WHEN THE EXTRAORDINARY BECOMES ORDINARY: IS THE EXPRESS NEGLIGENCE RULE UNDER ATTACK IN TEXAS?

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I. INTRODUCTION

Although most contracts "operate to transfer risk,"[1] risk-shifting clauses deemed extraordinary under Texas law "must satisfy two fair notice requirements."[2] One of these two requirements is the express negligence rule; it applies "to releases and indemnity clauses in which one party exculpates itself from its own future negligence."[3] The rule functions as "a rule of contract interpretation that applies specifically to agreements to indemnify another party for the consequences of that party's own negligence."[4] It also has been broadened to include releases, in reaction to "the injustice arising when a contracting party buries a provision substantially releasing itself from its own negligence in a way that is inconspicuous and does not provide fair notice to the other party."[5]

From its adoption by the Texas Supreme Court in 1987, litigants have sought to avoid the express negligence rule. In nearly all cases involving the rule, in fact, litigants have argued to narrow its scope. Some of these attempts have succeeded while others have been rejected.[6] This Article explains the outcome of some of these attempts. In Part II, we present an

[1] Dresser Indus., Inc. v. Page Petroleum, Inc., 853 S.W.2d 505, 508 (Tex. 1993).

[2] Littlefield v. Schaefer, 955 S.W.2d 272, 274 (Tex. 1997) (citing *Dresser*, 853 S.W.2d at 508).

[3] Green Int'l, Inc. v. Solis, 951 S.W.2d 384, 387 (Tex. 1997).

[4] Quorum Health Res., L.L.C. v. Maverick County Hosp. Dist., 308 F.3d 451, 458 (5th Cir. 2002).

[5] *Green Int'l*, 951 S.W.2d at 387.

[6] The drafting requirements for compliance with the express negligence rule are beyond the scope of this Article. For a general summary of Texas cases interpreting provisions that have been found to comply (and not comply) with the express negligence rule, see *Quorum Health Res., L.L.C.*, 308 F.3d at 460–66 (5th Cir. 2002).

overview of the express negligence rule in Texas courts. In Part III, we analyze three specific areas where the express negligence rule has come under attack. First, in line with a trend displayed by Texas appeals courts, we argue that the express negligence rule should not be subject to the "actual notice or knowledge" exception. Second, we argue that the express negligence rule is properly applied to causes of action other than negligence. Third, we suggest that the supreme court's recent decision in *Evanston Insurance Co. v. ATOFINA Petrochemicals, Inc.*[7] may create a new avenue for litigants to circumvent the express negligence rule by focusing solely on a contract's "additional insured" clause. Finally, in Part IV we conclude with a discussion of the future of the express negligence rule in Texas.

II. OVERVIEW OF THE EXPRESS NEGLIGENCE RULE IN TEXAS COURTS

Under Texas law, the fair notice requirements are two-fold: (1) the express negligence rule and (2) conspicuousness. "Thus, fair notice is the chief test we must apply, and conspicuousness and express negligence are merely the two prongs of that test."[8] Under the express negligence rule, "a party's intent to be released from [or indemnified for] all liability caused by its own future negligence must be expressed in unambiguous terms within the four corners of the contract."[9] Under the conspicuousness requirement, "the clause must be 'conspicuous' under the objective standard defined in the Uniform Commercial Code."[10] This requires that "'something must appear on the face of the [contract] to attract the attention of a reasonable person when [s]he looks at it.'"[11]

Any provision that "fails to satisfy either of the fair notice requirements when they are imposed is unenforceable as a matter of law."[12] In other

[7] 256 S.W.3d 660 (Tex. 2008).

[8] Sydlik v. REEII, Inc., 195 S.W.3d 329, 332 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

[9] Arthur's Garage, Inc. v. Rascal-Chubb Sec. Sys., Inc., 997 S.W.2d 803, 814 (Tex. App.—Dallas 1999, no pet.) (citing Ethyl Corp. v. Daniel Const. Co., 725 S.W.2d 705, 708 (Tex. 1987)); *see also* Storage & Processors, Inc. v. Reyes, 134 S.W.3d 190, 192 (Tex. 2004).

[10] *Arthur's Garage*, 997 S.W.2d at 814 (citing Dresser Indus., Inc. v. Page Petroleum, Inc., 853 S.W.2d 505, 510–11 (Tex. 1993); Tex. Bus. & Com. Code § 1.201(10)).

[11] *Reyes*, 134 S.W.3d at 192 (quoting *Dresser*, 853 S.W.2d at 508; Ling & Co. v. Trinity Sav. & Loan Ass'n, 482 S.W.2d 841, 843 (Tex. 1972)).

[12] *Id.* (citing *Dresser*, 853 S.W.2d at 509–10; U.S. Rentals, Inc. v. Mundy Serv. Corp., 901 S.W.2d 789, 792 (Tex. App.—Houston [14th Dist.] 1995, writ denied)).

words, it is an issue of law—not an issue of fact—whether a contract provision complies with both the express negligence rule and the conspicuousness requirement.[13]

A. Adoption of the Express Negligence Rule in Ethyl

In 1987, the Texas Supreme Court adopted the express negligence rule in *Ethyl Corp. v. Daniel Construction Co*.[14] The *Ethyl* court jettisoned "the less stringent 'clear and unequivocal' test, in recognition of the fact that 'indemnification of a party for its own negligence is an extraordinary shifting of risk.'"[15] Under the earlier test, courts determined "whether the contract between the parties expresse[d] in clear and unequivocal language the intent of the indemnitor to indemnify the indemnitee against the consequences of the indemnitee's own negligence."[16] In *Ethyl*, however, the court heightened the standard by "adopt[ing] the express negligence test for determining whether the parties to an indemnity contract intend to exculpate the indemnitee from the consequences of its own negligence."[17]

The court's adoption was foreseeable. As the court observed at the time, "An examination of cases from this court reveals its trend toward more strict construction of indemnity contracts. In prior cases we recognized that Texas has come as close as possible to adopting the express negligence doctrine without doing so."[18] The court further explained:

> As we have moved closer to the express negligence doctrine, the 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

[13] Ayres Welding Co. v. Conoco, Inc., 243 S.W.3d 177, 181 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd).

[14] 725 S.W.2d 705, 708 (Tex. 1987).

[15] Quorum Health Res., L.L.C., v. Maverick County Hosp. Dist., 308 F.3d 451, 458–59 (5th Cir. 2002) (citing *Ethyl*, 725 S.W.2d at 707–08 (Tex. 1987)).

[16] *Ethyl*, 725 S.W.2d at 707 (citing Sira & Payne, Inc. v. Wallace & Riddle, 484 S.W.2d 559, 561 (Tex. 1972)).

[17] *Id.* at 706.

[18] *Id.* at 707.

> its negligence, yet be just ambiguous enough to conceal that intent from the indemnitor.[19]

The express negligence rule closed the door on the "plethora of lawsuits" that litigants had filed "to construe those ambiguous contracts."[20] Facing a continual flood of satellite litigation, the court decided "the better policy is to cut through the ambiguity of those provisions and adopt the express negligence doctrine."[21]

The initial contours of the express negligence rule were plain. The court in *Ethyl* required that "parties seeking to indemnify the indemnitee from the consequences of its own negligence must express that intent in specific terms."[22] The court further declared that "the intent of the parties must be specifically stated within the four corners of the contract."[23] In doing so, the court expressly rejected earlier statements that "it is unnecessary for the parties to say, 'in so many words,' they intend to indemnify the indemnitee from liability for its own negligence."[24] This heightened standard has made a visible difference in Texas courts, which "have rigorously applied the express negligence rule since *Ethyl* was decided."[25]

B. Expansion of the Express Negligence Rule and Its Contours in Dresser Industries

The Texas Supreme Court further refined the express negligence rule in *Dresser Industries, Inc. v. Page Petroleum, Inc*.[26] In *Dresser*, the court confronted two primary issues:

> [W]hether the fair notice requirements applicable to indemnity agreements also apply to releases that operate to

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[19] *Id.* at 707–08.

[20] *Id.* at 708.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.* (citing Joe Adams & Son v. McCann Constr. Co., 475 S.W.2d 721, 723 (Tex. 1971), *overruled by Ethyl*, 725 S.W.2d at 708; Ohio Oil Co. v. Smith, 365 S.W.2d 621, 624 (Tex. 1963), *overruled by Ethyl*, 725 S.W.2d at 708; Mitchell's, Inc. v. Friedman, 303 S.W.2d 775, 779 (Tex. 1957), *overruled by Ethyl*, 725 S.W.2d at 708).

[25] Quorum Health Res., L.L.C. v. Maverick County Hosp. Dist., 308 F.3d 451, 461 (5th Cir. 2002).

[26] 853 S.W.2d 505 (Tex. 1993).

> relieve a party in advance for responsibility for its own negligence, and whether compliance with the fair notice requirements is a question of law for the court or a question of fact for the jury.[27]

The court first ruled that the express negligence rule should apply to releases. After discussing various definitions of releases and indemnity agreements, the court concluded that "these agreements, whether labeled as indemnity agreements, releases, exculpatory agreements, or waivers, all operate to transfer risk."[28] Although it recognized "that most contractual provisions operate to transfer risk," the court emphasized that "these particular agreements are used to exculpate a party from the consequences of its own negligence."[29] Further, the court noted:

> [W]e can discern no reason to fail to afford the fair notice protections to a party entering into a release when the protections have been held to apply to indemnity agreements and both have the same effect. . ..This is especially true because of the difficulty often inherent in distinguishing between these two similar provisions.[30]

As a result, the court held that "the fair notice requirements of conspicuousness and the express negligence doctrine apply to both indemnity agreements and to releases."[31]

The court also held that compliance of both fair notice requirements is an issue of law.[32] This resolved uncertainty from the court's decision in *Enserch Corp. v. Parker* about whether conspicuousness was an issue of fact or an issue of law.[33] The *Dresser* court first defined conspicuousness. To be conspicuous, the court explained, "something must appear on the face of the [contract] to attract the attention of a reasonable person when [s]he

[27] *Id.* at 506.

[28] *Id.* at 508.

[29] *Id.*

[30] *Id.* at 508–09.

[31] *Id.* at 509.

[32] *Id.* at 509–11.

[33] 794 S.W.2d 2 (Tex. 1990); *see also id.* at 509 n.4 (noting confusion caused by *Enserch Corp. v. Parker)*.

looks at it."[34] The *Dresser* court then concluded that "[w]hen a reasonable person against whom a clause is to operate ought to have a noticed it, the clause is conspicuous. For example, language in capital headings, language in contrasting type or color, and language in an extremely short document, such as a telegram, is conspicuous."[35] Ultimately, the court held that it is an issue of law whether a provision complies with both conspicuousness and the express negligence rule.[36]

III. EFFORTS TO SIDESTEP THE EXPRESS NEGLIGENCE RULE

A. The "Actual Notice or Knowledge" Exception

In *Dresser*, the court not only further refined the contours of the fair notice requirements, it also created a major loophole to escape the express negligence rule: the "actual notice or knowledge" exception.[37] In a single footnote, the court carved out a sweeping exception. *Dresser*'s footnote 2 states: "The fair notice requirements are not applicable when the indemnitee establishes that the indemnitor possessed actual notice or knowledge of the indemnity agreement."[38]

1. Direct Application of *Dresser*'s Footnote by some Texas Courts

Following *Dresser*'s footnote 2, some Texas courts have stated that it is proper to apply the "actual notice or knowledge" exception to both of the fair notice requirements. Both Texas state[39] and federal[40] courts have

[34] *Dresser*, 853 S.W.2d at 508 (quoting Ling & Co. v. Trinity Sav. & Loan Ass'n, 482 S.W.2d 841, 843 (Tex. 1972)); *see also* Storage & Processors, Inc. v. Reyes, 134 S.W.3d 190, 192 (Tex. 2004) ("Language may satisfy the conspicuousness requirement by appearing larger type, contrasting colors, or otherwise calling attention to itself." (citing Littlefield v. Schaefer, 955 S.W.2d 272, 274–75 (Tex. 1997))).

[35] *Dresser*, 853 S.W.2d at 511.

[36] *Id.* at 509.

[37] *Id.* at 508 n.2.

[38] *Id.*

[39] *See, e.g.*, Ayres Welding Co., Inc. v. Conoco, Inc., 243 S.W.3d 177, 181 n.3 (Tex. App.—Houston [14th Dist.] 2007, pet ref'd) ("The fair notice requirements are not applicable when the indemnitee establishes that the indemnitor possessed actual notice or knowledge of the indemnity agreement." (citing *Dresser*, 853 S.W.2d at 508 n.2)); Cabo Constr., Inc. v. R S Clark Constr.,

followed *Dresser*'s guidance that the exception applies to both conspicuousness and the express negligence rule. After *Dresser*, the Texas Supreme Court also reaffirmed its view that "if both contracting parties have actual knowledge of [a contract's] terms, an agreement can be enforced even if the fair notice requirements were not satisfied."[41]

2. Departing from *Dresser*: The "Four Corners" Rule and Avoiding Factual Quagmires

Not all Texas appeals courts have applied *Dresser*'s footnote 2 to the express negligence rule. To the contrary, some courts have recognized that the "actual notice or knowledge" exception should apply to the procedural requirement (conspicuousness), but not necessarily the substantive requirement (the express negligence rule).[42] In framing the dual fair notice requirements as independent, Texas courts are more likely to treat the procedural protections of the conspicuousness requirement ("Would something alert a party to read the clause, or, in any event, did the party actually read it?") as independent from the substantive protections of the express negligence requirement ("Is the language objectively express?").

As some Texas appeals courts have recognized, the impetus for creating the "actual notice or knowledge" exception remains unclear. In footnote 2, the *Dresser* court cited *Cate v. Dover Corp.*, a case involving a Uniform Commercial Code Article 2 warranty of merchantability dispute between a buyer and seller of goods.[43] In *Cate*, the seller argued that "even an inconspicuous disclaimer should be given effect because [the buyer in that

Inc., 227 S.W.3d 314, 317 (Tex. App.—Houston [1st Dist.] 2007, no pet. h.) (citing *Reyes*, 134 S.W.3d at 192).

[40] *See, e.g.*, Millennium Petrochemicals., Inc. v. Brown & Root Holdings, Inc., 390 F.3d 336, 345 (5th Cir. 2004) ("As Millennium correctly notes, 'the fair notice requirements are not applicable when it is established that the indemnitor possessed actual notice or knowledge of the indemnity agreement.'" (quoting *Dresser*, 853 S.W.2d at 508)); Cleere Drilling Co. v. Dominion Exploration & Prod., Inc., 351 F.3d 642, 647 (5th Cir. 2003) (concluding "we are convinced that the requirement of fair notice—both elements, i.e., express negligence and conspicuousness—is irrelevant in the face of Dominion's actual knowledge of the subject provisions of the Contract.").

[41] *Reyes*, 134 S.W.3d at 192 (citing *Dresser*, 853 S.W.2d at 508 n.2; Cate v. Dover Corp., 790 S.W.2d 559, 561 (Tex. 1990)).

[42] *See* Sydlik v. REEII, Inc., 195 S.W.3d 329, 333 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

[43] 790 S.W.2d 559, 560 (Tex. 1990).

case] had actual knowledge of it at the time of the purchase."[44] The court agreed, ruling that "[b]ecause the object of the conspicuousness requirement is to protect the buyer from surprise and an unknowing waiver of his or her rights, inconspicuous language is immaterial when the buyer had actual knowledge of the disclaimer."[45]

But there is reason to question applying that exception to the express negligence rule. Following the maxim that a party's subjective "actual notice or knowledge" of a provision should not alter that provision's objective interpretation, some Texas appeals courts have cited the "four corners" rule and refused to apply the "actual notice or knowledge" exception to the express negligence rule.[46] A touchstone of contract interpretation, the "four corners" rule preserves the objective interpretation of a contract over a party's *post hoc* subjective spin:

> The court should consider that the "intent of the parties must be taken from the agreement itself, not from the parties' present interpretation, and the agreement must be enforced as it is written." This is often referred to as the "Four Corners Rule" which means that the intention of the parties is to be ascertained from the instrument as a whole and not from isolated parts thereof. Moreover, a court will not change the contract merely because it or one of the parties comes to dislike its provisions or thinks that something else is needed. The court will not "ask about the subjective intent of the parties to the contract." When the contract is unambiguous, the court should apply the pertinent rules of construction, apply the plain meaning of the contract language, and enforce the contract as written.[47]

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[44] *Id.* at 561.

[45] *Id.*

[46] *E.g.*, Silsbee Hosp., Inc. v. George, 163 S.W.3d 284 (Tex. App.—Beaumont 2005, pet ref'd).

[47] Jacobson v. DP Partners L.P., 245 S.W.3d 102, 106–07 (Tex. App.—Dallas 2008, no pet. h.) (quoting Calpine Producer Servs., L.P. v. Wiser Oil Co., 169 S.W.3d 783, 787 (Tex. App.—Dallas 2005, no pet.) (citations omitted)); *accord* Lone Star Heat Treating Co., Ltd. v. Liberty Mut. Fire Ins. Co., 233 S.W.3d 524, 527 (Tex. App.—Houston [14th Dist.] 2007, no pet. h.). In *Lone Star Heat Treating*, the court of appeals instructed that:

> When construing a contract, our primary concern is to give effect to the written expression of the parties' intent. . . . If we can give a contract only one reasonable

In *Silsbee Hospital, Inc. v. George*, for example, the court noted the "four corners" rule when it refused to apply the "actual notice or knowledge" exception.[48] In *Silsbee*, the defendant hospital sought to enforce a waiver and release against the plaintiff, who asserted negligence claims.[49] In response, the plaintiff argued that the waiver and release defenses failed because they did not meet the demands of the express negligence rule.[50] In an attempt to escape the express negligence rule, the hospital asserted that the plaintiff's actual knowledge of signing a waiver triggered the "actual knowledge" exception.[51]

The court rejected this maneuver:

> We have held that the contract was not ambiguous, and is therefore construed under the "four corners" rule. Although the Hospital attempted to offer [plaintiff's] understanding of the waiver agreement into evidence, and this evidence was excluded, we note that [plaintiff's] testimony of his understanding of the waiver agreement would have injected testimony inconsistent with the express terms of the written agreement in violation of the parol evidence rule, which is a rule of substantive law.[52]

Thus, the plaintiff's "actual knowledge" did not influence the court's analysis of the express negligence rule.[53]

Moreover, the *Silsbee* court expressly questioned the basis for applying the "actual notice or knowledge" exception to the express negligence rule.[54] As the court observed, *Dresser*'s footnote 2 is dictum, and even after

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> meaning, the contract is not ambiguous and we will enforce it as written. Any ambiguity must be evident from the policy under scrutiny, and we may not consider extrinsic evidence unless the language is ambiguous.

Id. (citations omitted).

[48] 163 S.W.3d 284, 293 (Tex. App.—Beaumont 2005, pet. ref'd).

[49] *Id.* at 288.

[50] *Id.*

[51] *Id.* at 293.

[52] *Id.*; *accord Jacobson*, 245 S.W.3d at 106 ("If a contract is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law." (citing Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983))).

[53] *Silsbee*, 163 S.W.3d at 293.

[54] *Id.* at 293 n.4.

Dresser, the Texas Supreme Court has never applied "the 'actual knowledge' exception to the express negligence requirement."[55] Even more, the court pointed out, applying that exception to the express negligence rule would violate the "four corners" rule imposed in *Ethyl*—a primary tenet of the express negligence rule.[56] As a result, the court found that the "actual notice or knowledge" exception applies only to conspicuousness, not the express negligence rule.[57]

The court in *Sydlik v. REEII, Inc.* reached the same conclusion.[58] As in *Silsbee*, the court found no Texas decision that had applied the "actual notice or knowledge" exception to the express negligence rule.[59] Further, the court opined that "such an approach would fly in the face of our contract interpretation jurisprudence."[60] The court concluded that the plaintiff's actual knowledge of the release was:

> [N]o more than parol evidence from one of the parties to define the terms of an otherwise unambiguous contractual term. [A party's] interpretation is unimportant when we may construe the contract without that interpretation. Certainly, had [the plaintiff] stated she did not believe she had released anyone from liability, [the defendant] would not put such stock in her view.[61]

In sum, the court held that the "four corners" rule precluded the "actual notice or knowledge" exception.

There is a final reason not to apply the "actual notice or knowledge" exception to the express negligence rule: it transforms an issue of law into an issue of fact. In *Fisk Electric Co. v. Constructors & Associates, Inc.*, the Texas Supreme Court underscored that "[t]he express negligence test was established by this court in *Ethyl* in order 'to cut through the ambiguity' of indemnity provisions, thereby reducing the need for satellite litigation

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[55] *Id.* (citing Storage & Processors, Inc. v. Reyes, 134 S.W.3d 190, 193 (Tex. 2004)).

[56] *Id.* (citing *Reyes*, 134 S.W.3d at 192–94; Ethyl Corp. v. Daniel Constr. Co., 725 S.W.2d 705, 707–08 (Tex. 1987)).

[57] *Id.*

[58] 195 S.W.3d 329, 333 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

[59] *Id.* at 333 (noting that "we have found no case, including those cited, that has ever applied actual notice outside the context of the conspicuousness prong . . . .").

[60] *Id.*

[61] *Id.* at 334.

regarding interpretation of indemnity clauses."[62] The court confirmed that "[t]he express negligence requirement is not an affirmative defense but a rule of contract interpretation. Issues of contract interpretation are determinable as a matter of law."[63] The court insisted: "Either the indemnity agreement is clear and enforceable or it is not."[64]

That analysis underscores the reasons for keeping the express negligence rule apart from the "actual notice or knowledge" exception. In fact, the source of the "actual notice or knowledge" exception was criticized from its inception for these same reasons. In *Cate*, the dissenting opinion predicted that the "actual knowledge" exception would result in "a parade" of factual disputes regarding parties' "actual knowledge" of waivers that were otherwise inconspicuous:

> The effect of actual knowledge is subject to debate among leading commentators on commercial law. The purpose of the objective standard of conspicuousness adopted by the court today reflects the view that "the drafters intended a rigid adherence to the conspicuousness requirement in order to avoid arguments concerning what the parties said about the warranties at the time of the sale." An absolute rule that an inconspicuous disclaimer is invalid, despite the buyer's actual knowledge, encourages sellers to make their disclaimers conspicuous, thereby reducing the need for courts to evaluate swearing matches as to actual awareness in particular cases. Today's decision condemns our courts to a parade of such cases.[65]

That portent was proven a reality in *Reyes*, where the Texas Supreme Court ruled that the "actual notice or knowledge" exception is not an issue of law, but an issue of fact.[66] In *Reyes*, the court held that "[b]ecause actual

[62] 888 S.W.2d 813, 814 (Tex. 1994) (quoting Ethyl Corp. v. Daniel Constr. Co., 725 S.W.2d 705, 708 (Tex. 1987)).

[63] *Id.* (citations omitted).

[64] *Id.* at 815.

[65] Cate v. Dover Corp., 790 S.W.2d 559, 567 (Tex. 1990) (Ray, J., concurring in part and dissenting in part) (quoting JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 12-5 (2d ed. 1980)) (citations omitted).

[66] Storage & Processors, Inc. v. Reyes, 134 S.W.3d 190, 194 (Tex. 2004).

knowledge is an affirmative defense that defendants must prove, a disputed fact question exists on this issue."[67]

Therefore, if applied to the fair notice rule, the "actual notice or knowledge" exception transforms the rule—ordinarily an issue of law determined by the court under the "four corners" rule[68]—into a factual issue. That transformation will prevent courts from swiftly deciding the enforceability of extraordinary risk-shifting provisions as the Texas Supreme Court intended when it adopted the express negligence rule. If Texas courts opt to follow *Dresser*'s dictum in footnote 2 and apply the "actual notice or knowledge" exception to the express negligence rule, they likely will join the "parade of such cases" forewarned by the dissent in *Cate*.[69]

In any event, if given the opportunity, the Texas Supreme Court should clarify its footnote 2 in *Dresser* and expressly rule that the "actual notice or knowledge" exception applies only to conspicuousness—not the express negligence rule. This clarification would resolve the uncertainty among Texas courts and preserve the integrity of the express negligence rule.

B. Claims Subject to the Express Negligence Rule: More than Just Negligence?

1. The Texas Supreme Court Expanded the Rule

After the Texas Supreme Court adopted the express negligence rule for indemnity agreements in *Ethyl Corp.* and expanded the doctrine to release agreements in *Dresser Industries*, litigants soon began to argue that the express negligence rule applied to claims other than negligence. Although by name the express negligence rule only applies to negligence, the Texas Supreme Court expanded the express negligence doctrine to include other types of claims in *Houston Lighting & Power Co. v. Atchison, Topeka & Santa Fe Railway Co.*[70] In *Houston Lighting*, the court directly applied the

[67] *Id.* (citing Dresser Indus., Inc. v. Page Petroleum, 853 S.W.2d 505, 508 n.2 (Tex. 1993)).

[68] *See* Ethyl Corp. v. Daniel Constr. Co., 725 S.W.2d 705, 708 (Tex. 1987) (declaring that "the intent of the parties must be specifically stated within the four corners of the contract."); *Dresser*, 853 S.W.2d at 509 (holding that "compliance with both of the fair notice requirements is a question of law for the court.").

[69] *Cate*, 790 S.W.2d at 567.

[70] 890 S.W.2d 455 (Tex. 1994).

rule to statutory strict liability claims and, by inference, to products liability claims as well.[71]

In expanding the express negligence rule beyond negligence, the court reasoned that the same basis for applying the rule to negligence claims— to prevent the injustice of an innocent party incurring significant costs without notice of potential liability[72]—also applies to strict liability and products liability claims. Texas courts generally have cited two policy rationales for the express negligence rule: (1) if a contract explicitly covers all situations where a party might be forced to indemnify another, it prevents the injustice that may occur when an innocent party incurs tremendous cost because of another's liability; and (2) indemnification is an exception to the rule that parties are liable for their own actions.[73] Because these rationales applied to causes of action other than negligence, the Texas Supreme Court saw no reason to limit the scope of the express negligence rule to negligence.

2. Uncertainty Among the Texas Appeals Courts

Notwithstanding that the Texas Supreme Court broadened the express negligence rule beyond negligence, some Texas appeals courts continue to construe the express negligence rule narrowly. Without mentioning the Texas Supreme Court's precedent, the First and Fourteenth Courts of Appeals in Houston have limited the express negligence rule only to claims for negligence.[74] Seven years after the Texas Supreme Court expanded the express negligence rule, the Fourteenth Court of Appeals decided *DDD Energy, Inc., v. Veritas DGC Land, Inc.*, a case where the appellant sought indemnification under the parties' agreement for negligence claims, as well as claims for gross negligence, negligent misrepresentation, breach of

[71] *Id.* at 457–59; *see also* Dorchester Gas Corp. v. Am. Petrofina, Inc., 710 S.W.2d 541, 543 (Tex. 1986) ("The requirement for clear and unequivocal language in a contract for indemnity to protect the indemnitee against strict liability for a defective product is the same as for indemnity for one's own negligence.").

[72] *Houston Lighting*, 890 S.W.2d at 458.

[73] *Id.*

[74] English v. BGP Int'l, Inc., 174 S.W.3d 366, 375 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (explaining that "the express negligence doctrine does not apply to non-negligent actions" (citing DDD Energy, Inc. v. Veritas DGC Land, Inc., 60 S.W.3d 880, 885 (Tex. App.—Houston [14th Dist.] 2001, no pet.)); Devon SFS Operating, Inc. v. First Seismic Corp., No. 01-04-00077-CV, 2006 WL 374257, at *10 (Tex. App.—Houston [1st Dist.] Feb. 16, 2006, no pet.) (mem. op., not designated for publication)).

fiduciary duty and other torts.[75] The Fourteenth Court of Appeals found, citing only to general language in *Dresser*, that the express negligence rule applied only to negligence claims.[76] The court ignored the Texas Supreme Court's decision in *Houston Lighting* and remanded the matter to the trial court to determine the parties' obligations related to the indemnification of DDD for claims not based on negligence.[77]

Over the next few years, Texas appeals courts continued to ignore the *Houston Lighting* decision. First, in 2003, the Fourteenth Court of Appeals decreed, without any analysis, that the express negligence rule was not applicable to non-negligence claims.[78] Again, in 2005, the court examined the express negligence rule outside the context of negligence.[79] The court reiterated the statement in *DDD Energy* that "the express negligence doctrine does not apply to non-negligent actions."[80] Citing only its own decision in *DDD Energy*, the court did not recognize or contradict the Texas Supreme Court's *Houston Lighting* holding to the contrary. In 2006, the First Court of Appeals joined the Fourteenth Court of Appeals and also ignored the Texas Supreme Court's guidance.[81] The court stated that prior cases "limited application of the express negligence rule to negligence cases."[82] Again, however, the court offered no analysis supporting that conclusion.

The Corpus Christi Court of Appeals has also narrowed the scope of the express negligence rule. In *El Paso South Texas, L.P. v. Bay Ltd.*, the court noted that the proponent of the rule in that case "concedes that the fair

[75] 60 S.W.3d at 880.

[76] *Id.* at 885.

[77] *Id.*

[78] B.R. Brick & Masonry, Inc. v. Phillips, No. 14-02-01144-CV, 2003 WL 22724752, at *2 (Tex. App.—Houston [14th Dist.] Nov. 20, 2003, no pet.) (mem. op., not designated for publication).

[79] *English*, 174 S.W.3d at 366.

[80] *Id.* at 375.

[81] Devon SFS Operating, Inc. v. First Seismic Corp., No. 01-04-00077-CV, 2006 WL 374257, at *10 (Tex. App.—Houston [1st Dist.] Feb. 16, 2006, no pet.) (mem. op., not designated for publication).

[82] *Id.* (citing Green Int'l, Inc. v. Solis, 951 S.W.2d 384, 387 (Tex. 1997)) (comparing a no-damages-for-delay clause with an indemnification for negligence clause; the court did not specifically address the applicability of the express negligence rule to claims other than negligence and the case dealt with a breach of contract claim, not liability for third-party tort and negligence damages).

notice requirements do not apply in a non-negligent cause of action."[83] The case involved indemnification for a subcontractor's non-payment—a breach of contract action.[84] This court, too, ignored the Texas Supreme Court's expansion of the express negligence rule beyond negligence.

But the Fourteenth Court of Appeals may be falling in line with the *Houston Lightning* decision because, in a recent case, it recognized that the "express-negligence rule applies to indemnification for strict liability claims."[85] The court found that the provision at issue was unenforceable because it did not meet the requirements of the express negligence rule.[86]

In sum, it remains to be seen whether the Texas appeals courts will abide by the Texas Supreme Court's precedent broadening the express negligence rule beyond negligence or whether they will ignore *Houston Lighting* and narrowly construe the express negligence rule.

C. The "Additional Insured" Escape Hatch: Will ATOFINA *Help Indemnitees Evade the Express Negligence Rule?*

Although cases interpreting the express negligence rule have been limited to indemnity and release agreements, another important contract provision has been at play. Drafters seeking protection for their clients frequently include an "additional insured" clauses in indemnity contracts, either appended directly to the indemnity clause or as a separate and independent provisions. "Additional insured" clauses provide the indemnitee with an extra level of protection: not only can the indemnitee seek protection from his indemnitor, but he may also be able to rely on the indemnitor's insurance carrier as well.

The Texas Supreme Court first addressed the interaction between indemnity provisions and "additional insured" clauses fifteen years before it adopted the express negligence rule. And, until February 2008, the interaction was governed by two main decisions: *Fireman's Fund Insurance Co. v. Commercial Standard Insurance Co.*[87] and *Getty Oil Co. v.*

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[83] No. 13-06-186-CV, 2007 WL 4260523, at *3 (Tex. App.—Corpus Christi Dec. 6, 2007, pet. denied) (mem. op., not designated for publication).

[84] *Id.*

[85] AVCO Corp. v. Interstate Sw., Ltd., 251 S.W.3d 632, 666–67 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

[86] *Id.* at 667.

[87] 490 S.W.2d 818 (Tex. 1972), *overruled on other grounds by* Ethyl Corp. v. Daniel Constr. Co., 725 S.W.2d 705, 708 (Tex. 1987).

Insurance Co. of North America.[88] But the Texas Supreme Court's decision in *ATOFINA* has altered the landscape.[89] By allowing an indemnitee to obtain coverage for its own negligence directly from the indemnitor's insurer, the court may have inadvertently provided the "scriveners of indemnity agreements" that they chided in *Ethyl* with a new avenue to circumvent the express negligence rule.

1. Distinguishing Between *Fireman's Fund* and *Getty Oil*

The Texas Supreme Court decided *Fireman's Fund* in 1972, fifteen years before it adopted the express negligence rule.[90] The facts in *Fireman's Fund* resemble most lawsuits where the express negligence rule is an issue. In 1964, General Motors (GM) hired a contractor to build an annex to its Arlington plant, and the contractor hired a sub-contractor to build the annex's mechanical substructure.[91] Both construction contracts—General Motors' contract with the general contractor and the general contractor's contract with the subcontractor contained: (1) an indemnity provision that indemnified GM for all liability except that caused by its own negligence and (2) insuring agreements requiring that the contractor and subcontractor maintain insurance policies that inured to GM's benefit.[92] The indemnity and additional insured provisions were separate clauses in both contracts.[93] The insuring agreement was in Section 12 of the contract, whereas the indemnity provision was in Section 20.[94]

Two of the subcontractors' employees were later injured and sued GM.[95] GM sought and received indemnification from the general contractor and its insurance carrier, but the sub-contractor's carrier refused to indemnify the general contractor.[96] Commercial Standard, the general contractor's insurance carrier, filed a subrogation lawsuit to enforce its contractual indemnity right. The lawsuit alleged that: (1) the insuring agreement was broad enough to indemnify GM for its own negligence and

[88] 845 S.W.2d 794 (Tex. 1992).

[89] Evanston Ins. Co. v. ATOFINA Petrochemicals., Inc., 256 S.W.3d 660, 660 (Tex. 2008).

[90] *Fireman's Fund*, 490 S.W.2d at 818.

[91] *Id.* at 820.

[92] *Id.* at 821.

[93] *Id.*

[94] *Id.*

[95] *Id.* at 820.

[96] *Id.*

(2) the express negligence issue was irrelevant because the evidence showed that two of the subcontractor's employees caused the accident.[97]

Both the trial court and appeals court agreed with Commercial Standard's contentions, but the Texas Supreme Court overruled the finding that the insuring agreement superseded the indemnity provision.[98] The court held that the plain language of Section 20 excused the subcontractor from liability for GM's own negligence and that, even though the indemnity and additional insured clauses were independent of one another, they must be read together in order to determine the subcontractor's liability.[99] When these two independent provisions were read together, the subcontractor could not be held liable, regardless of how broad the language of the insuring agreement, because the indemnity provision specifically disclaimed liability for GM's own negligence.[100] In short, the specific language excluding coverage for a party's own negligence was enforced regardless of the coverage provided by a separate, broader insuring agreement.

Twenty years later, the court was again faced with a similar interplay between indemnity and "additional insured" provisions in *Getty Oil*.[101] Getty Oil purchased chemicals from NL Industries (NL) for its Midland oil well operations[102] under a contract that contained an Insurance and Indemnity provision that states, in relevant part:

> 4. INSURANCE AND INDEMNITY: Seller agrees to maintain at Seller's sole cost and expense . . . insurance of all types. . ..All insurance coverages carried by Seller, whether or not required hereby, shall extend to and protect Purchaser. . ..Seller shall not be held responsible for any losses, expenses, claims, subrogations, actions, costs, judgments, or other damages, directly, solely, and proximately caused by the negligence of Purchaser.[103]

[97] *Id.*

[98] *Id.* at 821–22.

[99] *Id.* at 822–23.

[100] *Id.* at 823.

[101] Getty Oil Co. v. Ins. Co. of N. Am., 845 S.W.2d 794 (Tex. 1992).

[102] *Id.* at 796.

[103] *Id.* at 796–97.

In 1983, a barrel of NL's chemicals exploded and killed an independent contractor working at a Getty Oil well.[104] The contractor's survivors sued Getty Oil and NL, and Getty Oil filed a cross-claim against NL for indemnity.[105] The jury found Getty Oil 100% negligent and grossly negligent for the contractor's death and awarded almost $29 million in damages, including punitive damages.[106] After its cross-claims for indemnification were denied, Getty Oil filed a claim with NL's insurers and asserted that it was an additional insured under NL's policies.[107]

Because Getty Oil had been found 100% negligent, NL's insurance carriers moved for summary judgment on the indemnity provision that excluded coverage for Getty Oil's own negligence, as well as under an oil and gas statute that prohibits parties to oil and gas agreements from indemnifying each other for express negligence.[108] The insurers argued that *Fireman's Fund* barred Getty Oil's claims because it held that the broad language of an insuring agreement will not be read to create coverage where a separate indemnity provision excludes coverage for the indemnitee's negligence.[109] The Texas Supreme Court rejected this argument and held that neither *Fireman's Fund* nor the oil and gas statute applied to the "additional insured" clause because insuring agreements are distinct from indemnity provisions, as they permit the indemnitee to be made whole by the indemnitor's insurer and not by the indemnitor himself.[110] The court also refused to extend the express negligence rule to "additional insured" clauses based on the same rationale,[111] but at the same time "express[ed] no opinion as to whether Getty is an additional insured under NL's insurance policies."[112]

The *Getty Oil* decision created uncertainty about the *Fireman's Fund* holding by finessing a difference between insuring agreements and "additional insured" clauses that "should be construed as assuring performance of an indemnity agreement"[113] and those that are "separate

[104] *Id.* at 797.
[105] *Id.*
[106] *Id.*
[107] *Id.* at 797–98.
[108] *Id.* at 802–05.
[109] *Id.* at 804.
[110] *Id.* at 803.
[111] *Id.* at 806.
[112] *Id.* at 804.
[113] *Id.*

obligation[s]"[114] that may be enforced independently.[115] As discussed below, although the supreme court's recent decision in *ATOFINA* resolved how to reconcile *Fireman's Fund* and *Getty Oil*, it may have only created more uncertainty regarding the future utility of the express negligence rule in Texas.

2. What's Next?: The Uncertainty Created by *ATOFINA*

The Texas Supreme Court's recent decision in *ATOFINA* concerned facts that are almost identical to both *Fireman's Fund* and *Getty Oil*.[116] ATOFINA Petrochemicals hired a general contractor to perform construction and maintenance work on its Port Arthur refinery.[117] As a condition of the job, the general contractor agreed to indemnify ATOFINA for all injuries occurring on the project, except for those arising from ATOFINA's own negligence.[118] The contractor also agreed to purchase insurance to secure its indemnity obligation and to name ATOFINA as an "additional insured" under these policies.[119]

During construction, one of the general contractor's employees was killed in an accident at ATOFINA's refinery.[120] The employees' survivors brought a wrongful death action against the general contractor and ATOFINA.[121] ATOFINA, in turn, tendered the claim to the contractor's insurers.[122] The primary insurer tendered its policy limits, but the excess insurer, Evanston Insurance, denied coverage because the construction contract specifically refused to indemnify ATOFINA for its own negligence.[123] According to Evanston Insurance, *Fireman's Fund* prohibited an indemnitee from obtaining coverage for its own negligence

[114] *See id.*

[115] *See, e.g.*, Emery Freight Air Corp. v. Ground Transp. Sys., Inc., 933 S.W.2d 312, 313–15 (Tex. App.—Houston [14th Dist.] 1996, no writ) (relying on this difference to distinguish between *Fireman's Fund* and *Getty Oil*).

[116] Evanston Ins. Co. v. ATOFINA Petrochemicals., Inc., 256 S.W.3d 660, 660 (Tex. 2008).

[117] *Id.* at 662.

[118] *Id.*

[119] *Id.* at 662–63.

[120] *Id.* at 663.

[121] *Id.*

[122] *Id.*

[123] *Id.*

when, as in ATOFINA, the insurance policy existed only to secure the indemnitor's contractual obligations.[124]

Conversely, ATOFINA argued it was an "additional insured" under the Evanston Insurance policy and therefore had an independent basis for coverage that was supported by the court's decision in *Getty Oil*.[125] In order to resolve this apparent conflict, the Texas Supreme Court had to answer this question:

> In this case, we examine the interplay between a contractual indemnity provision and a service contract's requirement to name an additional insured. More particularly, we must decide whether a commercial umbrella insurance policy that was purchased to secure the insured's indemnity obligation in a service contract with a third party also provides direct liability coverage for the third party.[126]

Thus, *ATOFINA* court did what was resisted in *Getty Oil*: it evaluated whether an indemnitee that is named as an additional insured under an indemnitor's policy could bypass its third-party contribution claim against the indemnitor and instead seek payment directly from the insurance carrier.

The court held that this direct route was available to ATOFINA because it was an additional insured under the Evanston Insurance policy.[127] As such, Evanston Insurance owed ATOFINA a direct obligation as an insured, even though ATOFINA's contract with the general contractor contained indemnity provisions that disclaimed responsibility for ATOFINA's sole negligence.[128] Rather than going through an indemnitor who would seek coverage from the insurance carrier, *ATOFINA* gives the indemnitee the right to go straight to the source itself and demand coverage from the indemnitor's insurance company.

The *ATOFINA* ruling therefore creates a new avenue for avoiding the express negligence rule. As the respondent argued in *Getty Oil*, a holding giving an indemnitee this direct route "allow[s] [the indemnitee] to accomplish indirectly what it otherwise could not achieve directly: avoiding

[124] *Id.*

[125] *Id.* at 664.

[126] *Id.* at 662.

[127] *Id.* at 670.

[128] *Id.*

liability for its own negligence"[129] by contracting to obtain insurance coverage for its own negligence rather than being bound by the specific contours of an indemnity provision. This result creates two types of uncertainty for contracting parties.

Initially, an indemnitor and indemnitee must now draft their "additional insured" clauses with greater scrutiny. Rather than argue about whether an indemnitor will assume liability for an indemnitee's own negligence, the indemnitee may instead focus on drafting an ironclad "additional insured" clause. An indemnitor may be quick to accept such terms, but their haste should be tempered by the second type of uncertainty: potential indemnitors must carefully watch their insurance premiums because, as forewarned by an *amicus curiae* in *Getty Oil*, insurance companies may respond to a broadening of their responsibility to additional insureds by "dramatically increas[ing] insurance premiums" on these type of commercial liability policies.[130] If this happens, general contractors and others who are often required to indemnify their clients in order to obtain work will be faced with the difficult decision of whether to self-insure and expressly accept liability for another's negligence or whether to pay significant premiums that could limit the profitability of each job.

Ultimately, *ATOFINA* may create the "extraordinary risk shifting" that the express negligence rule is meant to prevent because the indemnitor may be forced to decide between accepting the certain and immediate cost of increased insurance premiums and the potentially ruinous liability that comes with self-insuring. Future Texas Supreme Court cases that interpret the meaning and scope of "additional insured" clauses after *ATOFINA* should be carefully reviewed to determine whether this decision does, in fact, provide litigants with yet another means of avoiding the express negligence rule.

IV. CONCLUSION

Over the last few decades, Texas courts have grappled with how to calibrate the scope of the express negligence rule. From the time the express negligence rule was imposed in *Ethyl* by the Texas Supreme Court in 1987, the express negligence rule has faced continual attack. Ultimately, there is no question that litigants will continue to argue that the rule should

[129] Getty Oil Co. v. Ins. Co. of N. Am., 845 S.W.2d 794, 803 (Tex. 1992).

[130] *Id.* at 803 n.13.

be narrowly construed. It remains up to Texas courts to counter these attacks and retain the integrity of the express negligence rule in Texas.