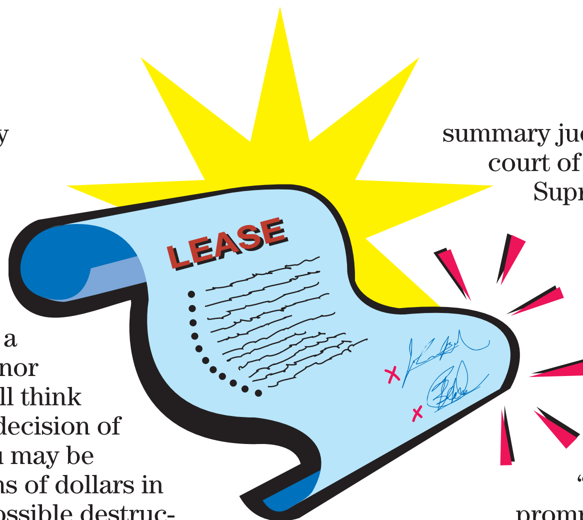
TENANT BEWARE
Freedom of Contract Prevails

By Julie K. Seymour*

Your adult son has recently headed off to college and asks you to co-sign his lease. Of course, you agree. You trust your son and know that even in the worst-case scenario the most you will be called on to pay is a few months rent and some minor damage to the apartment. Well think again. According to a recent decision of the Texas Supreme Court, you may be contractually liable for millions of dollars in damages resulting from the possible destruction of the entire complex. In fact, you may owe this money regardless of your own negligence, based on the negligence of your son, or even a guest. Perhaps more importantly, you will be uninsured for the loss because it will not be covered by either your son's renter's insurance or your homeowner's policy. This is all the result of the court's decision in Churchill Forge, Inc. v. Brown, ___S.W.3d___, 2001 WL 1424351 (Tex. 2001).



In *Churchill Forge*, the court held that the Texas Property Code not only permits parties to contract over who will pay for repairs when the tenant, co-tenant or guest causes damage, but specifically authorizes the parties to shift by contract the costs of repairs for damages from the landlord to the tenant irrespective of whether the damage was caused by the tenant. The court stated the issue as "whether by statute or the common law, a commercial landlord is prohibited from contractually obligating its tenant to be responsible for damages caused by the tenant, the tenant's occupant or guest." The case concerned JoAnn Brown, who co-signed a lease with her adult son, Carl Jeffrey ("Jeff"), for an apartment owned by Churchill Forge, Inc. Jeff allegedly caused a fire that extensively damaged the apartment complex. Churchill Forge sued JoAnn, who was not at fault, asserting that the lease required her, as a cotenant, to pay for any damages resulting from Jeff's negligence. Jo Ann defended, claiming that either the Texas Property Code or this court's fair notice doctrine prohibit Churchill Forge from contractually requiring her to pay for the alleged damage. The trial court granted summary judgment for JoAnn, and the court of appeals affirmed. The Texas Supreme Court reversed the court of appeals' judgment and remanded the case to the trial court for further proceedings.

At issue was an indemnity provision in the lease. The signed lease provided:

"REIMBURSEMENT. You must promptly reimburse us for loss, damage, or cost of repairs or service caused anywhere in the apartment community by your or any guest's or occupant's improper use or negligence. *Unless the damage or stoppage is due to our negligence*, *we're* not liable for—*and you must pay for*—repairs, *replacement* costs and damage *to the following* if occurring *during the Lease Contract* term or *renewal period: (1)damage* to doors, windows, or screens; (2) *damage* from *windows or doors left open;* and (3) damages *from wastewater stoppages* caused by *improper objects in lines exclusively serving* your apartment. We may require payment at any time, including advance payment of repairs for which you're liable. Any delay in our demanding sums you owe is not a waiver." (emphasis in original)

The court set out to determine if enforcement of this provision is prohibited by either Texas Property Code section 92.006(e) or the fair notice doctrine. The court observed that competent parties in Texas "shall have the utmost liberty of contracting." *Wood Motor Co., Inc. v. Nebel*, 238 S.W.2d 181, 185 (Tex. 1951). JoAnn asserted that this principle has been altered by the Legislature and pointed specifically to Chapter 92 of the Texas Property Code. The court agreed that statutory limitations on the freedom of landlord and tenant to contract are contained in Subchapter A, section 92.006, entitled "Waiver and Expansion of Duties and Remedies." JoAnn responded by arguing the Petitioner cannot enforce the lease provision against her because it cannot meet the

conditions of subsection (e). Subchapter A, section 92.006(e) reads:

> (e) A landlord and a tenant *may agree* for the tenant to repair or remedy, at the tenant's expense, any *condition covered by Subchapter B* if all of the following conditions are met:
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> (1) at the beginning of the lease term the landlord owns only one rental dwelling;
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> (2) at the beginning of the lease term the dwelling is free from any condition which would materially affect the physical health or safety of an ordinary tenant;
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> (3) at the beginning of the lease term the landlord has no reason to believe that any condition described in Subdivision (2) of this subsection is likely to occur or recur during the tenant's lease term or during a renewal or extension; and
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> (4)(A) the lease is in writing;
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> (B) the agreement for repairs by the tenant is either underlined or printed in boldface in the lease or in a separate written addendum;
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> (C) the agreement is specific and clear; and
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> (D) the agreement is made knowingly, voluntarily, and for consideration.
>
> (emphasis in original)

The court determined that nothing in subsection (e) prohibits a landlord from contracting with its tenant for the tenant to be responsible for damages the tenant, the tenant's occupant, or guest causes. The court explained that subsection (e) only says that a landlord, meeting the section's requirements, *may* contract for the tenant to pay for certain repairs. The court reasoned that Legislative permission to contract under certain circumstances does not necessarily imply that contracting under other circumstances is prohibited. The court refused to infer a general prohibition from a statutory clause granting specific permission to contract since the State has a strong commitment to the principle of contractual freedom, noting that the Legislature explicitly identified the prohibition it intended to enforce. That prohibition is found in section 92.006(c): A landlord's duties and the tenant's remedies under Subchapter B, which covers conditions materially affecting the physical health or safety of the ordinary tenant, may not be waived except as provided in Subsections (d), (e), and (f) of this section.

The court went on to say that a tenant's contractual agreement to bear the cost of repair must meet the requirements of subsection (e) when it would otherwise be prohibited as an impermissible waiver of the landlord's duties or the tenant's remedies under Subchapter B. The landlord's duties are found in Subchapter B section 92.052 which reads in pertinent part:

> (a) A landlord shall make a diligent effort to repair or remedy a condition if:
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> (3) the condition materially affects the physical health or safety of an ordinary tenant. [But,]
>
> (b) unless the condition was caused by normal wear and tear, the landlord *does not* have a duty … to repair or remedy a condition caused by:
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> (1) the tenant;
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> (2) a lawful occupant in the tenant's dwelling;
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> (3) a member of the tenant's family; or
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> (4) a guest or invitee of the tenant.

The court reasoned that Subchapter B did not impose a duty on Churchill Forge to bear the cost of repairing damage allegedly caused by the tenant. A tenant's remedies under Subchapter B are conditioned upon the landlord's liability, *See* Tex. Prop. Code § 92.056(e); Tex. Prop. Code § 92.0561(a). The landlord's liability is conditioned upon the existence of a duty under Subchapter B. Tex. Prop. Code § 92.056(a). Because Churchill Forge had no duty to pay for repair of tenant caused damages, and JoAnn had no remedy against Churchill Forge for such damages, sections 92.006(c) and (e) did not restrict the parties' freedom to contract as they wish concerning the matter. The Court reiterated that section 92.061 makes it clear that the Legislature did not intend the Subchapter to otherwise affect the parties' presumptive right to contract over who would be responsible for conditions caused by the tenant, the tenant's occupant, or guest. Furthermore, subsection (e)'s reach is explicitly limited to conditions "covered by Subchapter B." Subchapter B established a landlord's duty to repair certain conditions not caused by the tenant, the tenant's lawful occupant, or guest. Because no duty is triggered when a tenant damages the rented dwelling, such damage would not be a condition "covered by Subchapter B" to which subsection (e)'s requirements apply.

Legislative permission to contract under certain circumstances does not necessarily imply that contracting under other circumstances is prohibited.

While subsection (e) permits, under certain circumstances, a one-unit landlord to contract with tenants over the cost of repairing conditions covered by Subchapter B, subsection 92.006(f) allows any commercial landlord to shift the cost of repairs to the tenant, with a sufficiently clear agreement, for three specific types of conditions that are typically tenant caused. There is no requirement in subsection (f) for a landlord to prove that the tenant caused these damages before seeking reimbursement. The court noted that by adding subsection (f), the Legislature permitted landlords and tenants to bargain over who would bear the cost of repairing these specific conditions, typically caused by the tenant, without requiring landlords to show that they were tenant caused. The Property Code not only permits the parties to contract over who will pay for repairs

when the tenant causes damage, it specifically authorizes the parties to shift, by contract, costs of repairs or certain damages from the landlord to the tenant irrespective of whether the damage was caused by the tenant.

Summarizing its analysis, the court noted that, subsections (c) and (e) dictate that, as a general rule, a commercial landlord may not ask a tenant to pay for repairs that the landlord has a duty to make. Excepted from that dictate, however, is subsection (f), under which there are three specific kinds of repairs that the parties can, by contract, shift the duty to pay for from the landlord to the tenant. The tenant would typically cause these damages. Not covered by that dictate are those agreements between the parties concerning damages for which the landlord has no duty to repair (tenant caused damages).

Finally, the court points out that Subchapter B does not distinguish between casualty losses and other conditions in determining whether the landlord has a duty to repair. In subchapter B, the Legislature expressly pardoned landlords of any duty to repair occupant-caused conditions. The Property Code is consistent with the Restatement, which "takes the position that the tenant should be liable for damage done to the premises by those who are on the property with his consent…" Restatement (Second) of Property § 12.2(1977). The court finds that the statute, common law, and Restatement are in harmony on this point: there is nothing extraordinary or unjust in requiring a tenant to reimburse the landlord for damages negligently caused by the tenant or one occupying the premises with the tenant's consent.

Subsections (c) and (e) dictate that, as a general rule, a commercial landlord may not ask a tenant to pay for repairs that the landlord has a duty to make.

In finding for the landlord, the court also determined the fair notice doctrine did not apply. Under the fair notice doctrine, "certain contractual provisions relieving a party in advance for its own negligence must be unambiguous and conspicuous." *Green International, Inc. v. Solis*, 951 S.W.2d 384, 386 (Tex. 1997). The Court explained in *Green International Inc.* that the doctrine's definition makes clear that it only applies when a party seeks release or indemnity from the consequences of its own negligence. *Id.* at 386-87. The provision in this case does not attempt to shift responsibility to the tenant for any negligence by the landlord.

In a dissenting opinion, Justice Hankinson, joined by Chief Justice Phillips, and Justices Baker and O'Neill, said the majority's opinion "defies the plain language and purpose of the Legislature's comprehensive and carefully crafted scheme governing residential tenancies." Arguing that the court of appeals decision should have been upheld the dissent believes that the majority fused together section 92.006(c) and (e) by reading the application of subsection (e) to be dependent on the application of subsection (c). The dissent reasoned that reading these two subsections together drove the court to misconceive the issue presented. The dissent claims the issue presented is not whether, under section 92.006(c), JoAnn Brown agreed to waive any duty Churchill Forge has to repair the apartment building, but whether under section 92.006(e), Churchill Forge and JoAnn Brown created a valid agreement for her to "repair or remedy, at [her] expense" the condition at issue. Therefore, the true issue should have been whether Churchill Forge had a contractual right to reimbursement from Brown.

The dissent came to an easy determination that subsection(c) did not apply because Churchill Forge did not have a duty to repair under section 92.052(b). However, the lease still had to meet the requirements of section 92.006(e) for Brown to be responsible to repair or remedy the damage. Because the lease did not meet the section 92.006(e) requirements, Churchill Forge may not rely on the lease as a basis to recover reimbursement from JoAnn Brown.

The decision in *Churchill Forge*, based on notions of freedom of contract and statutory interpretation, ignores the reality of the marketplace and imposes liability on an innocent party, not capable of insuring against possible catastrophic loss. To pretend that tenants bargain for the kind of liability that the courts assumed they voluntarily accepted under the lease in question, is to believe in witches, elves, fairies, and Santa Clause. Perhaps this suggests how the case should be dealt with upon remand. Although the Texas Supreme Court held that such clauses are not null and void under the Property Code, it did not hold, as a matter of law, that they are always valid and enforceable. Like any contract provision, this provision must be evaluated under a traditional contract analysis. Hopefully, when the court has an opportunity to review the provision at issue, it will either hold that it applies to only losses of the nature indicated in the clauses, e.g., windows, doors and screens, or, that it was never understood or agreed to, and did not become part of the parties' agreement. In the meantime, tenants beware! Carefully read your lease before signing it and, whenever possible, delete clauses such as that found in the *Churchill Forge* lease.

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