

# Are Liability Waivers Enforceable?

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Life is inherently risky. As a result, much of contract law involves allocating the risk among the parties to a transaction. A common way for this to occur is through what is often called a “liability waiver.”

These agreements include releases, in which one party discharges claims for injury, and indemnity agreements, in which one party promises to save and hold another harmless in case of injury or damage. In the real estate context, this often arises when one party enters onto the property of another to engage in some activity. Some examples are horseback riding, exercising, rock climbing, hunting, or jumping in a trampoline park. Many landowners require liability waivers to be signed prior to participating in such activities.

Depending on the situation, pre-injury releases might be executed as part of a larger contract, as a separate addendum, or as a stand-alone release. Often, landowners draft them haphazardly or copy and paste them from the Internet, and those entering the premises nonchalantly

## The Takeaway

Liability waivers are intended to protect a party from legal consequences if another party is injured while on the first party’s property. Although many believe such waivers won’t hold up in court, a waiver, if properly drafted, will likely be enforced against an injured party.

sign them without reading them. But do they really waive all claims if someone is injured?

There is a widespread belief that these waivers are easy to get around if an injury should occur. However, the truth is that a liability waiver, if properly drafted, will likely be enforced against an injured party, preventing him from recovering damages for their injuries.

## Enforceability of Liability Waivers

Whether included in a larger contract or signed as a separate agreement, a liability waiver is a contract. Most

contractual provisions exist to allocate risk among the parties. However, this type of liability waiver is signed prior to a party's being injured (when the injury is as yet unknown) and relieves another party of liability, even for that party's own negligence. Essentially, the signer is saying, "I realize that something bad might happen. I realize that I could possibly hold you legally responsible for it if it does. I'm agreeing not to do that even if it is your fault." As such, it is considered an extraordinary shifting of risk, and the Texas Supreme Court has developed the doctrine of "fair notice." To be enforceable, a pre-injury release of liability must satisfy the requirements of the "fair notice" doctrine. The fair notice doctrine has two requirements: the express negligence doctrine and conspicuousness.

### Express Negligence Doctrine

The express negligence doctrine states that a party seeking indemnity from the consequences of its own negligence must express that intent in specific terms in the contract. Exactly how specific is specific enough? That is something a court must decide based on the facts of the case. This rule was adopted by the Texas Supreme Court in *Ethyl Corp. v. Daniel Const. Co.*, 725 S.W.2d 705 (Tex. 1987).

In that case, Daniel was a contractor doing construction on Ethyl's property. A third party was injured when both Ethyl and Daniel were negligent. Ethyl claimed that Daniel had agreed to indemnify Ethyl, even for Ethyl's own negligence. The contractual provision read: "[Daniel] shall indemnify and hold [Ethyl] harmless against any loss or damage to persons or property as a result of operations growing out of the performance of this contract and caused by the negligence or carelessness of [Daniel], [Daniel]'s employees, subcontractors, and agents or licensees."

The court held that this language was not specific enough, and the waiver was ineffective. Although the waiver referred to "any loss or damage" and "as a result of operations growing out of the performance of this contract," it referred only to the negligence or carelessness of Daniel—not Ethyl. Therefore, the court reasoned, the contract did not specifically express the intent of the parties that Daniel would indemnify for Ethyl's negligence.

Here are some examples of what has been held sufficient to uphold the waiver.

A clause providing indemnification for "any negligent act or omission of [the indemnitee], its officers, agents

or employees," was held sufficiently to define the parties' intent, as was language requiring indemnity "regardless of any cause or of any concurrent or contributing fault or negligence of [indemnitee]." *B-F-W Const. Co. Inc. v. Garza*, 748 S.W.2d 611 (Tex. App.—Fort Worth 1988, no writ)

In another case, the Texas Supreme Court upheld a waiver stating that [indemnitor] assumed all liability "regardless of whether such claims are founded in whole or in part upon alleged negligence of [indemnitee] . . . [Indemnitor] further agrees to indemnify and hold harmless [indemnitee] and its representatives, and the employees, agents, invitees, and licensees thereof in respect of any such matters." *Enserch Corp. v. Parker*, 794 S.W.2d 2 (Tex. 1990)

The deciding factor in determining enforceability is whether the waiver specifically states what claims are being released. Is it clear that the releasing party is releasing the other party for claims for that party's own negligence? Is it clear what activities are covered? If so, it's likely the waiver satisfies the express negligence rule.

### Conspicuousness

According to the courts and applicable statutes, a waiver is conspicuous if a reasonable person against whom it is to operate ought to have noticed it. Another statement of the rule is that "something must appear on the face of the [contract] to attract the attention of a reasonable person when he looks at it." Clear as mud, right? Again, when definitions fail, a few examples may help. A printed heading in capitals is considered conspicuous, as is language in larger or other contrasting type or color. However, illegible small print is not sufficient.

In *Littlefield v. Schaefer*, 955 S.W.2d 272 (Tex. 1997), the Texas Supreme Court noted that the entry form for a motorcycle race had large type and plenty of room on the front where riders entered their personal information. The release and waiver of liability, however, comprised 30 lines in which the headings were four-point text, and the main text was even smaller and could not be read. The court held that release was as inconspicuous as the pole struck by the rider and, therefore, invalidated the waiver.

In *Dresser Industries Inc. v. Page Petroleum*, 853 S.W.2d 505 (Tex. 1993), release provisions were on the back of a work order in a series of uniformly printed and spaced paragraphs. A provision on the front of the work order incorporated all 18 paragraphs. No headings

or contrasting typeface were used. The court determined the release did not meet conspicuousness requirements.

On the other hand, language scattered within a larger contract can still be considered conspicuous. In *Ranger Ins. Co. v. American Intern. Specialty Lines Ins. Co.*, 78 S.W.3d 659 (Tex. App.—Houston [1st Dist.] 2002, no pet.), the indemnification provisions were scattered among several paragraphs, but were included in paragraphs with descriptive headings such as “Operator’s Indemnification of Contractor” under a section entitled “RESPONSIBILITY FOR LOSS OR DAMAGE, INDEMNITY, RELEASE OF LIABILITY AND ALLOCATION OF RISK,” in larger, bold, capital letters. The Houston court held it to be conspicuous.

### Actual Knowledge

Because the fair notice requirements are designed to make sure the signer knows he is waiving his rights, some courts have held that the requirements do not apply when it is shown that the signer actually knew that he was waiving them. That is, if the evidence shows that the signer had actual knowledge that he was waiving his rights to recover damages for his injuries, then he has waived them, and it does not matter if the fair notice requirements are met. For an example, see *Tamimi Global Co. Ltd. v. Kellogg Brown & Root LLC*, 483 S.W.3d 678 (Tex. App.—Houston [14th Dist.] 2015, no pet.), citing *Dresser*, 853 S.W.2d at 508, n.2. The actual knowledge exception only applies to the conspicuousness requirement and not to the express negligence doctrine. An excellent discussion is found in *Sydlik v. REEIII Inc.*, 195 S.W.3d 329 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

### Waiving Gross Negligence

Negligence involves unintentionally falling short of a duty of care legally owed to others. Gross negligence involves violation of a different standard. While gross negligence involves particularly egregious conduct, the Texas Supreme Court has held that it is *not* simply an aggravated form of negligence. *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994) Gross negligence basically means a person was aware that his conduct involved extreme risk of serious harm to someone else, and he did it anyway, in actual conscious indifference to the rights, safety, or welfare of others (Tex. Civ. Prac. & Rem. Code § 41.001[11]). Gross negligence, proven by clear and convincing evidence, can be a basis for exemplary damages.

May a liability waiver release claims for the released party’s gross negligence? That question has not been decided by the Texas Supreme Court. Several courts of appeals have dealt with the question, and most have determined that pre-injury releases may not waive claims for gross negligence because such a waiver is against public policy. The idea is that conduct rising to the level of gross negligence is so egregious that liability for it should not be waivable.

Cases so holding appear to have been following *Smith v. Golden Triangle Raceway*, 708 S.W.2d 574 (Tex. App.—Beaumont 1986, no writ). At least one case cites the Texas Supreme Court case of *Mem’l Med. Ctr. of East Texas v. Keszler, M.D.*, 943 S.W.2d 433 (Tex. 1997) as having cited *Golden Triangle* with approval. *Texas Moto-Plex Inc. v. Phelps*, 2006 WL 246520 (Tex. App.—Eastland Feb. 2, 2006, no pet.) (not designated for publication) However, *Keszler* dealt with a post-injury release, and the Texas Supreme Court upheld the post-injury release of a gross negligence claim. Post-injury releases may release a party from liability for gross negligence.

In *Newman v. Tropical Visions Inc.*, 891 S.W.2d 713 (Tex. App.—San Antonio 1994, writ denied), the San Antonio court upheld a release that, under the facts of that case, absolved the defendants from liability for gross negligence. However, the court specifically did not reach the question of whether a pre-injury release of claims for gross negligence violates public policy. Another case holds that a pre-injury waiver releasing a party from liability for negligence does not release that party from liability for gross negligence. *Van Voris v. Team Chop Shop*, 402 S.W.3d 915 (Tex. App.—Dallas 2013, no pet.) Interestingly, none of the cases dealt with a waiver that specifically released claims for “gross negligence.”

### Waiver on Behalf of a Minor Child

The Texas Supreme Court has not yet decided whether a parent may waive liability on behalf of a minor child. The 14th Court of Appeals in Houston held that they may not in *Muñoz v. II Jaz Inc.*, 863 S.W.2d 207 (Tex. App.—Houston [14th Dist.] 1993, no writ). However, that case was decided based on the fact that the waiver was signed by the parents’ adult daughter rather than the parents themselves. Arguably, this was dictum. In any case, it is not statewide precedent.

There is a federal case in which a federal district court predicted that the Texas Supreme Court would not allow

a parent to waive liability on behalf of a minor child. *Paz v. Life Time Fitness Inc.*, 757 F.Supp.2d 658 (S.D. Tex., Houston Division 2010). The prediction in this case is what is called an “*Erie* guess.” It is likely that federal cases arising in Texas would follow this holding. However, the holding is *not binding on Texas courts*.

In the unpublished case of *Quiroz v. Jumpstreet8 Inc.*, 2018 WL 3342695 (Tex. App.—Dallas July 9, 2018, no pet.), a parent argued that a parent cannot waive the claims of a minor child. The court did not agree because, in that case, the parent was the one injured. The mother’s lawsuit included derivative claims on behalf of her minor children for loss of parental consortium and bystander claims for mental anguish. The court held that the mother had waived her claims and, because the claims of the parent were barred by the release, all of the derivative and bystander claims of the children were also barred.

### **Ambiguity and Affirmative Defense**

Ambiguities in a release will be narrowly construed against the released party.

The existence and enforceability of a liability waiver is an affirmative defense. An affirmative defense is considered

a defense of “confession and avoidance.” This means that the defendant is saying, “Even if it can be proven that we were negligent, we are not liable because of the release.” Because it is an affirmative defense, the defendant has the burden to plead and prove that the release is valid and enforceable.

### **Otherwise Unenforceable**

Exercise caution. Even if they meet these requirements, some liability waivers may be held unenforceable because of other applicable statutes or because they are otherwise unconscionable or against public policy.

For example, certain provisions in oil and gas contracts are declared by statute to be unenforceable. The same is true of certain construction contracts and motor carriers. These various provisions are very specific and contain exceptions.

Nothing in this article should be considered legal advice. For legal advice on a specific situation, consult an attorney. 📌

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