CONTRACTUAL EXEMPTIONS FROM NEGLIGENCE LIABILITY IN TEXAS

KRISTOPHER R. TILKER*
STUART MACDONALD**

I. INTRODUCTION

Negligence law imposes a duty on all members of society to carry out activities in a reasonable and careful manner. When a person violates this duty, he or she is liable for the tort of negligence and is required to pay for damages caused. The purpose behind enforcing liability for negligence is to compensate injured parties and to discourage parties from acting negligently, threatening the safety of others. Contract law enforces duties between parties who have voluntarily entered into reciprocal obligations. When a person breaches a contractual obligation, he or she is liable for damages caused. Economic stability acts as the policy behind freedom of contract and enforcing liability for breach of contract. The policies behind negligence law and contract law come into conflict when one party to a contract attempts to limit liability by use of an exculpatory clause.[395] This is because exculpatory clauses allow the culpable party to avoid financial liability for his own negligence. Each state's legal system must balance these competing interests, and states do this in many different ways.[396]

Texas courts, which have a long history of supporting freedom of contract, consistently recognize that individuals should be permitted to draft legally enforceable agreements with minimal judicial intervention.[397]

Therefore, in the absence of a law that prohibits exculpatory clauses,[398] the Texas judiciary generally upholds contracts that immunize parties from their own negligence. However, Texas courts require exculpatory clauses not subject to statutory law to give fair notice to the party taking the additional liability risk. Meeting this fair-notice scrutiny is a two-pronged test. First, the

* J.D., Professor of Business Law, Dillard College of Business Administration, Midwestern State University.
** J.D., Ph.D., George Mason University.

[395] BLACK'S LAW DICTIONARY 566 (6th ed. 1991) (defining exculpatory clause as "[a] contract clause which releases one of the parties from liability for his or her own wrongful acts. A provision in a document which protects a party from liability arising, in the main, from negligence.").

[396] *See generally*, Kevin G. Hroblak, *Adloo v. H. T. Brown Real Estate, Inc.:"Caveat Exculpator"–An Exculpatory Clause May Not Be Effective Under Maryland's Heightened Level of Scrutiny*, 27 U. BALT. L. REV. 439 (1998) (discussing standards used in multiple jurisdictions).

[397] Barbara J. Slotnick, 10-A Tex.Jur. 204, CONTRACTS, § 103 (Texas law permits the utmost freedom of contract between parties of full age and competent understanding and requires that their contracts, when freely and voluntarily entered into, shall be held sacred and enforced by the courts).

[398] *See generally*, Tex Lab. Code Ann. § 406.033 (Vernon Supp. 2005) (prohibiting an employee from waiving a cause of action prior to employee's injury or death when employer does not have a worker's compensation insurance); Tex. Civ. Prac. & Rem. Code Ann. §§ 127.003-05 (Vernon 2005) (prohibiting indemnifying against loss in certain oil and gas contracts unless indemnity obligation is supported by liability insurance coverage); Tex. Prop. Code Ann. § 113.059 (Vernon Supp. 2005) (limiting power of trustor to alter some of trustee's responsibilities); Tex. Bus. & Com. Code Ann. § 7.309 (Vernon Supp. 2005) (limiting liability of carrier based on value of goods); and Tex. Bus. & Com. Code Ann. § 7.204 (Vernon Supp. 2005) (prohibiting limitations on liability for warehouse's negligence).

exculpatory clause must expressly state the intent to indemnify a party from its own negligence in specific terms using the word "negligence" within the four corners of the contract. Second, the exculpatory clause must be conspicuous, which means that it must be printed in such a way that it attracts the attention of a reasonable person scrutinizing the contract.

The types of activities exculpatory clauses are intended to cover differ widely. Accordingly, a wide variety of language is used in drafting exculpatory clauses, and different methods are used to make exculpatory clauses conspicuous. In this paper we will first look at cases in which Texas courts did *not* apply fair-notice scrutiny in order to understand exactly what constitutes an exculpatory clause. Second, we will look at cases in which Texas courts applied fair-notice scrutiny by looking at the exact wording of exculpatory clauses that failed the express negligence prong of fair-notice scrutiny. Third, we will look at the exact wording of exculpatory clauses that met the express negligence prong of fair-notice scrutiny. Lastly, we will look at the Texas standard for conspicuousness, which is the second prong of fair-notice scrutiny, and at cases that did *not* meet that standard.

II. FAIR-NOTICE SCRUTINY NOT APPLICABLE

Texas courts require some contract provisions that transfer risk to meet the two-pronged test of fair-notice scrutiny; other contract provisions that transfer risk do not have to meet the same scrutiny. How is this distinction made? The Texas Supreme Court in *Dresser Ind., Inc. v. Page Petroleum, Inc.* (hereinafter referred to as Dresser) [399] gave some insight by stating:

> [T]hese agreements, whether labeled as indemnity agreements, releases, or exculpatory agreements, or waivers, all operate to transfer risk. Although we recognize that most contractual provisions operate to transfer risk, these particular agreements are used to exculpate a party from the consequences of its own negligence…indemnification of a party for its own negligence is an extraordinary shifting of risk…[400]

Thus contract provisions that require one party to pay for the future negligence liability of another party constitute not just a transferring of risk but an extraordinary transferring of risk and thus are considered exculpatory clauses subject to fair-notice scrutiny.

There are four key cases that further shed light on the distinction between transferring of risk and extraordinary transferring of risk. In each of these cases the risks transferred were not subject to fair-notice scrutiny because they were deemed not to be extraordinary transferring of risk and thus were not exculpatory clauses.

The first case is *Getty Oil Co. v. Insurance Co. of North America*.[401] In this case Getty Oil Co. (hereinafter referred to as Getty) purchased various chemicals from NL Industries, Inc. for oil and gas exploration. The contract clause at issue was a provision that required NL to maintain different types of insurance, including general liability, with specific minimal limits. In 1983, a barrel of chemical demulsifier delivered by NL exploded and killed an independent contractor. Getty and its insurers eventually settled the wrongful death claim and then sought recovery from NL and its insurance carriers, one of which was Insurance Company of North America (INA). Getty's attempt to recover funds paid was based on the contract clause requiring NL to maintain general liability insurance. INA contended the contract clause requiring minimal amounts of insurance failed to meet the Texas fair-notice requirement for such provisions. The court disagreed and held that the Texas fair-notice requirement applied only to indemnity provisions, not insurance-shifting provisions.[402]

[399] 853 S.W.2d 505 (Tex. 1993).
[400] *Id.* at 508.
[401] 845 S.W.2d. 794 (Tex. 1992).
[402] *Id.* at 806.

A second case is *Green International, Inc. v. Solis* [403] in which the court held that a contract clause containing a no-damages-for-delay clause resulting from breach of contract was not subject to Texas fair-notice scrutiny. In this case Argee Corp., now known as Green International, Inc. (hereinafter referred to as Green), was a general contractor on three Texas prison projects. Green contracted with Solis to provide labor for the erection of steel and concrete. The contract provision in dispute provided that contactor Green would not be liable to subcontractor Solis for delay to the subcontractor's work by the act, neglect or default of the contractor. Solis sued Green for damages, some of which were caused by Green's delay. Green asserted that Solis could not recover the damages caused by Green's delay because of the no-damages-for-delay clause. Solis countered that that clause was unenforceable because it did not meet Texas fair-notice scrutiny. The court refused to apply the two-pronged test of fair notice, emphasizing that the clause did not constitute an extraordinary transference of risk. The court reasoned that the clause shifted economic damages resulting from breach of contract, not economic damages from the shifting of tort damages.[404]

A third case that sheds further light on contract clauses not subject to the fair-notice scrutiny is *CBI NA, Inc, v. UOP Inc*.[405] In this case, Fina Oil Company (hereinafter referred to as Fina) entered into a contract with UOP to buy engineering design specifications from UOP for a fluidized catalytic cracking unit. This contract limited UOP's liability to Fina to reperforming in the event of any breach. Fina contracted with CBI and other parties to build the fluidized catalytic cracking unit. UOP did not have a contract with CBI. When the unit failed to operate properly, Fina sued CBI and other parties involved in the construction. CBI then filed a third-party claim against UOP for contribution, alleging faulty design by UOP. To counter, UOP argued that the reperforming clause in its Fina contract prohibited contribution. The court agreed and further stated that the reperforming clause was not subject to fair-notice scrutiny.[406] The court reasoned that a clause limiting contractual liability to others is distinguishable from a contract clause in which one party seeks indemnification for its own negligence.[407]

The final case in which a contract clause was not deemed extraordinary transference of risk and thus not subject to the fair-notice test is *American Airlines Employees Federal Credit Union v. Martin*.[408] Ordinarily, a statutory one-year notice is required to report unauthorized signatures on an account. In this case, the credit union, by deposit agreement, reduced the reporting period to sixty days. Martin attempted to recover unauthorized money withdrawn from the credit union after sixty days but before one year. The court held that the sixty-day notice provision in the deposit agreement was enforceable and did not have to meet the two-pronged test of fair notice required by Texas case law. The court explained that there is a careful distinction between disclaiming liability for one's own negligence and limiting the time period during which a bank can be charged with negligence for paying unauthorized items.[409]

Contracts by their nature spell out duties and obligations between parties. Some contract clauses rise to the level of extraordinary transference of risk. Texas law makes it clear that when a party attempts to indemnify itself from the consequences of its own negligence, this is an extraordinary transference of risk. Where there is such a shift, the double prongs of fair-notice scrutiny are applied. Where the transference of risk is not extraordinary, as was seen in the above four cases, the risk-transferring provisions are not subject to that test of fair notice. Next we will look at the Texas fair-notice scrutiny as it has developed and been applied to extraordinary shifting of risk cases.

III. FAIR-NOTICE SCRUTINY APPLICABLE

[403] 951 S.W.2d 384 (Tex. 1996).
[404] *Id.* at 387.
[405] 961 S.W.2d. 336 (Tex. App.–Houston 1998, pet. denied).
[406] *Id.* at 341.
[407] *Id.* at 342.
[408] 29 S.W.3d. 86 (Tex. 2000).
[409] *Id.* at 97.

Contract clauses that indemnify a party from its own negligence or release a party from its negligence are considered extraordinary transference of risk and the contract provisions are subject to fair-notice scrutiny. This scrutiny is a two-pronged test that has evolved through a long history of case law. Before 1987, these contractual provisions had to meet both a clear and unequivocal test and a conspicuous test. In 1987, the first prong of the Texas fair-notice test, the clear and unequivocal test, was abandoned and Texas became the first state to adopt the express negligence doctrine[410] in the precedent-case *Ethyl Corp. v. Daniel Constr. Co.*.[411] In 1993, the second prong of the Texas fair-notice test was standardized in the precedent-case *Dresser*[412] requiring the same conspicuousness standard used in the Texas Business and Commerce Code.[413]

A. EXPRESS NEGLIGENCE TEST

If a contract provision is deemed to be extraordinary transference of risk, the first prong of fair-notice scrutiny is applied. That is the express negligence test. This became law when the Texas Supreme Court adopted the standard in *Ethyl Corp. v. Daniel Const. Co.* (hereinafter referred to as *Ethyl*).[414] In so adopting a more stringent and exacting standard, the court rejected the previous case law standard of clear and unequivocal. The court in *Ethyl* explained the new standard as follows:

> The express negligence doctrine provides that parties seeking to indemnify the indemnitee from the consequences of his own negligence must express that intent in specific terms. Under the doctrine of express negligence, the intent of the parties must be specifically stated within the four corners of the contract.[415]

The court explained its decision to adopt the express negligence test as the first prong of fair-notice scrutiny as a replacement for the clear and unequivocal language as follows:

> [T]he scriveners of indemnity agreements have devised novel ways of writing provisions which fail to expressly state the true intent of those provisions. The intent of the scriveners is to indemnify the indemnitee for its negligence, yet be just ambiguous enough to conceal that intent from the indemnitor. We hold the better policy is to cut through the ambiguity of those provisions and adopt the express negligence doctrine.[416]

The facts in *Ethyl* are as follows. Ethyl Corp. (hereinafter referred to as Ethyl) needed construction of tie-in lines carrying aluminum alkyls, a highly dangerous substance, from an existing facility to a newly constructed one. Ethyl contracted with Daniel Constr. Co. (hereinafter referred to as Daniel) to do the construction of the tie-in lines. The contract between Ethyl, as owner, and Daniel, as contractor, contained the following provision:

> Contractor [Daniel] shall indemnify and hold Owner [Ethyl] harmless against any loss or damage to persons or property as a result of operations growing out of the performance of this contract and caused by the negligence or carelessness of Contractor, Contractor's employees, Subcontractors, and agents or licensees.[417]

[410] Scott A. Conwell, *Recent Decisions: The Maryland Court of Appeals*, 57 MD. L. Rev.706, 710 (1998).
[411] 725 S.W.2d. 705 (Tex. 1987).
[412] *Dresser*, 853 S.W.2d at 511.
[413] Tex. Bus. & Com. Code Ann. § 1.201(10) (Vernon Supp. 2005).
[414] *Ethyl*, 725 S.W.2d at 708.
[415] *Id.*
[416] *Id.* at 707.
[417] *Id.*

While the construction of the tie-in lines was being performed on the Ethyl premises, an employee of Daniel was seriously burned when alkyls escaped and ignited. The employee sued Ethyl which in turn sued Daniel, seeking indemnification under the contract provision above. The case was tried to a jury which found in favor of the Daniel employee and apportioned the negligence 90% to Ethyl and 10% to Daniel. Ethyl then sought to have Daniel pay its 90% negligence liability. The Texas Supreme Court held that the provision in question did not meet the express negligence test and thus did not provide fair notice. Specifically the court stated the language "any loss" and "as a result of operations" did not expressly indicate Daniel was responsible for Ethyl's negligence.[418]

1. Cases Failing the Express Negligence Test

When indemnity and release agreements fail the express negligence test, it is generally because either negligence was not specifically mentioned or because the extent of the coverage to be applied was not specified. A summary of the case history of unenforceable indemnity and release agreements follows.

In *Gulf Coast Masonry, Inc. v. Owens-Illinois, Inc.*,[419] Gulf Coast Masonry, Inc. (hereinafter referred to as Gulf Coast) contracted to perform repairs at the Owens-Illinois, Inc. (hereinafter referred to as Owens) plant. A Gulf Coast employee injured during the repair job sued Owens. Owens brought a third-party action against Gulf Coast seeking indemnity under the following contract clause. The clause provided:

> Contractor [Gulf Coast] agrees to indemnify and save owner [Owens-Illinois] harmless from any and all loss sustained by owner by reason of damage to owner's property or operations, and from any liability or expense on account of property damage or personal injury (including death resulted therefrom) sustained or alleged to have been sustained by any person or persons, including but not limited to employees of owner, contractor and subcontractors, arising out of or in any way connected with or attainable to the performance or nonperformance of work hereunder by contractor, its subcontractor(s), and their respective employees and agent, or by the act or admission of the contractor, its subcontractor(s), and their respective employees and agents while on the owner's premises, or by defects in material or equipment furnished hereunder . . .[420]

The court held the indemnity clause unenforceable. The problem with the indemnity clause (i.e., the exculpatory provision) was that it did not specifically mention the contractor would be responsible for the owner's negligence.[421]

In *Singleton v. Crown Central Petroleum Corp*.,[422] Mundy the contractor agreed to indemnify Crown Central Petroleum Corp. (hereinafter referred to as Crown) against any and all claims for personal injury "except those arising out of the sole negligence of Crown."[423] Singleton, an employee of Mundy, was seriously injured and filed suit against both Mundy and Crown. Mundy settled the claim but Crown did not. The case was tried to a jury, and Crown was found 34% negligent. The trial court then found Crown entitled to indemnity from Mundy because of indemnity provision. Upon review, the Supreme Court found that the clause did not meet the express negligence test and that Crown was not entitled to indemnity from Mundy. The problem

[418] *Id.* at 708.
[419] 739 S.W.2d 239 (Tex. 1987).
[420] *Id.*
[421] *Id.*
[422] 729 S.W.2d 690 (Tex. 1987).
[423] *Id.* at 691.

with the clause was that it did not specifically state Mundy would be responsible for Crown's negligence. Mundy had to infer negligence liability when Crown was not 100% negligent.[424]

In *Monsanto Company v. Owens-Corning Fiberglas Corp.*,[425] Owens-Corning Fiberglas Corp. (hereinafter referred to as Owens-Corning), the subcontractor agreed to indemnify Monsanto Co. (hereinafter referred to as Monsanto), the general contractor. An employee of Owens-Corning filed a personal injury suit against Monsanto which then filed a third-party action against Owens-Corning for indemnification. The indemnity provision between Monsanto and Owens-Corning was as follows:

> Contractor [Owens-Corning] agrees to indemnify and save Monsanto and its employees harmless against any and all liabilities, penalties, demands, claims, causes of action, suits, losses, damages, costs and expenses (including costs of defense, settlement, and reasonable attorneys' fees) which any or all of them may hereafter suffer, incur, be responsible for or pay out . . . as a result of bodily injuries to any person . . . occurring to or caused in whole or in part by, Contractor . . .[426]

The court ruled that Owens-Corning was not required to indemnify or defend Monsanto because the intent of the parties was not specifically stated within the four corners of the contract. More specifically, the Monsanto exculpatory provision did not use the term "negligence," and it also failed to provide for contractual comparative negligence, concurrent negligence, or gross negligence.[427]

In *Doe v. Smithkline Beecham Corp.*,[428] a prospective employee signed a "Pre-Employment Consent to Drug Screening" contract with Quaker Oats Company. This contract contained a release that read in part: "I consent to the release of the drug screen results to authorized Quaker representatives for appropriate review. I release and agree to hold harmless Quaker, its employees and its agents, from any liability to me based on the results of the drug screening."[429] Smithkline Beecham Corp. (hereinafter referred to as Smithkline) performed the drug screening test, and the prospective employee's urine sample tested positive for opiates. Quaker notified the potential employee that the employment offer was rescinded. Doe sued both Quaker and Smithkline, asserting that her positive test for opiates was the result of her consumption of several poppyseed muffins several days before providing the urine sample. The court clearly stated that the express negligence test applied to prospective releases and that the release provision in the "Pre-Employment Consent to Drug Screening" was not enforceable. The problem with the clause was that it released Quaker from "any liability" instead of specifically stating "negligence."[430]

In *Houston Health Clubs, Inc. v. Rickey*,[431] a customer entered into a retail installment contract with the health club. The retail installment contract contained a release provision as follows:

> You (the buyer and member) agree that you are aware that you are engaging in physical exercise and the use of exercise equipment and club facilities which could cause injury to you. You are voluntarily participating in these activities and assume all risk of injury to you that might result. You hereby agree to waive any claims or rights you might otherwise have to sue the health club, its employees or agents for injury to you on account of these

[424] *Id.*
[425] 764 S.W.2d 293 (Tex. App.–Houston 1988).
[426] *Id.* at 294.
[427] *Id* at 295.
[428] 855 S.W.2d 248 (Tex. App.–Austin 1993), *aff'd on other grounds*, 903 S.W. 2d 347 (Tex. 1995).
[429] *Id.* at 253.
[430] *Id.* at 254.
[431] 863 S.W.2d 148 (Tex. App.–Texarkana 1993), *withdrawn*, 888 S.W. 2d 812 (Tex 1994).

> activities. You have carefully read this waiver and release and fully understand it is a release of liability.[432]

Four months after joining the health club, the member injured his knee when he tripped and fell on the club's AstroTurf-covered jogging track. The member claimed the health club was negligent in installing a surface with a tendency to catch a runner's shoe. The clause was held unenforceable because it did not expressly list negligence as a claim to be relinquished by the member. [433]

Polley v. Odom[434] involved a commercial real estate lease. Polley leased a commercial space from Odom. The lease contained the following clause: "(a) Risk of loss. Except where due to the willful neglect of Lessor all risk of loss to personal property or loss to business resulting from any cause whatsoever shall be born exclusively by lessee." [435]

Two years into the lease a fire destroyed the commercial building. Polley and other tenants had previously complained to Odom about electrical problems. An investigation by the local fire department revealed that the fire was started by an electrical short in the building's attic area. Polley sued Odom for loss of inventory, profits, and construction expenses due to Odom's negligence. Odom defended on the ground that the risk-of-loss clause in the lease contract released him from any liability. The court held that the provision relieved Odom in advance of liability for his own negligence and was the same as a release that must comply with the express negligence test. Next the court held that the provision violated the express negligence test because the provision did not expressly state that Odom had no liability for his negligence. The court reasoned that the express negligence doctrine was not satisfied by implicit reference to liability for negligence.[436]

2. Cases Meeting the Express Negligence Test

When indemnity and release agreements meet the express negligence test, it is generally because "negligence" is specifically mentioned and the extent of the coverage to be applied is specified. In other words, parties accepting liability for someone else's negligence should clearly understand this obligation from the contract and do not have to deduce such an obligation by inference. A brief summary of the case history of enforceable indemnity and release agreements follows.

B-F-W Construction Co., Inc. v. Garza[437] involved an indemnity provision between B-F-W as general contractor and Garza as subcontractor. The subcontractor agreed to indemnify and defend the general contractor for:

> [A]ny and all claims, demands, liens, damages, causes of actions and liabilities of any and every nature whatsoever arising in any manner, directly or indirectly, out of or connection with or in the course of or incidental to any of Subcontractor's [Garza] work or operations hereunder or in connection herewith (regardless of cause or of any concurrent or contributing fault or negligence of Contractor [B-F-W] or any breach of or failure to comply with any of the provisions of this Subcontract or the Contract Documents by Subcontractor.[438]

An employee of the subcontractor was injured at the construction site. The injured employee collected on his workers' compensation claim in full and then brought a negligence cause of action

[432] *Id.* at 150.
[433] *Id.*
[434] 957 S.W.2d 932 (Tex. App.–Waco 1998).
[435] *Id.* at 935.
[436] *Id.* at 938.
[437] 748 S.W.2d. 611 (Tex. App.–Fort Worth 1988).
[438] *Id.* at 612.

against the general contractor. The general contractor then brought a third-party action against the subcontractor for indemnification under the provision in their contract. The court held that the language "regardless of any case or of any fault or negligence of the contractor" met the express negligence test because it expressly stated the contractor's intent. It was clear to the court that the subcontractor would indemnify the contractor for that contractor's own negligence and that there was no ambiguity in the language. Therefore the subcontractor was required to indemnify the general contractor for the general contractor's own negligence.[439]

Furthermore, the court observed that the result in the case allowed an injured employee to collect compensation for negligence indirectly from his employer while also collecting worker's compensation. Then the court stated that whether the result violates public policy is a matter for the State Supreme Court or the Legislature.[440]

In *Adams Resources Exploration Corporation v. Resource Drilling, Inc.*,[441] Adams Resources Exploration Corp. (hereinafter referred to as Adams) contracted with Resource Drilling, Inc. (hereinafter referred to as Resource Drilling) to work on a well. The contract included a provision under which Resource Drilling, the contractor, would indemnify Adams for the following:

> [A]ll claims, demands, and causes of action of every kind and character, without limit and without regard to the cause or causes thereof or the negligence of any party or parties, arising in connection herewith in favor of Contractor's employees or Contractor's subcontractors or their employees, or Contractor's invitees, on account of bodily injury, death or damage to property.[442]

An employee of Resource Drilling was injured on the job site and sued multiple parties for negligence. One of the named defendants brought a third-party action against Adams for contribution. Adams then filed a third-party action against Resource Drilling for indemnification under the contract clause stated above. The court ruled the clause enforceable because the intent of the parties was clearly expressed in the four corners of the agreement and because the clause specifically asserted Resource Drilling's responsibility for negligence of both parties. The court further held that the words "party or parties" was not too broad and met the specificity requirement of the express negligence test because Adams and Resource Drilling were the only parties to the contract.[443]

In *Atlantic Richfield Company v. Petroleum Personnel, Inc.*,[444] Atlantic Richfield Company (hereinafter referred to as ARCO) contracted with Petroleum Personnel, Inc. (hereinafter referred to as PPI) for work on an ARCO platform. A clause in the contract provided that "[PPI] agrees to … indemnify … [ARCO] … in any matter arising from the work performed hereunder, including but not limited to any negligent act or omission of [ARCO]." The contract provision became important when a PPI employee sued ARCO for injuries he sustained while working on the platform owned by ARCO. ARCO brought PPI into the suit, contending ARCO was entitled to indemnity from PPI. In turn, PPI contended ARCO was not entitled to indemnification because the clause did not meet the express negligence test. The court held for ARCO, stating that the provision expressly called for PPI to indemnify ARCO for ARCO's negligence. The court went on to note that although the language did not differentiate between degrees of negligence, the statement "any negligent act of ARCO" was sufficient to define the parties' intent. Using the terms "joint," "concurrent," or "comparative contractual" would not add to the already clear expression to exculpate ARCO for its negligence.[445]

[439] *Id.* at 613.
[440] *Id.* at 614.
[441] 761 S.W.2d 63 (Tex. App.–Houston 1988).
[442] *Id.* at 64.
[443] *Id.* at 64.
[444] 768 S.W.2d 724 (Tex. 1989).
[445] *Id.* at 726.

Eller v. NationsBank of Texas, N.A.[446] involved a contract for the rental of a safety deposit box. One provision in the contract provided:

> [T]he annual rental is solely for rental of the Box, and there shall be no liability on the part of the Lessor [NationsBank] for loss of, or injury to, the contents of the Box from any cause whatsoever, including but not limited to, fire, flood or other force majeure, deterioration of the contents of the Box, including loss of data on magnetic tape, disc, or other media, and criminal acts or negligence of any person, corporation or other entity. An unauthorized opening shall not be presumed or inferred from proof of partial or total loss of contents. It is expressly understood and agreed that Lessor [NationsBank] is not an insurer of the contents of Boxes. Insurance of the contents is the sole responsibility of Lessee [Eller].[447]

The customer sued the bank when she discovered $18,200 and four silver dollars missing from her box. The customer asserted that the release provision did not meet the express negligence test and was thus unenforceable. The court disagreed. The court reasoned that the release clause placed no restrictions upon the cause of the loss and expressly mentioned "negligence." The court further indicated that the words "any person, corporation, or other entity" encompasses every legally cognizable entity or being, including parties to the agreement. Thus the intent to release the bank from the results of its own negligence was clear.[448]

Arthur's Garage, Inc. v. Racal-Chubb Sec. Sys. Inc.[449] involved a contract between a car repair shop and a company that installed and monitored burglar and smoke alarms. The indemnity provision in the contract stated:

> When purchaser, in the ordinary course of business, has the property of others in his custody, or the alarm system extends to protect the property of others, purchaser agrees to and shall indemnify, defend, and hold harmless seller, its employees and agents for and against all claims brought by parties other than parties to this agreement. This provision shall apply to all claims, regardless of cause, including seller's performance or failure to perform, and including defects in products, design, installation, maintenance, operation or no-operation of the system, whether based upon negligence, active or passive, warranty, or strict product liability on the part of seller, its employees or agents, but this provision shall not apply to claims for loss or damage solely and directly caused by an employee of the seller while on purchaser's premises.[450]

On April 13, 1991, a fire occurred at the car repair shop, causing more than $400,000 in damage. As the fire spread, it did not set off a smoke alarm detector because the detector had been improperly wired. The car repair shop sued the alarm company. The landlord of the burned premises also joined in the suit, alleging negligence on the part of the alarm company. The alarm company countersued the car repair business for indemnity for any damages owed to the building owner. Later the landlord voluntarily dropped his lawsuit against the alarm company. Next the alarm company amended its countersuit against the car repair shop. In its amended countersuit, the alarm company contended that the indemnity provisions in the contract made the car repair business responsible for the alarm company's attorney's fees in defending the landlord's lawsuit and prosecuting its counterclaim against the car repair business for indemnity.

[446] 975 S.W.2d 803 (Tex. App.–Amarillo 1998).
[447] *Id.* at 805.
[448] *Id.* at 807.
[449] 997 S.W.2d 803 (Tex. App.–Dallas 1999).
[450] *Id.* at 815.

The car repair business defended on the grounds the indemnity provision did not meet the express negligence test. The court held that the provision did meet the express negligence test because the alarm company's intent to be released from its own negligence for damage to third parties was expressed in unambiguous terms within the four corners of the contract.[451] The court of appeals then upheld the trial court's requiring the car repair shop to pay $8,470 in attorney's fees incurred by the alarm company defending the landlord's suit and prosecuting the indemnity suit against the car company.[452]

Banner Sign & Barricade, Inc. v. Price Constr., Inc.[453] is another case involving a general contractor and a subcontractor. The general contractor, Price Construction, Inc. (hereinafter referred to as Price), contracted with the Texas Department of Transportation to perform construction work on a highway. Price then contracted with the subcontractor, Banner Sign & Barricade, Inc. (hereinafter referred to as Banner) for the provision of barricades, signs, and traffic devices. In this contract, the subcontractor obligated itself to the general contractor in the following respect:

> (b) To fully and unconditionally protect, indemnify, and defend [Price], its officers, agents and employees, and hold harmless from and against any and all costs, expenses, reasonable attorney fees, claims, suits, losses or liability for injuries to property, injuries to persons (including subcontractor's employees), including death, and from any other costs, expenses, reasonable attorney fees, claims, suits, losses or liabilities of any and every nature whatsoever arising in any manner, directly or indirectly, out of or in connection with or in the course of or incidental to, any of subcontractor's work or operations hereunder or in connection herewith, regardless of cause or of sole, joint, comparative or concurrent negligence or gross negligence of [Price], its officers agents or employees.

While construction was in progress, an automobile collision occurred causing the death of one driver and personal injury to another. The general contractor was sued. One of the allegations against the general contractor was negligence in the supplying of inadequate and inappropriate materials to be used as warning devices. The general contractor then filed a petition to join the subcontractor as a responsible third party. The petition contained a claim for contribution and indemnity from the subcontractor under the indemnification provision in the contract between the general contractor and subcontractor. The trial court severed the lawsuit into two causes of action. One was the injured party's case against the general contractor and the subcontractor. The other was the contractual indemnification claim between the general contractor and the subcontractor. The trial court then ruled on the latter, holding indemnification agreement between the general contractor and the subcontractor valid and enforceable. Next the injured plaintiffs' claims against the contractor and the subcontractor were tried to a jury. Interestingly, the jury found the general contractor 80% at fault and one of the drivers 20% at fault, assessing no fault to subcontractor.

On appeal, Banner contended the indemnity provision in the contract between the general contractor and the subcontractor did not meet the express negligence test. The appeals court disagreed and held the indemnity provision enforceable. The court reasoned that the indemnity provision specifically asserted that it covered the negligence of both parties. In addition, the court pointed out that the provision "regardless of cause or of sole, joint, comparative or concurrent negligence or gross negligence of [Price] its officers, agents, or employees" made clear the extent of the coverage.[454] Thus the subcontractor had to pay for the general contractor's negligence even though the subcontractor was not negligent.

[451] *Id.*
[452] *Id.* at 816.
[453] 94 S.W.3d 692 (Tex. App.–San Antonio 2002).
[454] *Id.* at 697.

Even if a contract provision meets the first prong of the Texas fair-notice test, it is unenforceable unless it also meets the second one, which is the conspicuousness test. We will now look at case law applicable to conspicuousness.

B. CONSPICUOUSNESS

The second prong of the Texas fair notice is conspicuousness. The precedent-setting case that established the guidelines for conspicuousness is *Dresser.*[455] Before *Dresser*, the courts looked generally into the contract for print color, type, size, and location to determine conspicuousness. In *Dresser*, the court adopted the standard for conspicuousness used on the Uniform Commercial Code. The court stated: "We thus adopt the standard for conspicuousness contained in the Code for indemnity agreements and releases like those contained in this case that relieve a party for its own negligence."[456] The court emphasized this was a more definite standard because the Code's standard was familiar to Texas courts and because it conformed to the objectives of commercial certainty and uniformity. Specifically the code states:

> "Conspicuous," with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is "conspicuous" or not is a decision for the court. Conspicuous terms include the following:
> (A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and
> (B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language. [457]

In the *Dresser* case, the release and indemnity provisions were in the same print and type color as the rest of the contract and were not distinguished by headings. The court thus found the clauses failed the required conspicuousness and were unenforceable.[458]

Littlefield v. Schaefer [459] is another case in which conspicuousness failed. In this case, Schaefer was in the business of promoting and conducting motorcycle races throughout Texas. Before being allowed to participate in a race, each contestant was required to sign a *Release and Entry Form* that contained ten lines of participant information. The form's typeface and font size were easily readable. The release part, in the lower left corner, had thirty lines of text in black type compressed into a 3-inch by 4.25-inch square. The release heading contained a larger font than the release itself. The court explained that the placement of the release itself was conspicuous but said the form still failed the UCC standard because the terms of the release were printed so small and illegibly. Thus, a reasonable person against whom it was to operate only knew it was releasing something but did not know it was releasing the other party from its own negligence. In other words, the releasing party must be able to read what is being released.[460]

A third case in which conspicuousness failed is *Douglas Cablevision IV, L.P. v. Southwestern Electric Power Company*.[461] In this case, Douglas Cablevision IV, L.P. (hereinafter referred to as the cable company) entered into a lease contract with Southwestern Electric Power company (hereinafter referred to as the electric company) that allowed the cable company to attach its wires

[455] *Supra* note 5.
[456] *Id.* at 511.
[457] Tex. Bus. & Com. Code Ann. §1.201 (10) (Vernon Supp. 2004).
[458] *Id*.
[459] 955 S.W. 2d 272 (Tex. 1997).
[460] *Id.* at 277.
[461] 992 S.W.2d 503 (Tex. App.–Texarkana 1999).

to utility poles owned by the electric company. The contract contained a provision that required the cable company to indemnify the electric company for costs associated with personal injuries sustained by third parties as a result of the electric company's own negligence. A third party was shocked and burned by an electrical line while attempting to move a house under the cable and electrical lines and then sued both the cable company and the electric company. The cable company and the electrical company settled the case by each paying $350,000 in damages. Then the electric company sought indemnification under the lease contract from the cable company.

The court held the indemnity provision unenforceable because the indemnity provision was not conspicuous under the UCC standard. This was because the indemnity provision was printed in the same size and type of font as the entire contract, which made the indemnification no more visible than any other provision of the contract. There was nothing designed to draw the attention of a reasonable person against whom the clause was to operate. The court rejected the electric company's contention that the sophistication of the parties to the agreement must also be evaluated.[462]

In a final example dealing with conspicuousness, *UPS Truck Leasing v. Leaseway Transfer Pool, Inc.*,[463] UPS Truck Leasing (hereinafter referred to as UPS) leased a truck to Leaseway Transfer Pool, Inc. (hereinafter referred to as Leaseway). The lease agreement contained a clause in which Leaseway agreed to indemnify UPS for liability in excess of Leaseway's insurance coverage. A third party, injured by a Leaseway employee driving the leased truck, sued Leaseway and UPS. UPS filed a cross-action against Leaseway, claiming that pursuant to the terms of the lease agreement Leaseway was obligated to indemnify UPS against claims asserted by the injured third party.

Leaseway challenged the indemnity provision's enforceability, contending the clause was not conspicuous and thus failed the second prong of the fair-notice test. The court agreed with Leaseway and found the indemnity clause, which was Paragraph 18 of 30 paragraphs and located on the back side of the two-page lease agreement, unenforceable.[464] The indemnity paragraph contained a heading titled "Customer Agrees" in upper case and boldface type. The court held that a reasonable reader would not have recognized Paragraph 18 as an indemnity provision because the heading did not refer to indemnity.[465] Specifically, the court emphasized that the heading did not identify the paragraph content as an indemnity clause.[466]

IV. CONCLUSION

The Texas courts uphold contract clauses that immunize parties from their own negligence in the absence of a statute limiting or prohibiting exculpatory clauses. Texas courts require the exculpatory clause to give fair notice to the party taking the additional liability risk. Meeting this fair-notice scrutiny is a two-pronged test. First, the exculpatory clause must expressly state the intent to indemnify or release a party from his own negligence in specific terms within the four corners of the agreement. Second, the exculpatory clause must be conspicuous, using the same standard as the UCC. Parties wanting to limit their negligence liability need to clearly state that, using the word "negligence." Parties need to avoid hiding their intent to limit negligence liability by making sure the exculpatory clause is conspicuous enough to attract the attention of a reasonable person.

Exculpatory provisions that meet the two-pronged test of fair notice are used more prevalently when one of the parties is a prospective employee or a customer; therefore, there will always be a chance the outcomes will be unfair even though fair notice is met. At this time, Texas courts will have to look again at how far freedom of contract should go and possibly carve out

[462] *Id.* at 509.
[463] 27 S.W.3d 174 (Tex. App.–San Antonio 2000).
[464] *Id*. at 177.
[465] *Id.* at 176.
[466] *Id.*

exceptions in the area of disparity of bargaining power or place the onus on the Legislature to provide additional statutory limitations or prohibitions.