VENUE MAP ANALYSIS

Analysis of Venue Favorability and Practical Tips on Venue Selection and Options to Limit Liability in Unfavorable Venues

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I.
INTRODUCTION

Venue is an essential factor that can sometimes be as important as the facts in a given case. This is especially true where there are polarizing opinions in various venues within each state. The same set of facts may be analyzed very differently in a conservative and affluent place than in a less conservative and economically challenged area. The difference between venues may directly impact a case's result.

The Harmonie Group member firms have created a map that evaluates the various venues for each of their respective states. As you can observe, there are areas in each state where a party would prefer its case not to be tried as a defendant because it is seen as "unfavorable to defendant." These maps will allow a party to determine if certain venue-selection clauses should be forcefully bargained into its agreements that may direct those parties away from venues within various states.

Based on the potential impact of venue, there are several choices available to an entity to potentially limit the exposure of that party to the courts in each of those unfavorable venues. If a party knows it may be subject to an "unfavorable to defendant" venue based on the location where it is offering its services, they may also want to bargain more vigorously for risk-limiting or risk-shifting options in its agreement proposals.

Ultimately, a party can either choose to bargain for limited exposure to specific venues or limit the potential liability within those unfavorable venues. This paper discusses some strategies to help avoid the unfavorable venues and to limit potential liability in those venues.

II.
PROPER VENUE

A. VENUE ANALYSIS

The presumption is that venue is proper where the Plaintiff files suit, and it is up to the defendant to challenge venue to a place of proper or mandatory venue. As the venue maps show, it could be vital to ensure venue is proper based on the facts of each case as alleged by the Plaintiff.

1. National.

28 U.S.C. § 1391(b) provides the venue standard for cases based on federal question jurisdiction. It states:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.[1]

One of the stated purposes of statutorily specified venue is "to protect the defendant against the risk that a plaintiff will select an unfair or inconvenient place for trial."[2] The elements of the venue statute are "intended to preserve the element of fairness so that a defendant is not haled into a remote jurisdiction having no real relationship to the dispute."[3] Thus, statutory venue is to "favor the defendant" in a venue dispute by requiring the jurisdiction to have more than a mere "tangential connection" to the dispute.[4]

Under the current venue statute, the test for determining venue focuses on the "location" of the "events or omissions giving rise to the claim" as opposed to the old venue statutes which focused on where the "claim arose."[5] When considering the "events or omissions" for purposes of deciding venue, a Court will "focus on the relevant activities of the defendant, not of the plaintiff."[6] Moreover, in a contract action, the event relevant to venue is the place where the contract is to be performed.[7]

28 U.S.C. § 1404(a) empowers the Court to transfer venue to prevent waste of time, energy, and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense.[8] This statute provides that:

> [f]or the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.[9]

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[1] 28 U.S.C. 1391(b).

[2] *LeRoy v. Great W. United Corp.,* 443 U.S. 173, 183-84, 99 S.Ct. 2710, 2716, 61 L.Ed.2d 464 (1979).

[3] *Cottman Transmission Syst., Inc. v. Martino*, 36 F.3d 291, 294 (3rd Cir. 1994).

[4] *See, Id.*, 36 F.3d at 294 (noting that current statutory venue language still favors the defendant in a venue dispute).

[5] *Id.*

[6] *Wooke v. Dahm*, 70 F.3d 983, 985 (8th Cir. 1995).

[7] *See, American Carpet Mills v. Gunny Corp.,* 649 F.2d 1056, 1059 (5th Cir. 1981).

[8] *See, Stabler v. N.Y. Times Co.,* 569 F.Supp. 1131, 1137 (S.D.Tex. 1983). *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964).

[9] 28 U.S.C. 1404(a).

A defendant seeking to transfer venue under 28 U.S.C. §1404(a) bears the burden of proving that transfer is warranted.[10]

When deciding if a convenience transfer is appropriate, the Fifth Circuit breaks its analysis under 28 U.S.C. §1404(a) into "private" and "public" concerns.[11] Private interest factors include: 1) the availability and convenience of the witnesses and parties; 2) the cost of obtaining the attendance of witnesses; 3) the relative ease of access to sources of proof; 4) the place of the alleged wrong; 5) the possibility of delay and prejudice if the case is transferred; and 6) the plaintiff's right to choose its forum.[12] Public, or interests of justice, factors include 1) the pendency of related litigation in another forum; 2) delays due to docket congestion; 3) familiarity with the law that governs the action; and 4) the local interest in having localized controversies resolved at home.[13]

2. Texas.

Texas' venue scheme divides venue into the following three categories: "general," mandatory," and "permissive."[14] If the plaintiff's venue choice is not properly challenged through a motion to transfer venue, the propriety of venue is fixed in the county chosen by the plaintiff.[15]

Under the mandatory venue provisions,[16] venue is required in those counties. For example, an action to recover damages related real property must be filed in the county where the land is located.[17]

Under the general venue provision,[18] venue is proper in any one of the following counties:

1) in the county in which all or a substantial part of the events or omissions giving rise to the claim occurred; or
2) in the county of Defendant's residence at the time the cause of action accrued if Defendant is a natural person; or
3) in the county of Defendant's principal office in this state if Defendant is not a natural person; or
4) if Subdivisions (1), (2), and (3) do not apply, in the county in which the Plaintiff resided at the time of the accrual of the cause of action.[19]

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[10] *Salinas v. O'Reilly Automotive, Inc.*, 358 F. Supp. 2d 569, 570 (N.D. Tex. 2005).

[11] *Von Graffenreid v. Craig*, 246 F. Supp. 2d 553, 562-63 (N.D. Tex. 2003).

[12] *Id.*

[13] *Id.*

[14] *Chiriboga v. State Farm Mut. Auto Ins. Co.*, 96 S.W.3d 673, 677 (Tex. App.—Austin 2003, no pet.).

[15] *N. Natural Gas Co. v. Chisos Joint Venture I*, 142 S.W.3d 447, 452 (Tex. App.—El Paso 2004, no pet.).

[16] Tex. Civ. Prac. & Rem. Code Ann. § 15.001.

[17] Tex. Civ. Prac. & Rem. Code Ann §15.011.

[18] Texas general venue provision comes into play when no mandatory or permissive venue provision is applicable. *See* Tex. Civ. Prac. & Rem. Code Ann. § 15.002(a).

[19] Tex. Civ. Prac. & Rem. Code Ann. §15.002(a).

A party who seeks to maintain venue of the action in a particular county in reliance on the general venue provision has the burden to prove that venue is maintainable in the county of suit.[20] A party who seeks to transfer venue of the action to another specified county in reliance on the general venue provision has the burden to prove that venue is maintainable in the county to which transfer is sought.[21]

All venue facts, when properly pleaded, shall be taken as true unless specifically denied by the adverse party.[22] When a venue fact is specifically denied, the party pleading the venue fact must make prima facie proof of that venue fact.[23] Prima facie proof is made when the venue facts are properly pleaded and an affidavit, and any duly proved attachments to the affidavit, are filed fully and specifically setting forth the facts supporting such pleading.[24] This prima facie proof is not subject to rebuttal, cross-examination, impeachment, or disproof.[25]

3. Florida.

Florida Statute § 47.011 provides that "actions shall be brought only in the county where the defendant resides, where the cause of action accrued, or where the property in litigation is located."[26]

When an action is commenced against a corporation, such actions "shall be brought only in the county where such corporation has, or usually keeps, an office for transaction of its customary business, where the cause of action accrued, or where the property in litigation is located."[27]

Although Florida Statute § 47.051 limits corporate residence to one county where the corporation has an office for customary business. Florida Statute § 47.021 permits actions against two or more defendants residing in different counties to be brought in any county where any defendant resides.[28]

4. Collective Venue Analysis.

Generally, venue is proper where at least one defendant lives.[29] Venue is also often proper where the events or obligations giving rise to the claim occurred, though this is somewhat less universal. For example, Nevada law provides that generally, actions must be tried in the county in which at least

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[20] Tex. R. Civ. P. 87(2)(a).

[21] *Id.*

[22] Tex. R. Civ. P. 87 (3)(a).

[23] *Id.*

[24] *Id.*

[25] *See Ruiz v. Conoco, Inc.*, 868 S.W.2d 752, 757 (Tex. 1993).

[26] *§ 47.011, Fla. Stat. Ann.*

[27] *§ 47.051, Fla. Stat. Ann.*

[28] *§ 47.021, Fla. Stat. Ann.*

[29] *See, e.g.,* Ariz. Rev. Stat. Ann. § 12-401 (2013); I.L.C.S. ch. 735 § 5/2-101 (2013); Nev. Rev. Stat. § 13.010 (2011); S.C. Code Ann. § 15-7-30 (2012); Va. Code Ann. § 8.01-261 (2013); Wash. Rev. Code § 4.12.025 (2013).

one defendant resides.[30] If none of the defendants are state residents, the action may be tried in any county designated by the plaintiff.[31] In breach of contract cases, however, a plaintiff may sue wherever the obligation was to be performed or where the defendant lives.[32]

Arizona law generally provides that no person shall be sued out of the county in which such person resides except in certain enumerated circumstances that include, for example: non-resident defendants can be sued in the county of plaintiff's residence, transient persons may be sued in any county in which found, and contract actions can be brought in the county of performance or where the defendant lives.[33] Actions against insurance companies, joint stock companies and other corporations may be brought in any county in which the cause of action arose or in the county in which the defendant has an agent, owns property or conducts business.[34]

Common areas subject to mandatory venue include actions involving real property, actions against cities or counties and certain financial claims. For example, in South Carolina, actions for the recovery of real estate, the partition of real property, foreclosure of a mortgage on real property, the recovery of distrained personal property and all matters between a landlord and tenant must be tried in the county in which some part of the property is situated.[35] In Georgia, actions involving promissory notes must be brought in the county in which the maker resides.[36] In Nevada, an action for the recovery of a penalty or forfeiture imposed by statute must be brought in the county where the cause or some part thereof accrued.[37]

Be cognizant that not all venues are created equal. In a 2012 poll by the U.S. Chamber Institute for Legal Reform, Delaware, Indiana and Virginia were ranked highest in the nation as having and enforcing meaningful venue requirements.[38] Mississippi, Illinois and West Virginia were in the bottom three.[39] Poll respondents included 1,125 in-house counsels, senior attorneys and other senior executives knowledgeable about litigation employed at public and private companies with annual revenues of at least $100 million. While this poll does not offer specific insight into the basis of these rankings, it highlights that venue among the states can sometimes be as important as venue within a particular state.

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[30] Nev. Rev. Stat. § 13.040 (2011).

[31] *Id.*

[32] Nev. Rev. Stat. § 13.010 (2011).

[33] Ariz. Rev. Stat. Ann. § 12-401 (2013).

[34] *Id.* at § 12-401(18).

[35] S.C. Code Ann. § 15-7-10 (2013).

[36] Ga. Const. art. VI, § 2, ¶ V (2013).

[37] Nev. Rev. Stat. § 13.020 (2011).

[38] http://www.instituteforlegalreform.com/states.

[39] *Id.*

Recall that venue is the geographic location where a case is heard and is distinct from jurisdiction. Although a court may have jurisdiction over a particular claim and the parties thereto, state law could provide for dismissal if another state, also having jurisdiction, is a more appropriate venue. This is referred to as forum non conveniens. To illustrate, suppose a plaintiff who had never lived or worked in Texas developed mesothelioma as a result of alleged exposure at his jobsite of over 30 years in Maine.[40] Fearing removal to the federal Multi-District Litigation Court for asbestos cases (MDL 875), his lawyer files the case in Dallas County, Texas against over 20 companies, three of which are headquartered in Texas. Several of the companies seek to dismiss the plaintiff's claims under Texas' forum non conveniens statute.[41] After weighing several factors specified in the statute, the Texas Supreme Court did, in fact, dismiss this Maine plaintiff's claims because the interests of justice and convenience of the parties dictated that Maine was the better venue.[42] The court noted, among other factors, that the courts of Maine could provide an adequate remedy for the plaintiff, the relevant evidence and witnesses are in Maine and outside the subpoena power of Texas courts, the defendants were subject to jurisdiction under Maine's long-arm statute, Maine has an interest in ensuring its citizens are not exposed to hazards in the workplace and Texas citizens should not be burdened with a complex asbestos case that has no relationship to Texas.

For a more detailed analysis of specific venues, the American Tort Reform Foundation's Judicial Hellholes program publishes annual reports that identify venues in which it believes the judges in civil cases systematically apply laws and court procedures in an unfair and unbalanced manner.[43] This editorial report includes a detailed analysis with reference to specific cases, statutes and current events. The worst ranked venues in the United States are California and West Virginia generally as well as Madison County (Illinois), New York City, Albany and Baltimore.[44] The report cites excessive damages awards and a troubling asbestos litigation environment among the factors influencing West Virginia's rank.[45] The report also notes that Los Angeles is among the top five cities for likely fraudulent slip-and-fall claims and that over a million lawsuits a year are filed in California.[46]

III.
VENUE SELECTION

A. FORUM-SELECTION CLAUSES

A forum-selection clause is a contractual provision by which the negotiating parties establish the venue (such as the country, state, or type of tribunal) for any potential litigation involving the terms of the contractual agreement. A forum-selection clause has the function of bargaining for a party's

[40] *In re Gen. Elec. Co.*, 271 S.W.3d 681, 684 (Tex. 2008).

[41] Tex. Civ. Prac. & Rem. Code §71.051(b) (2013).

[42] *In re Gen. Elec. Co.*, 271 S.W.3d 681, 684 (Tex. 2008).

[43] http://www.judicialhellholes.org

[44] *Judicial Hellholes 2012/13*, American Tort Reform Foundation (2012).

[45] *Id.*

[46] *Id.*

consent to the jurisdiction of the chosen forum within the clause. These clauses would be the easiest way to prevent venue in unfavorable areas on the venue maps.

1. National.

The United States Supreme Court has consistently held for more than a quarter century that forum-selection clauses are presumptively valid and should be enforced unless it is shown by the party resisting the enforcement of the forum-selection clause that enforcement would be unreasonable.[47]

In *Bremen v. Zapata Off-Shore Company*, the Supreme Court established basic standards for the enforceability of forum-selection clauses.[48] The Supreme Court held the elimination of certain uncertainties related to venue "is an indispensable element in international trade, commerce, and contracting."[49]

The Supreme Court held that in a freely negotiated agreement, forum-selection clauses "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances."[50] Of course, the determination of whether a forum-selection clause is unreasonable varies from venue to venue based on local laws regarding contract formation.

2. Texas.

Texas courts consistently recognize the presumptive validity of forum-selection clauses. Adopting the United States Supreme Court's test for determining whether a forum-selection clause is enforceable, the Texas Supreme Court has held that enforcement of a forum-selection clause is mandatory unless the party resisting the clause shows that the enforcement of it would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.[51]

Mandamus relief is available to enforce forum-selection agreements because there is no adequate remedy by appeal when a trial court abuses its discretion by refusing to enforce a valid forum-selection clause that covers the dispute.[52]

To overcome the presumption of validity of a forum-selection clause, the party challenging enforcement bears the "heavy burden" of demonstrating that enforcement of the clause would be

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[47] *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (forum selection clause in contract for passage enforced despite the non-negotiated clause in the standard ticket); *M/S Bremen v. Zapata Off-shore Co.,* 407 U.S. 1 (1972) (enforcement of forum selection clause in towing contract between American company and Italian company calling for resolution in London).

[48] 407 U.S. 1 (1972).

[49] *Id.* at 13-14.

[50] *Id.* at 10.

[51] *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 793 (Tex. 2005); *Abacan Tech. Serv. Ltd. V. Global Marine Int'l Serv. Corp.*, 994 S.W.2d 839 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (forum selection clause binding two non-resident corporations to arbitration in Houston, Texas, enforced); *In re AIU Ins. Co.*, 148 S.W.3d 109 (Tex. 2004) (forum selection clause requiring resolution of all disputes in New York was enforceable despite the insurance dispute arising over coverage for contamination in Texas).

[52] *Lyon*, 257 S.W.3d at 231; *In re Int'l Profit Assocs., Inc.*, 274 S.W.3d 672 (Tex. 2009) (Tex. 2009)(forum selection clause enforced by mandamus).

unreasonable under the circumstances.[53] In general, a court will enforce a forum-selection clause unless the party opposing it can clearly show one or more of the following: 1) enforcement would be unreasonable or unjust, 2) the clause is invalid for reasons of fraud or overreaching, 3) enforcement would contravene a strong public policy of the forum where the suit was brought, or 4) the selected forum would be seriously inconvenient.[54]

a. Overreaching.

First, overreaching occurs only when there is an unequal bargaining power between the two parties.[55] Moreover, use of boilerplate contractual language does not amount to overreaching.[56]

b. Fraudulent.

Second, a claim that the contract as a whole was procured by fraud is insufficient to establish that the forum-selection clause was unreasonable due to the clause resulting from fraud.[57] A party seeking to avoid a forum-selection clause must prove that the clause itself, not the contract as a whole, was secured by fraud.[58]

c. Public Policy.

Texas courts have held that "'the contractual forum [must] be so gravely difficult and inconvenient' that the opponent 'will for all practical purposes be deprived of his day in court.'"[59] The mere fact of expense and inconvenience of litigating in another forum will not support such a claim.[60] A party's agreement to litigate a dispute in the State of Texas waives any objection to personal jurisdiction in the state.[61]

3. Florida.

In Florida, forum-selection clauses are presumptively valid to "eliminate uncertainty as to the nature, location and outlook for the forum in which the parties might find themselves."[62]

Florida Courts hold that forum-selection clauses should be enforced in the absence of a showing that enforcement would be unreasonable or unjust.[63] It is the burden of the party seeking to avoid

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[53] *In re Int'l Profit Assocs., Inc.*, 274 S.W.3d 672, 675 (Tex. 2009) (citing *In re Lyon Fin. Servs, Inc.*, 257 S.W.3d 228, 231-32 (Tex. 2008)).

[54] *Id.*; *In re Laibe Corp.*, 307 S.W.3d 314, 316 (Tex. 2010); *In re ADM Investor Servs.*, 304 S.W.3d 271, 275 (Tex. 2010).

[55] *Holeman v. National Business Institute, Inc.,* 94 S.W.3d 91, 96 (Tex. App.—Houston [14th Dist.] 2002, pet. denied).

[56] *Abramson v. America Online, Inc.*, 393 F.Supp.2d 438, 442 (N.D. Tex. 2005) (citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594-95 (1991)).

[57] *My Café – CCC, Ltd. v. Lunchstop, Inc.*, 107 S.W.3d 860, 865-67 (Tex. App.—Dallas 2003, no pet.) *abrogated on other grounds, In re AIU Ins. Co.,* 148 S.W.3d 109 (Tex. 2004).

[58] *Id.*

[59] *Clark*, 192 S.W.3d at 800 (quoting *Bremen,* 407 U.S. at 15, 18).

[60] *See In re AIU Ins. Co.*, 148 S.W.3d at 112-115; *In re Tyco Electronics Power Systems,* No. 05-04-01808-CV, 2005 WL 237232 at *2 (Tex. App.—Dallas Feb. 2, 2005, orig. proceeding) (citing *Carnival Cruise Lines, Inc. v. Shute,* 499 U.S. 585, 593-95 (1991)).

[61] *Abacan Tech. v. Global Mar. Int'l*, 994 S.W.2d 839, 843-44 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

[62] *Manrique v. Fabbri*, 493 So. 2d 437, 440 (Fla. 1986).

[63] *Id.*

that contractual agreement to establish "that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court."[64] Specifically, the court in *Manrique* found that forum-selection clauses will be enforced provided:

> (1) The forum was not chosen because of overwhelming bargaining power on the part of one party which would constitute overreaching at the other's expense;
> (2) Enforcement would not contravene strong public policy enunciated by statute or judicial fiat, either in the forum where the suit would be brought, or the forum from which the suit has been excluded; and
> (3) The purpose was not to transfer an essentially local dispute to a remote and alien forum in order to seriously inconvenience one or both of the parties. [65]

B. ARBITRATION CLAUSES

If a party that is subject to an unfavorable venue is unable to negotiate a full forum-selection clause into its agreement, another option is to bargain for an arbitration clause. This type of clause allows for an entity to avoid potentially unfavorable venues by ensuring all litigated matters are kept out of the courts.

An arbitration clause allows an entity to bargain for the right to litigate all issues that may arise from the agreement to be submitted to arbitration rather than going to state or federal court. Whether the parties have agreed to arbitrate is a question of law. When the parties have agreed to arbitrate, the courts must compel arbitration.

1. National and Texas.

Both the United States Supreme Court and the Texas Supreme Court have held that an arbitration agreement is simply a type of forum-selection clause and that there is no meaningful distinction between the two.[66]

Under both the Federal Arbitration Act (the "FAA") and the Texas Arbitration Act (the "TAA"), a case should be compelled to arbitration if: (1) a valid arbitration agreement exists, and (2) the claims raised in the lawsuit fall under the agreement.[67] A strong presumption favoring arbitration exists under both Texas and federal law generally requiring courts to resolve doubts as to the scope of the agreements in favor of arbitration.[68] Once a movant establishes that an agreement exists, a court should not deny arbitration unless it can be said with positive assurance that an arbitration clause is

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[64] *Id.*

[65] *Id.*

[66] *See Deep Water Slender Wells*, 234 S.W.3d at 693-94 (citing *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 482-83 (1989) and *In re AIU Ins. Co.*, 148 S.W.3d at 115-16).

[67] Federal Arbitration Act, 9 U.S.C. § 4; Tex. Civ. Prac. & Rem. Code § 171.001(a) (Vernon 2005); *OPE Int'l LP v. Chet Morrison Contractors, Inc.,* 258 F.3d 443, 445 (5th Cir. 2001); *Shanks v. Swift Trans. Co. Inc.*, Civil Action No. L-07-55, 2008 WL 2513056, *4 (S.D. Tex. June 19, 2008).

[68] *In re D. Wilson Const. Co.*, 196 S.W.3d 774, 782-83 (Tex. 2006) (orig. proceeding); *In re FirstMerit Bank*, 52 S.W.3d 749, 753 (Tex. 2001); *Ford Motor Co. v. Ables,* No. 05-60391, 207 Fed. Appx. 443, 446 (5th Cir. Nov. 29, 2006).

not susceptible of an interpretation which would cover the dispute at issue."[69] Further, the party opposing arbitration has the burden to prove that no agreement exists.[70]

a. There must be a valid agreement to arbitrate.

The first requirement to be met to enforce an arbitration agreement is the existence of a valid agreement to arbitrate between the parties.[71]

The consideration for the Arbitration Agreement may be the mutual agreement to arbitrate disputes covered by the agreement and the waiver of the parties' rights to litigate covered claims before a court.[72]

Further, an agreement to arbitrate is enforceable if it clearly appears from the agreement that it was the intention of the parties to submit their dispute to arbitrators and to be bound by their decision.[73]

An arbitration agreement not only binds claims brought by the parties to the agreement but it also binds non-signatories. Under the doctrines of estoppel and third-party beneficiary, a non-signatory to an arbitration agreement may be bound by the terms of that agreement.[74]

b. Arbitration is favored in cases of ambiguity.

Once it has been established that the parties had entered into a binding agreement to arbitrate, the entire controversy, including the validity (and essence) of the disputed contract must be referred to arbitration.[75] If an ambiguity exists concerning the scope of an arbitration agreement, all doubts must be resolved in favor of arbitration.[76] Once a party establishes the existence of an agreement, "a court should not deny arbitration unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue."[77]

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[69] *Prudential Sec. Inc. v. Marshall*, 909 S.W.2d 896, 899 (Tex. 1995) (per curiam) (emphasis in original).

[70] *Cantella & Co. v. Goodwin,* 924 S.W.2d 943, 944 (Tex. 1996) (per curiam).

[71] Federal Arbitration Act, 9 U.S.C. § 4; Tex. Civ. Prac. & Rem. Code Ann. § 171.001(a) (Vernon 2005); *OPE Int'l LP,* 258 F.3d at 445; *Shanks*, 2008 WL 2513056 at *4.

[72] *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1108 (9th Cir. 2002) (holding mutual agreement to arbitrate sufficient consideration); *see also In re Halliburton Co.*, 80 S.W.3d 566, 569 (Tex. 2002) (holding mutual agreement to arbitrate not illusory).

[73] *Trico Marine Servs., Inc. v. Stewart & Stevenson Tech. Servs., Inc.*, 73 S.W.3d 545, 547 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *Manes v. Dallas Baptist College*, 638 S.W.2d 143, 145 (Tex. App.—Dallas 1982, writ ref'd n.r.e.); *see In re Allstate County Mut. Ins. Co.*, 85 S.W.3d 193, 195 (Tex. 2002).

[74] *Washington Mutual Finance Group, LLC v. Bailey,* 364 F.3d 260, 267 (5th Cir. 2004); *In re Weekley Homes, L.P.,* 180 S.W.3d 127, 131-35 (Tex. 2005) (orig. proceeding); *In re FirstMerit Bank, N.A.*, 52 S.W.3d at 755-56; *Shanks,* 2008 WL 2513056, at *4-5.

[75] *Ormsbee Dev. Co. v. Grace*, 668 F.2d 1140, 1146 (10th Cir. 1982).

[76] *Id.*, *see also In re D. Wilson Const. Co.*, 196 S.W.3d 774, 782 (Tex. 2006); *Roe v. Ladymon*, 318 S.W.3d 502, 510 (Tex. App.—Dallas 2010, no pet.).

[77] *In re D. Wilson Const. Co.,* at 783.

2. Florida.

Florida follows federal law by generally favoring the use of arbitration agreements.[78] Pursuant to federal statutes and Florida's arbitration code, there are three elements for a court to consider when ruling on a motion to compel arbitration of a given dispute: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived.[79]

The *Seifert* court further noted that the parties' intent is the paramount consideration in determining whether or not a particular dispute is subject to arbitration.[80] Florida Supreme Court has also cautioned "neither the statutes validating arbitration clauses nor favoring such provisions should be used as a shield to block a party's access to a judicial forum in every case."[81]

In deciding whether an arbitration clause covers a particular type of dispute, the court must discern the intent of the parties by examining the language of the agreement.[82] This discussion probably arises most often when the dispute is over whether an arbitration agreement covers a particular tort claim as well as a breach of contract claim. The *Seifert* court held that the appropriate test was whether "the tort claim, as alleged in the complaint, arises from and bears such a significant relationship to the contract between the parties as to mandate application of the arbitration clause."[83] In *Seifert*, the Florida Supreme Court concluded that the tort claim in that case did not have a sufficient relationship to the agreement so as to require submission of the cause to arbitration, because none of the plaintiff's allegations asserted that the defendant's duties or obligations arose from or were governed by the contract.[84] On the other hand, in the *Burke* case the court held that a claim for breach of fiduciary duty by a company against its former CEO was arbitrable under the employment agreement's arbitration clause, because it was necessary to examine the contract to ascertain exactly what the CEO's duties to the company were.[85]

IV.
RISK-SHIFTING OPTIONS

If a party is unable to bargain for a forum-selection clause or an arbitration clause to avoid an unfavorable venue, the next step would be to bargain strongly to limit liability or shift liability in those potentially unfavorable venues.

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[78] *Seifert v. U.S. Home Corp.*, 750 So.2d 633, 636 (Fla.1999).

[79] *Id.*

[80] *Id.* at 636.

[81] *Id.* at 642.

[82] *Episcopal Diocese of Cent. Fla. v. Prudential Secs., Inc.*, 925 So.2d 1112, 1115 (Fla. 5th DCA 2006).

[83] *Id.* at 640.

[84] *Id.* at 640.

[85] *Burke v. Windjammer Barefoot Cruises*, 972 So. 2d 1108 (Fla.3rd DCA 2008).

A. LIMITATION-OF-LIABILITY CLAUSES

Limitation-of-liability clauses allow for a party to limit the amount of damages it may be liable for under a particular agreement. This common type of clause can limit damages to a fixed dollar amount or to the amount of fees paid under the agreement. This type of clause is particularly important when the fees for services in a particular agreement could be a fraction of potential liability.

1. National.

The national impact of limitation-of-liability clauses varies greatly based on whether the jurisdiction has anti-indemnity statues and whether the clauses are analyzed against strong public policy issues in each of those respective jurisdictions.

Historically, many jurisdictions enforce such limitation-of-liability clauses as they permit commercial entities to identify potential risks and to negotiate financial terms prior to commencing work on a project. Many of the early cases upholding contract provisions limiting liability were based on various telephone companies' liability for errors or omissions in a directory listing and similar clauses.[86]

However, many states have analyzed the clauses differently when more public policy issues are concerned and when the analysis of the clause is interpreted with potentially applicable anti-indemnity statutes.[87]

2. Texas.

Section 2.719 of the Texas Business and Commerce Code provides for this remedy limitation by stating parties may limit or alter the measure of damages recoverable by limiting the buyer's remedies to repair and replacement of the non-conforming goods.[88] Additionally, by including the

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[86] *McTighe v. New England Telephone and Telegraph Co.*, 216 F.2d 26 (2d Cir.1954); *Vails v. Southwestern Bell Telephone Co.*, 504 F.Supp. 740 (W.D.Okla.1980); *Pilot Industries v. Southern Bell Telephone and Telegraph Co.*, 495 F.Supp. 356 (D.S.C.1979); *Robinson Insurance & Real Estate, Inc. v. Southwestern Bell Telephone Co.*, 366 F.Supp. 307 (W.D.Ark.1973); *Neering v. Southern Bell Telephone and Telegraph Co.*, 169 F.Supp. 133 (S.D.Fla.1958); *Mendel v. Mountain States Telephone and Telegraph Co.*, 117 Ariz. 491, 573 P.2d 891 (Ct.App.1977); *University Hills Beauty Academy v. Mountain States Telephone and Telegraph Co.*, 38 Colo.App. 194, 554 P.2d 723 (1976); *Woodburn v. Northwestern Bell Telephone Co.*, 275 N.W.2d 403 (Iowa 1979); *Wille v. Southwestern Bell Telephone Co.*, 219 Kan. 755, 549 P.2d 903 (1976); *Roll-up Shutters, Inc. v. South Central Bell Telephone Co.*, 394 So.2d 796 (La.Ct.App.), cert. denied, 399 So.2d 599 (La.1981); *Montana ex rel. Mountain States Telephone and Telegraph Co. v. District Court of the Second Judicial District*, 160 Mont. 443, 503 P.2d 526 (1972); *Gas House, Inc. v. Southern Bell Telephone and Telegraph Co.*, 289 N.C. 175, 221 S.E.2d 499 (1976); *Richard A. Berjian, D.O., Inc. v. Ohio Bell Telephone Co.*, 54 Ohio St.2d 147, 375 N.E.2d 410 (1978); *Affiliated Professional Services v. South Central Bell Telephone Co.*, 606 S.W.2d 671 (Tenn.1980); *Morris v. Mountain States Telephone and Telegraph Co.*, 658 P.2d 1199 (Utah 1983); *Allen v. General Telephone Co. of the Northwest*, 20 Wash.App. 144, 578 P.2d 1333 (1978).

[87] *Lanier at McEver, L.P. v. Planners and Engineers Collaborative, Inc.*, 2008 WL 2579237, No. S07G1424 (Ga. June 30, 2008) (a limitation of liability provision was unenforceable under statute, even though the provision purported only to limit liability and did not require a party to indemnify or hold harmless the other party).

[88] Tex. Bus. & Com. Code Ann. § 2.719(a)(1).

language "any cause," a party may not be liable for any damages regardless of how such damages are claimed, either by negligence or breach of contract.[89]

In *Arthur's Garage,* the Dallas Court of Appeals specifically looked at a limitation-of-liability provision and determined that the provision was enforceable.[90] A "Liquidated Damages and Indemnification" clause that limited the liability of the monitoring company to $350.00 "which sum shall be paid and received as liquidated damages and not a penalty and this liability shall be complete and exclusive" was held to be enforceable.[91] The Court stated "an agreement to limit the liability for future negligence is enforceable if the agreement does not violate public policy."[92]

a. Bargaining Power.

In cases examining any type of exculpatory clauses, the Texas courts tend to first look to the relationship of the parties and their bargaining power.[93] The Court in *Allright* held "[a]n exculpatory clause is enforceable unless one party is at a disadvantage in bargaining power and the contract is void as against public policy."[94]

b. Conspicuousness.

A factor considered by Texas courts in determining whether a limitation-of-liability clause is unconscionable is whether the clause is conspicuous. To be conspicuous, "something must appear on the face of the contract to attract the attention of a reasonable person when he looks at it."[95] The *Dresser* Court adopted the standard for conspicuousness found in the Uniform Commercial Code:

> A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color.[96]

Accordingly, Texas courts have upheld similar exculpatory provisions in certain contracts that limit the damages payable by a party upon breach.[97]

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[89] *See Fox Elec. Co. v. Tone Guard Sec*., 861 S.W.2d 79, 82 (Tex. App.—Fort Worth 1993, no writ) (holding that limitation of liability clause in contract was enforceable regardless of what cause of action the plaintiff pursued because the contractual clause took into account loss derived from other theories).

[90] *Arthur's Garage, Inc. v. Racal-Chubb Security Systems, Inc.*, 997 S.W.2d 803, 810 (Tex. App.-Dallas 1999, no pet.).

[91] *Id.* at 809.

[92] *Id.*

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

[94] *Id.*

[95] *Dresser Indus., Inc. v. Page Petroleum, Inc.,* 853 S.W.2d 505, 509 (Tex. 1993).

[96] *Id.*

[97] *See Head v. U.S. Inspect DFW, Inc.,* 159 S.W.3d 731 (Tex. App.-Fort Worth 2005, no pet.). (A limitation of liability clause that was set apart from the other provisions, enclosed in a box and separately initialed by the plaintiff was enforceable because contracting parties are free to limit their liability in damages to a specified amount.); *Global Octanes Texas, L.P. v. BP Exploration & Oil, Inc*., 154 F.3d 518, 521 (5th Cir. 1998). (Under Texas law contracting parties can limit their liability in damages to a specified amount...and it is immaterial whether a limitation of liability is a reasonable estimate of probable damages resulting from a breach.); V*allance & Co. v. De Anda*, 595 S.W.2d 587, 590 (Tex. Civ. App. - San Antonio 1980, no writ) ("It is immaterial whether a limitation of liability is a reasonable estimate of probable

3. Florida.

In Florida, enforcement of limitation-of-liability provisions is regulated by statutes and public policy and is a pure question of law.[98] In *Gessa*, the Florida Supreme Court found that the limitation-of-liability provisions were unconscionable, holding that any agreement that substantially diminishes or attempts to circumvent the statutory remedies afforded to a nursing home resident is unenforceable as against public policy and cannot be severed to uphold the remainder of the agreement.[99] The Florida Supreme Court held that the limitation-of-liability provisions, which placed a $250,000 cap on noneconomic damages and waived punitive damages, were not severable; the court and not the arbitrator must decide whether the arbitration agreement violates public policy; and the limitation-of-liability provisions violated public policy and were unenforceable because they directly frustrated the remedies created by the Nursing Home Residents Act.

Shotts v. OP Winter Haven, Inc. addressed many of the same issues raised in *Gessa*.[100] In *Shotts*, the Florida Supreme Court held that (i) the "limitations of remedies" provisions, were not severable, despite the expressly stated language to the contrary, (ii) the court and not the arbitrator must decide whether the arbitration agreement violates public policy, and (iii) the "limitation of remedies" provisions violated public policy and were unenforceable because they "directly undermine specific statutory remedies created by the legislature."[101] The Court concluded that any agreement that "substantially diminishes or circumvents" remedies provided for by the legislature stands in violation of the public policy of the State of Florida and is therefore unenforceable.[102]

B. INDEMNITY CLAUSES

One of the most effective risk-shifting methods is found in indemnification clauses. These clauses allow parties to determine that one of the parties will pay the legal and other expenses of the other party should litigation or damages involving the agreement arise.

1. National.

The enforceability of indemnification clauses varies greatly by jurisdiction depending on the existence of anti-indemnity statutes in these jurisdictions. The enforceability of indemnity clauses, with or without anti-indemnity statutes, also varies based on the degree of indemnification that is shifted from another party and whether the liability shift violates public policy.

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damages resulting from a breach."); *Wade & Sons, Inc. v. American Standard, Inc.*, 127 S.W.3d 814 (Tex. App.—San Antonio 2003, pet. denied) ("The contract's exclusion for consequential damages was enforceable and damages arising from the insured's failure to deliver the appropriate piping packages for the air conditioning system were consequential."); *Continental Holdings, Ltd. v. Leahy*, 132 S.W.3d 471 (Tex. App.—Eastland, no pet.) (limitation of liability provision for consequential damages was enforceable).

[98] *Gessa v. Manor Care of Florida, Inc.*, 86 So. 3d 484 (Fla. 2011), reh'g denied (Apr. 17, 2012).

[99] *Id.*

[100] *Shotts v. OP Winter Haven, Inc.*, No. SC08-1774 20911 WL 5864830 (Fla.)

[101] *Id.*

[102] *Id.*

2. Texas.

Under Texas Law, a court considers the entire four corners of the instrument to determine the true intention of the parties in analyzing a contractual indemnity clause.[103] The courts will presume the parties to the contract intend every clause to have some effect.[104] Texas courts apply the rule of *strictissimi juris,* which means that the indemnitor is entitled to have his agreement strictly construed.[105] This rule prohibits the extension, by construction or implication, of the indemnitor's obligations beyond the precise terms of the agreement.[106] When the agreement is unambiguous, its interpretation is one of a matter of law.[107]

a. Express Negligence Doctrine.

As to whether a party agreed to indemnify another party for its own negligence, the Texas Supreme Court's holding in *Ethyl Corp. v. Daniel Construction Co.,* officially recognized and applied the express negligence doctrine to indemnity agreements.[108] The express negligence doctrine is a rule of contract interpretation that applies specifically to agreements to indemnify another party for the consequences of that party's own negligence.[109] Under this rule, the intent to indemnify one party from the consequences of its own negligence must be expressed in specific terms within the four corners of the document.[110]

With the express negligence test in place, the Texas Supreme Court addressed indemnity law again in *Enserch Corp. v. Parker.*[111] In *Enserch Corp.*, the Texas Supreme Court turned to the language expressing the actions being indemnified to determine if fair notice was given.[112] In order to meet the "fair notice test," the indemnity clause must: (1) meet the express negligence test and (2) be itself conspicuous.[113]

b. Conspicuousness.

In addition to the indemnification clause meeting the express negligence test, the indemnification clause must also meet the second prong of the fair notice test – conspicuousness prong.[114] The

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[103] *Irvin,* 2008 WL 2971806, at *3 (citing *Pratt-Shaw v. Pilgrim's Pride Corp.,* 122 S.W.3d 825, 829 (Tex. App.—Dallas 2003, pet. denied)).

[104] *Id.*

[105] *Id.* (citing *First Union Nat'l Bank v. Richmont Capital Partners I,* 168 S.W.3d 917, 924-25 (Tex. App.—Dallas 2005, no pet.)).

[106] *Id.*

[107] *Irvin,* 2008 WL 2971806, at *4.

[108] *Ethyl Corp. v. Daniel Construction Co.,* 725 S.W.2d 706, 707 (Tex. 1987).

[109] *XL Specialty Ins. Co. v. Kiewit Offshore Services, Ltd.,* 513 F.3d 146, 149 (5th Cir. 2008).

[110] *Ethyl Corp.,* 725 S.W.3d at 707-08.

[111] 794 S.W.2d 2 (Tex. 1990).

[112] I*d.* at 6-8.

[113] I*d.* at 8-9.

[114] *Enserch Corp.,* 794 S.W.2d at 8-9.

conspicuousness prong means that "something must appear on the face of the instrument to attract the attention of a reasonable person."[115]

A provision is ordinarily conspicuous when a reasonable person against whom it is to operate ought to have noticed it. Accordingly, provisions located on the back of a contract in a series of paragraphs in the same font, typeface, and color as the rest of the agreement, are not conspicuous.[116] In contrast, language in capital headings, contrasting color or type, or in an extremely short document is conspicuous.[117]

c. Actual knowledge.

The Texas Supreme Court provided a defense to the fair notice requirements in a brief footnote in *Dresser Industries v. Page Petroleum*.[118] The *Dresser* court noted that "[t]he fair notice requirements are not applicable when the indemnitee establishes that the indemnitor possessed actual notice or knowledge of the indemnity agreement."[119]

The actual notice defense was addressed in *Coastal Transport Co. v. Crown Central Petroleum Corp.*[120] In *Coastal Transport*, the court held that because the defendant had actual notice of the indemnity provision contained in the parties' contract, the fair notice requirements were not applicable.[121] While examining only the conspicuousness prong, the court held that because the defendant stipulated that its president read and signed the two and one-half page agreement, the defendant had actual notice of the indemnity clause.[122]

3. Florida.

Florida recognizes common-law indemnity and contractual indemnity. First, indemnity may be created explicitly by a contract.[123] A contract of indemnity must have sufficient consideration and be sufficiently clear to be enforceable.[124]

If there is no contract provision providing indemnity, there still may be a claim for what is called "common law indemnity."[125] For a party to prevail on a claim of common law indemnity, a party

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[115] *Coastal Transport*, 20 S.W.3d at 126 (citing *Dresser*, 853 S.W.2d at 508). It is important to note that the conspicuousness prong of the fair notice test evolved from the UCC. *See Cate v. Dover Corp.*, 790 S.W.2d 559, 561-61 (Tex. 1990) (citing Tex. Bus. & Com. Code § 2.316).

[116] *Am. Home Shield Corp. v. Lahorgue,* 201 S.W.3d 181, 184-85 (Tex. App.—Dallas 2006, pet. denied).

[117] *Dresser Indus., Inc.,* 853 S.W.3d at 511; *Amtech Elevator Services Co. v. CSFB 1998-P1 Buffalo Speedway Office Ltd. P'ship,* 248 S.W.3d 373, 377-79 (Tex. App.—Houston [1st Dist.] 2007, no pet.); Tex. Bus. & Com. Code § 1.201(b)(10); *cf UPS Truck Leasing v. Leaseway Transfer Pool,* 27 S.W.3d 174, 176 (Tex. App.—San Antonio 2000, no pet.) (indemnity provision in two-page, single-spaced standard form lease in paragraph heading "CUSTOMER AGREES" was not conspicuous because the contrasting type did not indicate that it involved an indemnity obligation).

[118] 853 S.W.2d 505, 508 n. 2 (Tex. 1993).

[119] *Id.*

[120] 20 S.W.3d 119, 125-27 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

[121] *Id.* at 126.

[122] *Id.* at 126 n. 3.

[123] *Id.* at 643.

[124] *Id.*

seeking the indemnity must overcome a difficult two-prong test: (1) the party seeking indemnification must show that they are faultless and their liability must be solely vicarious for the wrongdoing of another; and (2) in order for the faultless party to shift liability to the other, the party against whom indemnification is sought must be at fault.[126] Indemnity between more than one tortfeasor is allowed only where the whole of the fault was that of the person from whom indemnity is requested.[127]

C. ELIMINATE THIRD-PARTY BENEFICIARIES

Many contracts are silent regarding whether there are any third-party beneficiaries to the contract. This allows potential parties to argue they were "implied" or "intended" third-party beneficiaries when they are not. Parties should explicitly state in the agreement that there are no third-party beneficiaries to the agreement that are not explicitly disclosed in the agreement.

1. National.

The Supreme Court rejected a third-party beneficiary claim brought by a county to enforce drug price limits set forth in contracts between pharmaceutical companies and the federal government, suggesting that the federal courts are unlikely to be receptive to such claims when the federal government asserts exclusive authority to enforce the contract.[128] *Astra USA* concerned Section 340B of the Public Health Services Act, which imposes limits on the prices drug manufacturers may charge certain health facilities, generally those serving low-income patients.[129] Santa Clara County conceded that there was no private right of action to enforce the statutes containing the price ceilings, but argued that it was a third-party beneficiary to these agreements.[130] The Supreme Court rejected the claim, holding that the agreements were not subject to negotiation, contained only terms required by the statute and that; as a result, a third-party beneficiary claim was no different than a private right of action.[131] "[R]ecognition of any private right of action for violating a federal statute ... must ultimately rest on congressional intent to provide a private remedy."[132]

In the absence of an express private right of action to enforce a federal law, courts should only infer a right of action when there is explicit evidence of Congressional intent.[133] "[A] federal court should not strain to find in a contract a state-law right of action for violation of federal law under which no private right of action exists."[134] "Although whether the plaintiff has a private right of action under

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[125] *Id at 642*.

[126] *Stuart v. Heartz Corp., 351 So.2d 703, 705 (Fla. 1977).*

[127] *Id.*

[128] *Astra USA, Inc. v. Santa Clara County, California*, 563 U.S. - , 131 S.Ct. 1342 (Mar. 29, 2011).

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.* at 1347.

[133] *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001).

[134] *Broder v. Cablevision Sys. Corp*., 418 F.3d 187,198 (2d Cir. 2005) (citing *Grochowski v. Phoenix Construction*, 318 F.3d 80 (2d Cir. 2003».

the statute is conceptually distinct from whether the plaintiff may sue as a third-party beneficiary of the contract mandated by the statute, the same considerations largely determine both issues."[135]

2. Texas.

In Texas, a third party is a beneficiary to a contract if (1) the contracting parties intended to secure a benefit to the third party, and (2) the contracting parties entered into the contract directly for the third party's benefit.[136]

Courts in Texas will not create third-party beneficiary contracts by implication, and any such obligation must be explicit in the language of the contract for a third party to recover damages.[137] Parties are presumed to contract for themselves, and contracts will not be construed as having been made for the benefit of third persons unless such an intention clearly appears.[138] The agreement must fully and clearly express an intent to confer a direct benefit to the third party.[139] To determine the parties' intent regarding a third-party beneficiary, courts must examine the entire agreement when interpreting a contract and give effect to all the contract's provisions so that none are rendered meaningless.[140]

3. Florida.

Under Florida law, a third party is considered a beneficiary of the contract only if the contracting parties intended to primarily and directly benefit the third party.[141] The elements of such a claim are: "(1) existence of a contract; (2) the clear or manifest intent of the contracting parties that the contract primarily and directly benefit the third party; (3) breach of the contract by a contracting party; and (4) damages to the third party resulting from the breach."[142]

D. DISCLAIMING EXPRESS/IMPLIED WARRANTIES

Disclaiming warranties is an easy way to limit potential claims to the terms of the agreement and not allow any potential liability to be subject to potentially overbroad statutory express and implied warranties.

1. National.

Express and implied warranties vary greatly by state and jurisdiction. Accordingly, the ability to disclaim these warranties also varies by each jurisdiction.

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[135] *Davis v. United Air Lines, Inc.*, 575 F. Supp. 677,680 (E.D.N.Y. 1983).

[136] *Stine v. Stewart*, 80 S.W.3d 586, 589 (Tex. 2002); *MCI Telecomms. Corp v. Texas Util. Elec. Co.*, 995 S.W.2d 647 651 (Tex. 1999); *Raymond v. Rahme*, 78 S.W.3d 552, 561 (Tex. App.—Austin 2002, no pet.)(property owner is not third-party beneficiary of contract between general contractor and subcontractor simply because the owner will benefit from the contract).

[137] *Stine v. Stewart*, 80 S.W.3d at 589*; MCI Telecomms. Corp. v. Texas Util. Elec. Co.*, 995 S.W.2d at 651.

[138] *Melvin Green, Inc. v. Questor Drilling Corp.*, 946 S.W.2d 907, 911 (Tex. App.—Amarillo 1997, no writ).

[139] *Stine v. Stewart*, 80 S.W.3d at 589; *MCI Telecomms. Corp. v. Texas Util. Elec. Co.*, 995 S.W.2d at 651.

[140] *Stine v. Stewart*, 80 S.W.3d at 589; *MCI Telecomms. Corp. v. Texas Util. Elec. Co.*, 995 S.W.2d at 651 - 52.

[141] *Networkip, LLC v. Spread Enters., Inc.,* 922 So.2d 355, 358 (Fla. 3d DCA 2006).

[142] *Id.*

2. Texas.

a. UCC Warranties.

A seller may disclaim UCC implied warranties, but he must comply with requirements of section 2.316.[143] The disclaimer can be communicated by oral or written words, or conduct tending to negate or limit the warranty.[144] The disclaimer must be made before a contract for sale has been completed, or if after completion, qualifies as a modification to the contract.[145] However, any conflict between the disclaimer and express warranty will be resolved in favor of the warranty.[146]

Further, such conflict is subject to the Texas UCC parol or extrinsic evidence rules, which provide that the terms of a written agreement, intended by the parties as a final expression of their agreement, may not be contradicted by evidence of an earlier agreement or a contemporaneous oral agreement, but may be explained or supplemented by (1) course of performance, course of dealing, or usage of trade, or (2) evidence of consistent additional terms, unless the court finds the writing was intended as a complete and exclusive statement of the terms of the agreement.[147]

b. Express Warranties.

Express warranties are created and defined primarily by agreements between parties and the negotiated aspects of such agreements. The focus is on the parties' active conduct and words, as well as the documents evidencing such negotiation, such as contract documents. In light of the fact that express warranties arise out of parties' negotiated agreements, breach of an express warranty is considered similar to a breach-of-contract action, rather than a tort. Since an express warranty is generally a matter of contract, the parties are in large part able to define or limit the "contractual" obligations respecting the thing sold or the services rendered, and to specify how the warranty is to be fulfilled.[148] Accordingly, express warranties can generally be disclaimed.[149]

3. Florida.

In Florida, a seller may limit his liability exposure by disclaiming implied warranties, provided the disclaimers are specific, and in the case of a writing, that it be conspicuous.[150]

In the *McCormick* case, the seller of a used bulldozer included the following language in the sales contract: "Seller makes no warranty express or implied with respect to the property and Buyer accepts delivery thereof under the warranty if any of the manufacturer."[151] The *McCormick* court found that this language was ineffective as to the implied warranty of merchantability.[152] In so

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[143] Tex. Bus. & Com. Code § 2.316.

[144] *Id.*

[145] *Womco, Inc. v. Navistar Int'l Corp.*, 84 S.W.3d 272, 279-80 (Tex.App.—Tyler 2002, no pet.).

[146] Tex. Bus. & Com. Code § 2.316(a); see id. cmt. 1.

[147] *Id.*

[148] *Donelson v. Fairmont Foods Co.*, 252 S.W.2d 796, 799 (Tex.Civ.App.— Waco 1952, writ ref'd n.r.e.).

[149] *See Southwestern Bell Tel. Co. v. FDP Corp.*, 811 S.W.2d 572, 575 (Tex. 1991); Tex. Bus. & Com. Code § 2.316.

[150] *McCormick Mach., Inc. v. Julian E. Johnson & Sons, Inc.*, 523 So. 2d 651, 653 (Fla. 1st DCA 1988), § 672.316(2), Fla. Stat. Ann.

[151] *Id.* at 653.

[152] *Id.*

finding, the court relied on Fla. Stat. § 672.316(2), which provides in pertinent part that "to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability." Because the language at issue did not include the word "merchantability," the court found that that particular implied warranty remained in effect.[153]

E. WAIVER-OF-SUBROGATION CLAUSES

A waiver-of-subrogation clause is a risk-shifting provision premised upon the recognition that it is economically inefficient for parties to a contract to insure against the same risk. As such, a waiver-of-subrogation clause provides there is no right for a party to recover for any damages that are covered by insurance proceeds.

1. National.

Clauses waiving subrogation rights are consistently upheld in many jurisdictions. For example, the Supreme Court of Maine held a contract between an owner and a contractor which contained a waiver of subrogation clause, barred claims for damages by the owner to the extent the claims were covered by insurance.[154]

Additionally, in *South Tippecanoe School Bldg. Corp. v. Shambaugh* & *Son, Inc.,* the Court affirmed summary judgment for a defendant contractor based on a waiver of subrogation clause, noting the contract displayed the intention to place the risk of loss on insurance, and thereby, this protection was the exclusive source of redress for damages covered by the insurance policy obtained.[155] In affirming summary judgment for the defendant and limiting any recovery to the insurance proceeds, the court noted the enforcement of clauses waiving subrogation rights would work to reduce litigation, and decrease the risk of dramatic inflations in the amount of premiums and construction costs paid by parties to construction contracts.[156]

Courts in other jurisdictions have also upheld clauses waiving subrogation rights, thereby barring claims by owners against contractors and subcontractors.[157]

2. Texas.

Waiver of subrogation clauses included in contracts have been consistently enforced by Texas courts. A waiver-of-subrogation clause encourages parties to anticipate risks and to procure insurance covering those risks and also facilitates and preserves economic relations and activity.[158] Because a property owner can generally acquire insurance to protect the property against fire and

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[153] *Id.* at 654.

[154] *Willis Realty Associates v. Cimino Const. Co. 623* A.2d 1287, 1288-89 (Me. 1993).

[155] 395 N.E.2d 320, 327-328 (1st Dist. 1979).

[156] *Id.*

[157] *See i.e. Mu Chapter of Sigma Pi Fraternity of U.S. Inc.* v. *Northeast Const. Services, Inc.,* 684 N.Y.S.2d 872 (Sup. 1999); *Davlar Corp v. Superior Court,* 72 Cal.Rptr.2d 199 (Cal. App. [2d Dist.] 1997) (AIA Contract waiver of subrogation clause upheld); *Butler v. Mitchell-Hugeback, Inc.,* 895 S.W.2d 15 (Mo. 1995); *Chadwick v. CSI, Ltd.*. 629 A.2d 820 (1993) (waiver of subrogation provisions did not constitute unenforceable exculpatory clauses); *Willis Realty Associates* v. *Cimino Const. Co.;* 623 A.2d 1287 (Me. 1993); *E.C. Long. Inc. v. Brennan's of Atlanta, Inc.,* 252 S.E.2d 642 (Ga.App.1979).

[158] *TX.* C.C., *Inc.* v. *Wilson/Barnes,* 233 S.W.3d at 567.

other perils, in the context of a construction contract, the waiver of subrogation clause shifts the ultimate risk of loss resulting from such perils to the owner to the extent the damages are covered by insurance.[159] "In other words, a waiver of subrogation clause substitutes the protection of insurance for the uncertain and expensive protection of liability litigation."[160]

For example the *Trinity* Court affirmed summary judgment against an insurance company that sought the right to subrogation from a general contractor that was found negligent in an arbitration proceeding.[161] The *Trinity* Court acknowledged that subrogation waiver clauses are intended to avoid litigation over claims for damages and held that where the parties have agreed that recovery for losses is limited to insurance proceeds, the insurer (as subrogee) does not have any cause of action against the contractor.[162] Other Texas courts have consistently enforced waiver-of-subrogation clauses.[163]

3. Florida.

In Florida, it is well established that parties to a contract may mutually agree that one party will obtain insurance as part of the bargain, to shift the risk of loss from both of them to the insurance carrier. If loss occurs, they are deemed to have agreed to look solely to the insurance, without regard to which party was negligent, and subrogation is not allowed.[164]

In *Fairchild*, the court found that although the parties could bargain for and shift the risk of loss, they could not make the provision obscure and indefinite and it was only applicable to the specific time-period contemplated in the contract.[165]

F. ANTI-ASSIGNMENT CLAUSES

Another important way of limiting exposure to liability in certain venues is to prohibit the assignment of agreements to third parties without consent. To recover on an assigned cause of action, the party claiming the assigned rights must prove a cause of action existed that was capable of assignment and the cause was in fact assigned to the party seeking recovery.[166] As such, preventing a party from assigning the rights from its agreement can limit potential additional parties which may litigate to enforce the terms of the agreement.

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[159] *Id.*

[160] *Id.* at 567-568.

[161] *Trinity Universal Ins. Co. v. Bill Cox Const., Inc.*, 75 S.W.3d 6, 9, 15 (Tex. App.—San Antonio 2001, no pet.)

[162] *Id.* at 13.

[163] *See-i.e., TX. C.C., Inc. v. Wilson/Barnes General Contractors,* 233 S.W.3d 562 (562 (Tex. App.-Dallas 2007, pet. denied) (upholding loss of use and waiver of subrogation clauses in standard form AIA contract); *Walker Engineering v. Bracebridge,* 102 S.W.3d 837 (Tex. App.-Dallas 2003, pet. denied) (upholding waiver of subrogation clause in standard form AIA contract); *Trinity Universal Ins. Co. v. Bill Cox Constr., Inc.*, 75 S.W.3d 6 (Tex. App.-San Antonio 2001, no pet.) (upholding waiver of subrogation clause in standard for AIA contract).

[164] *Fairchild for Use & Benefit of State Farm Fire & Cas. Co. v. W. O. Taylor Commercial Refrigeration & Elec. Co., Inc.*, 403 So. 2d 1119, 1120 (Fla. 5th DCA 1981).

[165] *Id.* at 1121.

[166] *Texas Farmers Ins. Co. v Gerdes*, 880 S.W.2d 215, 217 (Tex. App.-Fort Worth, 1994).

1. National.

Anti-assignment clauses are disfavored and construed narrowly in deference to policies that seek to facilitate commercial transactions by fostering the free assignability of contracts.[167]

2. Texas.

In contrast, Texas courts regularly enforce anti-assignment clauses in contracts unless the clause is rendered ineffective by a statute.[168] A party is entitled to the trial court's enforcement of the anti-assignment clause in the absence of a successful challenge to the clause.[169] As such, Texas courts have consistently upheld anti-assignment clauses in contracts.[170]

3. Florida.

In Florida, Anti-assignment clauses are generally enforced as long as they do not violate public policy.[171] The *Kohl* Court held that a health insurance contract between a health insurer and an insured which prohibited the assignment of benefits to non-participating providers was valid and that all benefits rendered by non-participating providers could be paid directly to the insured.[172] The Count found that anti-assignment clauses prohibiting insured's assignments to out-of-network medical providers are in accord with the public interest in limiting health care costs.[173]

V.
RISK-SHIFTING OPTIONS IN THE CONSTRUCTION INDUSTRY

Risk-shifting clauses within the construction industry are important and vary by state. Specific examples of these situations as they apply in Texas are outlined below.

A. ANTI-INDEMNITY CLAUSES IN TEXAS CONSTRUCTION CONTRACTS

In Texas, the indemnity clauses discussed above are limited in construction contracts as of January 1, 2012. Texas has a new "Anti-Indemnity Act," codified as new Chapter 151 of the Texas Insurance Code, that applies to prohibit certain indemnity agreements in construction contracts for certain projects within the state.[174]

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[167] *Rumbin v. Utica Mut. Ins. Co.*, 254 Conn. 259, 757 A.2d 526, 531 (2000), 531, citing 3 E. Farnsworth, Contracts (2d Ed. 1998) § 11.4, pp. 82-83 ("Given the importance of free assignability . . . anti-assignment clauses are construed narrowly whenever possible.").

[168] *Johnson v. Structured Asset Services, L.L.C.*, 148 S.W.3d 711, 721 (Tex.App.-Dallas 2004).

[169] *Id.*

[170] *See, e.g., Texas Pacific Indem. Co. v. Atlantic Richfield Co.*, 846 S.W.2d 580, 583 (Tex.App.-Houston 14th Dist. 1993) citing I*sland Recreational Dev. Corp. v. Republic of Texas Sav. Ass'n*, 710 S.W.2d 551 (Tex. 1986). The United States Court of Appeals for the Fifth Circuit also consistently upholds anti-assignment clauses when interpreting Texas law. *See, e.g., Atlantic Richfield*, 846 S.W.2d at 583 citing *Conoco, Inc. v. Republic Ins. Co*, 819 F.2d 120 (5th Cir. 1987).

[171] *Abraham K. Kohl, D.C. v. Blue Cross & Blue Shield of Florida, Inc.*, 955 So. 2d 1140, 1144 (Fla. 4th DCA 2007).

[172] *Id.*

[173] *Id.*

[174] TEX. INS. CODE § 151.

Under the statute, a "construction contract" is defined to include:

> A contract ... or agreement ... entered into by an owner, ... contractor, ... subcontractor, supplier or material or equipment lessor for the design, construction, alteration, ... repair, or maintenance of, or ... furnishing of material or equipment for, a building, structure, appurtenance, or other improvement to or on public or private real property.[175]

While a "construction project" is defined to include:

> A construction, remodeling, maintenance, or repair of improvements to real property. The term includes the immediate construction location and areas incidental and necessary to the work as defined in the construction contract documents. A construction project under this chapter does not include a single family house, townhouse, duplex, or land development directly related thereto.[176]
> The "Anti-Indemnity Act" changes the impact of indemnity provisions under Texas law.

Section 151.102 states that a provision in a construction contract, or an agreement collateral to or affecting a construction contract, is void to the extent that it requires one party to indemnify another for claims arising out of the negligence or other fault of the indemnitee or any third party under the control or supervision of the indemnitee.[177] This is a significant change in Texas law, which previously permitted "regardless-of-fault" indemnities subject to certain notice requirements discussed above. As a result, the Act prohibits indemnity for situations in which the indemnitee is at fault with respect to property damage claims.[178]

The "Anti-Indemnity Act," however, includes certain key exceptions. With regards to personal injury claims, the Act expressly allows indemnity from an employer for bodily injury or death to its employees or any employees of its subcontractors.[179] Thus, it appears that the statute's impact on indemnity for bodily injury and death claims will be modest.

The Act also prohibits a party from naming someone as an additional insured for claims for which indemnity is prohibited under section 151.102.[180] But given that section 151.103 allows certain personal injury indemnities, additional insured protection should still be available for circumstances in which indemnity for personal injuries or death is not prohibited, such as claims by the indemnitor's employees or its subcontractors' employees.

Importantly, the statute does not address waiver-of-subrogation clauses for property damage. There is nothing in the statute that expressly prohibits a party from requiring a waiver-of-subrogation for

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[175] TEX. INS. CODE § 151.001.

[176] *Id.*

[177] TEX. INS. CODE § 151.002.

[178] *Id.*

[179] TEX. INS. CODE § 151.003.

[180] TEX. INS. CODE § 151.004.

property damage from the other party (and requiring that any subcontractors also provide such a waiver).

Overall, there are eleven express statutory exceptions to the new act, most notably construction contracts using OCIP or CCIP insurance programs, construction contracts for single family homes, and construction contracts covered by the Texas Oilfield Anti-Indemnity Act.[181]

Since indemnity will be difficult to obtain in construction contracts moving forward in Texas, the other venue-selection and risk-shifting options discussed will be even more important in the construction industry.

B. THIRD-PARTY BENEFICIARY STATUS IN TEXAS CONSTRUCTION CONTRACTS

In construction contracts, a subcontractor is usually in privity only with the general contractor.[182] A property owner is not a third-party beneficiary of a contract between a general contractor and a subcontractor, even though the owner will benefit from the contract, unless the contract clearly provides for the owner to be a third-party beneficiary.[183]

C. DISCLAIMING IMPLIED WARRANTIES IN TEXAS CONSTRUCTION CONTRACTS

In Texas, most, but not all, common-law warranties may be disclaimed. It is important to ensure that these warranties are disclaimed when available as the warranties are very broad.

1. Residential.

The common-law implied warranty of good and workmanlike performance of services in the construction of residential property can be disclaimed.[184] "Good and workmanlike manner" is defined as "quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work."[185] This warranty serves as a "gap-filler" or "default warranty" if the parties do not agree to another standard for the manner, performance, or quality.[186] The warranty can be disclaimed only by an express agreement between the parties that provides for an alternative manner, performance, or quality of the desired construction in an express warranty.[187]

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[181] TEX. INS. CODE § 151.005.

[182] *City of La Porte v. Taylor*, 836 S.W.2d 829, 831 (Tex. App.—Houston [1st Dist.] 1992, no writ); *City of Corpus Christi v. Heldenfels Bros., Inc.*, 802 S.W.2d 35, 38 (Tex. App.—Corpus Christi 1990), *aff'd*, 832 S.W.2d 39 (Tex. 1992).

[183] *Raymond v. Rahme*, 78 S.W.3d 552, 561 (Tex. App.--Austin 2002, no pet.).

[184] *Centex Homes v. Buecher*, 95 S.W.3d 266, 268 (Tex. 2002).

[185] *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 446 (Tex. 1995); *Melody*, 741 S.W.2d at 354.

[186] *Centex Homes v. Buecher*, 95 S.W.3d 266, 273 (Tex. 2002).

[187] *Id.*

The common-law warranty of habitability can be disclaimed only in limited circumstances, such as a home buyer's express and full knowledge of defects.[188]

2. Commercial.

Texas law recognizes an "implied warranty of suitability for intended commercial purposes."[189] For commercial leasing, this warranty is the closest equivalent of the implied warranty of habitability utilized in the residential construction industry. Basically, the warranty of suitability ensures that, at the inception of the lease, there are no latent defects in the premises that are vital to the use of the premises for their intended commercial purpose.[190] Furthermore, it ensures that such essential facilities will remain in a suitable condition.[191]

A 2007 Texas Supreme Court case, *Gym-N-I Playgrounds, Inc. v. Snider*, evaluated whether a tenant can waive its rights under the implied warranty of suitability for intended commercial purposes by signing a lease containing an "as-is" provision.[192] The Court relied upon the proposition that absent fraud, an "as is" provision can waive claims based upon the condition of the property and ruled the implied warranty of suitability is waived when the lease expressly disclaims that warranty.[193] The Court differentiated the implied warranty of suitability from the implied warranty of habitability (which cannot be waived) by emphasizing that parties to a commercial lease are generally sophisticated and negotiate on more equal footing in arms-length transactions, whereas residential leases generally involve unsophisticated parties in need of greater protection.[194]

VI.
FORUM-SELECTION IN THE TRANSPORTATION INDUSTRY

Forum-selection clauses within the transportation industry are contractual in nature, and therefore should follow general contract law when being negotiated. Situations when a motor carrier should decide to include a forum-selection clause occur when the motor carrier is entering into a contractual agreement with an entity, consumer, or employee. Specific examples of these situations are outlined below.

1. Shipment of Goods.

The shipment of goods is at the root of a motor-carrier's operations. Whether the shipment is consumer related, such as an auto transport carrier transporting an automobile from one location to the next, or non-consumer related, such as the shipment of goods to a wholesale distributor, a motor-carrier can use a forum-selection clause in the bill of lading contract to prevent litigating in an unfavorable venue should a dispute arise related to the shipment. Similar to other contractual provisions, the motor-carrier has the initial burden to establish that the forum-selection clause is

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[188] *Centex Homes*, 95 S.W.3d at 274.

[189] *Davidow v. Inwood North Professional Group-Phase I*, 747 S.W.2d 373 (Tex. 1988).

[190] *Id.*

[191] *Id.*

[192] *Gym-N-I Playgrounds, Inc. v. Snider*, 220 S.W.3d 905 (Tex. 2007).

[193] *Id.*

[194] *Id.*

valid.[195] Importantly, a motor-carrier should always include the forum-selection clause in the initial bill of lading or shipment contract and have it signed by the customer before the shipment takes place.[196] If the forum-selection clause is not contained in the initial contract document, but instead is contained in a subsequent document or invoice, courts will likely find the forum-selection clause was not part of the original agreement and it may not be enforced.[197]

After the motor-carrier establishes that the forum-selection clause was agreed to prior to shipment and that it applies to the dispute before the court, the forum-selection clause is presumed valid. The burden then shifts to the party opposing the forum-selection clause to establish that (1) enforcement would be unreasonable or unjust, (2) the clause is invalid for reasons of fraud or overreaching, (3) enforcement would contravene a strong public policy of the forum where the suit was brought, or (4) the selected forum would be seriously inconvenient for trial.[198]

2. Equipment Leases, Brokerage Agreements, and Owner/Operator Agreements.

Motor-carriers often enter into agreements to obtain equipment, take on or give away additional loads, or hire independent owner/operators to drive for the carrier. When these agreements are entered into, situations may arise that lead to a dispute, such as when the leased equipment fails, the lessee does not pay as required, or a party breaches a non-compete clause in the brokerage agreement. Additionally, when a motor-carrier hires an owner/operator and leases a tractor back to the owner/operator, similar disputes may arise between the owner/operator and the parties regarding the leased equipment.

In situations where the motor-carrier is the entity leasing the equipment, brokering the loads to other motor-carriers or hiring an owner/operator, the motor-carrier should include a forum-selection clause into its contract in order to limit an unfavorable venue if and when a dispute arises.[199] Since any lease agreement, brokerage agreement, or owner/operator agreement is contractual in nature, the motor-carrier will again carry the burden to show the forum-selection clause is valid.[200] Once accomplished, the burden will then shift to the party opposing the forum-selection clause to show that (1) enforcement would be unreasonable or unjust, (2) the clause is invalid for reasons of fraud or overreaching, (3) enforcement would contravene a strong public policy of the forum where the suit was brought, or (4) the selected forum would be seriously inconvenient for trial.[201]

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[195] *Int'l Metal Sales, Inc. v. Global Steel Corp.*, 2010 LEXIS 2201, *6 (Tex.App.—Austin, March 24, 2010); *see Phoenix Network Techs. (Europe) Ltd. v. Neon Sys., Inc.* 177 S.W.3d 605, 611-12 (Tex.App.—Houston [1st Dist.] 2005, no pet.)

[196] *Int'l Metal Sales, Inc. v. Global Steel Corp.*, 2010 LEXIS 2201, *6 (Tex. App.—Austin March, 24, 2010);

[197] *Id.*; *see also Triton Oil & Gas Corp.*, 644 S.W.2d 443, 445 (Tex. 1983).

[198] *In re Lyon Fin. Servs.*, 257 S.W.3d 228, 231-32 (Tex. 2008) (per curiam); see *In re Automated Collection Techs.*, 156 S.W.3d 557, 559 (Tex. 2004) [12] (per curiam) (enforcement of forum-selection clause is "mandatory" unless party opposing enforcement meets this burden).

[199] *See In re GreatAmerica Leasing Corp.*, 294 S.W.3d 912 (Tex.App.—Corpus Christi 2009, no pet.)

[200] *Int'l Metal Sales, Inc. v. Global Steel Corp.*, 2010 LEXIS 2201, *6 (Tex.App.—Austin Mar. 24, 2010); *see Phoenix Network Techs. (Europe) Ltd. v. Neon Sys., Inc.* 177 S.W.3d 605, 611-12 (Tex.App.—Houston [1st Dist.] 2005, no pet.)

[201] *In re Lyon Fin. Servs.*, 257 S.W.3d 228, 231-32 (Tex. 2008) (per curiam); see *In re Automated Collection Techs.*, 156 S.W.3d 557, 559 (Tex. 2004) [12] (per curiam) (enforcement of forum-selection clause is "mandatory" unless party opposing enforcement meets this burden).

3. Non-Subscribers and Arbitration Agreements.

In Texas, motor-carriers who decide not to carry worker's compensation insurance and instead carry their own employee benefit plan in the case of a work-related injury, are termed as "non-subscribers." When motor-carries decide to be non-subscribers, an employee injured while on the job may file suit against his/her employer alleging the employer was negligent in some manner. Often, the employee will claim the employer failed to provide a reasonably safe work environment due to equipment failures that result in an injury. When an employee files suit against a non-subscribing motor-carrier, the motor carrier waives all common-law defenses, including comparative fault and assumption of the risk.[202] In these situations, litigating before an arbitrator may be more favorable than proceeding before a state court.

Arbitration agreements are similar to forum-selection clauses in that the motor-carrier seeks to avoid an unfavorable venue and have all issues decided before an arbitrator rather than in the courts. Arbitration agreements often contain forum-selection clauses within them that dictate the city and state where the arbitration must take place, as well as which state's law will be applied in the arbitration proceedings.[203] If a motor-carrier has an arbitration agreement with an employee and the employee first files a work-related suit in a state court, the motor-carrier bears the initial burden to show the arbitration agreement is valid before the court will compel the matter to arbitration.[204]

Initially, the motor-carrier must establish a valid agreement to arbitrate exists.[205] The agreement must contain consideration, which may be a mutual agreement to arbitrate disputes covered by the agreement and the waiver of the parties' rights to litigate covered claims before a court.[206] Texas law does not require thae arbitration agreement to be signed to be enforceable, but it must be shown that the agreement to arbitrate is written and agreed to by the parties.[207] After the arbitration agreement is shown to be valid, the burden shifts to the employee, or party opposing arbitration, to show an affirmative defense to arbitration.[208] Once the court finds the arbitration agreement is valid and there are not any enforceable defenses, the court will compel the entire suit to arbitration.[209]

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[202] TEX. LAB. CODE §406.033(a); *Omoruyi v. Grocers Supply Co.*, 2010 LEXIS 3753, *20 (Tex.App.—Houston [14th Dist.] May 20, 2010)

[203] *See In re AdvancePCS Health, L.P.*, 172 S.W.3d 603, 605 (Tex.2005).

[204] *In re Villanueva*, 311 S.W.3d 475, 478-79 (Tex.App.—El Paso 2009, no pet.); *In re AdvancePCS Health, L.P.*, 172 S.W.3d 603, 605 (Tex.2005).

[205] Federal Arbitration Act, 9 U.S.C. § 4; TEX. CIV. PRAC. & REM. CODE ANN. § 171.001(a) (Vernon 2005); *OPE Int'l LP,* 258 F.3d at 445; *Shanks*, 2008 WL 2513056 at *4.

[206] *In re Halliburton Co.*, 80 S.W.3d 566, 569 (Tex. 2002) (holding mutual agreement to arbitrate not illusory).

[207] *In re Halliburton Co.*, 80 S.W.3d 566, 569, 45 Tex. Sup. Ct. J. 720 (Tex. 2002) (holding arbitration clause was accepted by continued employment).

[208] *In re Villanueva*, 311 S.W.3d 475, 478-79 (Tex.App.—El Paso 2009, no pet.); *In re AdvancePCS Health, L.P.*, 172 S.W.3d 603, 605 (Tex.2005); *In re J.M. Davidson*, 128 S.W.3d 223, 227 (Tex. 2003)

[209] *In re D. Wilson Const. Co.*, 196 S.W.3d 774, 782 (Tex. 2006); *Roe v. Ladymon*, 318 S.W.3d 502, 510 (Tex. App.—Dallas 2010, no pet.).

VII.
VENUE SELECTION FOR PROPERTY OWNERS & OPERATORS

Owners of real property or operators of businesses located on leased property routinely enter into contracts such as property leases, equipment leases and agreements with third parties for services such as property management, security and maintenance. When entering into such contracts, property owners and operators should consider including a forum-selection clause or arbitration clause in order to reduce the risk of landing in an unfavorable venue should litigation later arise between the parties to the contracts.

A. FORUM-SELECTION CLAUSES

Negotiating the venue for any potential litigation can sometimes prevent having to litigate in an unfavorable venue. This risk-shifting option is particularly attractive in situations such as when business operators with several locations throughout the country exclusively contract with a particular company to provide necessary equipment or services at all such locations throughout the country. Rather than having to potentially litigate multiple matters in multiple venues throughout the country, a forum-selection clause will ensure all such potential litigation is litigated in the same, agreed-upon venue.

To ensure the validity of a forum-selection clause within a property lease, equipment lease or service agreement, property owners and operators should make certain the forum-selection clause is at the very least reasonable under the circumstances, as required by the U.S. Supreme Court.[210] Property owners and operators should then ensure that the forum-selection clause would be considered reasonable under their state laws regarding contract formation and forum-selection clauses, as whether a forum-selection clause is considered unreasonable varies from state to state. In Texas for example, the Texas Supreme Court has held that enforcement of a forum-selection clause is mandatory unless the party resisting the clause shows one or more of the following: 1) enforcement of it would be unreasonable and unjust, 2) the clause is invalid due to fraud or overreaching, 3) enforcement would contravene a strong public policy of the forum where the suit was brought, or 4) the selected forum would be seriously inconvenient.[211]

B. ARBITRATION CLAUSES

If a property owner or operator is not able to negotiate a forum-selection clause into their property lease, equipment lease or service agreement in an attempt to avoid litigating in a potentially unfavorable venue, an arbitration clause is another option to consider. Rather than ensuring a dispute will be litigated in a particular venue through a forum-selection clause, an arbitration clause will ensure a dispute is heard before a particular type of tribunal. An arbitration clause allows a property owner or operator to submit disputes that may arise from the property lease, equipment lease or service agreement to arbitration rather than litigating the dispute in state or federal court.

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[210] *See M/S Bremen v. Zapata Off-shore Co.*, 407 U.S. 1, 10 (1972).

[211] *See Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 793 (Tex. 2005); *see also In re Laibe Corp.*, 307 S.W.3d 314, 316 (Tex. 2010).

If a valid arbitration agreement exists and the claims raised fall under the agreement, the Federal Arbitration Act and state equivalents such as the Texas Arbitration Act, generally dictate that the dispute should be compelled to arbitration.[212] An agreement to arbitrate is enforceable if it clearly appears from the agreement that it was the intention of the parties to submit their dispute to arbitrators and to be bound by their decision.[213]

VIII.
VENUE-SELECTION IN PRODUCTS LIABILITY

Venue-selection and risk-shifting is highly important in the area of products liability. Within the industry, both venue-selection and risk-shifting are addressed through contractual clauses contained in contracts for the supply/distribution, shipment, or sales of products. Thus, such clauses should be negotiated in accordance with general contract law. Types of potential clauses are discussed below.

1. Forum-Selection Clauses.

A product manufacturer, supplier, distributor, or seller seeking to avoid an unfavorable venue should include forum-selection clauses in the various contracts entered into throughout the supply-chain. These include supplier contracts, shipping contracts, and sales contracts. In supplier contracts, for example, forum-selection clauses can help ensure that disputes between the supplier and vendors, dealers, or distributors will be decided in the supplier's home state, thereby providing the supplier with "home court" advantage in litigation and eliminating any costs that would ordinarily arise with having to litigate out-of-state. As previously noted, a supplier should always include the forum-selection clause in the initial bill-of-lading or shipping contract and have it signed by customer prior to shipment (rather than in a subsequent document) to avoid a court determining that the forum-selection clause was not part of the original agreement and finding it invalid as a result.[214] In the context of sales contracts, forum-selection clauses may allow suppliers to avoid unfavorable venues when resolving disputes with purchasers. In such situations, the forum-selection clause should be included in the sales contract, in the materials that come with the product, and/or on the product itself. Importantly, in each of the above situations, the product manufacturer, supplier, distributor, or seller (as the case may be) will bear the initial burden of showing the forum-selection clause is valid.[215]

2. Arbitration Clauses.

Like forum-selection clauses, arbitration clauses seek to divest the courts in an unfavorable venue of jurisdiction and, instead, have a matter decided through arbitration rather than litigation. Such clauses can be included in the contracts discussed above, that is, contracts for the supply/distribution, shipment, or sales of products. In such instances, the arbitration clause may

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[212] *See* Federal Arbitration Act, 9 U.S.C. § 4; Tex. Civ. Prac. & Rem. Code § 171.001(a) (Vernon 2005); *OPE Int'l LP v. Chet Morrison Contractors, Inc.,* 258 F.3d 443, 445 (5th Cir. 2001).

[213] *Trico Marine Servs., Inc. v. Stewart & Stevenson Tech. Servs., Inc.*, 73 S.W.3d 545, 547 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *Manes v. Dallas Baptist College*, 638 S.W.2d 143, 145 (Tex. App.—Dallas 1982, writ ref'd n.r.e.); *see In re Allstate County Mut. Ins. Co.*, 85 S.W.3d 193, 195 (Tex. 2002).

[214] *Int'l Metal Sales, Inc. v. Global Steel Corp.*, 2010 LEXIS 2201, *6 (Tex. App.—Austin March, 24, 2010);

[215] *Int'l Metal Sales, Inc. v. Global Steel Corp.*, 2010 LEXIS 2201, *6 (Tex.App.—Austin, March 24, 2010); *see Phoenix Network Techs. (Europe) Ltd. v. Neon Sys., Inc.* 177 S.W.3d 605, 611-12 (Tex.App.—Houston [1st Dist.] 2005, no pet.)

(and should) contain a forum-selection clause specifying the location of the arbitration (city, state) and the state-law applicable to the proceedings.[216] The inclusion of an arbitration clause, in the event a party brings suit in a court of law, enables a product manufacturer, supplier, distributor, or seller to seek to have the court compel the proceeding to arbitration.[217]

To compel a matter to arbitration, a contracting party must first establish the existence of a valid arbitration agreement.[218] To be valid, an arbitration agreement must: (1) contain consideration, such as a mutual agreement to arbitrate contract-covered disputes and the parties' waiver of rights to litigation; (2) be written; and (3) be enforceable.[219] Notably, however, an arbitration agreement need not be signed in order to be valid.[220] But, if shown to be valid, the burden shifts to the party disputing arbitration to show why the matter should not be compelled to arbitration.[221] If no enforceable defense exists, the court will compel arbitration.[222]

IX.
FORUM AND VENUE SELECTION CLAUSES IN INSURANCE POLICIES

Insurance policies may contain forum and venue selection clauses; however, the enforceability of such clauses depends upon the interaction with state law.

A. FORUM SELECTION CLAUSES

Forum selection clauses are prima facie valid and will be enforced unless the insured/plaintiff can prove that:

(1) Enforcement would be unreasonable or unjust;
(2) The clause is invalid for reasons of fraud or overreaching;
(3) Enforcement would contravene a strong public policy of the forum where the suit was brought; or,
(4) The selected forum would be seriously inconvenient for trial.

In re Lyon Fin. Servs., 257 S.W.3d 228, 232 (Tex. 2008).

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[216] *See In re AdvancePCS Health, L.P.*, 172 S.W.3d 603, 605 (Tex.2005).

[217] *In re Villanueva*, 311 S.W.3d 475, 478-79 (Tex.App.—El Paso 2009, no pet.); *In re AdvancePCS Health, L.P.*, 172 S.W.3d 603, 605 (Tex.2005).

[218] Federal Arbitration Act, 9 U.S.C. § 4; TEX. CIV. PRAC. & REM. CODE ANN. § 171.001(a) (Vernon 2005); *OPE Int'l LP,* 258 F.3d at 445; *Shanks*, 2008 WL 2513056 at *4.

[219] *In re Halliburton Co.*, 80 S.W.3d 566, 569 (Tex. 2002).

[220] *In re Halliburton Co.*, 80 S.W.3d 566, 569, 45 Tex. Sup. Ct. J. 720 (Tex. 2002) (holding arbitration clause was accepted by continued employment).

[221] *In re Villanueva*, 311 S.W.3d 475, 478-79 (Tex.App.—El Paso 2009, no pet.); *In re AdvancePCS Health, L.P.*, 172 S.W.3d 603, 605 (Tex.2005); *In re J.M. Davidson*, 128 S.W.3d 223, 227 (Tex. 2003)

[222] *In re D. Wilson Const. Co.*, 196 S.W.3d 774, 782 (Tex. 2006); *Roe v. Ladymon*, 318 S.W.3d 502, 510 (Tex. App.—Dallas 2010, no pet.).

Courts rarely decline to enforce a forum selection clause based upon inconvenience, but it does not preclude a dismissal on the theory of forum non conveniens. *Sarieddine v Moussa*, 820 S.W.2d 837, 839 (Tex. App. – Dallas 1991, writ denied) (enforcing the forum selection clause and reversing the trial court's forum non conveniens dismissal). Failure to enforce a valid forum selection clause by a trial court can be asserted as error in a writ of mandamus. *See, eg., In re ADM Investor Srvs.*, 304 S.W.3d. 371, 374 (Tex. 2010).

The clauses need to be conspicuous - such as in all capital letters. *See In re Lyon Fin. Servs.*, 375 S.W.3d at 233. If all parties are American, then a foreign nation cannot be chosen. *See Carnival Cruise Line, Inc. v. Shute*, 499 S.W. 585, 594 (1991). When attempting to enforce a forum selection clause, the party should file a motion to dismiss early in the proceedings. *See, e.g., Flying Diamond – W. Madisonville Ltd. P'ship v. GW Petroleum, Inc.*, No. 10-07-00281-VB, 2009 Tex. App. LEXIS 6891 at 27-35 (Tex. App. – Waco Aug. 26, 2009, no pet.).

> An example of a forum selection clause is as follows:
> Choice of Law and Forum – In the event that the Insured and the Company dispute the validity or formation of this policy or the meaning, interpretation or operation of any term, condition, definition, or provision of this policy resulting in litigation, arbitration or other form of dispute resolution, the Insured and the Company agree that the law of the State of New York shall apply and that all litigation, arbitration or other form of dispute resolution shall take place in the State of New York.

In re AIV Ins. Co., 148 S.W.3d 109, 111 (Tex. 2004).

B. VENUE SELECTION CLAUSES

Texas Courts are more circumspect with respect to venue selection clauses. Section 15.020 of the Texas Civil Practice & Remedies Code applies to venue selection clauses. Many insurance policies do not fall within the protection afforded under this statute. Courts enforce contractual venue selection clauses that relate to "major transactions" (as long as a mandatory venue provision does not apply and the clause is not unconscionable). A "major transaction" must have an "aggregate stated a value" of at least one million dollars. The Texas Supreme Court has held that an insurance policy is a "major transaction" only if its premium is at least one million dollars. *In Re Texas Ass'n of School Boards*, 169 S.W.3d 653, 659-660 (Tex. 2006).

Even in light of a venue selection clause, the state rule of dominant jurisdiction and its federal counterpart, the "first-to-file" rule may trump the contractual clause. In other words, the court in which the action is first filed acquires dominant jurisdiction and is the proper venue to try the action. *Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 247 (Tex. 1988). There are specific rules that must be followed in order to invoke the rule of dominant jurisdiction. *Flores v. Peschel*, 927 S.W.2d 209, 212 (Tex. App. – Corpus Christi 1996, orig. proc.). The federal first-to-file rule is similar but does not require the court in which the suit was first filed to actually hear the case. *Save Power Ltd. v. Syntek Fin. Corp.*, 121 F.3d 947, 950 (5th Cir. 1997). Instead, the first-filed court determines which of the competing cases should proceed.

X.
VENUE CONSIDERATIONS IN ENVIRONMENTAL LITIGATION

A. FORUM SELECTION CLAUSES

Owners of businesses with any potential environmental impact should strongly consider including a forum-selection clause in their contracts. An environmental incident could involve several counties or states and allow the plaintiff to select a court hostile to the defense while leaving the defendant with no way to transfer venue to a more favorable jurisdiction. A forum selection clause in an applicable contract could provide the means to transfer the case to the friendly jurisdiction pre-selected by the defendant in the contract greatly reducing the judgment and settlement value of the case. Contractual forum selection clauses, when applicable, are generally favored in Texas state court and federal court as they are considered presumptively valid and should be enforced unless enforcement would be unreasonable. [223] The Supreme Court of the United States recently stated that a contractual forum selection clause should be given "controlling weight in all but the most exceptional cases". [224] The Supreme Court held that as a result, the traditional venue analysis under 28 U.S.C. 1404(a) is modified when there is a valid forum selection clause such that the court: (1) gives no weight to the plaintiff's choice of forum; (2) does not consider the parties' private interests because the private interest factors have been predetermined by contract to favor the selected forum; and (3) uses the choice of law rules of the preselected forum to govern the transfer motion.[225]

B. MULTIDISTRICT LITIGATION

Large scale environmental incidents such as the Deepwater Horizon oil spill can lead to the filing of multiple suits in different federal district courts. Multidistrict Litigation (MDL) is a procedure in federal court designed to speed the process of handling complex cases with common questions of fact filed in different federal districts. Forum-selection clauses are not directly considered in Multidistrict Litigation (MDL), although the location of the main federal action can influence the location of the MDL. With MDLs, federal courts can consolidate similar claims filed in different jurisdictions to resolve pretrial matters. To be eligible as an MDL, the Judicial Panel on Multidistrict Litigation must determine that there are common questions of fact among the federal lawsuits.[226] Proceedings to transfer an action in MDL can be initiated by the Judicial Panel itself, or by any party in any action in which transfer for coordinated or consolidated pretrial proceedings may be appropriate.[227] Most importantly, once an MDL is initiated, the Judicial Panel solely determines the

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[223] *Seattle–First Nat'l Bank v. Manges*, 900 F.2d 795, 799 (5th Cir.1990) (citing *M/S Bremen v. Zapata Off–Shore Co.*, 407 U.S. 1, 10 (1972)); *Deep Water Slender Wells, Ltd. v. Shell Intern. Explor. & Prod, Inc.*, 234 S.W.3d 679, 692 (Tex. App.—Houston [14 Dist.], 2007) (pet. denied).

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[224] *Atlantic Marine Constr. Co. v. U.S. Dist. Court for the W. Dist of Tex*, 571 U.S. ___, 2013 WL 6231157, at *3 (Dec. 3, 2013).

[225] *Id.* at *11-13.

[226] 28 U.S.C. § 1407 (a).

[227] 28 U.S.C. § 1407 (c).

forum and venue for the proceeding based on "the convenience of parties and witnesses, and will promote the just and efficient conduct of such actions."[228] The MDL Panel in the Deepwater Horizon oil spill case considered: (1) the location of the defendant's headquarters; (2) the location of witnesses and documents; (3) the accessibility of the chosen location; and (4) the experience of the presiding MDL judge. The Deepwater Horizon MDL Panel used those factors to determine that the cases arising out of the spill would be consolidated for pre-trial proceedings in the U. S. District Court for the Eastern District of Louisiana instead of the Southern District of Texas, where the majority of the actions were preemptively filed by plaintiffs or transferred by defendant BP.

C. MANDATORY VENUE PROVISIONS

Environmental litigation is often governed by specific environmental statutes that provide the basis for the cause of action. Many of these statutes contain mandatory venue provisions that will control the determination of venue. An example is Texas Water Code § 7.105, which provides that a water violation can be brought in Travis County, in the county where the defendant resides, or in the county in which the violation or threat of violation occurs.[229] Another example is the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA") which provides that venue in a civil proceeding under CERCLA "shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office."[230] Such statutes, when applicable, will control the determination of venue over more the more general venue rules of the jurisdiction.

[228] *Id.*

[229] Tex. Water Code § 7.105 (c).

[230] 42 U.S.C § 9613(b).