that Mercedes repeatedly failed to dispel.[75] The Thirteenth Court concluded that because Mercedes' fraudulent conduct stemmed from a collaborative scheme to work around Rene's sale, conduct that belied the foregone assumption that Mercedes had already approved the Harlingen dealership's move to McAllen, the dealer agreement did not wholly contradict Mercedes' oral representations.[76]

By overruling that issue, the court could reach the effect of the dealer agreement's disclaimer of reliance on Carduco's fraudulent inducement claim. According to the Thirteenth Court, Carduco was not barred from

justified as a matter of law, barred its claims for fraudulent inducement, and render judgment that Carduco take nothing. *Id*. at 500.

[69] *Id*. at 460 (majority opinion).

[70] *Id*. at 459.

[71] *Id*. ("Dealer . . . understands that its appointment as a Dealer (i) does not grant it an exclusive right to sell Mercedes-Benz Passenger Car Products in its Area of Influence [AOI] or any other geographic area.").

[72] Mercedes-Benz USA, LLC v. Carduco, Inc., No. 16-0644, 2019 WL 847845 *4 (Tex. Feb. 22, 2019).

[73] *Id*. at *4–5.

[74] *Carduco*, 562 S.W.3d at 459–60.

[75] *Id*. at 460.

[76] *Id*.

justifiably relying on Mercedes' representations because the disclaimer language was neither clear nor unequivocal.[77]

II. DISCLAIMERS OF RELIANCE IN TEXAS

Section II examines the current state of the law in Texas concerning the effects that disclaimers of reliance have on fraudulent inducement claims. The purpose of this Section is to show current gaps within the court's previous decisions and illustrate how *Carduco* did not fall squarely within any previous lines of cases. Beginning with the seminal decisions in *Schlumberger* and *Forest Oil* where the court held that disclaimers of reliance negated a fraud claimant's element of justifiable reliance, this Section first explains the court's current framework for analyzing these issues. Next, it analyzes the effect of *Italian Cowboy*, where the court limited the types of contractual provisions that negate justifiable reliance, on the court's framework. Lastly, it discusses the competing public policy concerns, namely the amicable settlement of disputes and Texas' aversion to fraud, embedded within the court's decisions on this issue.

A. Schlumberger *and* Forest Oil

Under Texas law, a party to a contract can bring a claim for fraudulent inducement on the basis that its agreement was procured by fraud.[78] Fraudulent inducement, unlike other types of fraud, arises in the context of a contract, and it is based on one party's misrepresentations that induce another to enter into a contractual obligation.[79] Like other claims for common-law fraud, claimants must prove justifiable reliance to succeed on a claim for fraudulent inducement.[80] In other words, a claimant must both actually and

[77] *Id.* at 476–77. The automotive community responded favorably to this holding, commenting that "deception and fraudulent inducement have no place in the manufacturer-distributor-dealer arrangement." Eric Freedman, *Texas court upholds retailer's victory in suit against Mercedes*, AUTOMOTIVE NEWS (Jun. 27, 2016), http:////www.autonews.com//article//20160627//LEGALFILE//306279995//texas-court-upholds-retailers-victory-in-suit-against-mercedes.

[78] Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am., 341 S.W.3d 323, 331 (Tex. 2011) (citing Restatement (Second) of Contracts § 214 cmt. c (1981) ("What appears to be a binding integrated agreement . . . may be avoidable for fraud . . . .")).

[79] Haase v. Glazner, 62 S.W.3d 795, 800 (Tex. 2001); Nat'l Prop. Holdings v. Westergren, 453 S.W.3d 419, 423 (Tex. 2015).

[80] *Haase*, 62 S.W.3d at 798. To establish fraud, a claimant must prove (1) the other party made a material representation; (2) the representation was false or was made recklessly without knowledge of the truth; (3) the other party made the representation with the intention that the

justifiably rely on the other party's alleged misrepresentations.[81] The general rule in Texas relating to fraudulent inducement claims is that as long as a party can prove justifiable reliance, even through parol evidence, evidence of fraud can invalidate an agreement altogether.[82]

The court established the first notable exception to this general rule in *Schlumberger*, where it held that a disclaimer of reliance provision negates justifiable reliance if it has a "clear and unequivocal expression of intent."[83] *Schlumberger* arose out of a joint venture dispute in an offshore diamond project between Schlumberger Technology Corporation and the Swanson brothers.[84] After falsely representing to the Swansons that the project was neither "technologically feasible nor commercially viable," Schlumberger convinced them to sell it their interest for over $800,000.[85] As a result, the Swansons signed a release, which included a disclaimer of reliance stating that neither party was "relying upon any statement or representation" made by Schlumberger.[86] The offshore diamond project, however, turned out to be highly successful, and Schlumberger made over $4 million from it.[87] By holding that the Swansons could not prove justifiable reliance, *Schlumberger* clarified the court's previous decisions on this issue, which had not been entirely consistent.[88]

More than one decade later, in *Forest Oil*, the court similarly held that a disclaimer of reliance precluded a claim for fraudulent inducement with

claimant would act upon it; (4) the claimant *relied* upon that statement; and (5) the claimant suffered an injury. Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc., 962 S.W.2d 507, 524 (Tex. 1998) (emphasis added).

[81] JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C., 546 S.W.3d 648, 653 (Tex. 2018).

[82] Williams v. Glash, 789 S.W.2d 261, 264 (Tex. 1990). The remedies for fraudulent inducement include legal damages, such as out-of-pocket and benefit-of-the-bargain expenses, but also equitable remedies like rescission. Formosa Plastics Corp. USA v. Presidio Eng'rs and Contractors, Inc., 960 S.W.2d 41, 49 (Tex. 1998); Dallas Farm Machinery Co. v. Reaves, 307 S.W.2d 233, 240 (Tex. 1957).

[83] 959 S.W.2d 171, 177 (Tex. 1997).

[84] *Id.* at 173–74.

[85] *Id.* Additionally, Schlumberger refused to provide the Swansons with key information about the project's progress or status. *Id*. at 174.

[86] *Id.* at 180.

[87] *Id.*

[88] *Compare*, *e.g.*, Tex. & Pac. Ry. Co. v. Presley, 152 S.W.2d 1105, 1106–08 (Tex. 1941) (setting aside medical release obtained through misrepresentations), *with* Distribs. Inv. Co. v. Patton, 110 S.W.2d 47, 49 (Tex. 1937) (refusing to set aside an "as is" contract when the alleged fraud directly conflicted with the terms of the contract).

respect to an arbitration clause.[89] This case arose out of a settlement agreement in which Forest Oil Corporation settled a long-running lawsuit with James McAllen over oil and gas royalties.[90] In their settlement agreement, which included a disclaimer of reliance on extra-contractual representations, McAllen released Forest Oil of "any and all claims . . . of any type or character known or unknown" related to their oil and gas lease.[91] Although the parties negotiated this broad release to resolve their royalty disputes, they reserved the right to arbitrate any claims for environmental damages and other tort claims.[92] After McAllen discovered that Forest Oil had buried "highly toxic mercury-contaminated" material on his land, however, he sued Forest Oil in Texas state court.[93] When Forest Oil sought to compel arbitration, McAllen argued that the corporation's lawyers had fraudulently induced him to sign the settlement agreement through assurances that no environmental harm existed.[94]

Nonetheless, the court held that McAllen's claim for fraudulent inducement was barred because he had disclaimed reliance as a matter of law.[95] *Forest Oil* thus expanded the court's enforcement of disclaimers of reliance from *Schlumberger*, which at first glance seemed to be just a narrow exception to the general rule that fraud prevents the enforcement of an otherwise valid contract.[96] As Chief Justice Jefferson explained, the *Schlumberger* contract specifically disclaimed reliance on the very types of representations that constituted the alleged fraud.[97] *Forest Oil*, however, included a broad release for any and all claims that could arise, but the court still held that all-encompassing disclaimers can show sufficient intent to

[89] 268 S.W.3d 51, 62 (Tex. 2008). The settlement agreement, which disclaimed reliance on extra-contractual representations, released Forest Oil from further claims that could arise but reserved the right to arbitrate them under the TAA. The issue before the court was whether McAllen, who claimed that Forest Oil induced him to enter into the settlement agreement, could avoid the requirement to arbitrate as stipulated in the release. *Id*. at 54–56.

[90] *Id*. at 53.

[91] *Id*. at 53–54.

[92] *Id*. at 54.

[93] *Id*.

[94] *Id*. at 54–55.

[95] *Id*. at 62.

[96] *Id*. at 63 (Jefferson, C.J., dissenting).

[97] 959 S.W.2d 171, 181 (Tex. 1997) ("We conclude only that on this record, the disclaimer of reliance conclusively negates as a matter of law the element of reliance on representations . . . needed to support the [plaintiff's] claim of fraudulent inducement.").

disclaim reliance.[98] In addition, the court clarified the factors that guided its decision in *Schlumberger*:

> (1) the terms of the contract were negotiated, not boilerplate, and during negotiations the parties specifically discussed the issue which has become the topic of the subsequent dispute; (2) the complaining party was represented by counsel; (3) the parties dealt with each other in an arm's length transaction; (4) the parties were knowledgeable in business matters; and (5) the release language was clear.[99]

Importantly, the court failed to explain whether some of the abovementioned factors should weigh heavier than others or could alone be dispositive but just stated that all five factors were present in both *Schlumberger* and *Forest Oil*.[100] The court later explained that the fifth factor, whether the disclaimer language clearly and unequivocally disclaimed reliance, is a threshold issue, and courts should look to the circumstances surrounding the contract's formation only if the release language is clear.[101] Therefore, unless the disclaimer language is clear, a claimant is not barred from claiming justifiable reliance.[102] If the disclaimer is clear, however, then courts may look to the circumstances surrounding the formation of the contract, which the court, by describing them as factors, suggested that they need not all be present to bar reliance.[103] A large problem courts face following *Forest Oil* is the uncertainty in balancing the factors when not all of them favor enforcing the disclaimer, such as in *Carduco*.[104]

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[98] 268 S.W.3d at 53, n.2, 58.

[99] *Id*. at 60.

[100] *Id*. The court clarified the approach it took in *Schlumberger* after recognizing that several courts of appeals disagreed over which factors to consider. *Compare, e.g.*, Warehouse Assocs. Corp. Ctr. II, Inc. v. Celotex Corp., 192 S.W.3d 225, 230–34 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (applying *Schlumberger* only when the topic of dispute was also the basis for the alleged fraudulent representation), *with* John v. Marshall Health Servs., Inc., 91 S.W.3d 446, 450 (Tex. App.—Texarkana 2002, pet. denied) (refusing to apply *Schlumberger* when the contract signaled the start of a business relationship, not the termination of a long-running dispute).

[101] Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am., 341 S.W.3d 323, 331, 336–37, 337 n.8 (Tex. 2011).

[102] *Id*.

[103] *See* Allen v. Devon Energy Holdings, L.L.C, 367 S.W.3d 355, 384 (Tex. App.—Houston [1st Dist.] 2012, pet granted, judgm't vacated w.r.m.) (interpreting the *Forest Oil* factors as factors, not "absolute requirements").

[104] *See infra* Section II.C.

B. Italian Cowboy

Although *Schlumberger* and *Forest Oil* indicated a trend favoring enforcement of disclaimers, *Italian Cowboy* broke this trend in 2011 when the court held that a standard merger clause in a commercial lease did not disclaim a tenant's reliance on a property manager's oral representations.[105] The dispute there arose out of commercial lease negotiations where the tenants, owners of the Italian Cowboy restaurant, relied on the property manager's oral representations that the building was in perfect condition before entering the lease.[106] As it turned out, not only did the building have serious problems, but the property manager had full knowledge of this fact before he signed the lease with Italian Cowboy.[107] The same "foul sewer gas odor" that had led the previous tenant out of business returned when Italian Cowboy opened, but the property manager continued to lie that he was unaware of the problem despite repeated questions from his tenants.[108] Unfortunately for Italian Cowboy, the restaurant could not carry on due to the haunting stench, so it sued the property manager for fraudulently inducing it to enter into the lease.[109] However, the lease contained no-representation and merger clauses, which stated, respectively:

> Tenant acknowledges that neither Landlord nor Landlord's agents, employees or contractors have made any representations or promises . . . except as expressly set forth herein.
>
> . . . .
>
> This lease constitutes the entire agreement between the parties hereto with respect to the subject matter hereof, and no subsequent amendment or agreement shall be binding upon either party unless it is signed by each party . . . .[110]

Because the lease involved standard language found in merger clauses but lacked the express disclaimer of reliance language found in both

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[105] *Italian Cowboy*, 341 S.W.3d at 328.

[106] *Id*. In addition, the court listed other actionable misrepresentations, such as telling the would-be tenants that prior tenants had experienced no problems and that the building was a perfect restaurant site. *Id*. at 337.

[107] *Id*. at 330.

[108] *Id*. at 329–30.

[109] *Id*.

[110] *Id*. at 328.

Schlumberger and *Forest Oil*, the court held that Italian Cowboy did not have the requisite intent to disclaim reliance.[111] Recognizing that the purpose of merger clauses is to supersede any previous agreements and negate any potential apparent authority following the execution of a contract, the court explained that merger clauses standing alone do not speak to reliance at all.[112] Although the court focused most of its attention in *Italian Cowboy* on distinguishing the intent necessary to disclaim reliance, it also presented public policy concerns different from those found in *Schlumberger* and *Forest Oil*.

C. Competing Public Policy Concerns

To achieve consistency in settlement agreements and to ensure parties that courts will enforce their settlement agreements, the *Schlumberger* court set forth an overarching principle that "[p]arties should be able to *bargain for* and execute a release *barring all further dispute*."[113] The facts of *Schlumberger* and *Forest Oil* both involved agreements that ended long-running disputes, which the court highlighted in both opinions.[114] The court repeated Texas' strong public policy favoring the amicable settlement of disputes, though it is unclear if it intended to include the nature of the agreement at issue (*i.e.*, whether the disclaimer is found in a settlement agreement) as one of the enumerated factors surrounding the formation of an agreement.[115]

Unlike *Schlumberger* and *Forest Oil*, *Italian Cowboy* did not involve a settlement agreement, so the court discussed only the public policy considerations favoring the avoidance of contracts secured by fraud at the onset of a business relationship.[116] Citing one of its oldest cases about

[111] *Id*. at 334.

[112] *Id*. at 335 ("There is a significant difference between a party disclaiming its *reliance* on certain representations, and therefore potentially relinquishing the right to pursue any claim for which reliance is an element, and disclaiming the *fact* that no other representations were made.").

[113] 959 S.W.2d 171, 179 (Tex. 1997) (emphasis added).

[114] *See* Forest Oil Corp. v. McAllen, 268 S.W.3d 51, 60 (Tex. 2008) (involving a release that stipulated arbitration for future disputes); *Schlumberger*, 959 S.W.2d at 179–80 (concerning a decisive settlement agreement over a seafloor mining operation).

[115] *See Forest Oil*, 268 S.W.2d at 60 (citing Transp. Ins. Co. v. Faircloth, 898 S.W.2d 269, 280 (Tex. 1995) ("Settlements are favored because they avoid the uncertainties regarding the outcome of litigation, and the often-exorbitant amounts of time and money to . . . defend claims at trial.").

[116] *Italian Cowboy*, 341 S.W.3d at 332; *Cf. Forest Oil*, 268 S.W.3d at 60 & n.33 (discussing the public policy favoring settlement agreements).

fraudulent inducement, the court repeated the policy concerns in favor of allowing parties to avoid merger clauses when the other party has obtained a promise through deceit.[117] To prevent parties from suing for fraud due to merger clauses, the court explained, would "ignore the frequent instances in everyday experience where parties accept, often without critical examination . . . in reliance of supposed friends" or "the plausible and disarming statements of a salesman."[118]

In other words, when a contract signals the start of a business relationship, the court explained that a disclaimer of reliance should "be all the more clear and unequivocal" if the parties truly intended to disclaim reliance on representations not found in their agreement.[119] Although the court did not definitively include that consideration into the enumerated *Forest Oil* factors, the court's discussion indicated that the public policy considerations favoring settlement agreements are absent in contracts that signal the start of business relationships, such as in *Italian Cowboy* and *Carduco*. As this Note argues in further detail below, the court should include this distinction in its framework because whether a contract marks the start or the end of a business relationship shifts the entire public policy analysis.[120]

Although *Italian Cowboy* made the point that not all contracts will shield parties from fraud liability, it did little to provide Texas courts with a consistent framework to follow. Unsurprisingly, Texas appellate decisions after *Italian Cowboy* remain increasingly divergent, which further underlines *Carduco*'s importance.[121] Against this backdrop of unsettled case law, *Carduco* knocked on the doors of the Texas Supreme Court with a laundry

[117] *Italian Cowboy*, 341 S.W.3d at 332 (citing Dallas Farm Mach. Co. v. Reaves, 307 S.W.2d 233, 239 (Tex. 1957), quoting Bates v. Southgate, 31 N.E.2d 551, 558 (Mass. 1941)).

[118] *Id*. at 332.

[119] *Id*. at 335.

[120] *See* discussion *infra* at IV.A.

[121] *See* Hejin Hong v. Nations Renovations, LLC, No. 02-15-01036-CV, 2016 WL 7473900, at *5–6 (Tex. App.—Dallas Dec. 29, 2016, pet. denied) (mem. op.) (including a disclaimer stating that any representations "are agreed to be immaterial" and that neither party relies on them is sufficient to disclaim justifiable reliance); Leibovitz v. Sequoia Real Estate Holdings, L.P. 465 S.W.3d 331, 346 (Tex. App.—Dallas 2015, no pet.) (including a clause stating that settlement agreement was signed "voluntarily and without reliance upon any statement or representation by any party" constituted a clear and unequivocal disclaimer of reliance); Allen v. Devon Energy Holdings, L.L.C., 367 S.W.3d 355, 377 (Tex. App.—Houston [1st Dist.] 2012, pet. granted, judgm't vacated w.r.m.) (stating that the phrase "or were relied upon in entering this agreement" does not turn a merger clause into a clear and unequivocal disclaimer of reliance for fraudulent inducement purposes).

list of concerns: can parties to a contract always disclaim justifiable reliance by including a magic clause in their agreement? If not, under what circumstances can parties to a contract avoid their contractual promises and claim that they justifiably relied on the other party's representations?

III. THE TEXAS SUPREME COURT'S DECISION

The answer: to be determined. The phrase "disclaimer of reliance" did not show up once in the court's opinion.[122] Rather than use *Carduco* as an opportunity to clarify some of the nuances resulting from its previous disclaimer of reliance cases, the court punted the issue and instead reversed the Thirteenth Court's judgment, rendering that Carduco take nothing for unrelated reasons.[123] This next Section analyzes the court's flawed reasoning and explains the consequences of its decision, which regrettably inches closer to shutting the door for future fraudulent inducement claims.

A. The Dealer Agreement Directly Contradicts Carduco's Mistaken Beliefs

The court held that the "parties' written agreement directly contradict[ed] Carduco's alleged belief [in possibly relocating to McAllen] and thereby negate[ed] its justifiable reliance as a matter of law."[124] As support for this conclusion, the court primarily cited its 2018 decision in *Orca Assets*, where it held that a letter of intent "directly contradict[ing] the representations on which the plaintiff allegedly relied," together with "red flags" and the plaintiff's sophistication negated its justifiable reliance.[125] In *Orca Assets*, an experienced oil-and-gas company, Orca, signed a lease without knowledge that the defendant had previously leased the property to a third party, after which Orca sued for fraudulent inducement.[126] Like in *Carduco*, the court barred Orca's fraud claim on the basis that it did not justifiably rely on the defendant's extra-contractual representations as a matter of law.[127]

The court's holding initially suggested that it was not only the direct contradictions between the letter of intent and alleged misrepresentations but

[122] *See* Mercedes-Benz USA, LLC v. Carduco, Inc., No. 16-0644, 2019 WL 847845, at *1 (Tex. Feb. 22, 2019).

[123] *Id.* at *1.

[124] *Id.* at *4.

[125] 546 S.W.3d 648, 660 (Tex. 2018).

[126] *Id.* at 650, 652.

[127] *See id.* at 659–60.

also the "numerous 'red flags'" and "Orca's sophistication in the oil-and-gas industry" that negated Orca's justifiable reliance.[128] However, it dropped a footnote explaining that either direct contradiction or "red flags" alone could negate justifiable reliance.[129] In this case, the court concluded—despite the jury's findings to the contrary—that the "unambiguous" dealer agreement wholly contradicted Carduco's basis for fraud because it neither promised to "hold [the McAllen] market open for [Carduco]" nor gave Mercedes an obligation to grant its relocation to McAllen.[130] Coupled with Renato's experience in the car dealership industry, the court "required greater diligence" from him to justifiably rely on Mercedes' misrepresentations.[131] The court thus substituted its own judgment for that of the jury by concluding that the dealer agreement wholly contradicted Carduco's alleged reliance, a question the court even recognized is ordinarily one of fact.[132]

The court's conclusion treads upon dangerous ground. First, notwithstanding the terms of the dealer agreement, all Texas dealers have a statutory right under the Texas Occupations Code to relocate unless good cause exists to refuse relocation.[133] The court, however, would have required Carduco to negotiate that right into the boilerplate dealer agreement.[134] Second, as Carduco's counsel explained in oral arguments before the Texas Supreme Court, the "no right of exclusivity" clause merely gives dealers non-

[128] *Id*. at 660.

[129] *Id*. at 660 n.2. However, the footnote was silent about whether sophistication in the business could alone negate justifiable reliance. *Id*.

[130] Mercedes-Benz USA, LLC v. Carduco, Inc., No. 16-0644, 2019 WL 847845, at *9 (Tex. Feb. 22, 2019).

[131] *Id*. Interestingly, the court did not bother to acknowledge that Renato Cardenas passed away several years ago, stating that he currently "*is* a very successful businessman" and "*is* an experienced car dealer." *Id*. at *2, 9 (emphasis added).

[132] *See id*. at *4. However, by continually contradicting the trier of fact's findings and substituting its own conclusions in recent cases, the court would be more accurate to characterize this question as one of law. *See e.g.*, *Orca Assets*, 546 S.W.3d at 660 (recognizing that actual reliance is ordinarily a fact question, yet finding against the jury on this issue as a matter of law); Nat'l Prop. Holdings, L.P. v. Westergren, 453 S.W.3d 419, 424 (Tex. 2015).

[133] TEX. OCC. CODE ANN. § 2301.464 ("[A] manufacturer . . . may not deny or withhold approval of a written application relocate a franchise" within the dealer's AOI without reasonable grounds.).

[134] *Carduco*, 2019 WL 847845, at *6 ("Carduco should have insisted on these terms in the parties' contract rather than agreeing in writing to the opposite."). There was no indication in the record, however, to suggest that the dealer agreement was negotiable.

exclusive control over their AOI's population.[135] That clause does not give manufacturers like Mercedes the unfettered right to place more dealers in any given AOI.[136] For example, if a Harlingen resident wishes to purchase a Mercedes-Benz vehicle in Corpus Christi outside of Carduco's AOI, the Corpus Christi dealer cannot force the resident to purchase the car with Carduco.[137] Therefore, the terms of the agreement did not contradict Carduco's belief that its relocation to McAllen was a "foregone conclusion."[138] At best, this "no right of exclusivity" clause was ambiguous as to the full scope of its meaning, making the court's narrow interpretation an imprudent encroachment upon the jury's findings. With no indication as to the appropriate standard or scope of review, however, the court freely "start[ed] with its intended result and worked its way backwards—changing the facts and claims as necessary to justify a preordained outcome."[139]

Most importantly, the court conflated two distinct issues with respect to Mercedes' right to add more dealers into Carduco's AOI. The problem with the court's reasoning is not that the dealer agreement granted Mercedes a right to add more dealers into Carduco's AOI. The issue underlying Carduco's fraud claim, however, was not whether Mercedes had this contractual right.[140] The alleged actionable conduct was Mercedes knowing that Carduco's sole motivation to purchase the Harlingen dealership was relocating to McAllen, yet repeatedly misleading Carduco about its intentions and actions surrounding the McAllen location.[141] Mercedes retaining its contractual right to add more dealers into Carduco's AOI is one issue, but concealing from Carduco its decision to award Heller-Bird the McAllen point—a decision that related to past conduct—is a separate one.[142] In other words, Mercedes could retain a contractual right to add *future* dealers into

[135] Oral Argument at 18:10–18:40, Mercedes-Benz USA, LLC v. Carduco, Inc., No. 16-0644, 2019 WL 847845, at *1 (Tex. Feb. 22, 2019), *available at* http:////www.texasbarcle.com//CLE//SCPlayer.asp?sCaseNo=16-0644.

[136] *See id.* (It must act in good faith).

[137] *Id*.

[138] Mercedes-Benz USA, LLC v. Carduco, Inc., 562 S.W.3d 451, 458 (Tex. App—Corpus Christi-Edinburg 2016, pet. granted), *rev'd*, No. 16-0644, 2019 WL 847845 (Tex. Feb. 22, 2019). (internal quotations omitted).

[139] Mark Curriden, *Written Contracts Can Protect Corporations' Fraudulent Conduct, Says Texas Supreme Court*, DALLAS BUSINESS JOURNAL (Feb. 26, 2019), https:////www.bizjournals.com//dallas//news//2019//02//26//mercedes-benz-carduco.html.

[140] *See Carduco*, 562 S.W.3d at 468–69.

[141] *See id.*

[142] *See id.*

the AOI and still lie to Carduco about whether it had *already* contracted to place another dealer in McAllen. Those two ideas are not mutually exclusive, but the court's opinion treats them as if they were one and the same.[143]

Lastly, despite Carduco's justified assurances that it could trust in the Texas Occupation Code's protections for relocating, assurances that Mercedes only bolstered through its year-long campaign of misleading conduct, the court underrated Carduco's reliance.[144] The court called Carduco's reliance on the Texas Occupations Code "the fundamental problem with [its] case" and reasoned that Carduco should have insisted on including a provision granting it a right to relocate to McAllen.[145] But why would a small South Texas dealership negotiate in its boilerplate agreement with one of the world's largest car manufacturers a "right to relocate" provision when the Texas Occupations Code already gave the dealership that right?[146] The court did not answer that question. This decision suggests, however, that the more statutory protections afforded to a contracting party, the less it can justifiably rely on them.[147]

The court's holding in *Carduco*, as well as the recent cases it cited for the rule that a contract's terms can independently negate justifiable reliance, contradicts the purpose behind fraudulent inducement claims.[148] The court referenced its 2015 decision in *Westergren* to support its conclusion that Carduco did not justifiably rely on Mercedes' representations, which incorrectly presupposes that Carduco blindly relied on Mercedes and failed to exercise reasonable care.[149] As a result, the court impliedly, if not directly,

[143] *See* Mercedes-Benz USA, LLC v. Carduco, Inc., No. 16-0644, 2019 WL 847845, at *6 (Tex. Feb. 22, 2019).

[144] *See id.*

[145] *Id*.

[146] *See* TEX. OCC. CODE ANN. § 2301.464.

[147] *Carduco*, 2019 WL 847845, at *6.

[148] *See* Italian Cowboy Partners v. Prudential Ins. of Am., 341 S.W.3d 323, 331 (Tex. 2011) (citing the RESTATEMENT (SECOND) OF CONTRACTS § 214 cmt. c (AM. LAW INST. 1981) ("What appears to be a *complete* and *binding integrated agreement* . . . may be voidable for fraud . . . .") (emphasis added).

[149] *See* 453 S.W.3d 419, 424–25 (Tex. 2015) (stating that a "recipient of a fraudulent misrepresentation" cannot justifiably rely on falsities that are "obvious to him" or on "misrepresentations regarding the contract's ambiguous terms"). However, it was clearly not obvious to Carduco that Mercedes had secretly agreed to place Heller-Bird in McAllen or that it would not honor Carduco's eventual request to relocate; otherwise, Carduco would not have gone through with the Harlingen transaction. Additionally, Carduco never challenged the contract's terms stating that Mercedes had a right to add future dealers into Carduco's AOI. As the preceding

raised the standard for due diligence that parties must follow to successfully claim justifiable reliance.[150] Rather than the gross negligence standard that the court's "red flags" approach indicated, *Carduco* now imposes on sophisticated parties an affirmative duty to seek out and dispel any possibility of fraud.[151] But the consequences extend beyond that. As a result of this case, fraud defendants can now mislead another party with actual knowledge of the other party's mistaken reliance on material facts so long as a court could plausibly interpret their boilerplate contract to conflict with the facts that the defendants concealed or misrepresented.[152]

*B. No Duty to Disclose…*Technically

The court decided a second issue against Carduco's fraud claim on a technicality "never conceived before, then [it] misapplie[d] its own new rule."[153] Out of its recent fraudulent inducement decisions, this technicality arguably reflects the court's most desperate attempt at exonerating a party's fraudulent conduct. Faced with whether Mercedes' actions gave rise to a duty to disclose the Heller-Bird deal, the court sidestepped the question because Renato, Carduco's "sole decision-maker," was not *technically* the target of Mercedes' misleading acts.[154]

The general rule for silence as fraud is that "a failure to disclose information does not constitute fraud" absent a duty to disclose the information.[155] However, a duty to speak may arise when a party voluntarily makes a partial disclosure that either fails to disclose the whole truth or

discussion illustrates, Carduco's basis for fraud was Mercedes' conduct regarding its decision to award Heller-Bird the McAllen point. By conflating those two issues, however, the court could reach its desired result.

[150] *See Carduco*, 2019 WL 847845, at *8–9 (stating that the standard is "ordinary care" but requiring Carduco to treat a contract that marks the beginning of a business relationship as a "red flag" indicating the possibility of fraud).

[151] *Id*. at *5 (agreeing with Mercedes that Carduco's duty to protect its own interests "required it and its lawyers to edit the written contractual provisions stating that [Mercedes] could assign another dealer [in the AOI] and that Carduco had no right to any particular area").

[152] *See id.* at *4, 5.

[153] State Farm Life. Ins. Co. v. Beaston, 907 S.W.2d 430, 438 (Tex. 1995) (Gammage, J., dissenting).

[154] *See Carduco*, 2019 WL 847845, at *.8

[155] Bradford v. Vento, 48 S.W.3d 749, 755 (Tex. 2001).

conveys a false impression.[156] The court considered the fact that Mercedes' employees falsely denied they knew anything about plans for another dealership in McAllen and even inspected potential sites in McAllen with Rene.[157] Nonetheless, Justice Devine reasoned that no defendant made any representations directly to Renato, just to his son Rene and employees of the Harlingen dealership.[158] The court's reasoning conveniently overlooked the fact that two Mercedes employees personally told Renato to submit two plans, one for Harlingen and one for McAllen, thus falsely insinuating that Carduco would have an opportunity to relocate to McAllen.[159] Mercedes conveyed this false impression directly to Renato, but the court decided to ignore that fact in order to reach its desired result.[160]

Nonetheless, the court's disconcerting logic means that individuals do not have a duty to speak even after making misleading statements to agents, employees, or other persons involved a transaction, as long as the misrepresentations are not directed at this enigmatic "decision-maker."[161] Wrong should not win by technicalities. Unsurprisingly, as support that no duty to speak arose in this case, the court cited to dicta in *SmithKline*, a case that had zero relation to fraud or actionable misrepresentations.[162] The issue in *SmithKline* was whether the defendant owed a legal duty of care to the plaintiff, not whether a duty to speak existed.[163] The court's unconvincing attempt to justify why Mercedes *technically* had no duty to speak will undoubtedly create problems when future fraud defendants argue that their misrepresentations were not *technically* directed toward the plaintiff's "decision-maker."[164]

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[156] *See* RESTATEMENT (SECOND) OF TORTS § 551 (AM. LAW INST. 1981). Although the court has never adopted this section of the Restatement, *see Bradford*, 48 S.W.3d at 755–56, it still concluded that its application to *Carduco* would not give rise to a duty to speak. 2019 WL 847845, at *8.

[157] *Carduco*, 2019 WL 847845, at *7.

[158] *Id.* at *8.

[159] *See id.* at *2.

[160] *See id.*

[161] *See id.*

[162] 903 S.W.2d 347, 350, 353 (Tex. 1995) ("However, Doe does not allege fraud in this case, nor could she inasmuch as she had no contact with SmithKline.").

[163] *Id.* at 351.

[164] *See Carduco*, 2019 WL 847845, at *8.

IV. *CARDUCO* AND THE FUTURE OF DISCLAIMERS OF RELIANCE IN TEXAS

By refusing to address the disclaimer issue, the question of when parties to a contract can effectively disclaim reliance remains unanswered.[165] Accordingly, this Note endorses an approach that courts should follow and one that the Texas Supreme Court should adopt once it decides to not shy away from the disclaimer issue. Although the abovementioned cases will undoubtedly guide Texas courts in different ways, one overarching objective threads through all the cases: intent. Ultimately, the court is not looking for a few, magic words or a "gotcha" factor, but rather, whether both parties truly intended to disclaim reliance.[166]

A. A Steady Framework

Although the court was silent on the disclaimer issue, *Carduco* allowed Mercedes to escape liability through a mere boilerplate agreement, which poses a significant obstacle for future fraudulent inducement plaintiffs.[167] Texas law should not permit disclaimers of reliance to bar claims for fraudulent inducement when the disclaimer is boilerplate, the agreement marks the formal beginning of a business relationship, and the defrauded party has no reasonable means of independently discovering the truth. The court intended *Schlumberger* and *Forest Oil* to be narrow exceptions to the general rule that evidence of fraudulent inducement can invalidate an

[165] Even more recently, on March 15, 2019, the court decided a different fraudulent inducement case where it barred the plaintiff's claim because the disclaimer of reliance was clear, the parties' attorneys negotiated the agreement at arm's length, and both parties were knowledgeable in business matters. *Int'l Bus. Machs. Corp. v. Lufkin Indus. LLC*, No. 17-0666, 2019 WL 1232879, at *4 (Tex. Mar. 15, 2019). Interestingly, the court did not expressly dismiss the plaintiff's argument that these disclaimers should be viewed in a different light "when [they] appear in an agreement that initiates the parties' business relationship." *Id.* at *6. Nonetheless, it enforced the disclaimer outside the context of a long-running dispute and explained that the agreement, not the specific disclaimer, must be specifically negotiated under the *Forest Oil* factors. *Id.* at *4, 5 n.4.

[166] Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am., 341 S.W.3d 323, 333 (Tex. 2011).

[167] *See* 2019 WL 847845, at *2 (nowhere indicating that Carduco had equal bargaining power to insert a term obligating Mercedes to relocate the dealership to McAllen). Carduco had a reasonable basis to rely on statutory protections, which would have granted it a right of relocation within its AOI absent reasonable grounds for denying the relocation. *See* TEX. OCC. CODE ANN. § 2301.359.

agreement.[168] By inadvertently extending fraud liability protection further, the court continues to turn this general rule on its head and slowly convert it into the exception.[169]

Therefore, this Note introduces a framework that builds upon the current rules promulgated by the Texas judiciary and addresses the dangerous precedent of enforcing disclaimers in future cases that resemble *Carduco*. Texas courts should not enforce disclaimers of reliance to bar fraudulent inducement claims unless: (1) the contractual disclaimer of reliance is clear and unequivocal; (2) the four *Forest Oil* factors are met; (3) there are "red flags" indicating the presence of fraud; and (4) the contract represents the end, rather than the beginning, of a business relationship.

First, the court failed to explicitly define what makes a disclaimer "clear" or "unequivocal," but its holdings suggest an important distinction. In *Schlumberger* and *Forest Oil*, the court enforced disclaimers of reliance, which stated that the parties were not relying on extra-contractual representations but, rather, their own judgment.[170] The key in those cases was that the parties expressly disclaimed *reliance*.[171] However, the *Italian Cowboy* court refused to recognize that a merger clause, which stated only that a contract constituted the parties' entire agreement, showed the same level of intent to disclaim reliance.[172]

Applying that distinction to other types of clauses indicates that similar provisions like disclaimers of representations and "as is" clauses would also be insufficient to negate reliance. Disclaimers of representations merely acknowledge that neither party has made any representations not expressly stated in the agreement, and "as is" clauses similarly state that a party is accepting a product or service under the agreement as it comes.[173]

Although the distinction appears arbitrary at first glance, it is a distinction the court found dispositive in *Italian Cowboy* and demonstrates that only disclaimers of reliance can bar fraudulent inducement claims.[174] Therefore, building on that precedent, this Note proposes that the threshold question in any similar fraudulent inducement case should be whether the provision in

[168] *See* Forest Oil Corp. v. McAllen, 268 S.W.3d 51, 64 (Tex. 2008) (Jefferson, C.J., dissenting).

[169] *See* Bridger v. Goldsmith, 38 N.E. 458, 459 (N.Y. 1894) ("The maxim that fraud vitiates every transaction would no longer be the rule, but the exception.").

[170] *See Italian Cowboy*, 341 S.W.3d at 332–33.

[171] *See id.*

[172] *Id.* at 334.

[173] *As is*, BLACK'S LAW DICTIONARY (10th ed. 2015).

[174] *See Italian Cowboy*, 341 S.W.3d at 332–33.

question expressly disclaims reliance. If it only recognizes the absence of other representations or states that the agreement is complete, then the provision should not bar a claimant's justifiable reliance as a matter of law.

Second, the court should turn the four *Forest Oil* factors into elements and require they be met before negating justifiable reliance. The final three factors (representation by counsel, arms' length, and sophistication of parties) all show that courts should enforce disclaimers of reliance only in cases where both parties are actually or constructively aware of their interests and how to protect them.[175] Whether only a few of those three factors are present or not may not provide a significant distinction in most cases, but it does lead to inconsistent analyses.[176]

Importantly, the first *Forest Oil* factor—whether "the terms of the contract were negotiated, not boilerplate, and during negotiations the parties specifically discussed the issue which has become the topic of the subsequent dispute"—speaks most strongly to intent.[177] If parties to a contract negotiate a specific issue and disclaim any reliance on representations made about that negotiated issue, then they likely intended to not rely on representations about that issue.[178] *Schlumberger* presented this precise scenario: the only dispute the parties settled, the feasibility of the joint venture project, became the basis for the Swansons' fraudulent inducement claim.[179] Therefore, the court could safely presume that the disclaimer of reliance applied directly to representations made about the feasibility of the joint venture project.[180] The same cannot be said about dealer agreements like the one in *Carduco*, which included a broad disclaimer and could have encompassed any one of Mercedes' extra-contractual representations.[181]

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[175] *See* Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 180 (Tex. 1997) ("[B]oth Schlumberger and the Swansons are knowledgeable and sophisticated business players.").

[176] *See, e.g.*, Fletcher v. Edwards, 26 S.W.3d 66, 76–77 (Tex. App.—Waco 2000, pet. denied) (automatically concluding that justifiable reliance was not negated because some *Forest Oil* factors were absent).

[177] *See* 268 S.W.3d 51, 62 (Tex. 2008) (Jefferson, C.J., dissenting). Importantly, the *Lufkin* decision does not undermine this argument because, unlike *Lufkin*, *Carduco* involved a boilerplate agreement.

[178] *Forest Oil*, 268 S.W.3d at 64.

[179] *Id.*

[180] *Id.*

[181] *See* Mercedes-Benz USA, LLC v. Carduco, Inc., 562 S.W.3d 451, 476 (Tex.App—Corpus Christi-Edinburg 2016, pet. granted), *rev'd*, No. 16-0644, 2019 WL 847845 (Tex. Feb. 22, 2019).

Third, *Carduco* highlights the importance of not barring fraud claimants when they could not have either discovered the alleged fraud through reasonable inquiry or arrived at an independent conclusion. When the facts and circumstances of a transaction indicate that a reasonably diligent party could have discovered the fraud, Texas courts have always prevented parties from covering their eyes and claiming justifiable reliance.[182] In *Orca Assets*, the Texas Supreme Court reiterated the principle that these "red flags" can undermine and even negate justifiable reliance.[183] Importantly, the court's decision in *Carduco* took *Orca Assets* one step further by affirming that the contract at issue can constitute a "red flag" and independently negate justifiable reliance.[184]

Notwithstanding the court's holding in *Carduco*, the theme of "red flags" threads through its seminal disclaimer of reliance cases. In *Italian Cowboy*, for example, Chief Justice Hecht dedicated a significant portion of his dissent to explaining why the plaintiffs could have independently determined that the defendant's representations were false.[185] Similarly, in *Schlumberger*, the court pointed out that the Swansons had the ability to review the joint venture's financial records and come to an independent evaluation of the sea-diamond project's feasibility.[186] This case was factually distinct, however, because Carduco could not independently discover through a reasonable investigation that Mercedes undertook a company-wide scheme to prevent it from ever relocating to McAllen.[187] Any time Carduco mentioned the

[182] Grant Thornton LLP v. Prospect High Income Fund, 314 S.W.3d 913, 923 (Tex. 2010) ("[W]e must inquire whether, given a fraud plaintiff's individual characteristics, abilities, and appreciation of facts and circumstances at or before the time of the alleged fraud, it is extremely unlikely that there is actual reliance . . . .") (internal quotations omitted).

[183] 546 S.W.3d 648, 660 (Tex. 2018) ("Viewed in context with the numerous 'red flags' . . . Orca cannot maintain its claim of justifiable reliance.").

[184] Mercedes-Benz USA, LLC v. Carduco, Inc., No. 16-0644, 2019 WL 847845, at *5 (Tex. Feb. 22, 2019) ("In truth, when a plaintiff asserts reliance on a misrepresentation that the written contract directly and unambiguously contradicts . . . the existence of such a conflict is itself a large red flag.").

[185] Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am., 341 S.W.3d 323, 347–48 (Tex. 2011) (Hecht, J. dissenting).

[186] Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 180 (Tex. 1997).

[187] *See* Mercedes-Benz USA, LLC v. Carduco, Inc., 562 S.W.3d 451, 461–62 (Tex. App.—Corpus Christi-Edinburg 2016, pet. granted), *rev'd*, No. 16-0644, 2019 WL 847845 (Tex. Feb. 22, 2019). In other settings, such as divorce proceedings, Texas courts set aside settlement agreements when one of the parties does not have certain information or access to that information. *See, e.g.*, Boyd v. Boyd, 67 S.W.3d 398, 405 (Tex. App.—Fort Worth 2002, no pet.) (to enforce such

presumptive relocation to McAllen, Mercedes' employees kept straight faces and told Renato that everything was going as planned.[188] Despite Mercedes' year-long campaign of representations indicating that the deal to relocate was still in place, the court still held that there were sufficient "red flags" to undermine justifiable reliance.[189] Nonetheless, assuming that no contradiction between the contract and the alleged misrepresentations exists, the court should not negate justifiable reliance when the surrounding circumstances are devoid of other "red flags."

Fourth, the dealer agreement represented the official start of a business relationship, which the *Italian Cowboy* court implied is subject to a higher standard in order to successfully disclaim reliance as a matter of law.[190] When the court decided *Schlumberger* and *Forest Oil*, it balanced competing concerns between disincentivizing fraud and honoring the finality of settlement disputes.[191] However, when parties to a contract are at the outset of their relationship, the public policy concerns favoring the finality of settlement agreements are wholly absent because those contracts are not settlement agreements.[192] The only remaining public policies are Texas' aversion to fraud on the one hand and Texas' policy favoring the freedom to contract on the other.[193] But the mere fact that Texas law favors the freedom to contract has never prevented it from setting aside agreements that are illegal or contrary to public policy, and fraud is both illegal and contrary to

settlement agreements "would encourage gamesmanship, not the peaceable resolution of disputes favored by Texas public policy").

[188] *See Carduco*, 562 S.W.3d at 463, 465.

[189] *Compare* JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C., 546 S.W.3d 648, 655–56 (Tex. 2018) (expressly rejecting the argument that negation-of-warranty and no-recourse provisions alone raise "red flags" or negate justifiable reliance), *with* Mercedes-Benz USA, LLC v. Carduco, Inc., No. 16-0644, 2019 WL 847845, at *5 (Tex. Feb. 22, 2019) (stating that when the contract contradicts the plaintiff's reliance on a misrepresentation, it is "itself a large red flag.").

[190] 341 S.W.3d at 335; *see also* Int'l Bus. Machs. Corp. v. Lufkin Indus. LLC, No. 17-0666, 2019 WL 1232879, at *6 (Tex. 2019) (suggesting that *Italian Cowboys* may require a different approach to the "clear and unequivocal" requirement when "the disclaimer appears in an agreement that initiates the parties' business relationship"). Even though the court in *Lufkin* enforced the disclaimer outside the context of a dispute, it failed to even mention the policy concerns that underlined its decisions in *Schlumberger* and *Forest Oil*.

[191] *See* Forest Oil Corp. v. McAllen, 268 S.W.3d 51, 60 (Tex. 2008).

[192] *See* Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 179 (Tex. 1997).

[193] *See id.* at 178.

public policy.[194] Not to mention that fraudulent inducement prevents a meeting of the minds in the first place, a concept oft-cited by other jurisdictions and mentioned in passing in *Schlumberger*.[195]

In justifying the policy underlying enforcement of disclaimers, the *Forest Oil* court explained that "[p]arties should not sign contracts while crossing their fingers behind their backs."[196] The court could point the same finger, however, to parties that use contractual ploys to fraudulently induce promises.[197] In addition to Mercedes' civil liability, its conduct was subject to criminal consequences because its employees secured a signature through deception.[198] The court could have used *Carduco* to consolidate gaps from its existing lines of cases analyzing disclaimers of reliance and fraudulent inducement. Instead, the court extended this inadvertent protection to fraud defendants and failed to clarify when contractual parties may disclaim justifiable reliance. Once the court decides to address the disclaimer issue, it should limit that use to cases where the disclaimer language is clear, the *Forest Oil* factors all favor enforcement of the disclaimer, no "red flags" are present, and the agreement marks the end of a business relationship.[199]

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[194] Woolsey v. Panhandle Ref. Co., 116 S.W.2d 675, 678 (Tex. 1938); Kevin Davis, *Licensing Lies: Merger Clauses, the Parol Evidence Rule and Pre-Contractual Misrepresentations*, 33 VAL. U. L. REV. 485, 494 (1999).

[195] 959 S.W.2d at 179.

[196] *Forest Oil*, 268 S.W.3d at 60.

[197] *See* Bates v. Southgate, 31 N.E.2d 551, 558 (Mass. 1941) ("The same public policy that in general sanctions the avoidance of a promise obtained by deceit strikes down all attempts to circumvent that policy by means of contractual devices.").

[198] Mercedes-Benz USA, LLC v. Carduco, Inc., 562 S.W.3d 451, 495 (Tex. App.—Corpus Christi-Edinburg 2016, pet. granted), *rev'd*, No. 16-0644, 2019 WL 847845 (Tex. Feb. 22, 2019); *see* TEX. PEN. CODE ANN. § 32.46(a)(1); TEX. PEN. CODE ANN. § 12.32(a). Although the Thirteenth Court concluded that Mercedes had committed only a third-degree felony, that is only if the value of the property or pecuniary interest in question ranges between $30,000 and $150,000. *Carduco*, 562 S.W.3d at 495; TEX. PEN. CODE ANN. § 32.46(b)(5). If the value exceeds $300,000, however, it becomes a first-degree felony, punishable not only by a $10,000 fine but also a minimum of five years imprisonment. TEX. PEN. CODE ANN. § 32.46(b)(7); TEX. PEN. CODE ANN. § 12.32. Setting the value of the dealer agreement aside, the asset-purchase agreement between Rene and Renato alone was worth $7 million, which indicates that Mercedes' conduct rose to the level of a first-degree felony. *See* Respondent's Brief on the Merits at *12, *Carduco*, 562 S.W.3d 451, (NO. 16-0644), *available at* http:////www.search.txcourts.gov//SearchMedia.aspx?MediaVersionID=225a5bd1-3dd2-4cd3-a118-3e0db45bff1e&coa=cossup&DT=BRIEFS&MediaID=da3550f4-bc76-40f6-9af3-0fd9e7273e25; TEX. PEN. CODE ANN. § 32.46(b)(7).

[199] *See* 268 S.W.3d at 63 (Jefferson, C.J., dissenting).

B. Effects of the Carduco *Decision*

Texas lawyers who often deal with business transactions do not yet have clear answers from the Texas Supreme Court's decisions, and they struggle with the inconsistent appellate courts' decisions.[200] Many of them looked to this case closely in the hopes that the Texas Supreme Court would finally clarify "both…the drafting of such reliance disclaimer clauses and their enforceability."[201] Not only is there no further guidance on disclaimers of reliance after this decision, but *Carduco* also illustrates that even the terms of a contract—ambiguous as they may appear to the parties at the time of contracting—can alone negate justifiable reliance.[202]

Despite the confusion that will survive *Carduco*, the court has at least held that merger clauses (and hinted that disclaimers of representations and "as is" clauses) are insufficient to disclaim reliance.[203] Notwithstanding what the court decides concerning future fraudulent inducement cases, lawyers already know what types of provisions the court would be willing to enforce.[204] Although the table below illustrates how subtle the differences in these provisions seem, lawyers control what they negotiate into their clients' agreements, and it can make the entire difference of whether it bars a claim for fraud or not.

[200] *See* Chris Brown, *Waiver//Disclaimer of Reliance Provisions After Allen v. Devon Energy Holdings, L.L.C.*, WINSTEAD (Aug. 10, 2011), https:////www.winstead.com//Knowledge-Events//News-Alerts//87766//WaiverDisclaimer-of-Reliance-Provisions-After-Allen-v-Devon-Energy-Holdings-LLC ("Magic words not necessary, but unclear what would suffice").

[201] *See* J. Laurens Wilkes & William R. Taylor, *Texas Supreme Court to Further Examine Disclaimer of Reliance Clauses*, JONES DAY (last updated Oct. 18, 2018), https:////www.jonesday.com//Texas-Supreme-Court-to-Further-Examine-Disclaimer-of-Reliance-Clauses-10-16-2018//?RSS=true&utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original (recognizing that the enforceability of these disclaimers of reliance is an "oft-litigated issue in Texas").

[202] No. 16-0644, 2019 WL 847845, at *5 (Tex. Feb. 22, 2019).

[203] *See* Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am., 341 S.W.3d 323, 334 (Tex. 2011).

[204] *Compare* Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 180 (Tex. 1997) (enforcing a disclaimer of reliance), *with Italian Cowboy*, 341 S.W.3d at 334 (refusing to enforce a merger clause).

Schlumberger	*Forest Oil*	*Italian Cowboy*	*Carduco*
Each of us . . . expressly warrants and represents . . . that no promise or agreement which is not herein expressed has been made to him or her in executing this release, and that *none of us is relying upon any statement or representation* of any agent of the parties being released hereby. Each of us is *relying* on his or her own judgment . . . [205]	[We] expressly represent and warrant . . . that no promise or agreement which is not herein expressed has been made to them in executing the releases contained in this Agreement, and that *they are not relying upon any statement or representation of any of the parties being released hereby*. [We] are *relying* upon [our] own judgment . . .[206]	Tenant acknowledges that neither Landlord nor Landlord's agents, employees or contractors have made any representations or promises . . . except as expressly set forth herein. This lease constitutes the entire agreement between the parties hereto with respect to the subject matter hereof, and no subsequent amendment or agreement shall be binding upon either party unless it is signed by each party . . .[207]	This Agreement terminates and supersedes all prior agreements between the parties relating to the subject matters covered herein. There are no prior agreements or understandings . . . . Dealer acknowledges that *no representations or statements other than those expressly set forth therein were made* by MBUSA, or any officer, employee, agent, or representative thereof, *or were relied upon by Dealer* in entering into this Agreement.[208]

Borrowing from the court's decisions under the express negligence doctrine, the same justifications it used to heighten standards for releases and indemnification agreements applies to disclaimers of reliance.

[205] *Schlumberger*, 959 S.W.2d at 180.

[206] Forest Oil Corp. v. McAllen, 268 S.W.3d 51, 54 n.4 (Tex. 2008).

[207] *Italian Cowboy*, 341 S.W.3d at 328.

[208] Petitioner's Brief on the Merits at *324, Mercedes-Benz USA, LLC v. Carduco, Inc., 562 S.W.3d 451 (No. 16-0644), *available at* http:////www.search.txcourts.gov//SearchMedia.aspx?MediaVersionID=4769274a-cbeb-4b02-952b-b83e0b719fdf&coa=cossup&DT=BRIEFS&MediaID=0333f157-642b-4724-b9b1-91cde43cc4a0.

Indemnification agreements and releases, like disclaimers of reliance, are an "extraordinary shifting of risk," so the court developed fair notice requirements that must be met for them to be enforceable.[209] To comply with fair notice, indemnitees must express their intent specifically and conspicuously, such that it would attract the attention of a reasonable person upon looking at the face of the contract.[210] The court did not derive these rules from statutes, but rather, formulated them after recognizing that indemnification agreements are powerful and surrender substantial rights.[211]

If releases and indemnification agreements will shield express negligence through boilerplate agreements, then attention must be drawn to these provisions to address the possibility that the indemnitor may not notice them. Although the court has never applied this reasoning to disclaimers of reliance in fraudulent inducement claims, it underlines the court's concern about parties being unaware of every single provision in their contracts.[212] Therefore, rather than secretly stick these disclaimers at the bottom of boilerplate agreements, lawyers should make them conform to the court's fair notice requirements. At a minimum, a conspicuous disclaimer undermines a fraud plaintiff's claim that it had no notice of the provision.

Although the court's decisions have not indicated that a magic disclaimer of reliance exists, this Note undertakes to draft a model disclaimer of reliance derived from the court's precedent. Because this Note argues that these disclaimers of reliance should be effective to negate justifiable reliance only at the end of a business relationship, it drafts the disclaimer in the context of a settlement agreement. The purpose of this disclaimer is to be as clear and unequivocal as the disclaimers the court has enforced, satisfy the *Forest Oil* factors, and comply with the court's fair notice requirements.

> **DISCLAIMER OF RELIANCE. In executing this Agreement, the Parties clearly and unequivocally state that no promise, statement, representation, or agreement, whether written or oral, which is not herein**

[209] *See* Dresser Indus., Inc. v. Page Petroleum, Inc., 853 S.W.2d 505, 508–09 (Tex. 1993) (holding that fair notice requirements apply not only to indemnity agreements but also to releases).

[210] *Id*. at 508.

[211] *Id*. The Texas Legislature later codified some of these rules. *See* TEX. BUS. & COMM. CODE ANN. § 1.201(10).

[212] *Italian Cowboy*, 341 S.W.3d at 332 ("To deny this possibility is to ignore the frequent instances in everyday experiences where parties accept, often without critical examination, and act upon agreements containing somewhere within their four corners exculpatory clauses in one form or another . . . .").

> **expressed is material to this final Agreement. The Parties further clearly and unequivocally state that neither Party is relying upon any statement or representation of any agent or representative of the other Party to this Agreement. In addition, the Parties represent and state that counsel represented them in the negotiation and formation of this Agreement, and this particular provision is one that both Parties negotiated at arm's length. Each Party is relying solely on its own knowledge, sophistication, and expertise of the matters pertinent to this Agreement. Except to the extent that a matter is expressly stated in this Agreement, the Parties hereby disclaim any right to revoke, rescind, or otherwise avoid the effects and consequences of this Agreement on the basis of any alleged fraudulent inducement, misrepresentation, or any other material omissions.**

This Note cautions against permitting carefully-worded disclaimers of reliance to categorically bar any claim for fraudulent inducement because doing so will prioritize the law of deceit over honest dealing.[213] Such a categorical decision would undoubtedly encourage lawyers to insert disclaimers at the bottom of every form contract and provide contractually based immunity for fraudulent behavior.[214] Nonetheless, it is crucial for lawyers to understand how to draft their agreements and protect their clients' interests because failing to do so could lead to unknown degrees of liability.

Despite the effect that words on a contract can have on a claim for fraud, that is not all with which the court is concerned, and lawyers should be aware of that. The inclusion of the *Forest Oil* factors and the narrow decisions thus far suggest that the court does not want to excuse fraud as a matter of law.[215] Because cooperation requires mutual honesty, especially in sophisticated

[213] *See* Allen v. Devon Energy Holdings, L.L.C., 367 S.W.3d 355, 377 (Tex. App.—Houston [1st Dist.] 2012, pet. granted, judgm't vacated w.r.m.); *see also* 2 Fowler V. Harper, et al., The Law of Torts 378 (2d ed. 1986) ("The type of interest protected by the law of deceit is the interest in formulating business judgment without being misled by others—in short, in not being cheated.").

[214] *See* Comment, *Action for Deceit as Barred by Contractual Disclaimer of Seller's Representations as to Specific Matters and of Buyer's Reliance on Representations*, 59 COLUM. L REV. 525, 529 (1959) ("[T]he cheat does not deserve the total security of contract which the court" would afford by shielding it from liability.).

[215] *Italian Cowboy*, 341 S.W.3d at 333 ("We decline to adopt a *per se* rule that a disclaimer automatically precludes a fraudulent-inducement claim . . . .").

business transactions, people depend on others to be honest with them.[216] Contracts achieve this goal by allowing people to make credible promises that others can rely on.[217] But disclaimers of reliance, if categorically enforced, give people the right to act dishonestly and escape scot-free. As a result, they breed dishonesty and discourage people from entering into contracts because they cannot know whether promises and representations made are credible or not.[218] The freedom to contract should have been no defense in a case like *Carduco* where no other public policy considerations were at stake, such as those favoring the amicable settlement of disputes.[219] Texas has long followed the principle that courts must set aside contracts that are illegal or violate public policy.[220] Fraud is both illegal and against public policy.[221]

Although lawyers may not find much clarity in the court's decision for their own disclaimers of reliance, *Carduco* teaches us a few lessons. First, if *Carduco* is any indication as to how the court will treat future fraudulent inducement claims, then it is safe to conclude that any ambiguities will be resolved in favor of barring fraud claims.[222] Second, *Carduco* instructs sophisticated parties to not rely on the other party's word; even if they do not have equal bargaining power, they must include any conceivable condition on which they may rely in the written contract or surrender their right to sue for fraudulent inducement.[223] However, because *Carduco*'s holding did not address the effect of the disclaimer of reliance, this case should not give lawyers comfort in their attempts to absolve their clients' fraud behind ambiguous contract terms or disclaimers of reliance.

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[216] Blair, *supra* note 15, at 460.

[217] *Id.* at 461.

[218] *Id.* ("[A]ny anticipated benefit that a promisee might gain from a promised performance or representation must be discounted by the possibility that the promisor will not perform or that the representation is false.").

[219] *See* Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 178 (Tex. 1997) ("Texas law favors and encourages voluntary settlements and orderly dispute resolution.").

[220] *See* Woolsey v. Panhandle Ref. Co., 116 S.W.2d 675, 678 (Tex. 1938) (Texas courts have "repeatedly refused to enforce contracts which are either expressly or impliedly prohibited by statutes or by public policy.").

[221] TEX. PEN. CODE ANN. § 32.46(a)(1).

[222] *See* No. 16-0644, 2019 WL 847845, at *5 (Tex. Feb. 22, 2019).

[223] *See id.* (quoting DRC Parts & Accessories, L.L.C. v. VM Motori, S.P.A., 112 S.W.3d 854, 858–59) (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (a party who enters into a written contract while relying on a contrary oral agreement does so at its peril and is not rewarded with a claim for fraudulent inducement.)).

CONCLUSION

"I'm not upset that you lied to me; I'm upset that from now on I can't believe you."[224]

Freedom of contract is, admittedly, a noble ideal. The idea that two parties can come together and contract for something with the assurance that courts will enforce the agreement is not something anyone should take for granted. A favorable business climate, however, depends on fair and predictable treatment of business dealings. The problem with enforcing all disclaimers of reliance and using ambiguous contract terms to excuse fraud is that it breeds distrust in the system. Sometimes, a bad deal is just that—a bad deal. If you did not think to protect your interests, then the courts are not going to swoop in and save those interests. But that approach ignores the fact that not all contracts encompass every imaginable contingency and assumes that people are inherently distrusting of others, which makes little sense when two parties come together to initiate a business relationship. Refusing to enforce all disclaimers of reliance or agreements procured by fraud does not undermine the freedom to contract; rather, it acknowledges that courts are not in the business of condoning fraudulent dealing. There are places where parties enter into a business deal wholly at their own risk, where the law provides no protection or aid.[225] Texas does not want to be that place, but *Carduco* begs the question of whether the Texas Supreme Court wants to take it there.

The court has recognized the important role of disclaimers in particular circumstances, namely the amicable settlement of long-standing disputes. Although it has expressly refused to adopt a blanket rule that disclaimers of reliance will automatically bar claims for fraudulent inducement, the court's holding that Carduco did not justifiably rely on Mercedes' representations forgave "intentional lies regardless of context."[226] The law should not turn a blind eye to fraudulent practices, nor should it bend in favor of those who use the law for fraudulent purposes. Before the Texas Supreme Court completely shuts the door on all fraudulent inducement claims, it should remember the principle that not all contracts are sacred and refuse to allow savvy lawyers from effortlessly relieving their clients from fraudulent conduct.

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[224] Robert C. Byrd & Steve Kettman, *Letter to a New President: Commonsense Lessons for Our Next Leader*, St. Martin's Press, 87 (2008).

[225] *See, e.g.*, Teer v. Johnston, 60 So.3d 253, 257–58 (Ala. 2011).

[226] Forest Oil Corp. v. McAllen, 268 S.W.3d 51, 61 (Tex. 2008).