ALLOCATING ENVIRONMENTAL LIABILITIES AND RISKS BY CONTRACT AND MAKING THAT STICK

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I. INTRODUCTION

Concern with environmentally-related issues in transactions has shifted dramatically over the last three decades. That concern has been particularly driven by the adoption at the federal level of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), [1] also known as the superfund law, and then by the subsequent adoption of corresponding state statutes.[2] Those statutes create a strict liability scheme.

A. Status Liability and Other Exposures to Environmental Liabilities and Risks

Under CERCLA and corresponding state statutes, certain persons are identified as "responsible parties" because of their "status" with respect to property. Of particular concern is the responsible party designation status imposed upon a current or former "owner or operator" of a "facility."[3] Not only are such persons strictly liable for contamination, but that liability can be, depending on the situation, joint and several. Consequently, any responsible party could conceivably be 100% liable for remediation of contaminated property even though the party did not cause or contribute to the contamination. One pervasive concern is that the cost of remediating site conditions could be material, in some cases exceeding the value of the property.

Responsible parties can additionally be subject to governmental claims for natural resource damages, fines, penalties and injunctive relief. Other third parties may also bring claims under those noted statutes for, among other things, contribution and cost recovery for remediation undertaken. Additionally, unresolved site conditions can potentially result in third-party claims arising in common law tort which seek property and bodily injury damages.

Environmental conditions impacting a property can impair the future marketability and resale value of that property. Unresolved environmental issues can also impair the ability of a prospective purchaser to finance its acquisition of property. Environmental impacts to property may occur in various ways, including spills or releases of contaminants through business operations (such as underground storage tanks or dry cleaning plants); the presence of contamination from historic operations and activities at a site; migration of contaminants onto the site from offsite sources; or hazardous substances incorporated in building materials (such as asbestos) or components (such as polychlorinated biphenyls [PCBs]) in electrical equipment. Uncertainties as to the nature and extent of site conditions can lead to uncertainty with respect to cost of remediation to reach regulatory closure. Even when issues have been appropriately addressed with governmental authorities and regulatory closure has been granted for a site, certain levels of contamination may remain at the property under the applicable risk-based closure rules. Dealing with such permissible residual conditions can result in project delays, along with increased construction and development costs. Additionally, properties that are remediated may have engineering controls or restrictions on permissible use or other institutional controls imposed upon them by governmental authorities as a condition of regulatory closure. These controls and restrictions may impede proposed site use or redevelopment.

Fears of purchasing or financing contaminated property, or even property with a perceived "taint" of environmental problems, arise in part because of the difficulties in reaching a comfort level as to the potential scope of environmental exposure. Environmental conditions are, by their nature, difficult to analyze. Those conditions often lurk beneath the surface of the property. Without a "Swiss cheese" approach to subsurface testing (which is both expensive and impractical), there is always the possibility that invasive testing in an area may miss a problem only a few feet away. Parties that conduct environmental site assessments are many times faced with the "slippery slope" of additional investigation and testing, although more investigation and testing does not always clarify the situation. Additionally, it may prove difficult to delineate the full extent of a problem discovered. One particular frustration is that environmental analysis is still more of an art than a science, so two technical consultants may provide widely-differing analyses of the same potential problem. Finally, even if a party feels it has gotten its arms around the problem, there still may be uncertainties regarding how much it will cost and how long it will take to reach regulatory closure for previously unresolved environmental conditions.

B. Managing Environmental Exposures

Various tools have been developed to help identify and then manage the potential environmental exposures.

1. Environmental Site Assessments

The Environmental Site Assessment ("ESA") is the primary tool for determining if there are environmental conditions potentially impacting a property. An ESA incorporates various component parts and uses an investigative process to highlight potential "recognized environmental conditions" at a site. This process includes review of historical use and regulatory records; property reconnaissance and

physical setting review; and interviews. Generally, environmental consultants performing an ESA will use an industry-developed form known as ASTM Standard E-1527-05. This standard reflects current "best practices" for the assessment process. It is designed to meet the "all appropriate inquiry" component required to qualify for certain defenses available under CERCLA.[4] (Those defenses are not available under the Texas counterpart of CERCLA.)

The ESA process has various practical shortcomings. In particular, it does not include a subsurface investigation component. Additionally, there will inevitably be gaps in information available about the site and surrounding properties. Also of significant importance, the scope of an ESA does not require analysis of certain potentially important concerns, including: wetlands, endangered species, asbestos, lead paint, mold, and regulatory compliance.

2. Governmental Liability Protection

There are also opportunities to utilize government programs to minimize exposure to environmental liabilities and risks. The Texas Voluntary Cleanup Program ("VCP") [5] administered by the Texas Commission on Environmental Quality ("TCEQ") creates a process for development of a risk-based cleanup plan approved by the TCEQ which, when successfully completed, provides a liability release from the State of Texas for new owners of and lenders on a property with respect to contamination remaining on that property. The liability release does not apply, however, with respect to any subsequent releases of contaminants impacting that property.

The Texas Innocent Owner/Operator Program ("IOP")[6] creates a process to obtain certification from the State of Texas that confirms the State will not hold the owner of a site liable for identified contamination that has migrated onto the site from adjacent property. Under the Texas Dry Cleaner Remediation Program ("DCRP"),[7] the State assumes remediation obligations for eligible sites impacted by retail dry cleaning operations.

Relief from status liability under CERCLA may also be available to qualifying "contiguous property owners," "bona fide prospective purchasers," and "innocent landowners" under various CERCLA liability exemptions and defenses. [8] Certain additional protections are available to qualifying lenders holding a security interest in contaminated property and to fiduciaries.[9]

3. Contractual Allocation

Because of the possibility of continuing uncertainties arising out of environmental conditions at a site, the parties to a real estate sale and purchase agreement will typically seek to allocate by contract environmental liabilities and risks that may be associated with a property being sold. A buyer will want to use such allocation to address concerns about how environmental liabilities and risks associated with site conditions may impact its ability to finance its purchase of the site, to lease or redevelop the site, and at some point in the future, to successfully exit its ownership portion. Sellers, on the other hand, may seek to transfer to the buyer all obligations regarding environmental liabilities and risks with respect to a site so it will not have legacy liabilities remaining after the sale closes. Both parties will be concerned about potential exposure not only for the known issues and conditions, but also for unknown latent issues and conditions.

The remaining of this paper will focus on Texas case law concerning the "trifecta" of contractual provisions used to allocate environmental liabilities and risks: "as is" provisions, releases, and indemnity provisions. The paper will also consider certain concerns that can impede the effectiveness of the contractual allocation sought by the parties and potential mechanisms to address such concerns.

The paper will discuss a number of significant Texas cases relating to contractual allocation. The reader will need to consult other resources for a detailed analysis of the mechanisms of contractual allocation provisions.[10]

While the discussion will focus on contractual risk allocation in the context of a buyer and seller, the concepts covered can also be applied to transactions between lenders and borrowers, landlords and tenants, and contractors and owners, as well as between adversaries seeking to settle disputes.

II. THE TRIFECTA OF CONTRACTUAL ALLOCATION PROVISIONS

A. The "As Is" Provision

Sellers will typically seek to sell real property on an "as is, where is" basis. The "as is" language in a contract is typically included in a long list of items for which the seller specifies it is not providing any representations or warranties. Any exceptions to that broad disclaimer (notably title matters) are also identified in that provision. Accordingly, the "as is" clause can be thought of as an "anti-representation and warranty," with the contract making clear that seller is not providing any assurance to buyer with respect to the items noted.

In many cases, the contract also requires that the buyer acknowledge that it had the opportunity to inspect the property with respect to environmental and other conditions and that it was relying solely on its own inspection and investigation of the property and not relying on representations or other information provided by the seller. Such acknowledgements are often included in what is referred to as a "waiver of reliance" clause.[11] One of the purposes of such contractual

clause is to negate the element of reliance which is an element of a fraud or misrepresentation claim. [12] The waiver additionally confirms that the buyer is acknowledging that the seller provided no warranties or representations upon which the buyer can rely.[13] Such clauses may be in different sections of a contract than an "as is" clause, but the two concepts are many times blurred by practitioners and lumped together by courts when referring to a transaction as an "as is" deal.

1. *Prudential*

In *Prudential Ins. Co. of Amer. v. Jefferson Assoc., Ltd.* [14] (hereinafter "*Prudential*"), the Texas Supreme Court considered a post-closing dispute arising out of a commercial real estate transaction involving the sale of an office building in Austin. The purchase and sale agreement contained the following provision:

> "As a material part of the consideration for the Agreement, Seller and Purchaser agree that Purchaser is taking the Property 'AS IS' with any and all latent and patent defects and that there is no warranty by Seller that the Property is fit for a particular purpose. Purchaser acknowledges that it is not relying on any representation, statement or other assertion with respect to the Property condition, but is relying upon its examination of the Property. Purchaser takes the Property under the express understanding there are no express or implied warranties..."[15]

The transaction was for cash.[16] The new owner later tried to refinance the building, and a prospective lender required evidence that the building did not contain asbestos.[17] When the building was inspected, asbestos fireproofing was discovered. [18] The new owner then filed suit against the seller, claiming that it had misrepresented the condition of the building and failed to disclose that it contained asbestos, which impaired its value.[19] The buyer alleged violations of the DTPA, fraud, negligence, and breach of the duty of good faith and fair dealing.[20]

Based on evidence at trial that the seller misrepresented the condition of the building and concealed the building's plans and specifications, the jury found for the buyer and awarded damages (including punitive damages) in excess of $25 million on a transaction where the purchase price for the property was only $7.25 million.[21] The Austin Court of Appeals affirmed the jury's award.[22]

On appeal, the Texas Supreme Court concluded that that the buyer's agreement to purchase the property "as is" precluded a claim that the seller's conduct caused the buyer any harm.[23] The court reasoned:

> "By agreeing to purchase something 'as is,' a buyer agrees to make his own appraisal of the bargain and to accept the risk that he may be wrong.[24] The seller gives no assurances, express or implied, concerning the value or condition of the thing sold."[25]

The Texas Supreme Court then reversed the judgment of the court of appeals and rendered a take-nothing judgment.[26]

Practitioners frequently point to *Prudential* as establishing that an "as is" transaction will foreclose later claims asserting breach of representations. However, the *Prudential* court qualified its holding by stating that an "as is" agreement would not have "this determinative effect in every circumstance."[27]

2. The *Prudential* Exceptions

In *Prudential*, the Texas Supreme Court specifically limited the enforceability of "as is" language in situations in which: (1) the buyer was induced to enter into a contract through a fraudulent representation or concealment of information by the seller, or (2) the seller engaged in conduct that impaired, obstructed, or interfered with the buyer's inspection of the property being sold.[28] One court of appeals has referred to these as the "fraudulent-inducement exception" and the "impairment-of-inspection exception," respectively.[29] In this regard, the Texas Supreme Court reasoned that:

> "A seller cannot have it both ways: he cannot assure the buyer of the condition of a thing to obtain the buyer's agreement to purchase 'as is', and then disavow the assurance which procured the 'as is' agreement. Also, a buyer is not bound by an 'as is' agreement if he is entitled to inspect the condition of what is being sold but is impaired by the seller's conduct. A seller cannot obstruct an inspection for defects in his property and still insist that the buyer take it 'as is'. In circumstances such as these an 'as is' agreement does not bar recovery against the seller."[30]

The *Prudential* court also recognized that, even absent fraudulent inducement or impairment of inspection, "other aspects" of a transaction may make an "as is" agreement unenforceable.[31] In particular, the nature of the transaction and totality of the circumstances surrounding the agreement must be considered.[32] The court stated that:

> "Where the 'as is' clause is an important part of the basis of the bargain, not an incidental or 'boiler-plate' provision, and is entered into by

> parties of relatively equal bargaining position, a buyer's affirmation and agreement that he is not relying on representations by the seller should be given effect. . . . We think it too obvious for argument that an 'as is' agreement freely negotiated by similarly sophisticated parties as part of the bargain in an arm's-length transaction has a different effect than a provision in a standard form contract which cannot be negotiated and cannot serve as the basis of the parties' bargain."[33]

3. The State of the *Prudential* Exceptions After *Schlumberger* and *Forest Oil*

The Texas Supreme Court subsequently considered the *Prudential* exceptions in both *Schlumberger Tech. Corp. v. Swanson* [34] ("*Schlumberger*") and *Forest Oil Corp. v. McAllen*[35] ("*Forest Oil*").

In *Schlumberger*, the Swansons agreed to a complete release of claims to settle a dispute involving an underwater diamond-mining project off the coast of South Africa.[36] The Swansons sold their interests in the venture to Schlumberger for roughly $1 million,[37] and the parties signed a settlement agreement, which included the following waiver-of-reliance provision:

> "[E]ach of us [the Swansons] expressly warrants and represents and does hereby state ... and represent ... that no promise or agreement which is not herein expressed has been made to him or her in executing this release, and that **none of us is relying upon any statement or representation of any agent of the parties being released hereby. Each of us is relying on his or her own judgment** and each has been represented by ... legal counsel in this matter. The aforesaid legal counsel has read and explained to each of us the entire contents of this Release in Full, as well as the legal consequences of this Release...."[38] (emphasis added).

After learning that Schlumberger later sold the interest to DeBeers for about $4 million, the Swansons sued, claiming Schlumberger had fraudulently induced them to accept the low-price buyout.[39] The Swansons maintained that Schlumberger, when it entered into the settlement knew that the Swansons' interest had a far higher value.[40]

In rendering its opinion, the Texas Supreme Court assumed that: (1) Schlumberger knew during negotiations that it was misrepresenting the value of the interest, and (2) the misrepresentations were made with the intent of inducing the Swansons to settle.[41] Despite these assumptions, the court held as a matter of law that the Swansons could not show fraudulent inducement.[42] The court found it significant that, throughout the negotiations that led to the execution of the release, the parties disagreed about the value of the Swansons' interest.[43] The court stated that the sole purpose of the release was to end the dispute as to the value of the commercial project once and for all.[44] Noting that the Swansons unequivocally disclaimed reliance upon representations by Schlumberger about the project's value, the court concluded that, in light of this language and in this context, the Swansons must have intended to forego reliance on any representations about the value of the project, given that this was the very dispute the release was supposed to resolve.[45]

In reported decisions after *Schlumberger*, Texas appellate courts disagreed over its holding; two courts even contended that the Texas Supreme Court had created yet another exception to *Prudential* that only applied when the parties are seeking to terminate a business relationship and resolve a long-running dispute.[46] However, the Texas Supreme Court clarified its previous holding in *Forest Oil Corp. v. McAllen,* by stating that although in *Schlumberger* the company's representations about the project's value and feasibility led to "the very dispute that the release was supposed to resolve," the reasoning applied "broadly to contracts generally."[47]

In *Forest Oil*, the Forest Oil Corporation settled a long-running lawsuit over oil and gas royalties and a leasehold development involving the McAllen Ranch.[48] The settlement agreement resulted from a week-long mediation that released Forest Oil from "any and all" claims "of any type or character known or unknown" that are "in any manner relating to" the McAllen Ranch Leases and the covered lands, whether the claims sound in contract, tort, trespass or any other theory.[49] While this sweeping release resolved the royalty and nondevelopment disputes, the parties reserved the right to arbitrate claims "for environmental liability, surface damages, personal injury, or wrongful death occurring at any time and relating to the McAllen Ranch Leases." [50] The settlement agreement specifically disclaimed reliance "upon any statement or any representation of any agent of the parties" in executing the releases contained in the agreement.[51] The parties also acknowledged they were "fully advised" by legal counsel as to both the contents and consequences of the release.[52]

McAllen subsequently sued Forest Oil to recover for environmental damage caused when Forest Oil allegedly "used its access under the leases to the surface estate to bury highly toxic mercury-contaminated" material on the McAllen Ranch. [53] McAllen also alleged environmental and personal injuries were caused when Forest Oil moved oilfield drilling pipe contaminated with radioactive material from the McAllen Ranch to a nearby property, which housed a sanctuary for endangered rhinoceroses.[54]

Forest Oil sought to compel arbitration under the settlement agreement, but McAllen argued that the arbitration provision was induced by fraud and thus unenforceable.[55] McAllen recounted assurances made during the 1999 settlement negotiations that no environmental pollutants or contaminants existed on the property.[56] McAllen claimed that an unidentified lawyer for one of the four defendants "assured [McAllen] that there was no problem, no issue at all that [he] would be concerned about," and McAllen says he signed the agreement based on that specific representation.[57] McAllen claimed that when this assurance of "no environmental issues" was given, Forest Oil knew all about the radioactive-contaminated pipe and the mercury-contaminated material.[58]

The Texas Supreme Court framed the pertinent issue as follows: "Did McAllen's disclaimer of reliance on Forest Oil's representations negate the fraudulent-inducement claim as a matter of law?"[59] Forest Oil contended the waiver-of-reliance provision in the settlement agreement conclusively defeated McAllen's fraudulent inducement claim.[60] The Texas Supreme Court agreed.[61]

In reaching its conclusion, the court stated that "parties who contractually promise not to rely on extra-contractual statements—*more than that, promise that they have in fact not relied upon such statements*—should be held to their word."[62] The court noted that when knowledgeable parties expressly discuss material issues during contract negotiations, but nevertheless elect to include a waiver-of-reliance provision, courts will generally uphold the contract.[63] An all-embracing disclaimer of any and all representations shows the parties' clear intent.[64] The court stated that "[i]f disclaimers of reliance cannot ensure finality and preclude post-deal claims for fraudulent inducement, then freedom of contract, even among the most knowledgeable parties [who were] advised by the most knowledgeable legal counsel, is grievously impaired."[65]

In *Forest Oil*, the court then reaffirmed its previous holdings in both *Prudential* and *Schlumberger* that a disclaimer of reliance "will not always bar a fraudulent inducement claim."[66] Instead, it merely acknowledges that facts may exist where the disclaimer lacks "the requisite clear and unequivocal expression of intent necessary to disclaim reliance" on the specific representations at issue.[67] Courts must always examine the contract itself and the totality of the surrounding circumstances when determining if a waiver-of-reliance provision is binding.[68] In doing so, the court also reaffirmed the factors previously established in both *Prudential* and *Schlumberger* as set forth above.[69]

4. The *Bonnie Blue* Exception

In *Bonnie Blue v. Reichenstein,* the Dallas Court of Appeals set forth another exception to the protection an "as is" provision offers to a seller with respect to environmental site conditions.[70] The case concerned a 1.5–acre tract of land located in Dallas.[71] From 1964 to 1982, a wood preserving business was operated on the property utilizing an underground storage tank, a concrete sump, and a steel vat containing wood preserving chemicals.[72] In 1982, Reichenstein sold the property to T.D. Corporation.[73] The sales contract contained the following provision as paragraph 8:

> "Purchaser acknowledges that he has inspected all buildings and improvements situated on the property and is thoroughly familiar with their condition, and Purchaser hereby accepts the property and the buildings and improvements situated thereon, in their present condition, with such changes therein as may hereafter be caused by reasonable deterioration."[74]

Bonnie Blue, Inc. subsequently purchased the property in 1991 from the successor-in-interest to T.D. Corporation.[75] In 1999, after discovering environmental contamination, Bonnie Blue, Inc. entered the property into the VCP and removed an underground storage tank, concrete sump, steel vat, and contaminated soil.[76] Bonnie Blue, Inc. then filed a cost recovery action against Reichenstein asserting a claim under the Texas Solid Waste Disposal Act ("TSWDA")[77] as well as a common law contribution and indemnity claim.[78]

Reichenstein moved for and was granted summary judgment on the ground that paragraph 8 of the sales contract between the Reichenstein and T.D. Corporation was an "as is" clause that barred Bonnie Blue, Inc.'s claims.[79] On appeal, Bonnie Blue, Inc. argued the trial court erred in granting summary judgment because: (1) paragraph 8 was not an "as is" clause, (2) Bonnie Blue, Inc. was not a party to the Reichenstein/T.D. Corporation sales contract, and (3) paragraph 8 did not preclude the TSWDA claim asserted by Bonnie Blue, Inc.[80]

The Dallas Court of Appeals dismissed the first two points of error because Bonnie Blue, Inc. failed to support such arguments with applicable authority.[81] However, with regard to the third point of error, the court ignored the fact that Bonnie Blue, Inc. was not a party to the original sale contract. The court ruled that, even where the seller and buyer of real estate had agreed in their contract of sale that the property was being sold "as is," a buyer could later bring a claim under the TSWDA for costs of remediating the property for contamination existing at the time of the sale.[82] The court recognized that in *Prudential*, the buyer could not recover for alleged misrepresentations made by the

seller concerning the condition of the property because the "as is" provision prevented the buyer from proving that the seller caused the buyer harm.[83] However, in a cost-recovery claim under the TSWDA, causation issues are not present since the cost-recovery claim is based on the status liability of the former owner.[84] On this basis, the court held that a "responsible party" under the TSWDA will be held liable "without the need to establish causation."[85] The court stated that to allow otherwise would "clearly circumvent both the intent and language of the statute."[86]

No reported Texas case has addressed whether an "as is" provision bars a cost-recovery claim under CERCLA, which creates the same type of strict liability exposure as the TSWDA. Nonetheless, the majority of the courts from other jurisdictions that have considered this issue have held that an "as is" clause does not preclude such a claim.[87]

If a seller intends to protect itself from a later cost-recovery claim by a buyer after selling property on an "as is" basis, it will need to obtain at least a release, if not an indemnity, from the buyer of the type discussed below. A seller should consider bolstering the protection provided by the "as is" language by also including a waiver-of-reliance clause. A seller may also propose an additional contractual covenant that states effective as of closing, as between seller and buyer, buyer will thereafter be responsible for, and assume liability arising out of, all environmental conditions, irrespective of the whether the environmental condition first occurred before or after closing, with respect to the property being sold. Because that covenant is not in the form of a release or indemnity obligation, the effect and enforceability of such covenant, standing by itself, is not clear.[88]

B. The Release Provision

A release is the primary contractual provision used by a seller to protect itself from liability exposure arising out of the *Bonnie Blue* exception. A release from the buyer would bar the buyer from asserting a TSWDA cost recovery claim against the seller of property.

A release[89] is a type of exculpatory clause in which one party, for consideration, releases or discharges the other party from, and relinquishes, actual or potential legal claims.[90] A release can extinguish a claim or cause of action in the same manner as a prior judgment and is an absolute bar to any suit on the released matter.[91]

In using a release to allocate liabilities and risks in a purchase and sale contract, the parties may provide for certain carve outs. These carve outs may limit the types of claims to which the release applies, thus reducing the scope of the release.

It is possible for one party to release another party from liability for future occurrences so long as the release is not unconstitutional, in violation of a statute, or against public policy.[92] An agreement may be found to be against public policy if there is a disparity of bargaining power or if the agreement releases a party from their own gross negligence or intentional conduct.[93] Releases are strictly construed.[94] Any claims that are not clearly within the subject matter of the release are not discharged.[95] In addition, a release discharges only those parties which are specifically named or otherwise identified.[96] Although releases are to be construed narrowly, if the release is broad enough to cover the released claims, the claim is released even if the releasing party is unaware of the existence of the claim.[97]

A release must satisfy both the fair notice requirements of the express negligence doctrine and conspicuousness requirements (noted below with respect to indemnity provisions) if it is intended to relieve a party in advance of responsibility for its own negligence.[98] However, such requirements only apply to release provisions regarding future acts of negligence, not past acts.[99]

In Texas, common law tort claims do not run with the land when the property is sold. A subsequent owner of property cannot assert common law claims that impact property it acquires unless it has received an assignment of those claims from the party that owned the property when the claims first arose.[100] Consequently, so long as seller does not assign its claims to buyer, seller should have the equivalent of a release from contribution claims that could otherwise be asserted against it by a third party, if buyer were to assert a claim against that third party relating to contamination to buyer's property that occurred during seller's ownership.

C. The Indemnity Provision

Under a contractual indemnification provision, an indemnitor agrees to hold an indemnitee harmless against existing or future loss or liability, or both.[101] The phrases "hold harmless" or "save harmless" are synonymous with indemnify.[102] An agreement to indemnify another party does not carry with it the duty to defend unless that duty to defend is specifically stated as part of the contractual provision.[103] An indemnity agreement creates a potential cause of action in the indemnitee against the indemnitor.[104]

In contrast to a release, which may be thought of as providing (to borrow from insurance terminology) "first party coverage" in that it protects the released party from subsequent claims by a party in contractual privity with the released party, an indemnity provision is typically thought of as being used to obligate the indemnitor to provide "third party coverage," by protecting the indemnitee against loss or liability to third parties.[105] There should be no reason, however, why the indemnification protection cannot apply to

environmental site conditions that create environmental liability or risk to the indemnitee, but for which a claim by a third party (such as a governmental entity) has not been asserted.

1. Coverage for Indemnity Claims

In *ZAO, Inc. v. Yarbrough Drive Center Joint Venture*, [106] the court considered whether a third-party claim was required to trigger the indemnity obligation in a lease. The disputed portion of the agreement stated:

> "Lessee agrees to indemnify and hold Lessor harmless from any and all claims, demands, losses or expenses asserted against or suffered by Lessor as a result of any hazardous or toxic substances located in or under the soil of the Leased Premises."[107]

ZAO, the lessee, interpreted the clause as imposing liability only if a third-party claim was asserted against Yarbrough pertaining to the toxic substances remaining in the leased premises. [108] Yarbrough, the lessor, interpreted the clause as requiring ZAO to return the leased premises to a toxic-free condition regardless of whether any third-party claims have been filed.[109]

The El Paso Court of Appeals first considered whether the provision was ambiguous.[110] The court held that ZAO's interpretation of the clause was reasonable, particularly when read in the following manner: "Lessee agrees to indemnify ... from any claims ... asserted against ... Lessor." [111] With respect to Yarbrough's interpretation, the court reasoned that although the word "indemnify" was not defined in the lease agreement, the legal term is commonly understood to mean the following:

> "To restore the victim of a loss, in whole or in part, by payment, repair, or replacement. To save harmless; to secure against loss or damage; to give security for the reimbursement of a person in case of an anticipated loss falling upon him. To make good; to compensate; to make reimbursement to one of a loss already incurred by him."[112]

Based on this fairly broad definition, the court held that the clause could be read in the following manner: "Lessee agrees to [reimburse] ... any and all losses or expenses ... suffered by Lessor." The court stated that when construed in this manner, Yarbrough's interpretation was not unreasonable as well and therefore the clause was ambiguous.[113]

Once the clause was determined to be ambiguous, the intended meaning of the contract became an issue of fact for the jury to decide. [114] At trial there was evidence from ZAO's president that his company was responsible for the "cleanup of any toxic substances" as well as a letter from him in which he stated that ZAO would "restore the property to its original condition."[115] Based upon this evidence, the El Paso Court of Appeals held that the evidence supported Yarbrough's interpretation that ZAO was required to restore the property regardless of whether a third-party claim had been filed.[116]

2. Additional Drafting Considerations

Experienced practitioners understand that attempting to utilize boilerplate indemnification provisions is asking for trouble. As a result, the contractual language that spells out the scope of, the trigger for, and the components of contractual indemnification provisions is typically heavily negotiated.[117] Those provisions require attention to detail and careful crafting to avoid the ambiguity that the *ZAO* court had to deal with.

The Texas Supreme Court has required indemnification provisions that protect a party against its own wrongdoing to satisfy the fair notice requirements of both express negligence and conspicuousness.[118] The fair notice requirements also apply to releases.[119]

Texas case law is not clear on whether an indemnitee can be protected against its own gross negligence.[120] Nonetheless, public policy most likely prohibits indemnification for an indemnittee's own intentional wrongful acts.[121] Texas has abolished the doctrine of common law indemnity.[122]

CERCLA provides that a party can contract to indemnify another party against CERCLA liability.[123] Unless that provision was intended to foreclose assertions that indemnification in the context of environmental liability is against public policy, the statutory provision appears to be superfluous. The TSWDA does not contain a similar provision. The Fifth Circuit has held that an indemnification agreement which indemnified a party from all liability, including CERCLA liability, was valid even though environmental liability under those statutes was not specifically contemplated at the time of contracting.[124]

III. THE SUCCESSOR PROPERTY OWNER PROBLEM

A. *In re El Paso Refinery, L.P.*

As noted previously, a seller will generally seek to protect itself from legacy environmental liabilities relating to property it sells by using one or more of the contractual allocation provisions discussed above. While the seller and buyer will be in contractual privity, and can bind themselves to the contractual provisions they negotiate, what happens to the protections negotiated by the seller when the buyer later sells the property to a subsequent purchaser? That question was considered by the Fifth Circuit in *In re El Paso Refinery, L.P.*[125]

That case arose out of a complicated series of transactions, and subsequent bankruptcy proceedings, involving the sale and purchase of a refinery located in El Paso. The original purchaser of the refinery, TRMI Holdings, Inc. ("TRMI"), had agreed to assume all responsibility for environmental contamination at the refinery.[126] TRMI later sold the refinery to El Paso Refinery, L.P. (the "Debtor") which took ownership of the refinery through a series of conveyances. [127] Following the Debtor's bankruptcy, the refinery was acquired by a subsequent buyer, Refinery Holding Company, L.P. ("RHC"). [128] RHC subsequently asserted contribution and environmental claims against TRMI and Texaco, a previous owner.[129]

In connection with claims asserted by various parties, the Fifth Circuit considered whether the covenants undertaken by the Debtor in connection with its purchase of the refinery from TRMI were binding on RHC, a subsequent purchaser.[130] When Debtor took ownership of the refinery, the deed from TRMI included the following provision:

> "Grantee [El Paso Ltd.] ***covenants and agrees that it shall never, directly or indirectly, attempt to compel Grantor [TRMI] to clean up, remove or take remedial action*** or any other response with respect to any of the buried sludge sites, the waste pile site, the Active Hazardous Waste Storage Sites, the underground liquid petroleum and petroleum vapors (including, without limitation, any leaching therefrom or contamination of the air, ground or the ground water thereunder or any effects related thereto), or any and all waste water treatment ponds or treatment systems on or in the vicinity of said premises ***or seek damages therefor. This covenant shall run with the land and shall bind Grantee's successors, assigns and all other subsequent owners of the property.***" [131] (Emphasis added).

The Fifth Circuit characterized the provision as a covenant barring the purchaser and all future owners from seeking contribution or indemnity from the seller for any environmental cleanup costs.[132] The federal court then held that under Texas law, the covenant obligation did not "touch and concern" land and thus was not enforceable against successor property owners as a covenant running with land.[133] The court stated the following:

> "***Any*** burden ***or benefit created by the TRMI Deed affects only TRMI personally and has no direct impact upon the land itself.*** The Refinery's owner may, in accordance with the deed's provisions, take remedial action or not take remedial action, pollute or not pollute, as long as contribution is not sought from TRMI. ***The covenant does not compel nor preclude the promisor or any subsequent owner from doing anything on the land itself.*** The covenant is not predicated upon an agreement to refrain from taking any action on the land, as in the case of a negative covenant. Nor does it permit TRMI, the promisee, to enter or utilize the land for any purpose. Rather, it is a continuing and non-contingent contractual agreement under which the Debtor [El Paso] agrees to refrain from seeking environmental remediation or damages from TRMI. A personal contractual arrangement does not qualify as a covenant."[134] (Emphasis added).

The court then held that the deed's restrictive language does little more than shield TRMI from the possibility of a contribution suit by a future owner.[135] In this respect, the covenant operated as a cost-shifting mechanism, by pushing all costs of remedial action forward onto the Debtor and any subsequent purchaser.[136] The court stated that "[w]e believe such a provision is more analogous to an obligation to assume an encumbrance .... Under Texas law, a covenant to pay an encumbrance does not run with the land."[137]

B. Related Texas Case Law

The Fifth Circuit's holding in *In re El Paso Refinery, L.P.*, as it relates to a subsequent property owner not being bound by an obligation that is not deemed to touch and concern the land, is consistent with Texas case law holding that a party to an agreement cannot obligate successors and assigns to indemnity obligations undertaken by that party absent express or implied assumption of those obligations by the successors or assigns. [138] A pertinent case in a non-environmental context is *Jones v. Cooper Industries, Inc.*,[139] where pursuant to a Patent Rights Agreement ("PRA") Jones sold and assigned certain patent rights to a third-party in exchange for future royalties. The PRA provided that it was binding on the "[third-party], its subsidiaries, successors, assigns, or licensees."[140] Cooper Industries, Inc. subsequently obtained the patents from the third-party, but did not expressly assume the obligations created by the PRA and refused to pay Jones the royalties.[141] Jones brought suit against Cooper Industries, Inc. for unpaid royalties and argued that it, as an assignee, was liable under the clause referenced above. [142] The Houston Court of Appeals disagreed and held that "a party cannot be held liable under another party's contract without an express or implied assumption of the obligations of that contract."[143]

The assignor of a contract will remain liable for performance of the obligations which the assignor

assumed therein, even after it is assigned.[144] The assignee of a contract is not bound to perform the assignor's obligations under the contract unless the assignee expressly or impliedly assumed the obligations.[145] In order to expressly assume a contractual obligation, there must be actual promissory words, or words of assumption, on the part of the assignee.[146] Implied covenants are not favored, and courts will not lightly imply additional covenants enlarging the terms of a contract.[147] Courts can find implied assumptions on equitable grounds.[148] However, the *Jones* court did not find that the subsequent assignee impliedly assumed the obligation simply because it was on notice of the obligation.[149]

C. Case Law from Other Jurisdictions

Courts from other jurisdictions have reached varying conclusions on whether a subsequent property owner is bound by covenants undertaken by previous property owners. For instance, in *Calabrese v. McHugh*,[150] a Connecticut court reached the same conclusion as in *In re El Paso Refinery, L.P.* when considering whether the owner of land with known environmental problems can shift the risk of liability to future owners by obtaining a covenant not to sue from the purchaser. The court concluded that a covenant that simply allocates such liability does not touch or concern the land and, thus, is effective only until the grantee transfers the property to a subsequent purchaser.[151] Like the court in *In re El Paso Refinery, L.P.*, the Connecticut court did not address whether its decision unfairly disregarded the intentions or expectations of the parties. Nor did it address the likely impact of its decision on the ability of companies to shift liability to purchasers of property that may be impacted by environmental contamination. The factor the courts viewed as determinative in both cases was that the covenant affected the economic positions of the parties, but did not affect their property.

In *1515-1519 Lakeview Boulevard Condo. Ass'n v. Apartment Sales Corp.*,[152] a Washington court came to the opposite conclusion from that reached in *In re El Paso Refinery, L.P.* and *Calabrese*. The Washington case involved a covenant not to sue in a situation where a city attempted to avoid liability for having permitted homes to be built in an area in which it had concerns about possible landslides.[153] The court concluded that a covenant not to sue for damages arising out of movement of the soil does affect the use or enjoyment of the land, and thereby touches or concerns the land, and can be made to run with the land to bind successors.[154]

In all three cases noted above, the covenants seem to have an identical effect—they shifted environmental risk to the current owners of the property without in any way purporting to restrict the use that is made of the property. Using the reasoning of the Washington court, the other two courts also could have concluded that the covenant at issue touched or concerned the soil, and the Washington court could have used the reasoning of the other two cases to conclude that the covenants did not do so.

The recently published Restatement (Third) of Property has abolished "touch and concern" as an element of enforceable covenants. In its stead, the Restatement provides that such covenants are valid unless they are illegal, unconstitutional, or violate public policy.[155] Under the revised Restatement, the party seeking to avoid enforcement bears the burden of proof,[156] and if a court determines that allowing a covenant to run with the land would violate public policy, it should identify the harm that leads to that conclusion.[157]

In *Bennett v. Commission of Food and Agriculture*,[158] the issue was whether the Bennetts were allowed to construct a dwelling for their use anywhere on their land even though it was subject to an Agriculture Preservation Restriction ("APR") negotiated by the previous owners of the land. Citing an earlier draft of section 3.1 of the Restatement, the court fashioned the following test: as long as the APR did not contravene public policy when it was made and its current enforcement was consistent with public policy and was reasonable, the APR should be enforced against the Bennetts.[159] Although the court did not explicitly identify the public policy on which it was relying, the court found that the APR was "consistent with, indeed strengthen[ed], the public policy expressed in [Massachusetts General Laws] § 31."[160] The *Bennett* court ended its opinion by saying that the case prompted the court "to observe that certain common law rules concerning the creation, validity, and enforcement of servitudes may no longer be sound and that we are willing to reconsider them in appropriate cases."[161]

IV. MAKING ALLOCATION STICK

Parties will want to keep in mind the issues presented by the *Prudential* exceptions, along with the holdings in *Bonnie Blue* and *ZAO* when negotiating contractual allocation provisions for purchase and sale agreements. For instance, without an "as is" provision and waiver of release, seller could be subject to claims based on breach of representations and warranties or fraud. Without a release in its favor, seller could be subject to a cost recovery claim by buyer. Without an indemnity provision, buyer or seller, as the case may be, is potentially exposed to third party claims.

The relative bargaining positions of the parties will, of course, have a material bearing on the types and scope of contractual allocation provisions that end up in a purchase and sale agreement. Additionally, requests for carve outs and other exceptions to the coverage of releases and indemnification provisions can add additional complications in determining whether

particular environmental liabilities and risks of concern have been appropriately addressed.

The holding in *In re El Paso Refining, L.P.* will pose a particular additional challenge when parties attempt to craft contractual provisions that will require successor property owners to release and indemnify the predecessor property owners. Where Owner A, as seller, sells the property to Owner B, and Owner B then sells the property to successor Owner C, Owner A will find it desirable to have the contractual protection of release and indemnity provisions directly from Owner C, even though Owner A and Owner C are not in contractual privity. Some potential contractual mechanisms to overcome that challenge are noted below. Environmental insurance may also be a way to allocate environmental risk outside of a purchase and sale agreement.

A. Potential Contractual Mechanisms – Successor Property Owners

One possible contractual mechanism to assure Owner A that the Owner B will negotiate provisions in the contract with Owner C that will obligate Owner C to provide a release and indemnity to Owner A would be to create a contingent restriction on property use. Such a restriction could, for instance, automatically prohibit use of the property for certain purposes, such as residential use, and thereby preclude uses that could result in exposure to conditions that could pose increased human health risks. Such a restriction would be triggered automatically when Owner B sells the property to Owner C without requiring Owner C to provide a release and indemnity to Owner A comparable to what had previously been provided to Owner A by Owner B. The provision would make Owner A a third party beneficiary of the subsequent purchase and sale contract.

A second possible contractual mechanism would be to tie a release and indemnity that would benefit predecessor property owners to other restrictions that clearly touch and concern the land, such as a restriction on use of groundwater or a restriction of the property to non-residential use. Making the contractual allocation an integral and inseparable part of a comprehensive property use restriction scheme that has elements that touch and concern the land may address the objections raised by the court in *In re El Paso Refining, L.P.* and allow the release and indemnity to run with the land and bind subsequent property owners.

A third possible contractual mechanism would be to have Owner B covenant that it will include a specified contractual provision protective of predecessor property owners in any sales contract it later enters into. Such contractual provision could require that Owner C, as the successor purchaser, provide Owner B and Owner A (as a third party beneficiary) the same contractual allocation protection as previously negotiated between Owner A and Owner B.

B. Environmental Insurance – An Alternative to Contractual Risk Allocation

A party seeking protection from environmental claims may want to consider a risk allocation tool outside of the purchase and sale agreement: an environmental insurance policy. There are a number of circumstances where risk allocation outside of a party's transactional agreement may be necessary: the other party may not be willing to provide an acceptable release or indemnity; an indemnity may be of limited value because of the indemnitor's lack of financial wherewithal; or a party may want contingent backup if indemnification, or governmental liability protection, does not respond adequately.

Insurance can allow environmental risks to be allocated to an insurance company willing to accept specified risks following an underwriting process. Because an insurance company is subject to state regulation, the insured party should be able to take some comfort that the risks are being covered by an entity that has demonstrated financial wherewithal.

Environmental insurance may have practical limitations that the party seeking protection may find unattractive in comparison to a contractual indemnity. An insurance policy will have specified coverage limits and a specified term. In contrast, indemnification provisions in a purchase and sale agreement can be negotiated so there is no monetary limit on coverage and no time limit on the indemnity obligation. Additionally, even where an insurance company is willing to underwrite the risks, there are exclusions in environmental insurance policy terms that may restrict coverage in certain key areas. One significant issue is a carve-out of coverage for cleanup costs for known pollution conditions. However, even known conditions can be strategically underwritten, particularly with the assistance of a broker and an attorney experienced in negotiating the terms of environmental insurance. It may be possible for a policy form to be manuscripted to provide those elements of coverage that are of particular importance to the party seeking coverage. Among the options to consider that may be applicable to the deal:

- excluding claims for cleanup, but not for bodily injury or property damage;
- distinguishing onsite and offsite exposures;
- providing that only specific contaminants or media are excluded;
- limiting the trigger for cleanup coverage to claims for government-mandated cleanup and excluding voluntary cleanup;

- providing that insurance only applies when contractual indemnity provisions or applicable state funds do not respond;
- utilizing higher retentions/deductibles; and
- providing coverage for new releases of an existing contaminant by the strategic use of retroactive dates.

Additionally, underwriters may be willing to re-evaluate the risk of known conditions after regulatory closure on the property has occurred, even though certain levels of contaminants still remain in place under risk-based closure, and readjust the coverage and exclusions accordingly.

Other exclusions commonly found in the forms of environmental insurance policies can restrict or eliminate coverage for underground storage tanks, asbestos and mold. Again, there may be opportunities to manuscript policy forms and craft meaningful coverage for those conditions.

Although the costs of obtaining an environmental insurance policy may make it an unattractive alternative to contractual indemnification, there are currently a significant number of environmental insurance companies offering this specialized coverage, which makes for a competitive environment with respect to coverage available and pricing. Exploring insurance as an alternative or as augmentation to environmental indemnity can be worthwhile. The insurance underwriting process can also provide parties to a transaction with an additional analysis of the actual risks presented, since a third party unaffiliated with those parties will be conducting the underwriting and basing a financial decision on its analysis. Many of the additional insurance companies now offering environmental policies have only recently come to the environmental insurance market and do not have prior experience in offering these types of policies. Consequently, for environmental policies with multi-year policy terms, it is increasingly important to consider the financial health of the insurance company offering a quote since the real value of a policy lies in having an insurance company with adequate financial wherewithal at the time a claim arises.

V. CLOSING

Environmental liabilities and risks pose particular challenges when parties seek to purchase and sell property. Parties can contractually allocate the liabilities and risks relating to environmental conditions in a purchase and sale agreement using "as is" provisions, releases, and indemnity provisions. The ultimate success of those provisions in meeting the respective goals of the parties will depend upon strategic analyses of the issues presented, along with careful and, in some instances, creative drafting keeping in mind applicable Texas case law. Finally, under certain circumstances, an insurance company may be able to underwrite and assume some or all of the environmental risks that would otherwise be allocated between the parties in the purchase and sale agreement.

ENDNOTES

[1] 42 U.S.C. § 9601 *et seq.* (2010).

[2] The Texas Solid Waste Disposal Act ("TSWDA") is the Texas state counterpart to two federal environmental statutes: CERCLA and the Resource Conservation and Recovery Act ("RCRA"). *R.R. Street & Co. Inc. v. Pilgrim Enterprises, Inc.*, 166 S.W.3d 232, 238 (Tex. 2005). CERCLA was enacted to facilitate the prompt clean-up of hazardous substances that have already been released into the environment and to ensure that those responsible for the hazardous substances bear the cost of their actions. *Id.* RCRA governs hazardous waste from the time it is generated through storage, transportation, and ultimate disposal. *Id.* Under certain conditions, RCRA also requires the cleanup of property contaminated with hazardous waste. *Id.* The TSWDA has cost-recovery provisions which are structured similarly to those in CERCLA. *Id.*

[3] CERCLA identifies the following as responsible parties: "1) owner and operator of a vessel or a facility, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance ...." 42 U.S.C. § 9607(a). The Texas Solid Waste Disposal Act similarly defines a person is responsible for solid waste if the person: "(1) is any owner or operator of a solid waste facility; (2) owned or operated a solid waste facility at the time of processing, storage, or disposal of any solid waste; (3) by contract, agreement, or otherwise, arranged to process, store, or dispose of, or arranged with a transporter for transport to process, store, or dispose of, solid waste owned or possessed by the person, by any other person or entity at: (A) the solid waste facility owned or operated by another person or entity that contains the solid waste; or (B) the site to which the solid waste was transported that contains the solid waste; or (4) accepts or accepted any solid waste for transport to a solid waste facility or site selected by the person." TEX. HEALTH & SAFETY CODE ANN. § 361.171(a).

[4] 40 C.F.R. Part 312 (2010).

[5] TEX. HEALTH & SAFETY CODE ANN. § 361.601- 361.613.

[6] *Id.* at § 361.751-361.754.

[7] *Id.* at § 374.001-374.253

[8] 42 U.S.C. §§ 9601(35)(A), (B), 9601(40), 9707(r)(1), 9707(q).

[9] 42 U.S.C. §§ 9601(20)(E), 9607(n)(5)(A)(i).

[10] For a discussion of the contractual components that may be considered in drafting indemnification provisions see Penny L. Parker & John Slavich, *Contractual Efforts to Allocate the Risk of Environmental Liability: Is There a Way to Make Indemnities Worth More Than the Paper They Are Written On?*, 44 SW. L.J. 1349 (1991). For a detailed summary of Texas case law applicable to various contractual provisions relating to risk in general see William H. Locke, Jr., *Risk Management: Through Contractual Provisions for Indemnity, Additional Insureds, Waiver of Subrogation, Limitation, Exculpation and Release*, 13th Annual Convention, Advanced Real Estate Drafting Course, March 6, 2002, as updated, in part, by *"As Is" in a Contaminated World*, 19th Annual Robert C. Sneed, Texas Land Title Institute, December 4, 2009.

[11] Such provisions may also be referred to as a "disclaimer of reliance" clause.

[12] *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 56 (Tex. 2008).

[13] *Id.*

[14] 896 S.W.2d 156, 159 (Tex. 1995).

[15] *Id.* at 160. The Houston Court of Appeals in *Warehouse Assoc. Corporate Centre II v. Celotex Corp.*, 192 S.W.3d 225, 230 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) noted that the provision also contained a "waiver of reliance" provision. Despite the presence of the waiver of reliance provision, the Texas Supreme Court limited its analysis to the "as is" provision.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* at 159.

[20] *Id.* at 160.

[21] *Id.* at 159-160.

[22] *Id.* at 160.

[23] *Id.* at 161.

[24] *Id.*

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

[26] *Id.* at 164.

[27] *Id.* at 162.

[28] *Id.* at 160-162.

[29] *Warehouse Assoc. Corporate Centre II*, 192 S.W.3d at 230.

[30] *Prudential*, 896 S.W.2d at 162.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] 959 S.W.2d 171 (Tex. 1997).

[35] 268 S.W.3d 51 (Tex. 2008).

[36] *Schlumberger*, 959 S.W.2d at 174.

[37] *Id.*

[38] *Id.* at 180 (emphasis in original).

[39] *Id.* at 174.

[40] *Id.*

[41] *Id.* at 178; *see also Forest Oil*, 268 S.W.3d at 57.

[42] *Id.* at 181.

[43] *See id.* at 180; *see also Warehouse Assoc. Corporate Centre II*, 192 S.W.3d at 232.

[44] *Id.*

[45] *Id.*

[46] *See Worldwide Asset Purchasing, LLC v. Rent-A-Center East, Inc.*, 290 S.W.3d 554 (Tex. App.—Dallas 2009, no pet.) (*citing Warehouse Assocs. Corp. Ctr. II* , 192 S.W.3d at 234; *Carousel's Creamery, L.L.C. v. Marble Slab Creamery, Inc.*, 134 S.W.3d 385, 394 (Tex. App.—Houston [1st Dist.] 2004, pet. dism'd)).

[47] *Forest Oil Corp.*, 268 S.W.3d at 58 n.25.

[48] *Id.* at 53.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 54.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.* at 55.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.* at 56.

[61] *Id.*

[62] *Id.* at 60 (emphasis in orig.).

[63] *Id.* at 58.

[64] *Id.*

[65] *Id.* at 61.

[66] *Id.* at 60.

[67] *Id.*

[68] *Id.*

[69] *See id.* (Those factors include the following: (1) the terms of the contract were negotiated, rather than boilerplate, and during negotiations the parties specifically discussed the issue which has become the topic of the subsequent dispute;

(2) the complaining party was represented by counsel; (3) the parties dealt with each other in an arm's length transaction; (4) the parties were knowledgeable in business matters; and (5) the release language was clear.).

[70] 127 S.W.3d 366, 367 (Tex. App.—Dallas 2004, no pet.).

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.* at 368.

[76] *Id.*

[77] *See* TEX. HEALTH & SAFETY CODE ANN. § 361.341-361.345. (Vernon 2010).

[78] *Bonnie Blue*, 127 S.W.3d at 368.

[79] *Id.*

[80] *Id.*

[81] *Id.* at 368. Based on the facts of the case, it appears that Bonnie Blue, Inc. was a successor purchaser. It is unclear whether the parties or the court considered that the "as is" provision was not enforceable against Bonnie Blue, Inc. due to the lack of privity. If that were the case, the court's analysis on the affect of an "as is" provision on a SWDA claim was unnecessary.

[82] *Id.* at 369.

[83] *Id.*

[84] *See id.*

[85] *Id.*

[86] *Id.*

[87] *See, e.g., Wiegmann & Rose Intern. Corp. v. NL Industries*, 735 F.Supp. 957, 962 (N.D. Cal. 1990); *Southfund Partners III v. Sears, Roebuck and Co.*, 57 F.Supp.2d 1369 (N.D. Ga. 1999); *Mardan Corp. v. C.G.C. Music, Ltd.*, 600 F.Supp. 1049, 1055 (D. Ariz. 1984) (*aff'd on other grounds*); *International Clinical Laboratories, Inc. v. Stevens*, 710 F.Supp. 466, 469-470 (E.D. N.Y. 1989); *Southland Corp. v. Ashland Oil, Inc.*, 696 F.Supp. 994, 1001 (D. N.J. 1988); *Channel Master Satellite Systems, Inc. v. JFD Electronics Corp.*, 702 F.Supp. 1229, 1232 (E.D. N.C.1988); *In re Sterling Steel Treating, Inc.*, 94 B.R. 924, 930 (Bkrtcy. E.D. Mich.1989); *Amland Properties Corp. v. Aluminum Company of Americ*a, 711 F.Supp. 784, 803 n.20 (D. N.J. 1989).

[88] *See e.g., In re El PasoRefinery, L.P.*, 302 F.3d 343, 350-351 (5th Cir. 2002), where the court held that a covenant not to sue did not create an "implied indemnity."

[89] A release is closely related to a "compromise and settlement agreement." BLACK'S LAW DICTIONARY 15c (9th ed. 2009). However, a compromise and settlement agreement is based on a disputed claim, whereas a release may be based on an undisputed claim. BLACK'S LAW DICTIONARY 14c (9th ed. 2009). Nonetheless, compromise and settlement agreements often have the same effect and the terms are often used interchangeably. A release can be distinguished a from "waiver," which is an intentional voluntary relinquishment of a known right which is usually unilateral in character. BLACK'S LAW DICTIONARY 17c (9th ed. 2009). Finally, "a covenant not to sue" can be distinguished from a release in that it is not a present abandonment or relinquishment of a

right or claim but is merely an agreement not to sue on an existing claim or it is an election not to proceed against a particular party. *Perdue v. Sears, Roebuck and Co.*, 694 F.2d 66 (4th Cir. 1982); *Batteast v. Wyeth Laboratories, Inc.*, 560 N.E.2d 315 (Ill. 1990); *Lincoln v. Gupta*, 370 N.W.2d 312 (Mich. Ct. App. 1985). In other words, a covenant not to sue is an agreement not to enforce an existing cause of action against another party to the agreement. *Karnes v. Quality Pork Processors*, 532 N.W.2d 560 (Minn. 1995); *Horace Mann Companies v. Pinaire*, 538 N.W.2d 168 (Neb. 1995). Nonetheless, in order to avoid confusion, a covenant not to sue is often given the same effect as a release. *Panhandle Gravel Co. v. Wilson*, 248 S.W.2d 779 (Tex. Civ. App.—Amarillo 1952, writ ref'd n.r.e.); *The Praetorians v. Simons*, 187 S.W.2d 238 (Tex. Civ. App.—Dallas 1945, no writ).

[90] *Dodson v. Stevens Transport*, 776 S.W.2d 800, 804 (Tex. App.—Dallas 1989, no writ).

[91] *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex.1993); *Derr Constr. Co. v. City of Houston*, 846 S.W.2d 854, 858 (Tex. App.—Houston [14th Dist] 1992, no writ.)

[92] *Allright, Inc. v. Elledge*, 515 S.W.2d 266, 267 (Tex. 1974).

[93] *Crowell v. Housing Authority of City of Dallas*, 495 S.W.2d 887, 889 (Tex. 1973); *Newman v. Tropical Visions, Inc.*, 891 S.W.2d 713, 722 (Tex. App.—San Antonio 1994, writ denied).

[94] *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 422 (Tex. 1984).

[95] *Id.*

[96] *Id.*; *see also Lloyd v. Ray*, 606 S.W.2d 545, 547 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.).

[97] *White v. Grinfas*, 809 F.2d 1157, 1160 (5th Cir. 1987).

[98] *Dresser Industries, Inc. v. Page Petroleum, Inc.* 853 S.W.2d 505, 507-09 (Tex. 1993); *Tamez v. Southwestern Motor Transport, Inc.*, 155 S.W.3d 564 (Tex. App.—San Antonio 2004, no pet.)

[99] *Dresser Indus.*, 853 S.W.2d at 508; *see also Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 387 (Tex. 1997).

[100] *Senn v. Texaco, Inc.*, 55 S.W.3d 222 (Tex. App.—Eastland 2001, pet. denied); *see also Exxon Corp. v. Pluff*, 94 S.W.3d 22 (Tex. App.—Tyler 2002, pet. denied).

[101] *Wallerstein v. Spirt*, 8 S.W.3d 774, 779 (Tex. App.—Austin 1999, no pet.); *Derr Constr.*, 846 S.W. 2d at 858.

[102] BLACK'S LAW DICTIONARY 18c (9th ed. 2009).

[103] *See e.g, McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298 (5th Cir. 1993) (Indemnity clause which required only that indemnitor indemnify indemnitee for injuries caused by indemnitor's act or omission did not oblige indemnitor to defend indemnitee against claims and suits or indemnify for costs incurred in defense of baseless claims).

[104] *Dresser*, 853 S.W.2d at 508.

[105] *Derr*, 846 S.W. 2d at 858.

[106] 50 S.W.3d 531, 539-540 (Tex. App.—El Paso 2001, no pet.).

[107] *Id.* at 540.

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.* (citing BLACK'S LAW DICTIONARY 769 (6th ed.1990)).

[113] *Id.* at 541.

[114] *Id.*

[115] *Id.* at 541.

[116] *Id.*

[117] *See* Parker & Slavich, *Id.* at endnote 10, for a discussion of the various components that may be considered in drafting indemnification provisions.

[118] *Dresser Industries,* 853 S.W.2d at 507-09.

[119] *Id.*

[120] *Fairfield Ins. Co. v. Stephens-Martin Paving, L.P.*, 246 S.W.3d 653, 688 (Tex. 2008).

[121] *Lamar Homes, Inc. v. Mid-Continent Cas. Co.* 242 S.W.3d 1 (Tex. 2007).

[122] *Federal Petroleum Co. v. Gas Equipment Co.*, 105 S.W.3d 281 (Tex. App.—Corpus Christi 2003, no pet.).

[123] *Bonnie Blue*, 127 S.W.3d at 369 (*citing* 42 U.S.C. § 9607(e)).

[124] *Joslyn Manufacturing v. Koppers Co.*, 40 F.3d 750, 755 (5th Cir. 1995); *see also Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 327 (7th Cir. 1994) (The Seventh Circuit has held that a party may contract to indemnify another for environmental liability even though CERCLA was not in existence at the time of contracting.).

[125] *In re El Paso Refinery, L.P.*, 302 F.3d 343 (5th Cir. 2002).

[126] *Id.* at 346.

[127] *Id.*

[128] *Id.* at 347.

[129] *Id.*

[130] *Id.* at 354.

[131] *Id.*

[132] *Id.* at 356.

[133] *Id.* at 356.

[134] *Id.* at 356-57.

[135] *Id.* at 357.

[136] *Id.*

[137] *Id.*

[138] However, in *Westland Oil Development v. Gulf Oil Corp.*, 637 S.W.2d 903, 911 (Tex. 1982), the Texas Supreme Court considered whether an assignment of oil and gas leases following drilling of a test well ran with the land. The Court held that it did because the promise to convey the prescribed interests affected the nature and value of the estate and burdened the promisor's estate which rendered it less valuable.

[139] 938 S.W.2d 118, 120 (Tex. App.—Houston [14th Dist.] 1997, writ denied).

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.* (*citing Int'l Ass'n of Machinists v. Falstaff Brew. Corp.*, 328 S.W.2d 778, 782 (Tex. Civ. App.—Houston 1959, no writ).

[144] *Potts v. Burkett*, 278 S.W. 471, 473 (Tex. Civ. App.—Eastland 1926, writ denied).

[145] *Id.*; *Int'l Ass'n of Machinists v. Falstaff Brew Corp.*, 328 S.W.2d 778, 782 (Tex. Civ. App.—Houston 1959, no writ).

[146] *Lone Star Gas v. Mexia Oil & Gas, Inc.*, 833 S.W.2d 199, 203 (Tex. App.—Dallas 1992, no writ) (citing 4 A. Corbin, Corbin on Contracts 906, at 632 n. 1).

[147] *Foster v. Wagner*, 343 S.W.2d 914, 920 (Tex. Civ. App.—El Paso 1961, writ ref'd n.r.e.).

[148] 938 S.W.2d at 126.

[149] *Id.*

[150] 170 F.Supp.2d 243, 255 (D. Conn. 2001).

[151] *Id.* at 255.

[152] 43 P.3d 1233 (Wash. 2002).

[153] *Id.* at 1239.

[154] *Id.*

[155] RESTATEMENT (THIRD) OF PROP: SERVITUDES § 3.1 (2000).

[156] *Id.*

[157] *Id.*

[158] 576 N.E.2d 1365, 1368 (Mass. 1991).

[159] *Id.*

[160] *Id.*

[161] *Id.* at n. 4.