INDEMNIFICATION FROM NEGLIGENCE: FREEDOM TO CONTRACT OR ABUSE OF BARGAINING POWER?

Travis Talerico†

TABLE OF CONTENTS

ABSTRACT

It is a general principle of free trade and American democracy that parties are generally free to contract however they like, as long as there is consent between both parties. Nonetheless, courts vary in their perspectives of indemnification and exculpatory agreements which seek to indemnify a party from its own negligence. While the general rule is that a party may indemnify itself from its own negligence, some courts find these agreements to be generally void and unenforceable, grounding their reasoning in that of public policy, unfairness of disparate bargaining power between parties while contracting, and lack of clear understanding between both parties as to what they are agreeing to indemnify for.

Others however, lean more towards allowing parties to be free to contract however they like, believing that both parties have the freedom to negotiate all terms of a contract, and the party agreeing to an indemnification clause is fully aware of what they are agreeing to. While just about all courts say that these types of agreements must be reviewed with

† J.D. Syracuse University College of Law, 2020; B.A. University of Rochester, 2013. I would like to thank my parents, Robert and Jo-Ann Talerico, my uncle, Joseph Panetta, and the rest of my family and friends for their constant love, support, and guidance throughout my academic career, and life in general.

"strict scrutiny," the application of that standard varies significantly based on what court is applying the standard.

Because it will be acknowledged that a general blanket ban on these types of agreements is not realistic, this Note will argue that these contracts must be reviewed with very strict scrutiny, and that it must be truly unmistakable as to what the intent of the parties was, advancing the position that using language that expressly references negligence as a better method. This Note will begin by giving an overview of the different "tiers of scrutiny" which courts across the United States tend to apply to these agreements. It will then identify and address some issues regarding the language within these contracts, specifically addressing the ambiguity of how courts define "clear and unambiguous" language and will highlight some of the problems and concerns with the varied interpretation of this language, which is a reason why there is so much litigation in this area. It will then turn to address several issues of equity with these types of contracts, discussing potential unequal bargaining power which is often afoot with these types of contracts, distinguishing between business to business and business to consumer relationships. This section will also briefly illustrate where courts tend to draw the line with indemnification from negligence, even if expressly mentioned in the contract. This Note then concludes with suggestions as to how to provide a more uniform and fair application of these agreements, when it is even valid to have them in place.

INTRODUCTION

Indemnification clauses and other similar provisions limiting the liability of contracting parties are common in both consumer and business contracts. However, these contracts are often the subject of litigation, because neither party wants to bear the consequences of these agreements, particularly when the harm was caused in part or wholly by the party being indemnified. While courts across the United States have set standards regarding how these types of agreements are enforced, courts give significantly different interpretation to these standards, sometimes yielding results that do not seem particularly fair.

An example of indemnification from a party's own negligence is illustrated in *Levine v. Shell Oil Company*, one of the leading cases in indemnification law in New York State.[1] The plaintiffs in *Levine* were employees at a gasoline station owned by Shell Oil Company, where they were injured in an explosion, and Shell Oil impleaded the lessee of the

1. *See* 269 N.E.2d 799, 801 (N.Y. 1971).

station, Joseph Visconti.[2] At trial, the court found that the explosion was caused by a natural gas heater in the station, which had a cracked fuel line, and expert testimony indicated that the explosion started in the heater.[3] Notwithstanding notice of the defective condition, Shell Oil did not make necessary inspections or repairs to the heater, and sufficient evidence at trial was presented for a jury to find that the explosion was a direct result of Shell's negligence.[4] Since Shell had active notice of the defective heating device and failed to remedy it, the court held there was no basis for common-law indemnification.[5]

However, the trial court held that Shell was entitled to contractual indemnification due to a provision in the lease which stated in relevant part:

> [lessee] [Visconti] shall indemnify Shell against any and all claims, suits, loss, cost and liability on account of injury or death of persons or damage to property, or for liens on the premises, caused by or happening in connection with the premises (including the adjacent sidewalks and driveways) or the condition maintenance, possession or use thereof or the operations thereon.[6]

The trial judge found that, by virtue of the above paragraph, "Visconti had specifically agreed to indemnify Shell [from] its own active negligence," but the appellate court disagreed, saying that the lease lacked "the all-embracing language upon which an unmistakable intention to indemnify . . . can be spelled out."[7]

The Court of Appeals affirmed the decision of the trial court, holding that it is not the position of the court to read contract language that provides indemnification for "any and all liability," that the parties might have intended for something else, or more limiting.[8]

The purpose of this illustration is twofold: 1) to show that courts struggle to grapple with the concept of what kind of language is sufficient to uphold a contract provision indemnifying a party from its own negligence; and 2) to show the potential unfairness of these types of contracts. Reading this case, it certainly poses the question: how much attention should be paid to the intent of the parties at the time of formation of the

2. *Id.* at 800.

3. *Id.*

4. *Id.* at 800–01.

5. *Id.* at 801 (citing Jackson v. Associated Dry Goods Corp., 12 N.E.2d 167, 169–70 (N.Y. 1963)).

6. Levine, 269 N.E.2d at 801.

7. *Id.* (quoting Levine v. Shell Oil Co., 313 N.Y.S.2d 581, 584 (App. Div. 2d Dep't 1970)).

8. *Id.* at 801–02.

contract, and in this case, if Mr. Visconti truly meant that he was willing to indemnify Shell from its own active negligence.[9]

This Note will provide an overview of the application of indemnification contracts across the nation by comparing application of similar language and facts in different jurisdictions, with often drastically different results.

Part I will provide a broad background on the law provided by the Supreme Court in this area and highlight a few key terms and presumptions that are generally accepted by all courts but applied quite differently.

Part II will focus on the language used in indemnification agreements. Specifically, this part illustrates how courts differ in their understanding of what "clear and unambiguous" intent to indemnify is, and the debate between whether express or implied intent to indemnify from one's own negligence is sufficient.

Part III will briefly examine several equitable concerns with disparity in bargaining power between parties, particularly when one of the parties does not truly have the ability to negotiate the terms of the contract. It will also illustrate when most courts will bar enforcement of these agreements, even when negligence is expressly mentioned in the contract. This Note will conclude with several recommendations on how to more uniformly regulate application of indemnification agreements.

I. APPLICATION OF INDEMNIFICATION CONTRACTS

Generally, "[c]ontracts insuring or indemnifying against the consequences of negligence, unless tending to promote a breach of duty to the public, or contrary to an express public policy, and undertakings by contractors to assume liability for all damages incurred in the completion of a job, are generally upheld."[10] However, while these contracts generally will be allowed, most courts do not favor agreements which tend to erode common-law liability or relieve the contracting party from their improper conduct.[11] Courts express this disfavor "either by indulging in a presumption against the parties' intention to contract for immunity against the consequences of their own negligence, or by requiring that such a provision for immunity in a contract must be expressed in clear and

9. *See id.* at 801.

10. 8 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 19:19 (4th ed. 2010).

11. 8 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 19:19 (4th ed. Supp. 2017).

unequivocal language in order to be valid and effective."[12] While this seems relatively straightforward, courts across the country differ significantly in what is sufficiently clear language.

A. Guidance from the Supreme Court

The Supreme Court has set some general guidelines regarding contracts which allow a party to indemnify itself from its own negligence, but as mentioned, these guidelines are interpreted differently based on the jurisdiction.[13] The Supreme Court in *United States v. Seckinger,* began its commentary about indemnification against one's own negligence with "the general maxim that a contract should be construed most strongly against the drafter."[14] It went on to state that "a contractual provision should not be construed to permit an indemnitee to recover for [its] own negligence unless the court is firmly convinced that such an interpretation reflects the intention of the parties."[15] Further, "[t]he traditional reluctance of courts to cast the burden of negligent actions upon those who were not actually at fault is particularly applicable to a situation in which there is a vast disparity in bargaining power and economic resources between the parties."[16] In *Seckinger*, the United States was looking to shift ultimate responsibility for its own negligence to its various contractors.[17] So, the mutual intention of the parties should appear with clarity from the face of the contract, which the Court held was not the case, since the contract language was not clear enough to show Seckinger's intent to indemnify the United States from its own negligence.[18]

The principle that a contractual provision should not be construed to permit an indemnitee to recover from their own negligence unless that intent is clearly expressed from the terms of the contract is accepted with virtual unanimity among American jurisdictions.[19] However, there is still a slew of case law where it seems questionable that a party absolutely

12. *Id.*; *see* Fina, Inc. v. ARCO, 200 F.3d 266, 269 (5th Cir. 2000) (applying Delaware law; to be enforceable, intent to indemnify must be clear and unequivocal on face of indemnity provision; provision must specifically focus attention on fact that, by agreement, indemnitor was assuming liability for indemnitee's own negligence).

13. *See* United States v. Seckinger, 397 U.S. 203, 204, 215–16 (1970); WILLISTON & LORD, *supra* note 11.

14. 397 U.S. at 210.

15. *Id.* at 211.

16. *Id.* at 211–12 (discussing the disparity in bargaining power between the United States government and various government contractors); *see* United States v. Haskin, 395 F.2d 503, 508 (10th Cir. 1968).

17. *See id*. at 212.

18. *Id.* at 212–13.

19. *See* WILLISTON & LORD, *supra* note 11.

intended to contract to absolve the other party of their responsibility for damages caused by their own negligence.[20]

B. How New York Courts Interpret "Strict Scrutiny"

Most courts agree that contracts which absolve a party from consequences of its own negligence should be reviewed with strict scrutiny, yet the standard of "strict scrutiny" seems to vary significantly from state to state.[21] For example, while New York courts apply a "strict scrutiny" standard, they still sometimes allow for broad contract language to be sufficient to encompass indemnification from one's own negligence.[22] As discussed above, the *Levine* court held that agreeing to indemnify Shell from any and "all claims, suits, loss, cost and liability" was sufficiently broad and clear enough language to establish the unmistakable intent of the parties.[23]

The New York Court of Appeals more recently illustrated its application of the "strict scrutiny" standard and what is sufficient to evince an "unmistakable intent" to indemnify as discussed in *Great Northern Insurance Company v. Interior Construction Corporation*.[24] Using the language of the court:

> When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. The promise should not be found unless it can clearly be implied from the language and purpose of the entire agreement and the surrounding facts and circumstances.[25]

This explanation shows that New York courts do not necessarily require indemnification from one's own negligence to be expressly stated in the contract.[26] It can be found to be implied by the situation and the level of sophistication between the two contracting parties.[27] The relevant portion of the indemnification clause stated required the lessee to indemnify for "any" accident occurring on the premises unless solely by the

20. *See id.*

21. Robert L. Meyers, III & Debra A. Perelman, *Risk Allocation Through Indemnity Obligations in Construction Contracts*, 40 S.C. L. REV. 989, 996–97 (1989).

22. *See Levine*, 269 N.E.2d at 801.

23. *Id.* at 802–03.

24. 857 N.E.2d 60, 62 (N.Y. 2006) (citing *Levine*, 269 N.E.2d at 802–03).

25. *Id.* (quoting Hooper Assocs., Ltd. v. AGS Computers, Inc., 548 N.E.2d 903, 905 (N.Y. 1989)).

26. *See generally Hooper Assocs. Ltd.*, 548 N.E.2d at 492–93 (discussing the indemnity provision of the contract at issue and determining that by construing the clause as pertaining to third party suits such as the one at issue, such construction does afford a fair-meaning as to the language employed by both the parties).

27. *See Great N. Ins. Co.*, 857 N.E.2d at 63.

lessor's negligence.[28] The parties stipulated that the lessor was ninety percent at fault for causing the accident that was in question, with the lessee being ten percent responsible.[29] The court held that the specific language regarding indemnifying unless the lessor was solely at fault, unmistakably afforded indemnification under all the circumstances of the case.[30] It is important to note the emphasis that the court placed on the fact that this was a commercial lease being negotiated between two sophisticated business entities with equal bargaining power, this will come into play later on when discussing issues with disparate bargaining power between the parties.[31]

While New York courts seem to be a bit more liberal in interpreting contract language broadly to allow for indemnification against one's own negligence, there are several statutory exceptions which forbid these agreements in certain situations.[32] Pursuant to New York General Obligations Law Section 5-321:

> Every covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable.[33]

Section 5-322 and Section 5-322.1 contain similar language forbidding these agreements in contracts involving catering companies and construction or demolition of real property, as also against public policy.[34] While it seems that Section 5-321 would have applied in *Great Northern*, the court there found an exception to the rule because both parties here were required to have insurance policies, so it is actually the insurance company that is bearing the cost of the damages, not the parties themselves.[35]

However, there is also a line of cases in New York which seems to reject the notion that broad language such as "any and all claims, liability, etc." is sufficient as a release from liability from a contracting party's

28. *Id.* at 62.
29. *Id.*
30. *Id.*
31. *Id.* at 63.
32. *See* N.Y. GEN. OBLIG. LAW §§ 5–321, 5–322, 5–322.1 (McKinney 2012).
33. N.Y. GEN. OBLIG. LAW § 5–321 (McKinney 2012).
34. N.Y. GEN. OBLIG. LAW §§ 5–322, 5–322.1 (McKinney 2012).
35. *Great N. Ins. Co.*, 857 N.E.2d at 63–64.

own negligence.[36] The Court of Appeals in *Gross v. Sweet*, only eight years after the holding in *Levine*, acknowledged that "if such is the intention of the parties, the fairest course is to provide explicitly that claims based on negligence are included."[37] However, the court was not willing to set the precedent that the word "negligence" needed to be expressly used in order to give effect to an exculpatory agreement, but stated that words conveying a similar effect must appear.[38]

The plaintiff in *Gross* suffered serious personal injuries as a result of hitting the ground during a parachute jump, alleging that his injuries were the direct result of the defendant's negligent failure to provide sufficient training and safety equipment, and failure to warn him of all of the possible risks of a parachute jump.[39] The defendant based its defense on a "Responsibility Release" agreement, saying that the plaintiff had waived any and all claims for injury as a result of the parachute jump.[40] While the court acknowledged that the language of this release alerted the plaintiff to the ordinary risks associated with parachute jumping, it was far too great of a stretch to think that this waiver made him aware of, much less that he intended to accept any enhanced exposure to injury as a result of the carelessness of the people and equipment that he depended

36. *See* Kaufman v. Am. Youth Hostels, 158 N.E.2d 128, 128–29 (N.Y. 1959) (release stating "any and all responsibility or liability of any nature whatsoever for any loss of property or personal injury occurring on this trip" not sufficient to bar negligence claim); *see also* Boll v. Sharp & Dohme, Inc., 120 N.E.2d 836, 837 (N.Y. 1954) (holding that a release for a blood donation stating that the defendants were not in any way responsible for any consequences . . . resulting from the giving of such blood or from any of the tests . . . and released and discharged the defendants from all claims and demands whatsoever . . . was not sufficiently unambiguous to bar suit for negligence when the plaintiff passed out after a blood donation).

37. 400 N.E.2d 306, 309 (N.Y. 1979) (citing Ciofalo v. Vic Tanney Gyms, 177 N.E.2d 925, 925–26 (N.Y. 1961) (the plaintiff "agreed to assume full responsibility for any injuries which might occur to her in or about defendant's premises, 'including but without limitation, any claims for personal injuries resulting from or arising out of the negligence of' the defendant")).

38. *Gross*, 400 N.E.2d at 309–10 (citing Theroux v. Kedenburg Racing Ass'n, 269 N.Y.S.2d 789, 792 (Sup. Ct. Suffolk Cty. 1965)).

39. *Id.* at 308.

40. *Id.* at 310. The agreement in full read . . .

> I, the undersigned, hereby, and by these covenants, do waive any and all claims that I, my heirs, and/or assignees may have against Nathaniel Sweet, the Stormville Parachute Center, the Jumpmaster and the Pilot who shall operate the aircraft when used for the purpose of parachute jumping for any personal injuries or property damage that I may sustain or which may arise out of my learning, practicing or actually jumping from an aircraft. I also assume full responsibility for any damage that I may do or cause while participating in this sport.

Id.

on for his safety.[41] So at most, the court found that the release could be understood to put the plaintiff on notice that the defendant would not be taking any responsibility for any injuries that may ordinarily occur from such a physically demanding activity, without any fault of the defendant.[42]

While it is understandable why New York courts hold broad contractual language sufficient to evince intent to indemnify, this standard does seem to leave a bit of a gray area as to what actually is "unmistakable intent" and how that is shown.[43] For example, in *Levine*, it seems that it certainly could be thought that the lessee in that case, an individual business owner, did not have the unmistakable intent to indemnify Shell, a massive oil company, from the consequences of its own negligence.[44] This application of the standard seems to be on the border of deviating from the holding of *Seckinger*, where "a contractual provision should not be construed to permit the indemnitee to recover for his own negligence unless the court is firmly convinced that" it was the intention of the parties to do so.[45]

The Court of Appeals in *Gross* did acknowledge this potential discrepancy, noting that it has enacted a more liberal standard in cases such as *Levine*, grounding its reasoning that in those cases, the agreements are negotiated at arm's length between sophisticated business entities, and can be viewed as allocating the risk of liability to third parties, usually through the employment of insurance.[46] However, it seems that much of this confusion of interpretation of contract language could be resolved simply by using express language conveying the true intent of both parties.

C. Other Jurisdictions Apply a More Rigid "Strict Scrutiny" Standard

Courts in other jurisdictions of the country seem to apply the "strict scrutiny" standard a bit more rigorously than New York courts.[47] For

41. *Id.* at 310–11 ("[s]pecifically, the release nowhere expresses any intention to exempt the defendant from liability for injury or property damages which may result from his failure to use due care either in his training methods or in his furnishing safe equipment.").

42. *Gross,* 400 N.E.2d at 311.

43. *See* Hartz Consumer Grp., Inc. v. JWC Hartz Holdings, Inc., No. 600610/03, 2005 N.Y. Misc. LEXIS 8534, at *15–16 (Sup. Ct. N.Y. Cty. Oct. 27, 2005) (discussing the unmistakable intent standard) (citing City of New York v. Black & Veatch, No. 1299, 1997 U.S. Dist. LEXIS 15510, at *1 (S.D. N.Y. Oct. 6, 1997)).

44. *See Levine*, 269 N.E.2d at 801.

45. *Seckinger*, 397 U.S. at 211.

46. *See Gross*, 400 N.E.2d at 310 (quoting Hogeland v. Sibley, Lindsay & Curr Co., 366 N.E.2d 263, 267 (N.Y. 1977)); *see also Levine*, 269 N.E.2d at 802.

47. *See* Wells v. State of Tennessee, 435 S.W.3d 734, 748 (Tenn. Ct. App. 2013).

example, under Tennessee law, contracts that indemnify a party against one's own negligence, while not against public policy, must state that intent in "expressly clear and in unequivocal terms."[48] While this language is almost identical to the law in New York, Tennessee courts apply this standard quite differently.[49] In direct contrast to the holding of the New York Court of Appeals in *Levine*, in Tennessee, "[m]ere general, broad, and seemingly all-inclusive language" is not sufficient to impose liability for the negligence of the indemnitee."[50]

Tennessee courts have also noted that "if the negligent acts of [an] indemnitee are intended to be included in the coverage, it would only take a few seconds for the attorneys to use appropriate express language such as 'including indemnitees' acts of negligence."[51] The language of the indemnification provision in *Wells* reads almost identical to that of *Levine*, where indemnification was to be provided for "any and all actions, claims, and liabilities, [etc.] . . . ."[52] While a New York court would have likely found this to be sufficient, the Tennessee Court of Appeals rejected the assertion that this broad language was sufficient to find an unmistakable intent of the parties for indemnification from one's own negligence.[53]

Louisiana courts also follow a similar interpretation of the standard required to show unequivocal intent to indemnify.[54] Similar to New York and Tennessee law, "[u]nder Louisiana law, an indemnification agreement will not be construed to cover losses arising from the indemnitee's negligence unless a mutual intent to provide such indemnification is expressed in unequivocal terms."[55] The Fifth Circuit elaborated on the reasoning behind this, stating that this standard "helps to ensure that an indemnitor has express notice that under the agreement, and through no fault of its own, it may be called upon to pay damages caused solely by the negligence of its indemnitee."[56] While Louisiana's interpretation of this standard "does not require any 'magic words' for an agreement to cover the indemnitee's [own] negligence, nor does it necessarily require

48. *Id.* at 747 (quoting Kellogg Co. v. Sanitors, Inc., 496 S.W.2d 472, 474 (Tenn. 1973)).

49. *Kellogg*, 496 S.W.2d at 474.

50. *Id.*

51. Wajtasiak v. Morgan Cty., 633 S.W.2d 488, 490 (Tenn. Ct. App. 1982).

52. *Wells*, 435 S.W.3d at 746.

53. *Id.* at 748.

54. *See* Amoco Prod. Co. v. Forest Oil Corp., 844 F.2d 251, 254 (5th Cir. 1988) (citing Knapp v. Chevron USA, Inc., 781 F.2d 1123, 1127–28 (5th Cir. 1986)).

55. *Id.* at 253–54 (citing Polozola v. Garlock, Inc., 343 So. 2d 1000, 1003 (Sup Ct. La. 1977)).

56. *Id.* at 254 (citing Foreman v. Exxon Corp., 770 F.2d 490, 498 (5th Cir. 1985)).

an express reference to 'negligence,'" these agreements still "must be strictly construed."[57] Thus, "in the absence of clear, express, and specific language plainly demonstrating that this was the parties' intention, such an agreement will not be read to include the indemnitee's own negligence."[58]

The language in contention in *Amoco Production* was that under a provision of "sole cost, risk and expense," where Forest Oil assumed all risks even including Amoco's own negligence.[59] The Fifth Circuit held that "sole cost" and "sole risk" are "nonspecific terms, and under Louisiana law nonspecific terms must be interpreted to [include] only those things it appears the parties intended to include."[60] While the court acknowledged that this language could imply that the parties may have intended this to encompass acts of negligence, they also may have intended this provision to only cover "ordinary risks" of running a "logging operation."[61] Because the terms of the agreement were vague, and did not clearly and unequivocally express a mutual intent to provide indemnification for Amoco's sole negligence, the provision was found to be void.[62]

So, as can be seen from the various comparisons of interpretations of indemnification agreements from jurisdictions across the country, there is significant disparity on how strict "strict scrutiny" must be applied when interpreting these agreements and the intent of the parties. Applying a more rigid standard such as the standards applied by Tennessee and Louisiana courts, and requiring more express language, would help avoid confusion as to exactly what parties are agreeing to in these types of agreements.

II. CONTRASTING CONTRACT LANGUAGE IN INDEMNIFICATION AGREEMENTS

While discussion thus far has involved interpretation of the "clear and unambiguous" standard, there has yet to be a jurisdiction discussed where courts require that indemnification from negligence is expressly required. Florida is a jurisdiction that historically has generally applied this standard, likely the most stringent standard for interpretation of these

57. *Id.* (citing Battig v. Hartford Accident & Indem. Co., 482 F. Supp. 338, 343–44 (W.D. La. 1977)).

58. *Id.* (*Knapp*, 781 F.2d at 1127–28).

59. *Amoco Prod. Co*., 844 F.2d at 253.

60. *Id.* at 255.

61. *Id.*

62. *Id.*

agreements.[63] The Supreme Court of Florida in *University Plaza Shopping Center, Inc. v. Stewart*, looked to address discrepancies within its district courts with regard to what "clear and unequivocal" intent to indemnify actually meant.[64] The plaintiff in this case was the widow of a barber suing for the wrongful death of her husband who leased the premises from the defendant, alleging that the cause of his death was an explosion in the shop due to a negligently maintained gas line.[65] The landlord-defendant based his defense upon the lease agreement, which read in pertinent part as follows:

> SECTION 11. INDEMNITY-LIABILITY INSURANCE. Tenant shall indemnify and save harmless the Landlord from and against any and all claims for damages to goods, wares, merchandise and property in and about the demised premises and *from and against any and all claims for any personal injury or loss of life in and about the demised premises*.[66]

Here, the central issue for the court to decide was whether the general terms of "any and all claims" indemnified the landlord-indemnitee for damages resulting from his "sole negligence," the alleged failure to properly maintain the gas line beneath the building.[67] After reviewing several prior cases in Florida state court and a case decided by the Fifth Circuit using Florida law, the Supreme Court of Florida decided to adopt the holding of those cases, that the intent to indemnify an indemnitee from his sole negligence "must be specifically provided for in an

63. *See* Fla. Power & Light Co. v. Mid-Valley, Inc., 763 F.2d 1316, 1318 (11th Cir. 1985); *see also* Univ. Plaza Shopping Ctr., Inc. v. Stewart, 272 So. 2d 507, 509–10 (Fla. 1973) (discussing the enforceability of a contract clause for indemnification under Florida law where the effect of the clause was to exculpate the indemnitee from its own negligence).

64. *Stewart*, 272 So. 2d at 509–510 (In its analysis, the court acknowledged that there are generally three different approaches to this issue: "One line of authority adheres to the view that general language such as 'any and all claims' in an agreement is not sufficient to impose indemnity for the indemnitee's negligence. In other words, the contract must contain a specific provision providing for indemnification in the event the indemnitee is negligent. Secondly, in a number of the cases, it has been held that promises to indemnify against 'any and all claims' includes losses attributed solely to the negligence of the indemnitee. This point of view is based upon the theory that the words 'any and all claims' are crystal clear; ergo, all means all without exception. Finally, many cases look to the particular contractual language *and any other factors indicating the intention of the parties* to determine if the parties 'clearly and unequivocally' expressed the intent to indemnify for indemnitee's own negligence." (emphasis added by court)).

65. *Id.* at 508.

66. *Id.* at 508–09 (emphasis added by court). Part of the lease also had an insurance requirement, requiring tenant to maintain a policy of general liability insurance covering injury, death, and property damage. *Id*. at 509.

67. *Id.* at 509.

indemnity contract."[68] The court's main intention here was to show clear intent of the parties involved, and finding that the phrasing of "any and all claims" did not disclose a sufficiently clear intention to indemnify for consequences caused "solely" by the negligence of the indemnitee.[69]

While this was the standard of law set by the Florida Supreme Court for about forty years, it recently declined to follow its decision in *University Plaza* in *Sanislo v. Give Kids the World, Inc*.[70] At the outset of its opinion, the court acknowledged the generally accepted principle that "[p]ublic policy disfavors exculpatory contracts because they relieve one party of the obligation to use due care and shift the risk of injury to the party who is probably least equipped to take the necessary precautions to avoid the injury and bear the risk of loss."[71] However, and adding a different theory of law that was not addressed as much in *University Plaza*, the court acknowledged the "countervailing policy that favors the enforcement of contracts, [so] as a general proposition, unambiguous exculpatory contracts are enforceable unless they [go against] public policy."[72] Again, the debate here turned to what is sufficiently unambiguous for the party agreeing to indemnify the other to have a clear understanding of what they are contracting away.[73]

The suit in *Sanislo* arose out of an injury to Ms. Sanislo when she and her husband stepped on the back of a wheelchair lift of a horse-drawn carriage that they were riding on to take a picture, when the lift collapsed due to weight overload, and Ms. Sanislo suffered an injury to her hip.[74] The liability form in question read in pertinent part:

> I/we hereby release Give Kids the World, Inc. and all of its agents, officers, directors, servants, and employees from any liability whatsoever in connection with the preparation, execution, and fulfillment of said wish, on behalf of ourselves, the above named wish child and all other

68. *Stewart,* 272 So.2d at 511 (quoting Seaboard Coast Line R.R. Co. v. Tenn. Corp., 421 F.2d 970, 973 (5th Cir. 1970) (holding that under Florida law, intent to indemnify must be expressly stated)).

69. *Id.*

70. 157 So. 3d 256, 260 (Fla. 2015) (holding that "an exculpatory clause is not ambiguous and, therefore, ineffective simply because it does not contain express language releasing a defendant from liability for his or her own negligence or negligent acts; such an approach could render similar provisions meaningless and fail to effectuate the intent of the parties.").

71. *Id.; see* Applegate v. Cable Water Ski, L.C., 974 So. 2d 1112, 1114 (Fla. Dist. Ct. App. 2008) (citing Cain v. Banka, 932 So. 2d 575, 578 (Fla. Dist. Ct. App. 2006)).

72. *Sanislo*, 157 So. 3d at 260.

73. *Id.* at 260–61 ("Exculpatory clauses are unambiguous and enforceable where the intention to be relieved from liability was made clear and unequivocal and the wording was so clear and understandable that an ordinary and knowledgeable person will know what he or she is contracting away.").

74. *Id.* at 258–59.

> participants. The scope of this release shall include, but not be limited to, damages or losses or injuries encountered in connection with transportation, food, lodging, medical concerns (physical and emotional), entertainment, photographs and physical injury of any kind . . .
>
> I/we further agree to hold harmless and to release Give Kids the World, Inc. from and against any and all claims and causes of action of every kind arising from any and all physical or emotional injuries and/or damages which may happen to me/us . . . .[75]

While the district court ruled in favor of the Sanislo's, holding that the agreement was not a bar to a negligence action, the Fifth District reversed on appeal, reasoning that exculpatory clauses are enforceable if an "ordinary and knowledgeable person" would know what he or she is contracting away, and that it had previously rejected the need to expressly mention "negligence" in order to find a release of this type effective to bar a negligence action.[76] Because the other four district courts in Florida at this time followed the standard set in *University Plaza*, requiring an express statement of indemnification from one's own negligence for the provision to be valid, the Supreme Court of Florida conducted another review of this standard, articulating a very detailed analysis of how other states apply this standard, to reach their decision to not require an express statement of negligence.[77] Forthcoming will be a review of that analysis to help illustrate the position taken on this issue by other courts across the nation, and to help detail the pros and cons of requiring an express statement of negligence.

American Jurisprudence has delineated four different standards that courts across the country use to determine whether exculpatory releases are effective.[78] The most obvious and likely uncontested standard is that an exculpatory clause is effective if the agreement clearly and unambiguously expresses a party's intent to release the other party from his or her negligence by expressly using the terms "negligence" or "negligent acts" and specifically describes injuries to time and place.[79]

75. *Id.*

76. *Id.* at 259 (citing Give Kids the World, Inc. v. Sanislo, 98 So. 3d 759, 761 (Fla. Dist. Ct. App. 2012)). The Fifth District also based its holding on the notion that the bargaining power of the parties should not be considered here, because this was outside the scope of public function or public utility and that the Sanislo's were by no means required to go on this vacation. *Sanislo*, 157 So. 3d at 259.

77. *See id. at* 263 (citing *Stewart*, 272 So. 2d at 509).

78. 57A AM. JUR. 2D *Negligence* § 53 (2004).

79. *Id.* (citing Jones v. Dressel, 623 P.2d 370, 378 (Colo. 1981). While the holding in this case could have likely been established on the fact alone that "negligence" was used in the agreement, it is worth noting that Colorado employs a four-factor test to determine the validity of an exculpatory agreement. *Jones*, 623 P.2d at 376 (citing Rosen v. LTV Recreational Dev.,

The other three standards show when a specific requirement to negligence is not required. First, if the clause clearly and specifically indicates an intent to release the defendant from liability for a personal injury caused by the defendant's negligence.[80] Second, if protection against negligence is the only reasonable construction of the provision.[81] Third, and finally, if the hazard experienced was clearly within the contemplation of the provision.[82] With the latter three of these standards, though, while "negligence" specifically does not need to be said, words conveying a similar import must appear, and a preinjury release will not cover negligence if it neither specifically numerates negligence, nor contains any other language which could relate to negligence.[83]

In its description of these various standards, *American Jurisprudence* advances the belief that the "better" practice is to expressly state the word "negligence" somewhere in the exculpatory provision.[84] Interestingly enough, when discussing *American Jurisprudence's* view that the better approach is express use of "negligence" the Supreme Court in

Inc., 569 F.2d 1117, 1117 (10th Cir. 1978)). These factors are: (1) the existence of a duty to the public; (2) the nature of the service performed; (3) whether the contract was fairly entered into; and (4) whether the intention of the parties is expressed in clear and unambiguous language. *Id.*

80. 57A AM. JUR. 2D, *supra* note 78 (citing Seigneur v. Nat'l Fitness Institute Inc., 752 A.2d 631, 635–36 (Md. 2000) (finding that "[i]n Maryland, for an exculpatory clause to be valid, it need not contain or use the word 'negligence' or any other 'magic words.'"). In the instant case, there is no suggestion that the agreement between NFI and Ms. Seigneur was the product of fraud, mistake, undue influence, overreaching, or the like. *Seigneur*, 752 A.2d at 636. The exculpatory clause unambiguously provides that Ms. Seigneur "expressly hereby forever releases and discharges NFI, Inc. from all claims, demands, injuries, damages, actions, or courses of action, and from all acts of active or passive negligence on the part of NFI, Inc., its servants, agents or employees." *Id*. It is also worth noting here that negligence was expressly mentioned in the agreement. *Id.*

81. 57A AM. JUR. 2D, *supra* note 78 (citing Am. Druggists' Ins. Co. v. Equifax, Inc., 505 F. Supp. 66, 69 (S.D. Ohio 1980) (applying Ohio law) ("[T]he release must have been designed to protect Equifax from its own negligence. This is the only reasonable construction of paragraph four. Having contracted away their right to recovery, ADIC cannot now claim redress for the negligent behavior of Equifax.").

82. *Id*. (citing Blide v. Rainier Mountaineering, Inc., 636 P.2d 492, 493 (Wash. Ct. App. 1981) ("The release referred to 'the hazards of traveling mountainous terrain, accidents or illness in remote places . . . and the forces of nature.' Whether the plaintiff had unintentionally fallen or was lowered into the crevasse where his injury occurred, the accident was within the contemplation of the hold harmless which was clear, unambiguous and conspicuous . . . [thus] failure to use the word 'negligence' did not render the release ineffective.").

83. *Id.* (citing Colton v. New York Hospital, 414 N.Y.S.2d 866, 875 (Sup. Ct. N.Y. Cty. 1979)) ("The courts must therefore resolve disagreements over a contract's meaning by examining the intent of the parties . . . [p]arties are held to have intended that which they wrote . . . [t]hus, since the covenant neither specifically enumerates negligence, nor contains any other language which could relate to it, the court can only presume that the parties intended that negligence not be included.").

84. *Id.*

Sanislo cites to the concurring opinion of Judge Cohen of the Fifth District.[85] Judge Cohen expressed the opinion that:

> The better view is to require an explicit provision to that effect [negligence] . . . [w]hile those trained in the law might understand and appreciate that the general language releasing a party from any and all liability could encompass the injuries suffered by Ms. Sanislo, a release should be readily understandable so that an ordinary and knowledgeable person would know what is being contracted away. I would suggest that the average ordinary and knowledgeable person would not understand from such language that they were absolving an entity from a duty to use reasonable care . . . [t]he other district courts of appeal have recognized how simple it is to add such a clause in a release. I suggest we do the same.[86]

However, the majority opinion in *Sanislo* disagreed with *American Jurisprudence* and Judge Cohen, grounding its opinion in that many states have rejected a specific requirement that "negligence" needs to be mentioned, referring to the option of using the four various standards as discussed above in *American Jurisprudence* which is applied in Kentucky.[87] The court also delineates a plethora of other states which do not require an express statement of negligence.[88] While the court did acknowledge that some jurisdictions do require an express provision,[89] it

85. *See Sanislo*, 157 So. 3d at 267 (citing 57A AM. JUR. 2D *Negligence* § 53 (2004)).

86. *Give Kids The World, Inc.*, 98 So. 3d at 763 (Cohen, J., concurring).

87. *Sanislo*, 157 So. 3d at 267 (citing Hargis v. Baize, 168 S.W.3d 36, 47 (Ky. 2005) ("[A] preinjury release will be upheld only if (1) it explicitly expresses an intention to exonerate by using the word 'negligence;' or (2) it clearly and specifically indicates an intent to release a party from liability for a personal injury caused by that party's own conduct; or (3) protection against negligence is the only reasonable construction of the contract language; or (4) the hazard experienced was clearly within the contemplation of the provision.").

88. *See id.* at 268 (citing Courbat v. Dahana Ranch, Inc., 141 P.3d 427, 439–40 (Haw. 2006) (holding that an exculpatory clause did not need to contain specific language to bar a simple negligence claim, but not gross negligence or willful misconduct); Cormier v. Cent. Mass. Chapter of the Nat'l Safety Council, 620 N.E.2d 784, 785 (Mass.1993) (holding that an exculpatory clause releasing a party from "any and all liability, loss, damage, costs, claims, and/or causes of action, including but not limited to all bodily injuries" was "unambiguous and comprehensive" enough to bar a negligence claim); Adloo v. H.T. Brown Real Estate, Inc., 686 A.2d 298, 304 (Md. 1996) ("the exculpatory clause need not contain the word 'negligence' or any other 'magic words.'")).

89. *See id.* at 269 (citing Dresser Indus., Inc. v. Page Petroleum, Inc., 853 S.W.2d 505, 508–09 (Tex.1993) (applying an "express negligence doctrine" because "indemnity agreements, releases, exculpatory agreements, or waivers, all operate to transfer risk" and such agreements are "an extraordinary shifting of risk"); Hyson v. White Water Mountain Resorts of Conn., Inc., 829 A.2d 827, 831 (Conn. 2003) ("A requirement of express language releasing the defendant from liability for its negligence prevents individuals from inadvertently relinquishing valuable legal rights. Furthermore, the requirement that parties seeking to be released from liability for their negligence expressly so indicate does not impose on them any significant cost.")).

did not find the reasoning of those courts persuasive to mandate this as a requirement, even though it does acknowledge that it may be the better approach.[90]

Citing to the holding of the United States Supreme Court in *Seckinger*, the court said that contract interpretation is largely an individualized process "with the conclusion in a particular case turning on the particular language used against the background of other indicia of the parties' intention,"[91] thus being reluctant to impose a bright-line rule requiring express use of "negligence" language.[92] However, it is worth noting that in its conclusion, the court did acknowledge that its holding is not intended to render general language in a release of liability per se effective to bar negligence actions.[93] It also made clear that it was not overruling its prior opinion in *University Plaza*, but was simply refusing to apply that standard to exculpatory agreements.[94]

The main purpose of showing the detailed holding of *Sanislo* was to illustrate not only how Florida courts interpret the need for express language in indemnification and exculpatory agreements, but also to give reasoning as to why this Note argues for the approach taken by Judge Cohen and the minority of states. While it is sound and logical for courts to not want to adopt a bright-line rule in this area, there also are some concerns in not doing so, and certainly advantages to doing so. Since it is almost universally accepted that there needs to be a clear and unambiguous understanding of the intent to indemnify, it seems that simply expressly stating those terms would potentially alleviate much confusion between parties, and also leave much less room for a party to contest that they did not understand what they are agreeing to indemnify for.[95]

As stated in *Wells*, it would not be difficult for the attorneys who draft up these types of agreements to simply include an express term

90. *Id.* at 270.

91. *Id.* (quoting *Seckinger*, 397 U.S at 212).

92. *Sanislo*, 157 So. 3d at 270.

93. *Id.* at 271. "As noted previously, exculpatory contracts are, by public policy, disfavored in the law because they relieve one party of the obligation to use due care." *Id.* (citing Applegate v. Cable Water Ski, L.C., 974 So. 2d 1112, 1114 (Fla. Dist. Ct. App. 2008)).

94. *Id.* (quoting *Stewart*, 272 So. 2d at 512). Earlier noted in the opinion was a distinction between indemnification agreements and exculpatory clauses. *Id*. at 264–65. The court distinguished them as indemnification clauses involving a third party being responsible for the negligence of another, where exculpatory agreements just involve two parties, with one directly agreeing to hold the other and identified party not liable. *Id*. For the purpose and scope of this section, the distinction found by Florida courts between the types of agreements is not particularly relevant, focus is directed towards the language used in them.

95. *Sanislo*, 157 So. 3d at 260–61 (citing *Banka*, 932 So.2d at 578) (discussing the necessity of clear and unequivocal language).

indemnifying the other party from their own negligence.[96] Failure to include an express provision often seems as if it could be a way of the party writing the contract to not be entirely transparent with the other party it is contracting with, seemingly in contradiction in the general principle that a contract should be viewed more harshly against the party that drafted it.[97] This concern is precisely why Texas has rejected the clear and unequivocal test, and adopted an express negligence doctrine.[98]

> The express negligence doctrine provides that parties seeking to indemnify the indemnitee from the consequences of its own negligence must express that intent in specific terms. Under the doctrine of express negligence, the intent of the parties must be specifically stated within the four corners of the contract.[99]

Judge Cohen also raises a very legitimate concern in his concurrence in *Sanislo* that while it may be obvious to those with extensive legal background and experience as to what the legal implications of these waivers may be, the average layperson very may well not understand fully what they are agreeing to, cutting against the principle that there needs to be a clear and unequivocal understanding between the parties in order for these agreements to be valid and enforceable.[100] In conjunction with this, it is also worth noting the distinction that New York places on allowing a more liberal interpretation for sophisticated business entities, often covered by insurance, holding both parties more accountable for understanding their contracts.[101] While it is understandable to not establish an express negligence doctrine in all cases, it could serve as a middle ground which undoubtedly would reduce a fair amount of litigation, and to apply the doctrine to more cases, particularly those with less bargaining power, such as consumer contracts.

96. *Wells*, 435 S.W.3d at 747.

97. *See* Gross v. Sweet, 400 N.E.2d 306, 311 (N.Y. 1979) ("In short, instead of specifying to prospective students that they would have to abide any consequences attributable to the instructor's own carelessness, the defendant seems to have preferred the use of opaque terminology rather than suffer the possibility of lower enrollment.").

98. Ethyl Corp. v. Daniel Const. Co., 725 S.W.2d 705, 707–08 (Tex. 1987) ("As we have moved closer to the express negligence doctrine, the scriveners of indemnity agreements have devised novel ways of writing provisions which fail to expressly state the true intent of those provisions. The intent of the scriveners is to indemnify the indemnitee for its negligence, yet be just ambiguous enough to conceal that intent from the indemnitor. The result has been a plethora of law suits to construe those ambiguous contracts. We hold the better policy is to cut through the ambiguity of those provisions and adopt the express negligence doctrine.").

99. *Id.* at 708.

100. *Sansilo,* 98 So. 3d at 763 (Cohen, J., concurring).

101. *See Gross*, 400 N.E.2d at 310 (quoting *Hogeland*, 366 N.E.2d at 266–67).

III. EQUITABLE CONCERNS AND GROSS NEGLIGENCE

While it has been discussed that courts generally tend to interpret indemnification agreements more liberally when the contracting parties are sophisticated business entities dealing at arm's length, there are still some equitable concerns which can be raised in conjunction with the presumption that the parties truly have equal bargaining power. This concern was raised earlier with *Levine*, with the concern being that an individual leasing a property from a large oil conglomerate does not actually have equal bargaining power with the oil company.[102]

Another example of a case where the equities of the contracts seem to be in question can be seen in *Castillo v. Port Authority of New York & New Jersey,* where two contracting companies employed by the Port Authority of New York and New Jersey were held potentially liable for a slip-and-fall on a premises owned by the Port Authority, where it was found that neither party breached their contract or owed a duty of care to the plaintiff, but were found potentially liable through contractual indemnity.[103] Both impleaded contracting companies had contracts with Port Authority, one to provide certain janitorial services, but without a duty for snow removal, and the other for parking lot management, but again, no duty for snow removal.[104]

After suit was brought by the plaintiff for a slip-and-fall in the parking lot, the court found that neither company had breached their duty of care or contractual obligations, explicitly acknowledging that the contracts were not comprehensive and exclusive property maintenance agreements intending to displace Port Authority's general duty of care for its property.[105] However, both companies had contracts with Port Authority which agreed to "indemnify the Port Authority for all loss or damage incurred in connection with causes of action alleging personal injuries arising out of or in any way connected with those contracts," with the court finding that there were sufficient issues of fact to still be determined if the contractors would be liable under this provision.[106]

This case seems to stand out as a situation where equitable principles should not favor enforcement of a contract like this.[107] The court here made a point to specifically mention that the contract did not replace Port

102. *See Levine*, 269 N.E.2d at 803.

103. 72 N.Y.S.3d 582, 585–86, 588–89 (App. Div. 2d Dep't 2018).

104. *Id.* at 585–86.

105. *Id.* at 587 (citing Rudloff v. Woodland Pond Condo. Ass'n, 971 N.Y.S.2d 170, 172–73 (App. Div. 2d Dep't 2013)).

106. *Id.* at 588.

107. *See* Daniel D. Barnhizer*, Inequality of Bargaining Power*, 76 U.Colo. L. Rev. 139, 148, 200–01 (2005).

Authority's general duty of care for its premises, yet its holding seems to be contrary to that point, that is essentially what the purpose of the indemnification provision is.[108] It seems like a bit of an abuse of power for such a large entity like Port Authority to be able to completely absolve itself from any liability in regard to the contracts it forms with other (and likely smaller) businesses. The smaller companies are likely in a lesser position of power to negotiate.[109] If it isn't happy with the terms of the contract, Port Authority would likely just be able to go out and find another similar company who would accept the terms of the contract.

A better interpretation of these contracts in a situation with disparate bargaining is shown in *Sweeney v. Hertz Corporation*, where it was alleged that Hertz negligently rented a vehicle with low tire pressure, causing the tire to burst, thus causing an accident, which killed one of the passengers.[110] The court held that a provision stating that holding Hertz harmless from "any loss, liability, and expense . . . arising from the use or possession of the car" did not clearly and unequivocally express the intent of the renters to indemnify Hertz from its own negligence, particularly with the allegation that the crash was caused by the sole negligence of Hertz.[111]

Both *Castillo* and *Sweeney* serve as examples of how courts within the same state grapple with very similar language and can still reach very different results.[112] While the degree of bargaining power likely could be found to be less in *Sweeney*, both of the incidents in question were alleged to be at the sole cause of the opposing parties.[113] As discussed above, setting a more rigid standard would allow for more even enforcement of these provisions, and improve the equitable principles of these contracts, providing a clearer understanding of the intent of each party.

Most states do set a bar limiting the protection of indemnification agreements, even when expressly mentioning that the party would be indemnified from its own negligence, which is when the negligence rises to a level of gross negligence.[114] Gross negligence, when invoked to

108. *Castillo*, 72 N.Y.S.3d at 587 (citing Rudloff, 971 N.Y.S.2d at 172–73).

109. *See* Barnhizer, *supra* note 107.

110. 740 N.Y.S.2d 19, 20 (App. Div. 1st Dep't 2002).

111. *Id.* at 21.

112. *Compare id.* (finding no clear and unequivocal expression of an intent to indemnify a company's own negligence "in excess of the limits stated herein or beyond the scope of the protection provided"), *and Castillo*, 292 A.D.2d at 288 (finding an express intent to indemnify a company's own negligence "to the extent permitted by law").

113. *Id.*

114. Sommer v. Federal Signal Corp., 593 N.E.2d 1365, 1370–71 (N.Y. 1992) (citing Kalisch-Jarcho, Inc. v. New York, 448 N.E.2d 413, 416–17 (N.Y. 1983) ("It is the public policy of this State, however, that a party may not insulate itself from grossly negligent conduct . . .

pierce an agreed-upon limitation of liability in a commercial contract, must "smack of intentional wrongdoing" or evince a reckless indifference to the rights of others.[115]

In *Sommer v. Federal Signal Corporation*, the gross negligence in question was the failure of an operator of an alarm company to report alarm signals in the building of one of its clients, when the newly hired operator misunderstood the client, and thought that it wanted its alarm services deactivated.[116] While the defendant did have an express negligence indemnification provision in its service contract, reading "Holmes shall not be liable for any of [810's] losses or damages . . . caused by performance or nonperformance of obligations imposed by this contract or by negligent acts or omissions by Holmes," the court held that the potential life threatening negligence here rose to the level of gross negligence, and potentially barring this as a defense if a jury found so.[117]

While this standard of not allowing parties to contract away their liability for gross negligence certainly is a rather obvious beneficial public policy, review of other case law along with the general disfavoring of shifting the burden of one's own negligence raises the question if more should be done to reduce the frequency of these agreements, or at least make them more transparent.

CONCLUSION

In conclusion, more courts should start adopting the minority opinion expressed by *American Jurisprudence* and states like Texas and Connecticut, which require express language when dealing with indemnification from one's own negligence.[118] This would advance the near-universally accepted standard and desire for a clear and unequivocal understanding of the intent of the parties to indemnify, thus leading to less confusion and need to litigate this area of the law. While some courts argue that this places a hindrance on freedom to contract, as stated by the Supreme Court of Texas in its decision to adopt an express negligence

[t]his applies equally to contract clauses purporting to exonerate a party from liability and clauses limiting damages to a nominal sum.").

115. *Id.*; *see also Kalisch-Jarcho, Inc.*, 448 N.E.2d at 416–17 ("[A]n exculpatory clause is unenforceable when, in contravention of acceptable notions of morality, the misconduct for which it would grant immunity smacks of intentional wrongdoing. This can be explicit, as when it is fraudulent, malicious or prompted by the sinister intention of one acting in bad faith. Or, when, as in gross negligence, it betokens a reckless indifference to the rights of others, it may be implicit.").

116. *Sommer*, 593 N.E.2d at 1367.

117. *Id.* at 1368, 1371.

118. *See Sweeney*, 292 A.D.2d at 288; *Hyson*, 829 A.2d at 831; 57A AM. JUR. 2D, *supra* note 78.

doctrine, "[t]he intent of the scriveners is to indemnify the indemnitee for its negligence, yet be just ambiguous enough to conceal that intent from the indemnitor."[119]

There simply does not seem to be much of a reason why a party would not want to clearly express what it wanted, unless it knew it was going to be a detriment to the other party. In these cases, it is rather obvious that the party bearing the burden of the other's negligence would likely be opposed to doing so and may be reluctant to agree to the term. Thus, it seems that the only true purpose of not having express language in these types of contractual provisions is to hide the true intent of the provision, which cuts directly against a true "meeting of the minds" necessary for proper contract formation.

If express statements of negligence are not to be accepted, then as an alternative courts should at least start narrowing their approach, similar to the Tennessee courts, which prohibit broad and inclusive language such as "any and all liability" as a clear and unequivocal understanding of an intent to indemnify.[120] Particularly in business to consumer contracts, this language should be avoided, because as reasoned by Judge Cohen, although while those with a legal background may understand the full extent of the implications that this language may have and what rights they may be giving up, the average layperson is much less likely to grasp that understanding.[121]

In conjunction with this, the final recommendation of this Note is to err more toward the side of the strictest scrutiny when these provisions involve business to consumer contracts, and if at all, to allow a more liberal reading of the contracts when the parties are sophisticated business entities. Overall, having a clearer and uniformly applied rule, particularly within states, should be implemented for there to be less arbitrary decisions with these types of agreements, and to enhance transparency in contracting.

119. *Ethyl Corp.*, 725 S.W.2d at 707–08.

120. *See Wells*, 435 S.W.3d at 748.

121. *Sansilo*, 98 So. 3d at 763 (Cohen, J., concurring).