COMMENT

INDEMNIFICATION AGREEMENTS FOR INTENTIONAL MISCONDUCT: BALANCING PUBLIC POLICY AND FREEDOM TO CONTRACT IN TEXAS

MEAGAN MCKEOWN*

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I. INTRODUCTION

The indemnification clause is one of the most common provisions in agreements between parties conducting business with one another.[1] These contract terms operate to relieve one party of the burden of liability by requiring another party, the indemnitor, to pay the costs associated with a judgment, settlement, or other loss to the indemnitee.[2] According to common law, indemnification requires a complete shift in liability, alleviating one party of the entire burden and obligating another party to bear it.[3]

Today, a right to indemnification may stem from the terms of a contract or from tort law, such as contributory or comparative fault statutes.[4] Texas courts favor strict construction in contract interpretation and protecting the rights of individuals to contract.[5] This is especially true

1. *See* Dresser Indus., Inc. v. Page Petrol., Inc., 853 S.W.2d 505, 508 (Tex. 1993) (describing the types of terms present in nearly all contracts that operate to allocate risk among parties, including indemnity agreements).

2. *See* BLACK'S LAW DICTIONARY 376 (9th ed. 2009) (defining an indemnity clause as "[a] contractual provision in which one party agrees to answer for any specified or unspecified liability or harm that the other party might incur"); *see also Dresser*, 853 S.W.2d at 508 ("An indemnity agreement is a promise to safeguard or hold the indemnitee harmless against either existing and/or future loss liability."); Russell v. Lemons, 205 S.W.2d 629, 631 (Tex. Civ. App.—Amarillo 1947, writ ref'd n.r.e.) ("[T]he obligation binds the indemnitor to protect the indemnitee against the rendition of a judgment against him, or against a liability, the obligation matures immediately upon the rendition of such a judgment or the accrual of liability against the indemnitee.").

3. Ethyl Corp. v. Daniel Constr. Co., 725 S.W.2d 705, 708 (Tex. 1987). With the adoption of statutory comparative negligence rules, indemnification no longer completely shifts the burden of liability from the indemnitee to the indemnitor. *Id.* Instead, parties can bargain for comparative indemnity, providing the agreement satisfies the express negligence doctrine. *Id.*

4. UMC, Inc. v. Coonrod Elec. Co., 667 S.W.2d 549, 554 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.); Tex. Constr. Assocs., Inc. v. Balli, 558 S.W.2d 513, 519 (Tex. Civ. App.—Corpus Christi 1977, no writ).

5. Mid-Continent Supply Co. v. Conway, 240 S.W.2d 796, 804 (Tex. Civ. App.—Texarkana 1951, writ ref'd n.r.e.) ("There is perhaps no higher public policy of the state than to uphold

where the parties are experienced, represented by counsel, and have clearly expressed their intent within the contract itself,[6] but does this same affinity for strict construction apply when the effect is to insulate people from their intentional misconduct?

The Supreme Court of Texas has not considered whether indemnity for intentional torts may be contracted for or awarded by the courts.[7] However, a case decided by the Fourth Court of Appeals in December 2013 asked the intermediate appellate court to determine the enforceability of an agreement that would require a corporation to indemnify a former officer who was found liable to the corporation's working partner in a civil suit for misappropriation of trade secrets.[8] There is little Texas precedent focused on indemnification against intentional misconduct, but the approaches of the state's intermediate appellate courts provide insight as to how other courts, including the Supreme Court of Texas, may approach the issue and the public policy questions it raises.

This Comment will analyze the public policy considerations regarding the enforcement of indemnification agreements that purport to shift liability for an indemnitee's willful or intentional misconduct to an indemnitor. First, this Comment provides an overview of Texas's dedication to protecting the right to contract. Furthermore, this Comment evaluates the sources Texas courts look to when determining whether the terms of a contract for indemnity violate public policy, including statements by the legislature in statutes, common law influences, and approaches to other risk-shifting contracts, such as insurance policies. Finally, this Comment discusses recent litigation in which Texas intermediate appellate courts have considered whether public policy permits parties to contract for indemnification against their intentional torts, as well as the approach the Supreme Court of Texas may take, should it hear a case on the issue.

contracts validly entered into and legally permissible in subject matter."). The *Conway* court emphasized, as many Texas cases have, that courts are not to interfere with freedom to contract without strong reason. *Id.*

6. *See, e.g.*, Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 179–80 (Tex. 1997) (enforcing a contractual disclaimer of reliance to prevent a fraud claim in light of fact that the parties were "sophisticated business players" and represented by competent counsel).

7. *See* Atl. Richfield Co. v. Petrol. Pers., Inc., 768 S.W.2d 724, 726 n.2 (Tex. 1989) (posing but not answering the question of whether public policy may prevent indemnification for one's intentional tort by discussing indemnity for "intentional injury").

8. *See* Hamblin v. Lamont, 433 S.W.3d 51, 54–57 (Tex. App.—San Antonio 2013, pet. denied) (analyzing whether Texas courts should enforce an indemnity agreement against damages arising from intentional torts).

II. FREEDOM TO CONTRACT AND INTERPRETING INDEMNITY AGREEMENTS IN TEXAS

> [I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.[9]

Texas has a long tradition of protecting the freedom to contract and enforcing the terms of contractual agreements, so long as the agreement doesn't violate the law or public policy.[10] Texas courts interpret indemnity agreements in the same way as other contract terms—as a matter of law.[11] According to well-established principles of contract law, the primary objective of interpretation is to determine and give effect to the intentions of the contracting parties.[12] Looking within the four corners of the document, the courts seek to discover the objective intent of the parties by considering the meaning the parties assigned to the terms, as well as the effect of those terms.[13] Terms are given their plain, ordinary

9. Wood Motor Co. v. Nebel, 150 Tex. 86, 238 S.W.2d 181, 185 (1951) (quoting Printing & Numerical Registering Co. v. Sampson, 19 L.R.Eq. 462, 465 (1875)).

10. *See* TEX. CONST. art. I, § 16 ("No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made."); Fairfield Ins. Co. v. Stephens Martin Paving, LP, 246 S.W.3d 653, 664 (Tex. 2008) ("This Court has long recognized Texas' strong public policy in favor of preserving the freedom of contract."); *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 129 (Tex. 2004) ("As a rule, parties have the right to contract as they see fit as long as their agreement does not violate the law or public policy."); Sonny Arnold, Inc. v. Sentry Sav. Ass'n, 633 S.W.2d 811, 815 (Tex. 1982) (emphasizing the right of parties to contract freely, so long as the agreement is not illegal or offensive to public policy); *Wood Motor*, 238 S.W.2d at 185 (refusing to "deny [the parties] the valuable right to contract for themselves").

11. Kemp v. Gulf Oil Corp., 745 F.2d 921, 924 (5th Cir.1984) ("Interpretation of the terms of a contract, including an indemnity clause, is a matter of law, reviewable *de novo* on appeal"); Gulf Ins. Co. v. Burns Motors, Inc., 22 S.W.3d 417, 423 (Tex. 2000); Fisk Elec. Co. v. Constructors & Assoc., Inc., 888 S.W.2d 813, 815 (Tex. 1994); City of Pinehurst v. Spooner Addition Water Co., 432 S.W.2d 515, 518 (Tex. 1968) ("It is elementary that if there is no ambiguity, the construction of the written instrument is a question of law for the court."); Ohio Oil Co. v. Smith, 365 S.W.2d 621, 624 (Tex. 1963); *see Hamblin*, 433 S.W.3d at 54 ("Indemnity agreements are construed under the normal rules of contract construction."); Phillips Pipeline Co. v. Richardson, 680 S.W.2d 43, 47 (Tex. App.—El Paso 1984, no writ) (deciding right to indemnity as a matter of law); UMC, Inc. v. Coonrod Elec. Co., 667 S.W.2d 549, 554 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.) ("The meaning of the indemnity contract before us is therefore a question of law for the court.").

12. El Paso Field Servs., LP v. MasTec N. Am., Inc., 389 S.W.3d 802, 805 (Tex. 2012); *Fisk Elec.*, 888 S.W.2d at 815; Ideal Lease Serv., Inc. v. Amoco Prod. Co., 662 S.W.2d 951, 953 (Tex. 1983); Mitchell's, Inc. v. Friedman, 157 Tex. 424, 303 S.W.2d 775, 777–78 (Tex. 1957), *overruled on other grounds by* Ethyl Corp. v. Daniel Constr. Co., 725 S.W.2d 705 (Tex. 1987).

13. *See* Mark K. Glasser & Keith A. Rowley, *On Parol: The Construction and Interpretation of Written*

meaning, unless it is apparent the terms are being used in an unusual or technical way, and the entire writing should be considered together—"in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless."[14] By construing contracts from a utilitarian viewpoint and with an eye towards the particular business activity involved, Texas courts make efforts to avoid unreasonable or oppressive effects of contract interpretation and construction.[15]

The Supreme Court of Texas has declared that certain types of contractual agreements are invalid because they violate public policy.[16] The difficulty in articulating a violation of public policy is that there is no universal standard for the definition of public policy that can be applied to all cases, in all circumstances.[17] Courts must look to whether the agreement operates contrary to the public good—the values of which can be derived from the state's constitution, statutes, and case law.[18] Looking to Texas statutory limitations on indemnification agreements, as well as common law principles that have developed in response to parties contracting for shifts of liability by indemnity, release, or insurance, may provide some insight as to whether a contract for indemnity against one's intentional acts would offend public policy.

Agreements and the Role of Extrinsic Evidence in Contract Litigation, 49 BAYLOR L. REV. 657, 663–64 (1997) (discussing Texas courts' approach to contract interpretation and construction).

14. Valence Operating Co. v. Dorsett, 164 S.W.3d 656, 662 (Tex. 2005).

15. *See* Frost Nat'l Bank v. L & F Distribs., Ltd., 165 S.W.3d 310, 312 (Tex. 2005) ("We construe contracts from a utilitarian standpoint bearing in mind the particular business activity sought to be served and will avoid when possible and proper a construction which is unreasonable, inequitable, and oppressive." (citations omitted)); *see also* Reilly v. Rangers Mgmt., Inc., 727 S.W.2d 527, 530 (Tex. 1987) ("A court should construe contracts from a utilitarian standpoint bearing in mind the particular business activity sought to be served and need not embrace strained rules of interpretation which would avoid ambiguity at all costs.").

16. *See, e.g.*, *Fairfield Ins.*, 246 S.W.3d at 665 n.20 (listing various types of contracts that have been invalidated by the Supreme Court of Texas based on a wide range of public policy concerns, including: lawyer fee share agreements; assignment of liability for legal malpractice; overbroad non-competition agreements; contracts assigning right to contest will to another beneficiary of the will; contract to release landlord from unknown tort liabilities to tenants).

17. *See, e.g.*, Ranger Ins. Co. v. Ward, 107 S.W.3d 820, 827 (Tex. App.—Texarkana 2003, pet. denied) ("While we have no standard definition or test that applies to all cases, courts generally find a contract violates public policy if it is illegal or inconsistent with or contrary to the best interest of the public.").

18. *See, e.g.*, *id.* (explaining that a state's public policy is discerned from its "constitution, statutes, and the decisions of its courts").

III. TEXAS STATUTORY LIMITS ON INDEMNITY

Texas statutes limit the ability of parties to contract for certain types of indemnity in particular situations. The Texas Anti-Indemnity Act,[19] for instance, prohibits an indemnitee from being indemnified for its own negligence in contractual situations relating to the oil, gas, and minerals industry.[20] The statute does not require actual negligence to invalidate the entire indemnity agreement—the fact that an agreement purports to indemnify a party against the party's own negligence is enough to nullify the entire indemnity provision.[21] Thus, any attempt to comply with the express negligence doctrine, would render an indemnity agreement that falls under this statute completely unenforceable.[22]

Another Texas statute imposes restrictions on indemnity agreements in the construction industry, invalidating agreements that attempt to indemnify an architect or engineer against their own negligence in preparing, approving, or using defective plans, designs or specifications in a building project.[23] Throughout the country, legislatures have imposed limitations on indemnity agreements in the construction industry on the grounds that fairness and public policy require the parties involved to bear their own proportions of liability based on fault, as determined by a jury.[24]

19. TEX. CIV. PRAC. & REM. CODE ANN. §§ 127.001–.008 (West 2012).

20. *Id.*

21. *Id.* § 127.003(a)(1). The statute provides:

> [A] covenant, promise, agreement, or understanding contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas, or water or to a mine for a mineral is void if it purports to indemnify a person against loss or liability for damage that is caused by or results from the sole or concurrent negligence of the indemnitee, his agent or employee, or an individual contractor directly responsible to the indemnitee.

Id.

22. *See* Jeanmarie Brock Tade, *The Texas and Louisiana Anti-Indemnity Statutes as Applied to Oil and Gas Industry Offshore Contracts*, 24 HOUS. L. REV. 665, 666 (1987) (discussing the interplay of the Texas common law express negligence doctrine with the Texas Anti-Indemnity Statute).

23. CIV. PRAC. & REM. §§ 130.001–.005.

24. *See, e.g.*, Hiway 20 Terminal, Inc. v. Tri-County Agri-Supply, Inc., 443 N.W.2d 872, 875–76 (Neb. 1989) (refusing to enforce an indemnity agreement on the grounds that both parties should bear the costs of their portion of fault for the damages as apportioned by the jury). *See generally* James Duffy O'Connor, *Wrestling with Reform: Indemnification Agreements, Statutory Bars, Promises to Procure, and Insurance Products for the Construction Industry*, 1 AM. C. CONSTRUCTION L.J. 57 (2007) (discussing various states' evolving approaches to indemnity agreements in the construction industry). The construction industry has long relied on indemnification agreements as a means of shifting the costs of liabilities and allocating risks among owners, contractors, and subcontractors. *Id.* at 57–58 (describing the role of indemnity agreements for sharing risks and liabilities in the construction industry). Historically, the judicial enforcement of these agreements within the industry was carried out under the same standards as indemnity agreements outside the industry—so long as the contract language was construed to indicate one party's intent to incur the costs of liability for another party,

Notably, the Texas statute permits an architect or engineer to be indemnified to the extent of their non-negligence, in accordance with comparative negligence principles.[25]

For corporate directors, officers, and shareholders, Texas statutes provide for when indemnification will be required, permitted, or prohibited for liability arising from an act or omission occurring in the course of an officer's professional capacity.[26] The Texas Business Organization Code requires a corporation to indemnify an officer or director against "reasonable expenses actually incurred by the person in connection with a proceeding in which the person is a respondent because the person is or was a governing person . . . if the person is wholly successful on the merits or otherwise."[27] A corporation may indemnify a director or officer who is determined to have acted in good faith and reasonably believed the conduct was in the corporation's best interest, or at least not opposed to the corporation's best interests.[28] However, the code also lists situations in which a director or office may not be indemnified by a corporation, such as where the director or officer is found liable to the enterprise or improperly received a benefit by breaching the duty of loyalty to the corporation; failing to act with good faith, amounting to a breach of a duty to the corporation; or the officer's or director's actions amounted to willful or intentional misconduct in the performance of the their duties to the corporation.[29]

the agreement would be enforced by the court. *See id.* at 57 ("It was not long ago that the black letter law required the judicial enforcement of indemnification agreements when the indemnification language could be fairly construed to imply a promise by one party to pay the obligation of another."). Courts and legislatures across the country challenged this approach during periods of tort reform in the 1960s and 1970s. *See id.* (describing how the tort reform movement in many states changed the laws governing indemnity between parties in the construction industry).

25. *See* CIV. PRAC. & REM. § 130.005(1) (permitting indemnity for negligent acts other than those listed in the statute or the negligence of the contractor, subcontractor, or their agents).

26. *See* Elizabeth S. Miller, *Overview of Fiduciary Duties, Exculpation, and Indemnification in Texas Business Organizations*, at 7, *in* State Bar of Tex. Prof. Dev. Program, Essentials of Business Law Course (2010), *available at* http://www.baylor.edu/content/services/document.php/117971 (describing the corporate statutes under which indemnification of corporate directors and officers is required, permitted, and prohibited).

27. TEX. BUS. ORG. CODE ANN. § 8.051(a) (West 2013).

28. *Id.* § 8.101(a).

29. *Id.* § 8.102(b)(3).

IV. COMMON LAW INFLUENCES: CONTRACT LAW, TORT LAW, AND THE LAW OF INDEMNITY

Determining whether a contract runs contrary to the public interest often requires the court to use its judgment in balancing competing interests.[30] With regard to indemnification agreements, these competing interests include the rights of private parties to contract freely, as weighed against the public's interest in discouraging negligence or intentional misconduct from increasing due to what could be perceived as a safety net of indemnification.[31]

At the center of this balance of interests lie the somewhat competing principles of contract law and tort law.[32] As discussed above, the principles of contract law in Texas have historically favored the strict enforcement of freely bargained-for agreements. Meanwhile, the aim of tort law is to protect citizens from unreasonable risks of harm, discourage wrongs, and place the burden of loss on the responsible parties based on their capability to prevent harm.[33] In Texas, the common law regarding indemnity supports the freedom of parties to bargain for terms that would allow one to assume the legal obligations of the other, even when the

30. *See, e.g.*, Ranger Ins. Co. v. Ward, 107 S.W.3d 820, 827 (Tex. App.—Texarkana 2003, pet. denied) (balancing the interests of parties to a contract for insurance).

31. *Cf.* Hamblin v. Lamont, 433 S.W.3d 51, 54–57 (Tex. App.—San Antonio 2013, pet. denied) (explaining the importance of protecting the right of parties to contract freely and describing fair notice requirements for indemnity contracts involving extraordinary burden shifts); *see also* Solis v. Evins, 951 S.W.2d 44, 50 (Tex. App.—Corpus Christi 1997, no writ) ("We find no authority for the proposition that a party may prospectively contractually exculpate itself with respect to intentional torts. That would be contrary to public policy."); Hous. & T.C.R. Co. v. Diamond Press Brick Co., 222 S.W. 204, 205 (Tex. Comm'n App. 1920, holding approved) (rejecting the contention that allowing indemnification for a railroad's negligence in maintaining a spur track would lead to similar neglect of duties to maintain safety by other companies), *modified*, 226 S.W. 140 (Tex. 1920), and *overruled on other grounds by* Ethyl Corp. v. Daniel Constr. Co., 725 S.W.2d 705 (Tex. 1987).

32. *See* Sw. Bell Tel. Co. v. DeLanney, 809 S.W.2d 493, 494 (Tex. 1991) (distinguishing between obligations imposed by tort and contract law but recognizing the relationship between the two areas of law); Ryan S. Holcomb, Comment, *The Validity and Effectiveness of Pre-Injury Releases of Gross Negligence in Texas*, 50 BAYLOR L. REV. 233, 235–36 (1998) (stating that the shifting of risks by releases of liability, as with indemnity agreements, brings together the conflicting principles of law at the foundation of the right to contract and the public policy against allowing wrongdoers to avoid liability for their conduct).

33. *See* Roberts v. Williamson, 111 S.W.3d 113, 118 (Tex. 2003) ("The fundamental purposes of our tort system are to deter wrongful conduct, shift losses to responsible parties, and fairly compensate deserving victims."); Boyles v. Kerr, 806 S.W.2d 255, 258 (Tex. App.—Texarkana 1991) ("[T]he aim of tort law is to protect the rights and privileges of persons against wrongful acts by others."), *rev'd on other grounds*, 855 S.W.2d 593 (Tex. 1993); *see also* RESTATEMENT (SECOND) OF TORTS § 491 (1965) (describing the fundamental principles of the torts system as deterring wrongful conduct, shifting liabilities to responsible parties, and adequately compensating deserving victims).

indemnitee holds 100% of the fault for the liability.[34]

A. *Development and Expansion of the Express Negligence Doctrine*

Historically, many jurisdictions believed it was so unusual and extraordinary for one party to underwrite liability arising from another's sole negligence that the courts prohibited an inference of such an agreement from being drawn from general terms in an agreement.[35] Texas courts initially required parties contracting for this type of indemnity to express their intent *clearly and in unequivocal terms* within the agreement.[36] The Supreme Court of Texas later adopted the express negligence doctrine, interpreting indemnity contracts more strictly and requiring parties to express their intent to indemnify the indemnitee from its own negligence in *specific* terms within the contract.[37] This requirement grew

34. *See, e.g.*, *Ethyl*, 725 S.W.2d at 708 (permitting parties to contract for indemnity even as against the indemnitee's sole negligence). More than fifty years ago, the United States Supreme Court determined it was inappropriate to consider the proportion of the indemnitee's fault, an influence of tort law, when determining the enforceability of a contractual indemnity provision. *See* Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563, 569 (1958) ("[I]n the area of contractual indemnity an application of the theories of 'active' or 'passive' as well as 'primary' or secondary' negligence is inappropriate); *cf.* Atl. Richfield Co. v. Petrol. Pers., Inc., 768 S.W.2d 724, 726 (Tex. 1989) ("Although the language does not differentiate between degrees of negligence, the language 'any negligent act of ARCO' is sufficient to define the parties' intent. Usage of the terms 'joint,' 'concurrent' or 'comparative contractual' would not add to the expression of intent to exculpate ARCO for its negligence.").

35. *See* J. D. LEE & BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION § 20:6 (2d ed. 2002) (describing agreements that indemnify the indemnitee from liability stemming from its sole negligence as "so unusual" that some courts do not enforce such agreements based on public policy; the courts that do allow these agreements require the parties express their intent for such an assumption of liabilities within the contract).

36. *See* Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co., 490 S.W.2d 818, 822 (Tex. 1972) (adopting the "clear and unequivocal" test, which questioned whether the parties to an agreement had expressed the intent of the indemnitor to indemnify the indemnitee against liability arising from the indemnitee's own negligence in "clear and unequivocal" language in the contract), *overruled by Ethyl*, 725 S.W.2d 705; *see also* Spence & Howe Constr. Co. v. Gulf Oil Corp., 365 S.W.2d 631, 634 (Tex. 1963) (enforcing broadly stated indemnity provision that satisfied the minimal requirement of "clear and unequivocal" language), *overruled by Ethyl*, 725 S.W.2d 705.

37. *See Ethyl*, 725 S.W.2d at 708 (rejecting the "clear and unequivocal" test, as well as its many exceptions). Prior to *Ethyl*, parties contracting for indemnity against their own negligence did not need to state that intent "in so many words" within their contract. *Id.* (citing Joe Adams & Son v. McCann Constr. Co., 475 S.W.2d 721, 723 (Tex. 1971) and Ohio Oil Co. v. Smith, 365 S.W.2d 621, 624 (Tex. 1963)). Instead, it was sufficient that the parties' intention for such indemnity was clear in light of all the provisions of the contract and surrounding circumstances at the time of execution. Joe Adams & Son v. McCann Constr. Co., 475 S.W.2d 721, 723 (Tex. 1971). In *Ethyl*, the Supreme Court of Texas adopted a higher standard and held a contractual indemnity provision purporting to exculpate Ethyl Corp. for any loss resulting from its operations failed to satisfy the express negligence test. *Ethyl*, 725 S.W.2d at 708. To effectively contract for indemnity against their own negligence, parties must state that intent clearly by the terms of their contract. *Ethyl*, 725 S.W.2d at

out of public policy concerns as to whether a party should be alleviated from liability for its own negligence,[38] as well as Texas's policy of strictly construing contracts based on the meaning of the terms within the four corners of the document.[39]

Texas courts have declared indemnity agreements that hold an indemnitee harmless for its own negligence are not against public policy when the contractual terms satisfy the express negligence test.[40] Consider,

708.

38. *See McCann*, 475 S.W.2d at 724 (discussing indemnity agreements that permit an indemnitee to escape the consequences of its own negligence while holding the faultless indemnitor liable for potentially large amounts of damages). The court in *McCann* stated the purpose of rules requiring parties to express their intention to agree to such indemnity provisions is to ensure the indemnitor was put on fair notice of the potential liability it was agreeing to incur—essentially balancing the policy of freedom to contract against the policy of holding a negligent party accountable for the consequences of the breach of duty giving rise to liability. *Id.* The *McCann* court stated:

> [A]n indemnity agreement will not protect the indemnitee against the consequence of his own negligence unless the obligation is expressed in unequivocal terms. The obvious purpose of this rule is to prevent injustice[.] A contracting party should be upon fair notice that under his agreement and through no fault of his own, a large and ruinous award of damages may be assessed against him solely by reason of negligence attributable to the opposite contracting party.

Id.; *see also* XL Specialty Ins. Co. v. Kiewit Offshore Servs., Ltd., 513 F.3d 146, 149–50 (5th Cir. 2008) (explaining that the Texas express negligence rule was adopted because indemnifying a party for the repercussions of its own negligence was an unusual instance of risk-shifting); Van Voris v. Team Chop Shop, LLC, 402 S.W.3d 915, 918 (Tex. App.—Dallas 2013, no pet.) (calling indemnity agreements against one's own negligence extraordinary risk-shifting provisions that necessitate providing fair notice of such a term to the indemnitor); *Spence & Howe*, 365 S.W.2d at 633 (describing contracts for indemnity against a party's own negligence as "exceptional" and declining to enforce such agreements absent clear appearance of intent that the indemnitor be held liable for damages arising from the indemnitee's negligence).

39. *Ethyl*, 725 S.W.2d at 707–08. A significant rise in litigation to interpret vague and ambiguous contract language regarding indemnity provisions under the clear and unequivocal test led the court in *Ethyl* to pronounce "the better policy is to cut through the ambiguity of those provisions and adopt the express negligence doctrine." *Id.* at 708.

40. *See Spence & Howe*, 365 S.W.2d at 633 (calling the issue of whether an indemnitee could be held harmless for its own negligence a problem of contract construction, rather than a public policy problem), *overruled on other grounds by Ethyl*, 725 S.W.2d 705; Tesoro Petrol. Corp. v. Nabors Drilling USA, Inc., 106 S.W.3d 118, 131 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (enforcing a contractual indemnity provision exculpating a party for its own negligence, as the terms met the fair notice requirements); Delta Eng'g Corp. v. Warren Petrol., Inc., 668 S.W.2d 770, 772 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.) (stating contracts providing for indemnity against one's own negligence do not violate public policy); Stewart & Co. v. Mobley, 282 S.W.2d 290, 293 (Tex. Civ. App.—Dallas 1955, writ ref'd) ("Nor does the fact that a contract undertakes to save one harmless from loss resulting through his own negligence, in itself, render the agreement contrary to public policy."), *overruled on other grounds by Ethyl*, 725 S.W.2d 705. In addition to its strict construction approach to indemnity contracts, Texas also requires indemnity agreements to be sufficiently conspicuous before the terms will be enforceable. *See* Dresser Indus., Inc. v. Page Petrol., Inc., 853 S.W.2d 505, 508 (Tex. 1993) (stating an indemnity agreement must be conspicuous on the face of the

for instance *Houston & Texas Central Railroad Co. v. Diamond Press Brick Co.*,[41] an early case involving an indemnification agreement for the maintenance of a railroad track. In that case, a contract between a railroad company and brick company required the railroad company to maintain the good condition of a spur track but also to be indemnified by the brick company against any claims stemming from the maintenance of the spur track.[42] The plaintiff railroad company argued that although its negligence in maintaining the track resulted in liabilities in a personal injury suit, the railroad was entitled to reimbursement by the brick company under the contract.[43] In response, the defendant argued public policy prevented the railroad company from being indemnified for its negligence, claiming providing this type of exculpation from liability would encourage railroad companies to neglect to properly maintain tracks and crossings as required by statute.[44] The court disagreed, refusing to assume this type of indemnity agreement would cause railroad companies to violate the statute or otherwise act negligently; and thus, the contract did not violate public policy.[45]

The express negligence doctrine has also found application in cases regarding indemnification for strict statutory liability and strict products liability.[46] The Supreme Court of Texas examined the "compelling reasons" for extending the principles of the express negligence doctrine to cases involving indemnity for strict liability claims in *Houston Lighting &*

document); K&S Oil Well Serv., Inc. v. Cabot Corp., 491 S.W.2d 733, 738 (Tex. Civ. App.—Corpus Christi 1973, writ ref'd n.r.e.) (including conspicuousness in the requirement of fair notice for indemnity provisions). *But see, e.g.*, Cate v. Dover Corp. 790 S.W.2d 559, 561 (Tex. 1990) (holding fair notice requirements, including conspicuousness, are not necessary when the indemnitor otherwise has actual knowledge of the indemnity terms).

41. Hous. & T.C.R. Co. v. Diamond Press Brick Co., 222 S.W. 204 (Tex. Comm'n App., holding approved), *modified*, 226 S.W. 140 (Tex. 1920), and *overruled on other grounds by Ethyl*, 725 S.W.2d 705.

42. *Id.* at 205–06.

43. *Id.*

44. *Id.*

45. *Id.*

46. *See* Hous. Lighting & Power Co. v. Atchison, Topeka, & Santa Fe Ry. Co., 890 S.W.2d 455, 459 (Tex. 1994) (extending the principles of the express negligence doctrine to indemnity agreements purporting to cover strict liability); UMC, Inc. v. Coonrod Elec. Co., 667 S.W.2d 549, 555 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.) (The same rules applied when construing indemnity agreements for the indemnitee's own negligence "will be applied in determining whether an agreement purports to indemnify one against the consequences of supplying a defective product"); *see also* Dorchester Gas Corp. v. Am. Petrofina, Inc., 710 S.W.2d 541, 543 (Tex. 1986) (applying the clear and unequivocal test to the terms of an indemnity agreement purporting to protect the indemnitee from strict liability), *overruled on other grounds by Ethyl*, 725 S.W.2d 705 (replacing the clear and unequivocal test with the express negligence doctrine).

Power.[47] The court explained that if parties were not required to expressly state their intent to indemnify one another against strict liability claims, a broad indemnification agreement written in general language could impose tremendous costs on an innocent party for the other's strict liability.[48] Noting the importance of preventing that type of injustice, the supreme court stated it would be unfair to shift the costs of strict liability to an indemnitor unless the agreement clearly stated the parties' intent to include strict liability claims.[49] Next, the court pointed to the judicial efficiency of requiring express intent of the parties to indemnify against strict liability in contracts, asserting this would reduce the number of cases in which Texas courts would be asked to construe the ambiguous language of indemnity agreements.[50] Finally, the court explained an "express intent" rule was consistent with the safety law that gave rise to the strict liability at issue in *Houston Lighting & Power*.[51] By obligating the parties to express their intent, the Supreme Court of Texas believed the party assuming the duty of maintaining workplace safety would be aware of and uphold its responsibility.[52] Although the Supreme Court of Texas has not yet extended the express intent requirement to cases involving gross negligence or intentional misconduct, some lower courts have considered the issue and reached divergent conclusions as to whether parties can contract for indemnity against gross negligence or intentional acts.[53]

47. *Hous. Lighting & Power*, 890 S.W.2d at 458. The case involved an indemnity agreement between Houston Lighting & Power Company (HL&P) and Atchison, Topeka & Santa Fe Railway Company (Santa Fe). A Santa Fe employee was injured on the job and filed suit against the railway under the Federal Employer's Liability Act (FELA) and the Federal Safety Appliance Acts (SAA), which impose strict liability duties. *Id.* at 455–57. Santa Fe joined HL&P as a third-party defendant and argued the railway was entitled to indemnity under the parties' agreement. *Id.* at 456.

48. *See id.* (pointing out that shifting the costs of strict liability from one party to another goes against common business practice, and thus necessitates that the party standing to incur the potential costs be given fair notice).

49. *Id.*

50. *Id.*

51. *Id.* at 458–59.

52. *Id.*

53. *See* Hamblin v. Lamont, 433 S.W.3d 51, 55 (Tex. App.—San Antonio 2013, pet. denied) (applying fair notice requirements to case involving indemnification against a party's intentional acts, but questioning whether a party can prospectively exculpate itself from the results of intentional conduct under Texas public policy); Oxy USA, Inc. v. Sw. Energy Prod. Co., 161 S.W.3d 277, 283 (Tex. App.—Corpus Christi 2005, pet. denied) (declining to apply fair notice requirements to an agreement shifting liability arising from the indemnitee's intentional torts to the indemnitor where the conduct occurred before the agreement was executed); Solis v. Evins, 951 S.W.2d 44, 50 (Tex. App.—Corpus Christi 1997, no writ) (stating contractual exculpation with respect to intentional torts is contrary to public policy); Webb v. Lawson–Avila Constr., Inc., 911 S.W.2d 457, 462 (Tex. App.—San Antonio 1995, writ dism'd) (declining to hold that an agreement for indemnity against gross

B. *Indemnity and Gross Negligence in Texas*

As defined by Texas common law, gross negligence involves a "want of care which would raise a presumption of indifference to the consequences" of the actor's conduct.[54] The definition of gross negligence has also been codified in the Texas Civil Practices and Remedies Code, which provides:

"Gross negligence" means an act or omission:

> (A) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
>
> (B) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.[55]

It can be argued that indemnification for gross negligence would thwart the foundational principles of tort law, insulating culpable parties from bearing the cost of their wrongdoings, encouraging misconduct, and placing the resulting cost on faultless parties.[56] Some jurisdictions refuse to enforce pre-injury releases of liability for gross negligence.[57] According

negligence violated public policy); Valero Energy Corp. v. M.W. Kellogg Constr. Co., 866 S.W.2d 252, 254 (Tex. App.—Corpus Christi 1993, writ denied) ("The waiver and indemnity provision absolving Kellogg of all liability sounding in products liability and gross negligence does not offend public policy."); *see also* Budner v. Wellness Int'l Network, Ltd., No. 3:06-CV-0329-K, 2007 WL 806642, at *8 (N.D. Tex. Mar. 15, 2007) (refusing to dismiss a complaint on the grounds that the defendant could not prospectively limit liability for intentional torts); Ott v. Sonic Land Corp. & Sonic Rests., Inc., No. 09-94-209CV, 1996 WL 185347, at *7 (Tex. App.—Beaumont Apr. 18, 1996, writ denied) (not designated for publication) ("If a release must expressly state it will release future negligence, then surely it must expressly state it will release future intentional tortious conduct."); Smith v. Golden Triangle Raceway, 708 S.W.2d 574, 576 (Tex. App.—Beaumont 1986, no writ) ("A term in a release attempting to exempt one from liability or damages occasioned by gross negligence is against public policy.").

54. Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 19 (Tex. 1994) (quoting S. Cotton Press & Mfg. Co. v. Bradley, 52 Tex. 587, 600 (1880)).

55. TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(5) (West 2008); *see also* Fairfield Ins. Co. v. Stephens Martin Paving, LP, 246 S.W.3d 653, 690 (Tex. 2008) (Hecht, J., concurring) ("[A] person who knows full well that his conduct poses an extreme risk of harm to others and yet does not care. That, in essence, is gross negligence.").

56. *See* Holcomb, *supra* note 32, at 235–36 (examining the influence of the public policy regarding freedom to contract and that of preventing wrongdoers from avoiding liability for their misconduct on pre-injury liability releases). Although releases and indemnity agreements are distinguishable risk-shifting tools, the similarities between the concepts have led Texas courts to treat them the same in many respects, particularly with regard to policy concerns affecting enforceability. *See* Dresser Indus., Inc. v. Page Petrol., Inc., 853 S.W.2d 505, 508 (Tex. 1993) (comparing contractual releases of liability with indemnity agreements and applying the fair notice requirements for contractual indemnity for one's own negligence to advanced releases of liability).

57. *See* RESTATEMENT (SECOND) OF CONTRACTS § 195 cmt. a (1981) ("The law of torts

to these jurisdictions, society's interest in discouraging aggravated harm—in line with the standards of conduct imposed by tort law—outweighs the right to contract for absolution of responsibility for damage caused by one's own conduct.[58]

The Supreme Court of Texas has not yet decided whether a party can be indemnified or released from liability for its gross negligence,[59] and Texas Courts of Appeal are split on the issue.[60] The Beaumont Court of Appeals considered whether a party could release liability for gross negligence in *Smith v. Golden Triangle Raceway*.[61] In *Golden Triangle*, a man attending a racing event signed a liability release before entering the race

imposes standards of conduct for the protection of others against unreasonable risk of harm."). *See generally* Holcomb, *supra* note 32, at 241 ("[T]he law of torts imposes certain standards of conduct that all citizens must follow to protect other citizens from an unreasonable risk of harm.").

58. *See* Farina v. Mt. Bachelor, Inc., 66 F.3d 233, 235–36 (9th Cir. 1995) (holding attempts to exculpate a party for liability arising from more than ordinary negligence invalid as against public policy); Thomas v. Atl. Coast Line R.R., 201 F.2d 167, 170 (5th Cir. 1953) (stating agreements relieving a party from liability arising from a willful breach of duty are illegal); Wade v. Watson, 527 F. Supp. 1049, 1052 (N.D. Ga. 1981) ("The court concludes that the authority of Georgia and other jurisdictions is in agreement that one may exculpate himself for liability for his own simple negligence, but not for gross negligence—at least not in these circumstances."), *aff'd*, 731 F.2d 890 (11th Cir. 1984); Barnes v. Birmingham Int'l Raceway, Inc., 551 So. 2d 929, 933 (Ala. 1989) (overruling the Alabama Supreme Court's previous holding and deciding releases exculpating a person from liability for their own wanton or willful conduct are invalid and contrary to public policy); Falkner v. Hinckley Parachute Ctr., Inc., 533 N.E.2d 941, 946 (Ill. App. Ct. 1989) (holding agreements exculpating from liability for willful and wanton misconduct are illegal); Universal Gym Equip., Inc. v. Vic Tanny Int'l, Inc., 526 N.W.2d 5, 7 (Mich. Ct. App.) (concluding pre-injury release for liability from gross negligence violates public policy); New Light Co. v. Wells Fargo Alarm Serv., 525 N.W.2d 25, 31 (Neb. 1994) ("Even if the exculpatory clause could be construed to include gross negligence and willful and wanton misconduct, public policy prohibits such an exclusion."); Gross v. Sweet, 400 N.E.2d 306, 308 (N.Y. 1979) ("To the extent that agreements purport to grant exemption for liability for willful or grossly negligent acts they have been viewed as wholly void."); Seymour v. New Bremen Speedway, Inc., 287 N.E.2d 111, 116 (Ohio Ct. App. 1971) (holding a release from liability was a valid defense against any claim against the defendant, except claims arising from wanton or willful negligence); Lee v. Beauchene, 337 N.W.2d 827, 828 (S.D. 1983) ("Valid releases, however, are generally not construed to cover willful negligence or intentional torts."); Liberty Furniture, Inc. v. Sonitrol of Spokane, Inc., 770 P.2d 1086, 1086 (Wash. Ct. App. 1989) (holding gross negligence invalidated an exculpatory agreement).

59. *See* Atl. Richfield Co. v. Petrol. Pers., Inc., 768 S.W.2d 724, 726 n.2 (Tex. 1989) (posing but not answering the question of whether indemnification for conduct amounting to gross negligence is valid under Texas public policy).

60. *Compare* Newman v. Tropical Visions, Inc., 891 S.W.2d 713, 722 (Tex. App.—San Antonio 1994, writ denied) (holding a release of a cause of action for gross negligence is not against public policy), *with* Smith v. Golden Triangle Raceway, 708 S.W.2d 574, 576 (Tex. App.—Beaumont 1986, no writ) ("[A] release attempting to exempt one from liability or damages occasioned by gross negligence is against public policy.").

61. *Golden Triangle*, 708 S.W.2d at 574.

pit.[62] After sustaining an injury while in the pit area, he brought a claim against the raceway, arguing the release was invalid because the raceway could not be relieved of liability for damages based on its own gross negligence.[63] Relying on cases from other jurisdictions, as well as treatises such as the Restatement (Second) of Contracts, the court held Texas public policy should not permit a release to provide exemption from damages caused by gross negligence.[64]

When the San Antonio Court of Appeals considered a products liability case seven years later, it reached the opposite conclusion: that parties could contract to waive liability arising from gross negligence without offending public policy.[65] The San Antonio case, *Valero Energy Corp. v. M.W. Kellogg Construction Co.*,[66] arose from a products liability claim after a piece of heavy machinery provided by Kellogg exploded, damaging several tons of other machinery and equipment.[67] The contract between the parties provided:

> [Valero] shall release, defend, indemnify and hold harmless [Kellogg] . . . and their employees performing services under this agreement against all claims, liabilities, loss or expense . . . arising out of or in connection with this Agreement or the Work to be performed hereunder, including losses attributable to [Kellogg's] negligence.[68]

Focusing heavily on its determination that the parties were sophisticated, represented by counsel in their negotiations, and familiar with the industry in which they operated, the San Antonio Court of Appeals held the terms relieving Kellogg of all liability from its gross negligence were enforceable and not contrary to public policy.[69] As the Texas appellate courts continue considering the closely related issues of indemnity and release from liability from gross negligence, it seems the

62. *Id.*

63. *Id.*

64. *Id.* at 576; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 195 (1981) ("[A] term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy.").

65. *See* Valero Energy Corp. v. M.W. Kellogg Constr. Co., 866 S.W.2d 252, 257–58 (Tex. App.—Corpus Christi 1993, writ denied) (holding public policy does not prohibit waiver of gross negligence claims in pre-injury releases).

66. Valero Energy Corp. v. M.W. Kellogg Constr. Co., 866 S.W.2d 252 (Tex. App.—Corpus Christi 1993, writ denied).

67. *Id.* at 257–58.

68. *Id.*

69. *Id.*; *see also* Newman v. Tropical Visions, Inc., 891 S.W.2d 713, 722 (Tex. App.—San Antonio 1994, writ denied) (holding a release of a cause of action for gross negligence is not against public policy).

courts will remain divided until the state's supreme court decides the matter.[70]

While the issues of whether contractual indemnity can be enforced for gross negligence and intentional misconduct remains undecided in Texas, the Supreme Court of Texas has spoken on related issues. The court has held that a contractual disclaimer of reliance can bar a claim for fraudulent inducement—insulating a party from liability for its own intentional misconduct[71]—and has permitted insured parties to seek refuge in their insurance policies by relieving liability for harm caused by the insured's intentional torts.[72]

V. ENFORCING INSURANCE COVERAGE FOR INTENTIONAL ACTS AND EXEMPLARY DAMAGES, DESPITE PUBLIC POLICY CONCERNS

Insurance policies are close cousins to contractual indemnity—both types of contracts shift liability from one party to another.[73] Insurance policies are subject to the same rules of interpretation as other contract

70. *See* Van Voris v. Team Chop Shop, LLC, 402 S.W.3d 915, 921 (Tex. App.—Dallas 2013, no pet.) (concluding releases of claims for gross negligence are against public policy unless the agreement meets the fair notice standards required of such agreements for ordinary negligence); Sydlik v. REEIII, Inc., 195 S.W.3d 329, 336 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (holding pre-injury waivers of liability for gross negligence are against public policy); Tesoro Petrol. Corp. v. Nabors Drilling USA, Inc., 106 S.W.3d 118, 131 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (describing negligence and gross negligence as inseparable causes of action, intertwined even in the context of releases of liability, and therefore enforcing a release for gross negligence); Webb v. Lawson–Avila Constr., Inc., 911 S.W.2d 457, 461–62 (Tex. App.—San Antonio 1995, writ dism'd w.o.j.) (holding public policy does not preclude indemnifying a person against their own gross negligence); *cf.* Akin v. Bally Total Fitness Corp., No. 10-05-00280-CV, 2007 WL 475406, at *3 n.1 (Tex. App.—Waco Feb. 14, 2007, pet. denied) (stating most courts agree pre-injury waivers of gross negligence are void, listing cases that have considered the issue, and concluding pre-injury waiver of negligence did not preclude proof of gross negligence).

71. *See* Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 179–81 (Tex. 1997) (enforcing disclaimer against claims of fraud). In *Schlumberger*, the Supreme Court of Texas balanced the following contradictory concerns: 1) that a merger clause can be avoided based on a valid claim of fraud, and 2) the interest of contracting parties to bring disputes to final settlement outside of court, often by including a release of future claims in the parties' agreement. *Id.* at 179. The court held a specific disclaimer, executed with clear intent, effectively precludes claims of fraudulent inducement, thereby absolving the party committing fraud of its own wrongdoing. *Id.* at 181 (noting, however, if other evidence were present, such as a fiduciary relationship, the disclaimer may not negate a fraud claim).

72. *See, e.g.*, Phx. Control Sys., Inc. v. Ins. Co. of North Am., 796 P.2d 463, 467 (Ariz. 1990) (en banc) (discussing availability of insurance coverage for intentional torts).

73. *See, e.g.*, Ronen Avraham, *The Economics of Insurance Law—A Primer*, 19 CONN. INS. L.J. 29, 32 (2012) ("Insurance is a legal mechanism by which the insured pays a premium to purchase from an insurer some financial protection against a future potential loss.").

provisions.[74] All insurance policies specify what types of liability will be covered or excluded.[75] Terms of the contract will be afforded their plain meaning and interpreted in the light most favorable to the insured, especially when the court is determining whether exclusion of coverage applies.[76]

It is widely accepted that public policy precludes a person from using insurance coverage to protect oneself against one's own intentional misconduct.[77] An insured should not be encouraged to "shoot someone because he is 'covered.'"[78] The insured is more likely to act in a way likely to cause harm if they believe the financial burden of that behavior will fall on the pockets of the insurance company.[79] Similarly, states are split over whether public policy should prohibit an insured from being covered for punitive damages, which are typically awarded as a punishment for egregious or intentional misconduct.[80] This body of case law stands on

74. *See* Tanner v. Nationwide Mut. Fire Ins. Co., 289 S.W.3d 828, 831 (Tex. 2009) ("Since insurance policies are contracts, we construe them using ordinary rules of contract interpretation."); Barnett v. Aetna Life Ins. Co., 723 S.W.2d 663, 665 (Tex. 1987) ("It is a fundamental rule of law that insurance policies are contracts and as such are controlled by rules of construction which are applicable to contracts generally.").

75. *See, e.g.*, Christopher C. French, *Debunking the Myth that Insurance Coverage Is Not Available or Allowed for Intentional Torts or Damages*, 8 HASTINGS BUS. L.J. 65, 95 (2012) (asserting insurers can specify within insurance policies exactly what types of claims will be covered and arguing that absent an exclusion in the contract, public policy favors enforcing coverage).

76. *See Barnett*, 723 S.W.2d at 666 ("[W]hen the language chosen is susceptible of more than one construction, such policies should be construed strictly against the insurer and liberally in favor of the insured."); Ramsay v. Md. Am. Gen. Ins. Co., 533 S.W.2d 344, 349 (Tex. 1976) ("It is a settled rule that policies of insurance will be interpreted and construed liberally in favor of the insured and strictly against the insurer, and especially so when dealing with exceptions and words of limitation.").

77. *See Phx. Control Sys.*, 796 P.2d at 467 ("Public policy forbids indemnifying a person for his own wilful wrongdoing."); Ranger Ins. Co. v. Bal Harbour Club, Inc., 549 So. 2d 1005, 1007 (Fla. 1989) ("It is axiomatic in the insurance industry that one should not be able to insure against one's own intentional misconduct."); Roman Catholic Diocese of Dallas *ex rel.* Grahmann v. Interstate Fire & Cas. Co., 133 S.W.3d 887, 896 (Tex. App.—Dallas 2004, pet. denied) ("Public policy prohibits allowing a person from insuring against his intentional misconduct."); Decorative Ctr. of Hous. v. Emp'rs Cas. Co., 833 S.W.2d 257, 260 (Tex. App.—Corpus Christi 1992, writ denied) ("Public policy prohibits permitting an insured to benefit from his own wrongdoing."). *But see* Grinnell Mut. Reinsurance Co. v. Jungling, 654 N.W.2d 530, 541 (Iowa 2002) (holding the public policy favoring freedom to contract for insurance outweighs the policy reasons for precluding insurance coverage against intentional acts).

78. *Phx. Control Sys.*, 796 P.2d at 467.

79. *See, e.g.*, *Decorative Ctr. of Hous.*, 833 S.W.2d at 260 ("The rationale behind the public policy is that the insured is more likely to engage in behavior which is harmful to society if he believes that he will not have to bear the financial costs of his intentional indiscretions." (citing *Ranger Ins. Co. v. Bal Harbour Club*, 549 So. 2d at 1007)).

80. *See generally* French, *supra* note 75, at 93–98 (discussing jurisdictional divisions regarding insurance coverage for punitive and exemplary damages).

the grounds that the purpose of punitive damages is illusory if the offender is allowed to recover the financial cost of this punishment from an insurer, thus going unscathed for the harm committed or damage caused.[81]

A. *Insurance and Intentional Acts*

Contrary to these well-founded public policy principles, there is an array of insurance coverage expressly providing coverage for intentional torts, as well as expressly excluding intentional acts from coverage.[82] Some jurisdictions have held the intentional act exclusion only applies where there has been intentional conduct and the result of that conduct was expected.[83] For instance, in *Phoenix Control Systems, Inc. v. Insurance Co. of North America*,[84] the Supreme Court of Arizona stated the key question in determining if the exclusion would apply was whether the insured's intentional act was wrongful or whether the intentional act amounted to unintentional wrongdoing.[85] If the insured acted with intent to cause harm, it would be subject to the intentional act exclusion and have to bear the cost of its liability.[86] On the other hand, if the insured acted intentionally but without intent to cause harm, the insured would fall within its policy coverage.[87]

The Supreme Court of Texas has reached the same conclusion as the court in *Phoenix*, holding that for an intentional-acts exclusion to apply, the insurer must have acted with *intent to cause injury*—that the insurer merely acted intentionally would not be enough to prevent coverage.[88] In *Tanner*

81. *See generally id.* (analyzing public policy arguments both in favor and against enforcing insurance coverage for punitive damages).

82. *See id.* at 86–90 (listing types of insurance coverage available for intentional acts and injuries under the standard forms published by the Insurance Services Organization).

83. *See Phx. Control Sys.*, 796 P.2d at 467–69 (enforcing insurance coverage because insured did not act with intent to cause injury or damage); Farmers Mut. Ins. Co. v. Kment, 658 N.W.2d 662, 668 (Neb. 2003) ("In order for the intentional or expected injury exclusion in a liability insurance policy to apply, the insurer must show that the insured acted with the specific intent to cause harm to a third party."); Tanner v. Nationwide Mut. Fire Ins. Co., 289 S.W.3d 828, 831 (Tex. 2009) (requiring proof of intent to cause injury before exclusion for intentional-acts exclusion in insurance policy to apply).

84. Phx. Control Sys., Inc. v. Ins. Co. of North Am., 796 P.2d 463 (Ariz. 1990) (en banc).

85. *Id.* at 468.

86. *Id.* at 467–69.

87. *Id.*

88. *Tanner*, 289 S.W.3d at 831–32; *see also* State Farm Fire & Cas. Co. v. S.S. & G.W., 858 S.W.2d 374, 375–76 (Tex. 1993) (holding the insured was entitled to coverage under his homeowner's policy where the insured unintentionally caused an injury—the transmission of herpes—through an intentional act—intercourse). The *S.S. & G.W.* court noted that the transmission of a disease was the natural result of an intentional act, but the injury was an accident under the insurance policy since the insured had not acted with intent to injure. However,

v. Nationwide Mutual Fire Insurance Co.,[89] the Tanner family sued the insurance provider of a driver who, while attempting to flee police during a high-speed chase, crashed into Tanner's car.[90] The four family members in the car at the time sustained substantial injuries.[91] After being arrested, the defendant driver posted bail and disappeared, and the trial court later granted the Tanner's a default judgment in their personal injury case.[92] However, Nationwide Mutual Fire Insurance Group, the driver's insurer, refused to pay damages, asserting an intentional-injury exclusion in the insurance policy prevented the Tanners from recovering for their claims.[93] Despite the jury's verdict that the defendant had not intentionally injured the Tanner family, the trial court granted Nationwide's motion for declaratory judgment, and the appellate court affirmed.[94]

Strictly construing the language in the Nationwide policy, the *Tanner* court held the word "intentionally" referred to the damage or injury rather than the action leading to it.[95] Applying this interpretation to the Tanners' case, the supreme court held it could not be said as a matter of law that the driver who caused the Tanners' injuries did so intentionally.[96] It is worth noting that the supreme court declined to rely on an Ohio appellate case that considered the same policy language.[97] In *Nationwide Mutual Insurance Co. v. Finkley*,[98] the Ohio court of appeals held coverage would not apply in situations where a reasonable person "would know, or should know,"

comparing *S.S. & G.W.* with *Trinity Universal Insurance Co. v. Cowan*, in which the supreme court held the insured's intentional copying and distributing provocative photographs of the plaintiff was not an "accident" and therefore not covered by the insured's homeowners' liability policy, demonstrates the muddled difference between an intentional act and intentional injury. *Compare* Trinity Universal Ins. Co. v. Cowan, 945 S.W.2d 819, 828 (Tex. 1997) (denying insurance coverage), *with S.S. & G.W.*, 858 S.W.2d at 375–76 (enforcing insurance coverage).

89. *Tanner*, 289 S.W.3d at 828.

90. *Id.* at 829–30.

91. *Id.* at 830.

92. *Id.*

93. *Id.*

94. *See* Tanner v. Nationwide Mut. Fire Ins. Co., 232 S.W.3d 330, 335 (Tex. App.—Eastland 2007) ("Because the evidence is undisputed that he intentionally created this heightened risk, the intentional-acts exclusion is still applicable."), *rev'd*, 289 S.W.3d 828 (Tex. 2009).

95. Tanner v. Nationwide Mut. Fire Ins. Co., 289 S.W.3d 828, 830–31 (Tex. 2009) ("[T]he language is effect-focused and not cause-focused, voiding coverage when the resulting *injury* was intentional, not merely when the insured's *conduct* was intentional.").

96. *Id.* at 832. Relying on evidence that the driver had slammed on his breaks and swerved before colliding with the Tanners' car, the supreme court stated it appeared the driver had tried to prevent the accident; he could not therefore have been said to intentionally cause the injuries. *Id.*

97. *Id.* at 833–34 (calling an Ohio intermediate appellate court's interpretation of the same policy language unpersuasive).

98. Nationwide Mut. Ins. Co. v. Finkley, 679 N.E.2d 1189 (Ohio Ct. App. 1996).

serious injury would probably result from their actions.[99] The *Tanner* court applied a more strict interpretation of the policy language, stating that for the exclusion to apply, the driver would have had to know injury would follow rather than would *probably* follow.[100] The supreme court's approach in *Tanner* emphasizes Texas's strict approach to contract interpretation and dedication to protecting parties' right to contract freely.

At first glance, it seems counterintuitive that courts would profess a policy prohibiting indemnifying a person for willful misconduct and yet permit a tortfeasor to recover under an insurance policy for damage springing from the tortfeasor's intentional misconduct. The justification lies at the crossroads between the near-sacred right to the freedom to contract, strict interpretation of contract provisions, and the purpose and functions of insurance. The insurance industry operates on a system of complex risk analysis, anticipating the likelihood of a particular loss.[101] The insurance company contracts with the insured, promising to indemnify the insured if a particular loss occurs.[102] In return, the insured pays a premium, the cost of which is based on the probability that the loss will occur.[103] According to strict application of contract law, the parties to the agreement for insurance coverage should be able to contract for the terms they desire, including coverage for intentional acts or even intentional torts. Courts and commentators have also cast doubt on the truth of the argument that an insured will be more likely to commit an intentional harm if he believes the financial burden will be appropriated to his insurer.[104]

The function of insurance and role it serves in society also point towards a policy of allowing coverage for any losses for which two parties may contract, regardless of whether the loss arises by accident or

99. *Id.* at 1190.

100. *See Tanner*, 289 S.W.3d at 834 ("[T]his reading departs from the controlling policy language. The exclusion does not apply whenever a reasonable person would or should know that his actions 'would probably lead' to injury; the policy imposes a stricter test, that the driver ought to know that injury 'will follow' from his conduct.").

101. *See* Avraham, *supra* note 73, at 39 ("[A]ll other functions of the insurer rely on its ability to gather data about the risks it intends to insure, including the frequency, severity, and variance thereof, and to translate that data into policies and premiums.").

102. *See id.* at 32.

103. *See id.* at 37–38 (summarizing how insurance premiums are calculated based on predictions of the likelihood that a particular loss will occur).

104. *See, e.g.*, French, *supra* note 75, at 92 (commenting on a lack of empirical evidence that an insured is more likely to act wrongfully if insurance is available to cover the resulting damages and listing cases that question the deterrent effect of withholding insurance coverage for intentional torts).

intentional occurrence. Insurance allows for risk-sharing, pooling, and transferring, which are fundamental to economic efficiency.[105] Individuals and businesses alike obtain insurance coverage to prevent severe loss and hardship from a potential financial burden resulting from the occurrence of a certain event or arising out of a particular project or venture.[106] The public is encouraged to obtain insurance to protect itself and ensure that in the event a loss or damage does occur, the victim will have recourse to be compensated—yet another competing public policy.[107]

B. *Insurance and Exemplary Damages*

More than two decades after its decision permitting insurance for damage caused by intentional acts, the Supreme Court of Texas held public policy was not offended by permitting insurance coverage for exemplary damages resulting from the insured's liability for gross negligence.[108] In *Fairfield Insurance Co. v. Stephens Martin Paving, L.P.*,[109] the court discussed the tension between the public interest in freedom to contract and the purpose of exemplary damages.[110] The case involved a suit for gross negligence, seeking only punitive damages, by a widow whose husband was killed on the job.[111]

The *Fairfield* court explained there was no reason Texas's strong favor for freedom to contract and contract enforcement should apply with any less strength to the contractual relationship between an insured and insurer.[112] Next, the court emphasized the dual purpose of exemplary

105. *See* Kathrin Hoppe, *The Value of Insurance to Society*, RISK MGMT. NEWSL. 51, May 2012, at 1, *available at* https://www.genevaassociation.org/media/185156/ga2012-rm51-hoppe.pdf (describing how insurance allows for flexibility in risk allocation, contributing to a well-functioning economy).

106. *See generally* Avraham, *supra* note 73 (describing the theoretical basis and functions of insurance).

107. *See id.* at 32 ("The goal of this transaction [between insured and insurer] is to provide the insured protection from financial risks to her assets, health, and life, or from third party claims, while incentivizing her to guard against those risks."); French, *supra* note 75, at 73 ("[P]ublic policy dictates that victims should be compensated for their injuries.").

108. Fairfield Ins. Co. v. Stephens Martin Paving, LP, 246 S.W.3d 653, 653 (Tex. 2008). In *Fairfield*, the supreme court noted that in the majority of states that have considered the issue, public policy does not preclude insurance coverage for exemplary damages for gross negligence. *Id.* at 660–62 (determining that the highest courts or legislatures of 45 states have addressed the issue and 25 of those states allow insurance coverage of punitive damages, at least in some circumstances).

109. Fairfield Ins. Co. v. Stephens Martin Paving, LP, 246 S.W.3d 653 (Tex. 2008).

110. *Id.* at 660–70.

111. *Id.* at 654.

112. *Id.* at 665 ("Absent strong public policy reasons for holding otherwise, however, the

damages, stating such awards serve to punish the wrongdoer and provide a public example intended to deter others from repeating the act.[113] In its analysis of the evidentiary factors considered when a court imposes exemplary damages, the court noted there is a subjective component that looks to what penalty the conduct in question should bear.[114] The subjective component includes elements such as the defendant's culpability, whether the defendant was in a position of trust with the plaintiff, and the defendant's net worth.[115] However, if the exemplary damages are to be paid by an insurance company, essentially relieving the defendant of the costs of punishment, the subjective elements become less relevant.[116]

Before *Fairfield*, Texas appellate courts refused to enforce coverage in uninsured or underinsured motorist policies when the insured sought recovery from its own insurer for exemplary damages levied against a third-party tortfeasor.[117] Since the cost of the punitive damages in that situation would be allocated entirely to the insurer and passed on to other innocent policyholders, the purpose of the damages—to punish the defendant—would be defeated.[118] The Texas intermediate appellate courts believed permitting such a result was against public policy.[119]

preservation of contractual freedom and enforcement is no less applicable to the relationship between an insured and insurer.").

113. *Id.*; *see also* Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 16 (Tex. 1994) (defining exemplary damages as those awarded as a penalty or punishment for the wrongdoer and example to others). Other cases have acknowledged exemplary damages may also serve as a means of reimbursing plaintiffs for remote or intangible losses. *See, e.g.*, Hofer v. Lavender, 679 S.W.2d 470, 474 (Tex. 1984) ("[E]xemplary damages also exist to reimburse for losses too remote to be considered as elements of strict compensation.").

114. *Fairfield Ins.*, 246 S.W.3d at 667–68.

115. *See id.* at 668 (discussing how the personality of the defendant and the nature of the harm at issue influence the amount of exemplary damages awarded).

116. *Id.* ("If exemplary damages are to be paid by insurance, it is less relevant to set the amount based on whether the plaintiff was trusting or the defendant calculating or wealthy.").

117. *See* Milligan v. State Farm Mut. Auto. Ins. Co., 940 S.W.2d 228, 230–32 (Tex. App.—Houston [14th Dist.] 1997, writ denied) (agreeing with other Texas appellate courts that permitting an insured to recover from its insurance provider for exemplary damages against a third-party went against public policy), *overruled by Fairfield Ins.*, 246 S.W.3d 653; State Farm Mut. Auto. Ins. Co. v. Shaffer, 888 S.W.2d 146, 149 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (refusing to require State Farm to pay exemplary damages that had been assessed against the defendant in a suit related to an automobile accident); Vanderlinden v. USAA Prop. & Cas. Ins. Co., 885 S.W.2d 239, 242 (Tex. App.—Texarkana 1994, writ denied) (concluding public policy did not permit an insured to recover exemplary damages from its own uninsured motorist insurer).

118. *Fairfield Ins.*, 246 S.W.3d at 668.

119. *See Milligan*, 940 S.W.2d at 231 ("Neither deterrence of wrongful conduct nor punishment of the wrongdoer is achieved by imposing exemplary damages against an insurance carrier in this situation."), *overruled by Fairfield Ins.*, 246 S.W.3d 653; *Shaffer*, 888 S.W.2d at 149 (holding public policy

Additionally, the court in *American Home Assurance Co. v. Safway Steel Products Co.*[120] stated that denying coverage for exemplary damages for a corporation results in the costs being passed to consumers, which also defeats the purpose of the damages.[121]

After considering the approaches of the appellate courts, the *Fairfield* court concluded Texas public policy did not preclude insurance coverage of exemplary damages arising from claims of gross negligence, but the court limited its holding to the workers' compensation context.[122] Despite the narrow scope of the holding, *Fairfield* could be an indication of the position the Supreme Court of Texas may take if and when cases outside the realm of workers compensation present a similar question.[123]

It is worth noting, the majority of courts in the United States permit policyholders to insure themselves against punitive or exemplary damages,[124] deflecting concern that permitting policyholders to recover

did not support an award of damages against an insurer, as no punishment or deterrent effect would reach the tortfeasor); *Vanderlinden*, 885 S.W.2d at 242 (agreeing with the majority of states that have considered the issue that holding an insurance provider responsible for punitive damages goes against the purposes of such damages).

120. Am. Home Assurance Co. v. Safway Steel Prods. Co., 743 S.W.2d 693 (Tex. App.—Austin 1987, writ denied).

121. *Id.* at 704–05 (upholding parties' ability to contract for insurance that covers liability for punitive damages).

122. *Fairfield Ins.*, 246 S.W.3d at 670 ("[T]he public policy of Texas does not prohibit insurance coverage of exemplary damages for gross negligence in the workers' compensation context. However, without clear legislative intent to generally prohibit or allow the insurance of exemplary damages arising from gross negligence, we decline to make a broad proclamation of public policy.").

123. *Cf. id.* ("Outside the insurance context, it is worth noting that this Court has suggested that a person's pre-injury waiver of another's liability for gross negligence is against public policy while holding that a post-injury waiver is not.").

124. *See* Price v. Hartford Accident & Indem. Co., 502 P.2d 522, 525 (Ariz. 1972) (enforcing insurance coverage where the insurer failed to exclude coverage for punitive damages from the policy); Greenwood Cemetery, Inc. v. Travelers Indem. Co., 232 S.E.2d 910, 914 (Ga. 1977) ("Punitive damages is a legal liability and accordingly insurance against such damages is expressly authorized."); Meijer, Inc. v. Gen. Star Indem. Co., 826 F. Supp. 241, 246 (W.D. Mich. 1993) (holding Michigan law permitted recovery from insurer for punitive damages), *aff'd*, 61 F.3d 903 (6th Cir. 1995); Anthony v. Frith, 394 So. 2d 867, 868 (Miss. 1981) ("[I]t was not against public policy to require the carrier to pay punitive damages."); Harrell v. Travelers Indem. Co., 567 P.2d 1013, 1017 (Or. 1977) (upholding availability of insurance coverage for punitive damages as consistent with public policy); Lazenby v. Universal Underwriters Ins. Co., 383 S.W.2d 1, 5 (Tenn. 1964) (holding insurance contract protected insured from both compensatory and punitive damages resulting and did not violate public policy); Dairyland Cnty. Mut. Ins. Co. v. Wallgren, 477 S.W.2d 341, 342 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.) ("[A] policy of automobile liability insurance affords indemnity applicable to exemplary damages as well as compensatory damages . . . Insurance thereby afforded does not contravene public policy."); Hensley v. Erie Ins. Co., 283 S.E.2d 227, 233 (W. Va. 1981) ("[W]e refuse to find that our public policy precludes insurance coverage for punitive damages arising from gross, reckless or wanton negligence."). *See generally* French, *supra* note 75, at 70–71 ("[T]he majority of courts have held . . . that a policyholder can obtain coverage for punitive damages

for punitive or exemplary damages may lead to people taking less care in their actions or even intentionally causing harm because they will not have to incur the costs.[125]

VI. TEXAS COURTS CONSIDER THE ISSUE: INDEMNIFICATION FOR INTENTIONAL ACTS

A. *Applying Fair Notice Requirements*

Few Texas courts have commented on whether public policy permits parties to contract for indemnity against intentional acts.[126] Recently, the Texas Fourth Court of Appeals in San Antonio considered the issue in *Hamblin v. Lamont*,[127] a case involving an indemnitee's liabilities as a result of intentional interference with a contract and misappropriation of trade secrets.[128] The parties in *Hamblin*, Jerry L. Hamblin and Thomas A. Lamont, were equal partners in Ricochet Energy, an oil and gas development company of which they were the only directors.[129] After a decade of working together as business partners, the parties ended their relationship, executing agreements to dissolve their business relationship and divide up the company's oil and gas prospects.[130] One of the agreements executed by the parties contained broad indemnification provisions.[131] The indemnity terms provided:

> In addition to the indemnification set forth in Sections in 3.03, 3.09 and elsewhere herein, Hamblin and Ricochet Energy, Inc. agree to INDEMNIFY Lamont against any and all liabilities, obligations or

unless such damages are expressly excluded under the policy at issue.").

125. *See Harrell*, 567 P.2d at 1017 (stating there is no empirical evidence to support the invalidation of contracts for insurance covering punitive damages based on the idea that these types of policies would make conduct giving rise to punitive damages less probable); *Lazenby*, 383 S.W.2d at 5 ("Then to say the closing of the insurance market, in the payment of punitive damages, would act to deter guilty drivers would in our opinion contain some element of speculation.").

126. *See* Hamblin v. Lamont, 433 S.W.3d 51, 57 (Tex. App.—San Antonio Dec. 11, 2013, no pet. h.) (refusing to require an indemnitor to indemnify an indemnitee where the contract language failed to specifically provide for indemnification against the indemnitee's intentional acts); Oxy USA, Inc. v. Sw. Energy Prod. Co., 161 S.W.3d 277, 283 (Tex. App.—Corpus Christi 2005, pet. denied) (concluding public policy did not preclude enforcement of an indemnity agreement for intentional acts where the conduct in question occurred before the contract for indemnity was executed); Solis v. Evins, 951 S.W.2d 44, 50 (Tex. App.—Corpus Christi 1997, no writ) (holding public policy does not permit parties to contract for indemnity against their intentional torts).

127. *Hamblin*, 433 S.W.3d at 57.

128. *Id.* at 53–54.

129. *Id.* at 52.

130. *Id.* at 54–55 (describing the agreements entered into by the parties).

131. *Id.*

> claims arising from any act, occurrence, omission or otherwise which occurs after the Effective Date of this Agreement and which in any way pertains to Ricochet Energy, Inc. and/or its operations, actions and inactions. It is the intention of the Parties and Ricochet Energy, Inc. to provide as broad of an indemnity as possible and all ambiguity as to whether Hamblin and Ricochet Energy, Inc. owe the duty of indemnification shall be resolved in favor of providing the indemnity/indemnification.
>
> Additionally, Hamblin and Ricochet Energy, Inc. specifically, as of the Effective Date, retain and assume any and all obligations or liabilities arising pursuant to any contracts, vendor agreements, contractor agreements, loans or other agreements executed by, on behalf of or for the benefit of Ricochet Energy, Inc., except those obligations and/or liabilities created by Lamont as a result of Lamont acting outside the normal course and scope of his employment with the corporation or normal course and scope of his duties as an officer of the corporation. Hamblin and Ricochet Energy, Inc. agree to INDEMNIFY Lamont against any and all liabilities, obligations or claims which in any way relate to the assumed and retained obligations and liabilities specified herein. It is the intention of the Parties and Ricochet Energy, Inc. to provide as broad of an indemnity as possible and all ambiguity as to whether Hamblin and Ricochet Energy, Inc. owe the duty of indemnification shall be resolved in favor of providing the indemnity/indemnification.[132]

A year after Hamblin and Lamont ended their business relationship, Lamont was sued by a Ricochet working interest partner, Vaquillas Energy Lopeno Ltd.[133] Vaquillas claimed Lamont had misappropriated a seismic map, referred to as the Treasure Map, in which Vaquillas held a proprietary interest.[134] The jury agreed and returned a verdict in favor of Vaquillas and finding Lamont and his co-defendants had misappropriated the Treasure Map, intentionally interfered with Vaquillas' contracts with Ricochet, and conspired to commit such acts.[135]

When Hamblin and Ricochet rebuffed Lamont asked the trial court indemnification under the parties' contract, Lamont filed for a declaration

132. *Id.* at 54.

133. *Id.* at 53.

134. *Id.*; *see also* Lamont v. Vaquillas Energy Lopeno Ltd., LLP, 421 S.W.3d 198, 208–09 (Tex. App.—San Antonio Dec. 11, 2013, no pet. h.) (describing the claims brought against Lamont by Vaquillas Energy Lopeno Ltd.).

135. *Lamont*, 421 S.W.3d at 205.

by the trial court that he was entitled to indemnity as a matter of law for the liabilities stemming from the verdict against him in the Vaquillas lawsuit.[136] The trial court judge granted Lamont's motion for summary judgment.[137] Hamblin and Ricochet subsequently appealed, arguing Lamont was not entitled to indemnity under the parties' agreement and, moreover, that public policy prohibited indemnification for Lamont's intentional actions.[138]

The majority in *Hamblin* focused its analysis on the fair notice requirements in Texas, stating "the same public policy concerns associated with extraordinary risk-shifting" should apply with the same or greater force where the risk involves intentional torts.[139] Strictly construing the indemnity provisions in the contract between Hamblin and Lamont, the appellate court said the agreement did not expressly provide for indemnification against Lamont's intentional acts, failing to satisfy the express intent requirement; thus the court declined to require Hamblin and Ricochet to indemnify Lamont.[140]

In contrast, the *Hamblin* dissent asserted that the majority erred by extending the requirement of express intent to the contract at issue.[141] In her dissenting opinion, Justice Martinez argued that imposing such a requirement was inappropriate without explicit guidance from the Supreme Court of Texas.[142] Hamblin and Lamont were sophisticated parties with business experience and represented by counsel when the

136. *Hamblin*, 433 S.W.3d at 53.

137. *Id.*

138. *Id.*

139. *Id.* at 57.

140. *Id.* ("We cannot conclude that a strict construction of the indemnity provisions in question expressly states the Appellants' intentions to indemnify Lamont for his own intentional torts.").

141. *Id.* (Martinez, J., dissenting) ("I disagree . . . with the majority's conclusion that the agreement's failure to meet the requirements of the express negligence test renders the indemnity clauses unenforceable.").

142. *Id.*; *see also* Webb v. Lawson–Avila Constr., Inc., 911 S.W.2d 457, 461–62 (Tex. App.—San Antonio 1995, writ dism'd w.o.j.) (refusing to make a public policy determination regarding the enforceability of indemnification agreements against gross negligence where the supreme court had not so held). Justice Martinez stated:

> In stretching to reverse the summary judgment, the majority *sua sponte* extends the express negligence doctrine and concludes that the indemnity provisions should fail because they did not specifically state that the parties intended to indemnify Lamont for his own intentional torts. As an intermediate appellate court, we are bound by the precedent of the highest courts of the state. Until a majority of the Supreme Court of Texas holds that in order to be indemnified for intentional torts contracting parties must explicitly state that the indemnitor will indemnify the indemnitee for his own torts, I am reluctant to do so.

Hamblin, 433 S.W.3d at 58.

contract and indemnity agreements were made.[143] Further, the agreement between Hamblin and Lamont provided it was the parties' intent "to provide as broad an indemnity as possible and all ambiguity as to whether Hamblin and Ricochet Energy, Inc. owe the duty of indemnification shall be resolved in favor of providing the indemnity/indemnification."[144] According to Martinez, Hamblin and Lamont were well aware that the indemnity agreements that had negotiated were incredibly broad; therefore, those agreements should not be subject to an extension of the express negligence rule.[145]

B. *Prohibiting Indemnity for Intentional Torts Based on Public Policy*

After stating its holding, the *Hamblin* majority went on to question but not decide whether public policy would permit Lamont to recover from Hamblin and Ricochet for the liabilities arising from the Vaquillas lawsuit even if the indemnification agreement had satisfied the express intent requirement.[146] In her dissent, Martinez discussed whether or not the Supreme Court of Texas would be inclined to require Hamblin to indemnify Lamont for the cost of liabilities stemming from the jury's findings in the Vaquillas lawsuit.[147] Relying on the supreme court's decision in *Tanner*, Martinez emphasized that there was no evidence to indicate that Lamont had intended to cause injury.[148] The dissent reasoned that since the supreme court had not taken the opportunity in *Tanner* to entirely prohibit insurance coverage for the insured's intentional acts or intentional torts, it was unlikely that it would find public policy prohibited indemnity for one's intentional torts.[149] Rather, if an indemnitee should be precluded from recovering from an indemnitor, it should only be in instances where the indemnitee's liability stems from actions taken with intent to cause injury.[150]

Only one other Texas intermediate appellate court has held indemnification against intentional torts is prohibited by Texas public

143. *Id.* at 59; *see also* Oxy USA, Inc. v. Sw. Energy Prod. Co., 161 S.W.3d 277, 283–84 (Tex. App.—Corpus Christi 2005, pet. denied) (discussing the concerns of the Supreme Court of Texas which formed the basis of its imposition of fair notice requirements for indemnity agreements).

144. *Hamblin*, 433 S.W.3d at 59 (Martinez, J., dissenting).

145. *Id.*

146. *Id.* at 57 (majority opinion).

147. *Id.* at 58 (Martinez, J., dissenting).

148. *Id.*; *see also* Tanner v. Nationwide Mut. Fire Ins. Co., 232 S.W.3d 330, 331 (Tex. App.—Eastland 2007), *rev'd*, 289 S.W.3d 828 (Tex. 2009) (permitting insurance coverage in situations where the insured acted intentionally but without intent to injure).

149. *Hamblin*, 433 S.W.3d at 58–59 (Martinez, J., dissenting) (citing *Tanner*, 289 S.W.3d 828).

150. *Id.*

policy.[151] In *Solis v. Evins*,[152] a case involving a request for writ of mandamus to correct an order compelling arbitration, the Corpus Christi Court of Appeals analogized contracts waiving tort claims in advance of their occurrence to arbitration agreements.[153] Following a similar analysis as the *Hamblin* court, the court in *Solis* noted Texas permits parties to contract in advance for exculpation from liability arising from their own negligence, and pointed out that so long as an agreement does not violate public policy, such as where one party is at a serious disparity in bargaining power, contracts between parties should be enforced.[154]

The underlying suit in *Solis* involved a claim of defamation by a former bank teller against the president of the bank.[155] The bank required employees to open accounts with the bank so paychecks could be directed into the accounts by direct deposit.[156] The bank president argued that teller's claims were required to be arbitrated based on the contract associated with the teller's bank account, which provided:

> (A) Any controversy between the Parties *arising out of or relating to the agreement or any alleged breach thereof*, shall be settled by arbitration . . . . [emphasis added].
>
> (B) Arbitrable disputes include any controversy or claim between the Parties *including any claim based on contract, tort, or statute*, arising out of or relating to the transaction evidenced by this agreement, . . . *and any aspect of the past present or future relationships of the Parties.* [emphasis added].[157]

The *Solis* court held the arbitration agreement did not extend to the teller's defamation claim, calling it "difficult to fathom" and "legally indefensible" that individuals would waive their right to sue for intentional tort claims.[158] Equating an agreement requiring arbitration of intentional tort claims to an exculpation of liability for the tortfeasor, the *Solis* court held such an agreement would not be permitted under Texas public policy.[159]

151. *See* Solis v. Evins, 951 S.W.2d 44, 50 (Tex. App.—Corpus Christi 1997, no writ) ("We find no authority for the proposition that a party may prospectively contractually exculpate itself with respect to intentional torts. That would be contrary to public policy.").

152. Solis v. Evins, 951 S.W.2d 44 (Tex. App.—Corpus Christi 1997, no writ).

153. *See id.* at 49 (Tex. App.—Corpus Christi 1997, no writ) (describing the contract requiring arbitration as an agreement by a depositor to forebear from bringing suit against the bank for claims arising from the depositor's contract).

154. *Id.* at 49–50.

155. *Id.* at 47.

156. *Id.*

157. *Id.* at 50–51.

158. *Id.* at 50–52.

159. *Id.* at 50. *But see* Jones v. Halliburton Co., 625 F. Supp. 2d 339, 348 (S.D. Tex. 2008), *aff'd*

Interestingly, eight years after its decision in *Solis*, the Corpus Christi appellate court enforced an indemnity agreement requiring one party to exculpate the other from liability arising from its intentional acts.[160] The 2005 case, *Oxy USA, Inc. v. Southwestern Energy Production Co.*,[161] was distinguishable, however, because the conduct in question occurred before the parties to the indemnification agreement executed the contract.[162] The *Oxy USA* court explained that contracting to transfer liability for conduct that had already occurred did not raise the same concerns as the extraordinary risk shifting that results when parties contractually allocate unknown liability for their own negligence or intentional acts.[163] The appellate court concluded the supreme court's concerns regarding fair notice were not present in *Oxy USA*.[164]

VII. CONCLUSION

The majority and dissenting opinions in *Hamblin v. Lamont* demonstrate the strong arguments on either side of the issue of indemnification against intentional acts. While Texas practitioners and their clients await a case focused on this type of extraordinary risk-shifting to be presented the state's highest court, looking to statutes limiting indemnification, consideration of similar types of contracts, and recent litigation at the intermediate appellate court level can provide insight as to how the supreme court may decide the issue.

and remanded, 583 F.3d 228 (5th Cir. 2009) (stating *Solis* incorrectly classifies arbitration of claims as an exculpation of liability and asserting an arbitration agreement is not equivalent to a waiver of the right to sue).

160. *See* Oxy USA, Inc. v. Sw. Energy Prod. Co., 161 S.W.3d 277, 284 (Tex. App.—Corpus Christi 2005, pet. denied) (declining to extend fair notice requirements to an indemnity agreement covering specific conduct that occurred before the parties entered their contract).

161. *Id.* at 277.

162. *See id.* at 283 ("SEPCO asks us to extend the reach of "fair notice" to cover indemnity agreements that are used to shift liability for actions that have already occurred.").

163. *See id.* at 283 (asserting the case in front of the court did not include the extraordinary risk shifting present in contracts purporting to indemnify a party against its own negligence).

164. *Id.* at 283–84 ("The supreme court's concerns are not present here."); *see also* Green Int'l, Inc. v. Solis, 951 S.W.2d 384, 387 (Tex. 1997) (describing the supreme court's concerns as clauses transferring risk in an extraordinary way, such as prospectively protecting an individual from the consequences associated with her own negligence). According to the *Oxy USA* court:

> The Indemnity Agreement was executed by two major oil and gas companies with equal bargaining power after negotiations that specifically contemplated the adoption of an agreement releasing OXY from liability. Both parties were fully aware of the risk-shifting nature of the agreement and limited it in scope to liability arising from a specific series of transactions that had already occurred. We decline to extend the fair notice requirements.

Oxy USA, 161 S.W.3d at 283–84.

A. *Extending Fair Notice Requirements*

Extending the express intent requirement furthers the goals of both contract and tort law.[165] The doctrine ensures the party responsible for intentional wrongdoing will carry the burden of the associated costs, in accordance with the principles of tort law, unless there is an express agreement providing otherwise.[166] Additionally, by providing notice to an indemnitor that it is assuming potential liability for the indemnitee's gross negligence or intentional torts, the express intent requirement encourages the indemnitor to respond to the possibility of damages by discouraging the indemnitee from engaging in conduct that would give rise to liability.[167] The express intent doctrine also protects the parties' freedom to contract by enabling them to contract for the shift of liability—so long as the parties expressly state their intent within the four corners of the agreement—and improves judicial efficiency by reducing the need for courts to interpret broad, non-specific contract terms.[168] If the Supreme Court of Texas were to determine the state's public policy could accommodate indemnification against intentional acts, it is likely such a decision would be accompanied by an extension of the express negligence doctrine to these types of agreements.

B. *Public Policy Arguments*

Logic indicates the same public policy considerations that instruct against insuring individuals for their own intentional torts and punitive damages should also invalidate contractual indemnification from intentional misconduct. Security from the costs associated with the

165. *See Statement on Legal Opinions Regarding Indemnification and Exculpation Provisions Under Texas Law Legal Opinions Committee of the Business Law Section of the State Bar of Texas*, 41 TEX. J. BUS. L. 271, 292 (Winter 2006) (stating the reasoning in Texas case law supports extending fair notice requirements, including express intent requirements, to contracts for indemnity against gross negligence or intentional misconduct to the extent such agreements are allowed by public policy).

166. *See* Hamblin v. Lamont, 433 S.W.3d 51, 55 (Tex. App.—San Antonio Dec. 11, 2013, no pet. h.) (holding indemnity agreements purporting to hold an indemnitee harmless for its own intentional acts should not be enforced if the agreement does not satisfy the fair notice requirements).

167. *Cf.* Hous. Lighting & Power Co. v. Atchison, Topeka, & Santa Fe Ry. Co., 890 S.W.2d 455, 458–59 (Tex. 1994) ("[I]f parties must expressly state their intent to provide indemnity for strict liability claims, the party that assumes the duty of maintaining a safe work place will be aware of its responsibility and act accordingly.").

168. *See id.* at 459 (allowing parties to contract for indemnity against strict liability subject to express intent doctrine); Dorchester Gas Corp. v. Am. Petrofina, Inc., 710 S.W.2d 541, 543 (Tex. 1986) (permitting contracts for indemnity against strict product liability if the parties intent is stated in the contract), *overruled on other grounds by* Ethyl Corp. v. Daniel Constr. Co., 725 S.W.2d 705 (Tex. 1987).

consequences of intentional torts or willful negligence leaves minimal incentive to maintain the standards of care envisioned by the foundations of tort law. Weighing the policies regarding freedom to contract and insurance against intentional acts, many jurisdictions have found the former more important.[169]

It is worth noting, however, that insurance policies between an insured and insurer are different from contractual indemnity agreements between two parties outside the insurance industry.[170] The insurance industry is heavily regulated, providing significant protections to consumers.[171] The insured pays premiums to the insurer who is hedging bets against the likelihood of occurrence of a covered incident.[172] On the other hand, most indemnification agreements lack the protection of government regulation, as well as the "pay for protection" aspect present in insurance policies. Insurance policies and indemnification contracts are not simply different degrees of risk-shifting agreements; the two contracts are different in kind and may require a different balance of the interests at question. Moreover, if individuals are already able to protect themselves from the burdens of liability for their intentional acts by purchasing insurance, there is no significant need for the courts to enable these individuals to protect themselves by contractual indemnity.

From the opposite perspective, it seems public policy arguments against indemnification for intentional acts are largely based on an almost instinctual aversion to enabling individuals to evade the consequences of their actions. Nonetheless, courts and commenters have struggled to produce evidence that indemnity against negligence or insurance coverage for intentional acts and punitive damages lead to indemnitees exercising less care or actively causing damage.[173] The potential is certainly there—

169. *Cf.* Fairfield Ins. Co. v. Stephens Martin Paving, LP, 246 S.W.3d 653, 660–62 (Tex. 2008) (providing lists of jurisdictions permitting insurance against exemplary damages, notwithstanding public policy concerns to the contrary).

170. *Compare* TEX. CIV. PRAC. & REM. CODE ANN. § 127.003(a)(1) (West 2012) (prohibiting many indemnity agreements), *with* Tanner v. Nationwide Mut. Fire Ins. Co., 289 S.W.3d 828, 833 (Tex. 2009) ("[T]he dispositive inquiry is whether the insured intended to inflict damage or injury. To forfeit coverage, the insured must intend to harm, not merely intend to act.").

171. *See* French, *supra* note 75, at 83–84 ([T]he policyholder should receive in coverage what it objectively, can reasonably expect to receive even if the policy language does not expressly support coverage.").

172. *See* Avraham, *supra* note 73, at 38 ("The law of large numbers . . . allows an insurer to predict with reasonable certainty the aggregate losses it will pay in a given year.").

173. *See, e.g.*, French, *supra* note 75, at 92 (pointing to commentary and cases that question the existence or reliability of evidence that prohibiting insurance for intentional acts and damages has deterrent effect).

an indemnitee on notice that an enforceable agreement exists to protect him from the costs of his willful or intentional transgressions may at least be *tempted* to take advantage of such protection. Notwithstanding that potential, Texas's commitment to the right to contract may be broad enough to permit parties entering a contract to agree to allocate any risks the parties may contemplate, especially if there is clear notice of the liability-shifting terms.[174] Moreover, an indemnitor's assumption of liability for an indemnitee's willful or intentional actions may act to encourage the parties to keep a watchful eye on one another, thus preventing a potential tortfeasor from committing its wrongdoing without the need for judicial intervention.

174. *See* Hamblin v. Lamont, 433 S.W.3d 51, 55 (Tex. App.—San Antonio Dec. 11, 2013, no pet. h.) ("To be enforceable, an indemnity contract must satisfy the fair notice requirements.").