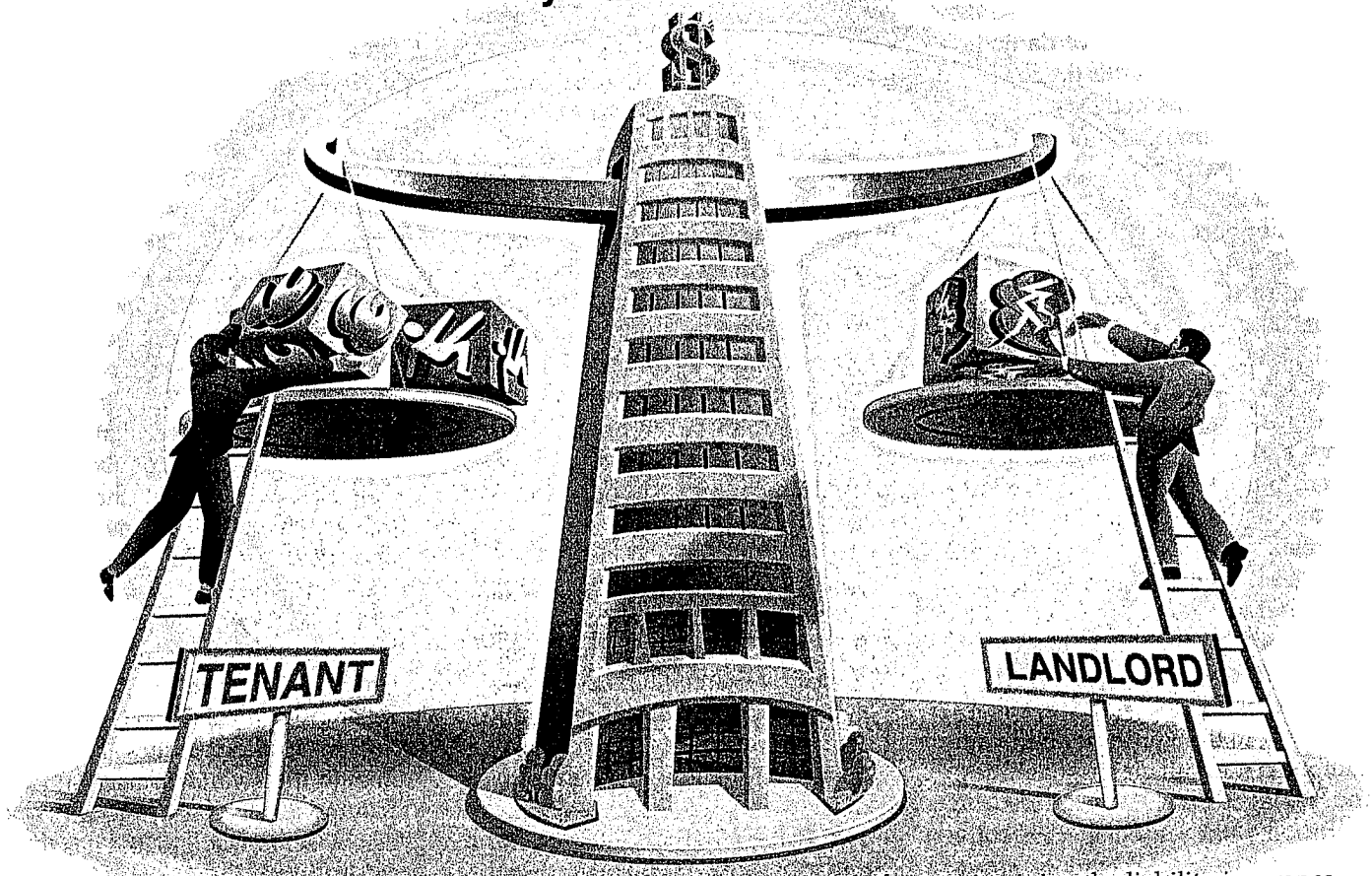
Indemnification Provisions in Leases

What We Ask for and What Really Matters

By Marie A. Moore



Jim Starr

The allocation of risks is one of the most important issues determined in a lease. Hours of negotiation can result if both parties view this issue as one of honor, rather than approaching it pragmatically as a matter of working with the parties' respective insurance obligations and the existing state laws.

The risk allocation issue arises out of the very nature of the lease transaction. In a lease, a landlord permits an unrelated party, the tenant, to do business in and have control over space owned by the landlord. The law of many states is based on an assumption that a property owner should have at least some responsibility for keeping property that he owns safe. On the one hand, because the landlord is the owner of the space, if the tenant or its property is damaged, or if a customer is injured in the space, the landlord is likely to be sued for the damage or injury. On the other hand, frequently, landlords have little practical control over a parcel of property or interior store space after it is leased to a tenant. They also do not wish to bear the cost of insuring for accidents in the leased space. As a consequence, most landlords' form waiver and indemnification provisions attempt to shift to the tenant all responsibility for losses and accidents in the leased space, even those caused by (or claimed to have been caused by) the negligence of the landlord's agents, employees, or contractors. The form language also seeks to insulate the landlord from responsibility for occurrences outside the space if the tenant or its customers are involved. The tenant is naturally reluctant to assume responsibility for accidents caused by defects in the landlord's property, particularly if the leased space was constructed by the landlord, or for accidents caused by the landlord's agents, employees, or contractors, even if the accident occurs in the leased space and the tenant is maintaining the liability insurance.

In negotiations, each party requests protection from the other for all possible claims—likely and unlikely. As a consequence, lease negotiations can be protracted on the issues surrounding the indemnification and waiver clauses. In most cases, the parties can resolve these issues by dividing their responsibilities in a way that is consistent with what their insurance and the laws of the state in which the property is located permit and then drafting the lease to match this division of responsibilities.

Indemnification and Waiver Provisions in Leases

In a lease's indemnity clause, a party agrees to pay the liability, and in

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some cases the defense costs and damages, of the other party if a claim is asserted by a third party. An indemnification provision may also include an agreement to reimburse the other party for its losses or damages if the other party itself is damaged. A waiver of claims in a lease is an agreement by one party not to look to the other party for reimbursement for certain damages or claims, even if the other party would otherwise be responsible.

Landlord form leases generally require the tenant to provide the landlord with both indemnification and a defense for claims, liabilities, and damages that arise out of the tenant's operation of a business in the leased space, the tenant's operation and maintenance of the leased space, the business conducted by the tenant in the leased space, and the negligence and intentional misconduct of the tenant or the tenant's agents, employees, and contractors. A more aggressive landlord may also ask the tenant to indemnify, defend, and reimburse it for all claims, liabilities, and damages that arise from the condition of the leased space and the negligence and intentional misconduct not only of the tenant and its agents, employees, or contractors but also of its customers and invitees.

Most landlord forms also contain a one-sided waiver of claims in favor of the landlord in which the tenant waives the right to assert a wide range of claims against the landlord. Originally, a waiver of claims was intended to cover loss of or damage to the tenant's property so that the landlord would not face claims by the tenant for its loss of business or for damage to its property, even if the tenant's property was damaged by the landlord's negligence. For example, in a retail lease the tenant's waiver was intended to prevent the tenant from making a claim against the landlord for damage to the tenant's inventory because of a roof leak or for the tenant's resulting loss of business. The landlord's position was that the tenant should insure its own property and business losses.

Today's landlord forms generally go beyond waivers of claims for the tenant's property and require that the tenant waive claims for all occurrences, including personal injuries caused by the landlord's negligence in the leased space or, in some cases, outside of it, based on the landlord's desire that the tenant insure against all of these risks. Unfortunately for landlords, in today's marketplace, many large tenants self-insure their inventory and loss of business, and tenants with great bargaining positions object even to the traditional waiver of claims against the landlord for property loss or damage.

An example of a landlord-oriented indemnification and waiver provision for in-line space in a shopping center is as follows:

> Tenant will reimburse Landlord and its property manager, and their respective owners, officers, directors, shareholders, affiliates, agents, employees, and representatives (collectively, "Landlord Parties") for and will indemnify, defend, and hold harmless Landlord Parties from and against any and all loss or damage sustained by, liability or charges imposed on, and claims or causes of action asserted against, Landlord Parties arising in whole or in part out of or by reason of (i) any accident or occurrence in or on the Premises, any use of or business conducted in or on the Premises, or any hidden or apparent defect in the Premises; or (ii) any damage to or loss of any property of Tenant or any person occupying the Premises or any of their respective officers, directors, shareholders, affiliates, agents, employees, or contractors (collectively, "Tenant Parties"), whether this damage to or loss of property occurs on the Premises or on any other part of the Property; or (iii) any act, negligence, or fault of Tenant Parties, whether occurring on the Premises or on any other part of the Shopping Center. Tenant's reimbursement and indemnity obligations will include, but not be limited to, any and all penalties, assessments, fines, damages, interest, settlement amounts, judgments, losses, reasonable attorneys' fees, and other expenses, and will survive the expiration or other termination of this Lease.
>
> Because of Tenant's insurance obligations under this Lease, Tenant assumes full responsibility for the condition of the Premises throughout the term, and Tenant hereby waives all rights and claims against Landlord Parties, for any and all property loss or damage occurring anywhere on the Shopping Center and any and all personal injury or death occurring in or about the Premises, except that each such person will be responsible for actual damage caused by each such person's gross negligence or intentional fault [and for personal injuries caused by each such person's negligent acts]. As part of its waiver, Tenant waives all rights and claims against Landlord Parties arising from (i) theft, vandalism, criminal acts, or lack of security (Tenant hereby acknowledges that it is solely responsible for its own security, and that neither Landlord nor its property manager is providing any security equipment, devices, or services); (ii) any acts or omissions of other tenants of the Shopping Center or any other property owned or managed by Landlord or Landlord's property manager; (iii) any freezing, bursting, or leaking of, or water otherwise coming out of pipes or sprinklers, leaks in the roof, or the lack of a sprinkler system or fire prevention system, or the failure of a sprinkler system or fire prevention system to work properly (Tenant hereby acknowledges that it has sole responsibility for insuring over loss or damage caused by malfunctions or failures to function of the sprinkler system or fire prevention system); (iv) any lack of or failure of the plumbing, heating, air conditioning, or any other mechanical system (including, but not limited to, those described

in (iii) above), except for the rent abatement to which Tenant may be entitled under the circumstances described in the provisions of this Lease with respect to fire and other casualty; or (v) any failure to cause the Premises to comply with laws or otherwise to be in a condition suitable for Tenant's use. This provision and Tenant's reimbursement and indemnification obligations set out above will apply notwithstanding the fact that Landlord is the owner and landlord of the Premises [and even if the incident that is the subject of the waiver, reimbursement, or indemnification arises from the negligence of the Landlord Parties, or any of them, or Landlord's contractors]; however, this clause will not exclude liability if the exclusion of that liability is prohibited by the laws of the state in which the Premises are located. This Section shall survive the termination of this Lease with respect to matters that occur during the term.

As a rule, indemnification clauses and waiver provisions are construed strictly by courts. If a landlord wishes the tenant to indemnify it or to waive claims against it for the landlord's own negligence or for matters for which the landlord is liable solely by reason of its status as landlord of the leased property, the lease should require the tenant to provide this indemnity and to waive these claims in explicit terms. It is possible, however, that a court may be satisfied by language that is less clear in order to permit the landlord to shift to the tenant only liability for matters for which the landlord is responsible solely because it is the owner of the property. Landlords should also be aware that in some circumstances and in some states a court will not permit the landlord to shift responsibility for its own negligence, particularly in a personal injury situation.

If the tenant is actually the party charged with the responsibility for performing all maintenance, repairs, and replacements to the leased space and has assumed responsibility for maintaining the space in a safe condition, a careful landlord will include specific language requiring the tenant to provide indemnification against claims arising from defects or deficiencies in the property, whether or not these defects are hidden or apparent, and against claims based on the landlord's liability solely as owner or landlord of the leased property. The landlord will also include waivers by the tenant of any claims that the tenant may have for accidents caused by unsafe conditions in the leased space.

If the landlord is to be responsible for the initial construction of the space and, after this initial construction, is to be responsible for repairs and replacements, the tenant will not wish to waive or to be obligated to indemnify the landlord for property damage or injuries that occur in the space by reason of its condition. In this case, the tenant will assert that its indemnification obligations and its waivers should be limited to matters arising from its business and its own acts or negligence. Many landlords, however, will not agree to this provision because it would require the landlord to show that the tenant's business or its acts or negligence caused the damage in each circumstance, and the landlord may wish the tenant's insurance to cover these accidents regardless of their cause.

Most landlords will agree to stipulate that the tenant is not obligated to indemnify the landlord for accidents that are caused by the landlord's gross negligence and willful misconduct. The landlord may not actually be giving up any rights by agreeing to this exclusion because most, if not all, states require parties to be responsible for their own gross negligence and willful misconduct.

Except in a net lease, a landlord may also agree that the tenant will not be obligated to indemnify the landlord or to waive claims for incidents caused by the landlord's negligence. If the landlord is self-insured, however, or is otherwise unwilling to expose its insurance to claims arising from accidents that occur inside the leased space, the landlord may agree to be subject to liability for its own negligence only if that negligence occurs in the common areas. To support this seemingly harsh position, landlords frequently assert that the landlord does not want to be caught up in a dispute over whose negligence caused the accident. Landlords contend that for property damage, the tenant's property policy is supposed to cover tenant's property regardless of the cause of the loss, and for personal injuries, the tenant's insurance should be primary and should pay all litigation and liability expenses for incidents that occur on the premises. As shown below, however, many states do not permit the landlord to shift responsibility for its own negligence.

Most landlord forms contain a one-sided waiver of claims in favor of the landlord in which the tenant waives the right to assert a wide range of claims against the landlord.

Tenants generally attempt to strike the phrase "in whole or in part" from waiver provisions and from provisions in which the tenant agrees to indemnify the landlord against accidents caused "in whole or in part" by the tenant's business, an occurrence in the leased space, or the tenant's acts or omissions. Tenants also frequently ask that the word "sole" be deleted from language making the landlord responsible only for its "sole" negligence. Many landlords will agree that the tenant will be obligated to indemnify the landlord only "to the extent of" the tenant's negligence, and this same qualifier can in some circumstances also be applied to the tenant's liability exclusion.

Many tenants ask that the landlord provide reciprocal indemnification to the tenant. As discussed above, the landlord should be able to provide indemnification for its own gross negligence or willful misconduct because under the laws of most states, it will be liable for these acts and omissions in any event. Some landlords may also be willing to provide indemnification for their own negligence and the negligence of their employees in the common areas, and possibly in the leased premises, particularly if the claim is for personal injury. If the tenant is large and the shopping center is small, the landlord may be willing to have the tenant named as an additional insured on the landlord's liability insurance. The landlord may also be willing in such circumstances to indemnify the tenant for accidents that occur in the common areas, possibly even if caused by the tenant's negligence, based on the shopping center's insurance coverage.

The parties' negotiation of these risk allocations should be guided by the parties' reciprocal insurance obligations and should be in accordance with the state laws that govern the shifting of liability by parties. If the landlord plans to pay for insurance covering occurrences in its leased spaces if caused by its own negligence, the negotiations should not be held up over whether the tenant will be liable for the landlord's negligence on the premises, at least for personal injury. If the tenant insures claims arising from the negligence of its own employees, then the tenant should not ask that the landlord cover this negligence in the common areas (although as mentioned above, in a small shopping center in which the landlord maintains the common areas but tenant bears much of the cost of the insurance for accidents in these areas, then the tenant can be named as an additional insured, and the landlord should be able to assume these risks).

The parties should also consider whether state law will invalidate their hard-fought allocations of liability. The following section contains a brief discussion of the laws of a few states on the enforcement of waivers of and indemnifications for the negligence of the other party.

Laws of Selected States on Exculpation and Indemnification

A survey of lease cases in certain states regarding the enforceability of lease indemnity agreements and waivers follows below. Although the courts in these selected states generally cite public policy when they find indemnity agreements and waivers unenforceable, most decisions appear to be somewhat fact-driven.

Landlords should be aware that in some circumstances and in some states a court will not permit the landlord to shift responsibility for its own negligence, particularly in a personal injury situation.

Alabama

In Alabama, indemnity agreements are generally enforceable. See, e.g., *Industrial Tile, Inc. v. Stewart*, 388 So. 2d 171, 175 (Ala. 1980), cert. denied, 449 U.S. 1081 (1981). "[I]f the parties knowingly, evenhandedly, and for valid consideration, intelligently enter into an agreement whereby one party agrees to indemnify the other, including indemnity against the indemnitee's own wrongs, if expressed in clear and unequivocal language, then such agreements will be upheld." Id. at 176.

In *Armi v. Huckabee*, 94 So. 2d 380 (Ala. 1957), a tenant was injured by a fire in an apartment building that the jury found was caused by the landlord's negligence. The appellate court upheld the trial court's decision finding the landlord liable for the injury despite waivers in the lease. The court decided that the provision in which the tenant generally waived claims against the landlord for loss or injury caused by defects in the building or "damages from wind, rain or other cause whatsoever" was not intended to exonerate the landlord from its own negligence. Id. at 384. It observed that a separate waiver expressly stating that the landlord would not be liable for the loss or damage to tenant's property "or for any act or negligence of any employee . . . or of any other person whomsoever in or about the building" applied only to property damage claims. Id. at 383, 384.

On the other hand, in *Baker v. Wheeler, Lacey & Brown, Inc.*, 128 So. 2d 721 (Ala. 1961), a court applied the exculpatory provisions of a residential lease to protect the landlord from liability for personal injury caused by a fall on an uneven walkway. The lease provided that the landlord would not be liable for damages caused by defects in the leased property. The court distinguished *Armi*, explaining that in *Armi*, there was "active negligence," whereas in *Baker*, the landlord's failure to correct defects that were present before the lease was executed was "passive negligence," and covered by the lease's waiver provisions.

In indemnity cases, Alabama courts seem to take a similar approach. In *City of Montgomery v. JYD Int'l, Inc.*, 534 So. 2d 592 (Ala. 1988), the court refused to require the tenant to indemnify the landlord for personal injury resulting from an accident in the common areas despite the court's assumption that the lease language provided for indemnification of the landlord against its own negligence. The fact that the injury occurred outside of the leased space, in an area over which the tenant exercised no control, appears to have been the crucial fact in this case. The court explained that "the degree of control retained by the indemnitee over the activity or property giving rise to liability is a relevant consideration" in a court's decision whether to uphold an

agreement that is normally against public policy—an agreement in which an indemnitee attempts to obtain indemnity for its own negligence. Id. at 595.

California

Cal. Civ. Code § 1668 provides that "[a]ll contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." Residential lease provisions in which the tenant waives its right to assert a cause of action against the landlord that arises in the future are decreed void as against public policy by Cal. Civ. Code § 1953(a)(2). Left open is the question of whether a provision in a commercial lease in which the tenant waives and agrees to indemnify the landlord for claims arising from defects in the property or the landlord's negligence will be given effect.

California courts have explained that contractual releases of future liability for ordinary negligence, as well as contractual indemnity provisions, are generally enforceable unless the "public interest" is involved or a statute expressly forbids it (as in the case of residential lease exculpations). E.g., *Farnham v. Superior Court (Sequoia Holdings, Inc.)*, 70 Cal. Rptr. 2d 85 (Ct. App. 1997). California courts generally look to a six-part test to determine whether an agreement exempting a party from liability is valid. *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441 (Cal. 1963). An indemnity agreement is considered void as contrary to public policy if:

> [1] It concerns a business of a type generally thought suitable for public regulation. [2] The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. [3] The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. [4] As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. [5] In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. [6] Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.

Id. at 445–46.

In *Henrioulle v. Marin Ventures, Inc.*, 573 P.2d 465 (Cal. 1978), the tenant was injured in a common stairway in an apartment building. The tenant sued the landlord alleging negligence because of the landlord's failure to repair the stairway. The landlord filed a motion for judgment notwithstanding the verdict and for a new trial, contending that the lease agreement contained an indemnity clause that exempted the landlord from liability for any and all loss or damage resulting from the occupancy. The motion was granted and the tenant appealed the decision, asserting that the indemnity agreement was void and unenforceable because it violated public policy. The appeals court held that exculpatory clauses in an indemnity agreement related to residential leases are against public policy and are unenforceable. The court concluded that the *Tunkl* factors were met in this case and the clause was unenforceable.

Of course, residential leases are treated differently from commercial leases by California law. In *Burnett v. Chimney Sweep*, 20 Cal. Rptr. 3d 562 (Ct. App. 2004), the court noted that a commercial lease is not within the six characteristics identified in *Tunkl* but is instead a matter of private contract. Nevertheless, the *Burnett* court held that even in a commercial lease, the exculpatory clause must be clear. An agreement that simply limits liability, but does not state that the tenant waives claims arising from the landlord's negligence, will protect the landlord only from claims for "passive" negligence but will not protect the landlord from claims for "active" negligence. Even this dichotomy will not be dispositive, however. If a landlord wishes to have the tenant waive claims for and indemnify it for its "active" negligence, this intent must be very clear in the parties' business arrangement as well as their language. In *Burnett*, the court found that the landlord was not necessarily shielded from liability for mold in the leased space by a provision requiring the tenant to keep the leased premises in good condition and repair or by the portion of the lease that required the tenant to insure its personal property. The court determined that those questions of fact were to be determined by the trial court.

Florida

In Florida, an indemnity agreement stated in general terms does not provide the landlord with indemnification from liability resulting from the landlord's sole negligence. *Univ. Plaza Shopping Center v. Stewart*, 272 So. 2d 507, 509 (Fla. 1973) (wrongful death due to pipe under, but not part of, leased property). The scope of an indemnity clause must be expressly set out in the clause and will not include the negligence of the indemnitee unless clearly and unequivocally stated in the agreement. *Jackson v. Florida Weathermakers, Inc.*, 55 So. 2d 575 (Fla. 1951). A general indemnification clause does not include the negligence of the indemnitee. Id.

It appears, however, that a Florida court will give effect to a lease provision in which the tenant agrees to indemnify the landlord against the landlord's sole negligence. See, e.g., *Lantz v. Iron Horse Saloon, Inc.*, 717 So. 2d 590 (Fla. Dist. Ct. App. 1998). Although in some of these cases, the word "sole" was not used, the court will uphold the provision if a "common sense reading . . . leaves no doubt" that the party is seeking

exculpation and indemnification from the other for its own negligence. *John W. Eshelman & Sons, Inc. v. Seaboard Coast Line R.R. Co.*, 431 So. 2d 345, 346 (Fla. Dist. Ct. App. 1983).

Georgia

Ga. Code Ann. § 13-8-2(b) voids agreements that indemnify or hold harmless an obligor from its sole negligence in a contract for the construction, alteration, repair, or maintenance of a building:

> A covenant, promise, agreement, or understanding in or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair, or maintenance of a building structure, appurtenances, and appliances, including moving, demolition, and excavating connected therewith, purporting to require that one party to such contract or agreement shall indemnify, hold harmless, insure, or defend the other party to the contract or other named indemnitee, including its, his, or her officers, agents, or employees, against liability or claims for damages, losses, or expenses, including attorney fees, arising out of bodily injury to persons, death, or damage to property caused by or resulting from the sole negligence of the indemnitee, or its, his, or her officers, agents, or employees, is against public policy and void and unenforceable. This subsection shall not affect any obligation under workers' compensation or coverage or insurance specifically relating to workers' compensation, nor shall this subsection apply to any requirement that one party to the contract purchase a project specific insurance policy, including an owner's or contractor's protective insurance, builder's risk insurance, installation coverage, project management protective liability insurance, an owner controlled insurance policy, or a contractor controlled insurance policy.

This prohibition can apply to a commercial lease. *May Dep't Store v. Center Developers, Inc.*, 471 S.E.2d 194 (Ga. 1996). This statute, however, does not bar a provision in which the parties have clearly expressed their intent to shift the risk of liability to one party's insurance company. See, e.g., *Great Atl. & Pac. Tea Co. v. F.S. Assocs., L.P.*, 571 S.E.2d 527 (Ga. Ct. App. 2002). There is also authority stating that Ga. Code Ann. § 13-8-2(b) does not prohibit a commercial lease provision in which one party clearly waives its claims against the other for its own ordinary (as opposed to "sole") negligence. *Borg-Warner Ins. Fin. Corp. v. Executive Park Ventures*, 400 S.E.2d 340, 341 (Ga. Ct. App. 1990) (tenant whose employee negligently caused fire found liable for the damage to the landlord's building because the lease did not contain a clear waiver by the landlord of damage caused by the tenant's negligence).

Georgia law also imposes on the landlord an obligation to keep the leased premises in repair as well as liability for all "substantial improvements." Ga. Code Ann. § 44-7-13. Similarly, although the landlord is not responsible to a third party for the tenant's negligence, it is "responsible for damages arising from defective construction or for damages arising from the failure to keep the premises in repair." Id. § 44-7-14. The rights, duties, and remedies provided in sections 44-7-13 and 44-7-14 cannot be waived or avoided in a "contract, lease, license agreement, or similar agreement, oral or written, for the use or rental of real property as a dwelling place[.]" Id. § 44-7-2(b). In *Gaffney v. EQK Realty Investors*, 445 S.E.2d 771 (Ga. Ct. App. 1994), the court stated that a landlord may enter into an agreement to avoid these statutory requirements "when renting property which is not to be used as a dwelling-place." Notwithstanding the fact that a commercial tenant can assume all responsibility for the condition of the premises and waive the landlord's obligation to keep the premises in repair, Georgia courts are loathe to permit a landlord to escape liability for injuries to third parties caused by failure to repair a dangerous or hazardous condition on the property when the landlord had knowledge of this condition, or with the exercise of due diligence, should have known of the condition but failed to repair it. See, e.g., *Birdsey v. Greene*, 168 S.E. 564 (Ga. 1933); cf. *Johnson v. Loy*, 499 S.E.2d 140 (Ga. Ct. App. 1998).

In Georgia, therefore, both landlords and tenants should include express insurance allocations in their leases because many courts have relied on them to avoid the statutory restrictions on exculpation and indemnification for a party's negligence. The parties should also delineate clearly the responsibility for the repairs to and maintenance of the leased space, and if a party wishes to obtain a waiver from liability and indemnification for its own ordinary negligence, this should be set out expressly in the lease.

Illinois

Section 705/1 of the Illinois Landlord and Tenant Act dictates the enforceability of indemnity agreements affecting real property as follows:

> (a) Except as otherwise provided in subsection (b), every covenant, agreement, or understanding in or in connection with or collateral to any lease of real property, exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his or her agents, servants, or employees, or in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable.
>
> (b) Subsection (a) does not apply to a provision in a non-residential lease that exempts the lessor from liability for property damage.

765 Ill. Comp. Stat. Ann. 705/1. This severe statute was passed in 1971; subsection (b) was added in 2005.

Illinois courts have recognized that this statute is in derogation of the general common law rule giving effect to a lease exculpatory clause exempting the landlord from liability for personal injury and property loss. *McMinn v. Cavanaugh*, 532 N.E.2d 343 (Ill. App. Ct. 1988). Nonetheless, they do not seem to hesitate to apply it broadly. It has been held to void indemnity clauses as well as waivers that attempt to shift a landlord's liability for its own negligence. Id.; *Whitledge v. Klein*, 810 N.E.2d 303 (Ill. App. Ct. 2004). Courts have also voided the parties' shifting of insurance responsibilities by reason of this statute. Id.

In Illinois, landlords should be very careful in drafting their exculpation and indemnification clauses. Commercial landlords may include exculpation and indemnification for property loss caused by their negligence, but the clause will be void if the landlord attempts to have the tenant waive and indemnify the landlord for personal injury or death caused by the landlord's negligence.

Massachusetts

Mass. Gen. Laws Ann. ch. 186, § 15 prohibits exculpation and indemnification provisions that relieve the landlord from liability for its own negligence as follows:

> Any provision of a lease or other rental agreement relating to real property whereby a lessee or tenant enters into a covenant, agreement or contract, by the use of any words whatsoever, the effect of which is to indemnify the lessor or landlord or hold the lessor or landlord harmless, or preclude or exonerate the lessor or landlord from any or all liability to the lessee or tenant, or to any other person, for any injury, loss, damage or liability arising from any omission, fault, negligence or other misconduct of the lessor or landlord on or about the leased or rented premises or on or about any elevators, stairways, hallways or other appurtenances used in connection therewith, shall be deemed to be against public policy and void.

This provision has been applied in commercial as well as residential leases. E.g., *Finley v. Gateway Self-Storage of Massachusetts, Inc.*, 780 N.E.2d 970 (Mass. App. Ct. 2003); *Knous v. Mehrez*, No. 97-05206D, 1999 WL 317430 (Mass. Super. Ct. Apr. 30, 1999). By its express terms, it applies to personal injury as well as property damage.

Massachusetts landlords should also be wary of Mass. Gen. Laws Ann. ch. 186, § 19, which provides:

> A landlord or lessor of any real estate except an owner-occupied two- or three-family dwelling shall, within a reasonable time following receipt of a written notice from a tenant forwarded by registered or certified mail of an unsafe condition, not caused by the tenant, his invitee, or any one occupying through or under the tenant, exercise reasonable care to correct the unsafe condition described in said notice except that such notice need not be given for unsafe conditions in that portion of the premises not under control of the tenant. The tenant or any person rightfully on said premises injured as a result of the failure to correct said unsafe condition within a reasonable time shall have a right of action in tort against the landlord or lessor for damages. Any waiver of this provision in any lease or other rental agreement shall be void and unenforceable. The notice requirement of this section shall be satisfied by a notice from a board of health or other code enforcement agency to a landlord or lessor of residential premises not exempted by the provisions of this section of a violation of the state sanitary code or other applicable by-laws, ordinances, rules or regulations.

In *Humphrey v. Byron*, 850 N.E.2d 1044 (Mass. 2006), however, the Massachusetts Supreme Judicial Court held that commercial landlords did not have the same repair and maintenance obligations toward their tenants as residential landlords. The court explained that although in residential leases the court has overthrown the old "caveat emptor" doctrine (which, the court noted, was rooted in the traditional common law concept that a lease was a conveyance of property), the court did not find that its consumer protection policies required that commercial landlords repair defects. Id. at 1047-48. Instead, it "left intact" the rule that a commercial landlord is liable in tort for personal injuries only when it contracts to make repairs and makes them negligently or the defect is in a common area or other area appurtenant to the leased space over which the landlord has some control. Id. at 1049.

New York

N.Y. Gen. Oblig. Law § 5-321 invalidates agreements that attempt to exempt a landlord from liability for his own negligence:

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

This statute governs commercial as well as residential leases. E.g., *Danielson v. Jameco Operating Corp.*, 800 N.Y.S.2d 421 (N.Y. App. Div. 2005).

Some New York courts have stated that although provisions purporting to exempt a landlord from liability for its own negligence are generally contrary to public policy and invalid, agreements between sophisticated parties, negotiating at arm's length, to allocate risk of liability to third parties between themselves, essentially through employment of insurance, are enforceable. E.g., *Great N. Ins. Co. v. Interior Constr. Corp.*, 796 N.Y.S.2d 51 (N.Y. App. Div. 2005). A number of other decisions, however, have

stated that the landlord cannot seek to circumvent section 5-321 simply by giving tenant the burden of obtaining insurance, even for property damage claims. E.g., *Radius, Ltd. v. Newhouse*, 624 N.Y.S.2d 227 (N.Y. App. Div. 1995). In *Duane Reade v. 405 Lexington, L.L.C.*, 800 N.Y.S.2d 664 (N.Y. App. Div. 2005), however, the court explained that section 5-321 does not void a waiver of claims for business interruption when coupled with a business interruption insurance requirement (the court stated that claims for lost transactions are not claims for property damage).

Pennsylvania

In Pennsylvania, parties are free to negotiate their private affairs and parties have free bargaining powers, so agreements in which a tenant waives claims against the landlord for damage caused by the landlord's own negligence are enforceable in Pennsylvania. *Cannon v. Bresch*, 160 A. 595 (Pa. 1932) (a covenant protecting a party against its own negligence does not contravene public policy). If this result is intended, the parties must use clear and unequivocal language stating that the landlord is to be indemnified against its own negligence. *Mace v. Atl. Ref. Mktg. Corp.*, 785 A.2d 491, 495 (Pa. 2001) (landlord indemnified for payment to injured employee of tenant store). A requirement that the tenant maintain liability insurance naming landlord as an additional insured will not, by itself, be considered an obligation by the tenant to indemnify the landlord for the claims covered by the policy, but this will not prevent the landlord from obtaining indemnification for its own negligence from the insurance company if the policy's language is sufficiently broad to permit this result. See *Maryland Casualty Co. v. Regis Ins. Co.*, 1997 WL 164268 (E.D. Pa. 1997); *Township of Springfield v. Ersek*, 660 A.2d 672 (Pa. Commw. 1995), reargument denied (1995), appeal denied, 675 A.2d 1254 (Pa. 1996).

Texas

Because indemnification of a party for its own negligence is an extraordinary shifting of risk, the Texas Supreme Court has imposed two "fair notice requirements" to such indemnity agreements: the express negligence doctrine and the conspicuousness requirement. *Dresser Indus. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993). The express negligence doctrine requires the party's intent be "specifically stated within the four corners of the contract." *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 708 (Tex. 1987). To satisfy the doctrine, "it is necessary to expressly articulate that the indemnity is intended to indemnify against one's own negligence." David A. Weatherbie, *Real Property*, 52 S.M.U. L. Rev. 1393, 1450 (1999). Though *Ethyl* dealt with an indemnification agreement between a contractor and a property owner, its holding has been applied to indemnification and release agreements between landlords and tenants. See *Dresser Indus.*, 853 S.W.2d 505 (release); *Polley v. Odom*, 957 S.W.2d 932 (Tex. App. 1997)(risk of loss provision), vacated on parties' settlement, 963 S.W.2d 917 (Tex. App. 1998). In *Polley*, the risk of loss provision stated that "[e]xcept where due to the willful neglect of the Lessor all risk of loss to personal property or loss to business resulting from any cause whatsoever shall be borne exclusively by the Lessee." 957 S.W.2d at 935. The court refused to enforce this provision because it did not expressly state that the landlord had no liability for its negligence. Id. at 938.

The results may differ, however, when the claim involves an insurer under an "additional insured" clause of the lease. In a recent federal decision, the court invalidated an indemnity clause because it failed to meet the express negligence doctrine; thus, the tenant was not required to protect the landlord against the landlord's own negligence. *Travelers Lloyds Ins. Co. v. Pacific Employers Ins. Co.*, Civ. Action No. H-05-2853, 2007 WL 128316 (S.D. Tex. Jan. 11, 2007). Nonetheless, the court held that the tenant's insurer remained liable to the landlord under a separate provision of the lease requiring the tenant to list the landlord as an "additional insured" under the tenant's commercial general liability insurance policy.

Courts have tended to evaluate indemnity contracts on a case-by-case basis. *Adams Res. Exploration Corp. v. Resource Drilling, Inc.*, 761 S.W.2d 63, 64 (Tex. App. 1988). As an example, to undertake its analysis, the *Polley* court compared the risk-of-loss provision at issue with indemnity and release provisions at issue in three cases that did not involve leases. 957 S.W.2d at 937.

Finally, an indemnity clause must be conspicuous to meet the fair notice requirement. *Enserch Corp. v. Parker*, 794 S.W.2d 2 (Tex. 1990) (indemnity clause on front of contract is sufficiently conspicuous). If a party has actual notice of an indemnity provision, however, the provision need not be conspicuous in the contract to satisfy the fair notice requirements. *Interstate Northborough Partners v. Examination Mgmt. Serv., Inc.*, No. 14-96-00335-CV, 1998 WL 242448 at *1 (Tex. App. May 14, 1998).

Conclusion

The survey above demonstrates that each state appears to take a unique position on provisions in which one party exonerates the other from liability for and agrees to indemnify the other party for that other party's own negligence. Courts in all states, however, appear to be concerned about the protection of the party providing the exoneration and indemnity from a contract that the courts perceive to be unfair. Coupling the exoneration and indemnification obligations with matching insurance obligations *appears* to increase the likelihood that a court will uphold the exoneration and waiver provision—or at least require the insurance company to protect the landlord. Similarly, if the court believes that both parties are of equal bargaining position, then it is more likely to uphold one party's assumption of responsibility for the other's negligent acts. Careful drafting, however, is always necessary, and all indemnification provisions should be made subject to the provisions of applicable law. ■