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Notes: Adloo v. H.T. Brown Real Estate, Inc.: "Caveat Exculpator" — an Exculpatory Clause May Not Be Effective Under Maryland's Heightened Level of Scrutiny

Kevin G. Hroblak
University of Baltimore School of Law

ADLOO v. H.T. BROWN REAL ESTATE, INC.: "CAVEAT EXCULPATOR"—AN EXCULPATORY CLAUSE MAY NOT BE EFFECTIVE UNDER MARYLAND'S HEIGHTENED LEVEL OF SCRUTINY

I. INTRODUCTION

The freedom to contract is a well-founded theory based on principles of public policy.[1] Consistent with this theory, exculpatory contract clauses are generally valid.[2] An exculpatory contract clause is "an agreement to release one or more individuals or entities from liability resulting from any negligent act or omission or other wrongful conduct committed by" any person or entity—it exculpates a party from liability.[3] However, only a carefully crafted excul-

1. *See, e.g.*, Federal Maritime Comm'n v. Pacific Maritime Ass'n, 435 U.S. 40, 70 (1978) (Powell, J., dissenting); H.K. Porter Co. v. NLRB, 397 U.S. 99, 107 (1970); Simmons v. Columbus Venetian Stevens Bldgs., Inc., 155 N.E.2d 372, 379-80 (Ill. App. Ct. 1958); Rogers v. Webb, 558 N.W.2d 155, 157 (Iowa 1997); Anne Arundel County v. Hartford Accident & Indem. Co., 329 Md. 677, 686, 621 A.2d 427, 431 (1993); Leet v. Totah, 329 Md. 645, 662, 620 A.2d 1372, 1380 (1993); Condry v. Laurie, 184 Md. 317, 326, 41 A.2d 66, 70 (1945); Progressive Cas. Ins. Co. v. Jester, 683 P.2d 180, 182 (Wash. 1984) (en banc).
2. *See* Wolf v. Ford, 335 Md. 525, 531, 644 A.2d 522, 525 (1994) (citing Winterstein v. Wilcom, 16 Md. App. 130, 293 A.2d 821 (1972)); Attorney Grievance Comm'n v. Owrutsky, 322 Md. 334, 350, 587 A.2d 511, 518 (1991); Sullivan v. Mosner, 266 Md. 479, 494-96, 295 A.2d 482, 490-91 (1972); Eastern Ave. Corp. v. Hughes, 228 Md. 477, 480, 180 A.2d 486, 488 (1962); Baker v. Roy H. Haas Assoc., 97 Md. App. 371, 377, 629 A.2d 1317, 1320 (1993); Schrier v. Beltway Alarm Co., 73 Md. App. 281, 288, 533 A.2d 1316, 1319 (1987); Boucher v. Riner, 68 Md. App. 539, 548, 514 A.2d 485, 490 (1986); *see also, e.g.*, Nikolic v. Seidenberg, 610 N.E.2d 177, 179-80 (Ill. App. Ct. 1993) (explaining that although exculpatory clauses are not favored and are strictly construed, they will be enforced unless they are against public policy); 57A AM. JUR. 2D *Negligence* § 53 (1989) (explaining that the generally accepted rule is to permit exculpatory contract clauses for negligent acts because public policy favors the freedom to contract); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 68, at 482 (5th ed. 1984) (explaining that public policy does not normally prevent the parties from contracting as they see fit); RESTATEMENT (SECOND) OF CONTRACTS § 195 cmt. a (1981) (explaining that parties to a contract can ordinarily absolve themselves from liability for harm caused by their own negligence).
3. Cadek v. Great Lakes Dragaway, Inc., 843 F. Supp. 420, 422 (N.D. Ill. 1994); *see also* Valhal Corp. v. Sullivan Assoc., 44 F.3d 195, 202 (3d Cir. 1995) (illustrating

patory clause can insulate a party from liability for their own negligence.

Maryland courts recognize that exculpatory clauses are valid and enforceable when the language used ostensibly expresses the intent to exculpate one of the parties from liability.[4] In *Adloo v. H.T. Brown Real Estate, Inc.*,[5] the court of appeals addressed what is required to create a sufficient exculpatory contract clause in a real estate listing agreement.[6] The court held that the language used in two separate contracts was insufficient to exculpate a real estate agency from liability stemming from *its own* negligence.[7]

The *Adloo* court's holding will certainly guide real estate brokers when crafting future listing agreements with homeowners. Of more notable significance, however, is the effect *Adloo* will have on the language employed in all future exculpatory clauses executed in Maryland.[8] Indeed, the opinion in *Adloo* may invalidate many existing exculpatory clauses. Therefore, drafters must review and conceivably redraft[9] current exculpatory clauses to ensure that the clause effectively exonerates a party from liability.

This Note examines the court of appeals's decision in *Adloo*. Part II traces the development and validity of exculpatory clauses, with an emphasis on Maryland law.[10] Part III discusses the facts in *Adloo* and the court's rationale.[11] Part IV analyzes the *Adloo* opinion, concluding that the standard adopted is too amorphous and leaves practitioners without intelligible guidance.[12] Finally, Part IV also discusses the impact of the *Adloo* opinion and provides contract drafters with suggestions for complying with the new standard adopted by the *Adloo* court.[13]

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the impact of an exculpatory clause); Crawford v. Buckner, 839 S.W.2d 754, 756 (Tenn. 1992) (describing the rationale supporting the enforceability of an exculpatory clause); Dobratz v. Thomson, 468 N.W.2d 654, 657-59 (Wis. 1991) (defining an exculpatory provision in a contract).

4. *See Wolf*, 335 Md. at 537, 644 A.2d at 528.
5. 344 Md. 254, 686 A.2d 298 (1996).
6. *See infra* text accompanying notes 84-137.
7. *See Adloo*, 344 Md. at 267-68, 686 A.2d at 305.
8. See *infra* notes 212-31 and accompanying text for a discussion of instances where exculpatory provisions are commonly found.
9. See *infra* text accompanying notes 232-56 for a discussion of suggestions for drafting after the *Adloo* decision.
10. *See infra* notes 14-83 and accompanying text.
11. *See infra* notes 84-132 and accompanying text.
12. *See infra* notes 133-211 and accompanying text.
13. *See infra* notes 212-56 and accompanying text.

II. BACKGROUND

A. General Validity

Due to strong public policy considerations that support parties' freedom to contract,[14] courts consistently recognize that individuals should be permitted to draft legally enforceable agreements without judicial intervention.[15] Although contracts that immunize parties from their own negligence are not viewed favorably,[16] the Maryland judiciary generally upholds these types of agreements.[17]

Eastern Avenue Corp. v. Hughes[18] exhibits Maryland judiciary's tendency to uphold exculpatory contract clauses in Maryland. In *Eastern*, the court of appeals examined a lease clause that attempted to exonerate a landlord from liability for injury to the person or property of a tenant.[19] The court upheld the validity of the clause.[20] Shortly thereafter, the General Assembly of Maryland responded to this judicial act by abrogating the court's holding.[21] The General As-

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14. *See supra* note 1 and accompanying text.
15. *See* United States v. Moorman, 338 U.S. 457, 462 (1950) (explaining that courts are reluctant to nullify the intent of a competent party; if anticipatory provisions for the settlement of disputes are to be deprived, they should be deprived by the legislative branch).
16. *See, e.g.*, Koutoufaris v. Dick, 604 A.2d 390, 402 (Del. Super. Ct. 1992) (explaining that "clauses which exonerate a party from the consequences of his own negligence are looked upon with disfavor").
17. *See* Wolf v. Ford, 335 Md. 525, 531, 644 A.2d 522, 525 (1994) (citing Winterstein v. Wilcom, 16 Md. App. 130, 135, 293 A.2d 821, 824 (1972)); Attorney Grievance Comm'n v. Owrutsky, 322 Md. 334, 350, 587 A.2d 511, 518 (1991); Sullivan v. Mosner, 266 Md. 479, 494-96, 295 A.2d 482, 490-91 (1972); Eastern Ave. Corp. v. Hughes, 228 Md. 477, 480, 180 A.2d 486, 488 (1962); Baker v. Roy H. Haas Assoc., 97 Md. App. 371, 377, 629 A.2d 1317, 1320 (1993); Schrier v. Beltway Alarm Co., 73 Md. App. 281, 293-94, 533 A.2d 1316, 1322 (1987); Boucher v. Riner, 68 Md. App. 539, 548, 514 A.2d 485, 490 (1986).
18. 228 Md. 477, 180 A.2d 486 (1962).
19. *See id.* at 479, 180 A.2d at 488. The clause provided:

> The Tenant covenants and agrees that the Landlord shall not be liable for any injury to his person or damages to his property occasioned by failure to keep the demised premises in repair or howsoever caused, nor shall the Landlord be responsible for any accident to the Tenant or any occupant or visitor to the premises resulting from any cause whatsoever; and Tenant agrees he will not hold Landlord responsible in any way, whether such accident occurred in any of the Landlord's buildings or on any of its property.

Id.

20. *See id.* at 480, 180 A.2d at 488.
21. *See* 1964 Md. Laws ch. 124 (recodified at MD. CODE ANN., REAL PROP. § 8-105

sembly enacted a statute that invalidated agreements between landlords and tenants that exculpate landlords from liability for their own negligence.[22] Apart from landlord and tenant law, however, the General Assembly has not abrogated the common law on *exculpatory* clauses.[23]

The policies behind the freedom to contract support the judiciary's general position of upholding exculpatory clauses. As one notable scholar explained: "It is quite possible for the parties expressly to agree, in advance, that the defendant is under no obligation of care for the benefit of the plaintiff, and shall not be liable for the consequences of conduct which would otherwise be negligent."[24] The law, however, seeks to discourage negligent conduct by imposing liability on culpable parties. In balancing these competing interests, courts recognize exculpatory contract clauses as valid and enforceable, but strictly interpret and construe any ambiguity against the party relying on them.[25]

B. Three Exceptional Circumstances to the General Validity

Courts will disregard otherwise valid exculpatory clauses under

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(1988)).

22. *See id.*; Prince Phillip Partnership v. Cutlip, 321 Md. 296, 303, 582 A.2d 992, 995 (1990) (holding that a lease provision was void pursuant to a statute that invalidated clauses which exculpate landlords from liability arising from the landlord's negligence).

23. *See* Schrier v. Beltway Alarm Co., 73 Md. App. 281, 294, 533 A.2d 1316, 1322 (1987). However, the General Assembly has enacted analogous legislation forbidding indemnity provisions in construction and maintenance contracts that were used to accomplish results similar to exculpatory clauses. *See* MD. CODE ANN., CTS. & JUD. PROC. § 5-305 (1989 & Supp. 1993). The statute provides:

> A covenant, promise, agreement . . . relating to the construction, alteration, repair, or maintenance of a building, structure, appurtenance or appliance, . . . purporting to *indemnify the promisee against liability for damages . . . resulting from the sole negligence of the promisee* or indemnity, his agents or employees, is against public policy and is void and unenforceable.

Id. (emphasis added). Indeed, the *Adloo* court applied the same rules of construction employed by courts when interpreting indemnity clauses to the exculpatory clause at issue explaining: "[w]e see no reason, when the effect of the two clauses is the same to approach their interpretation from a different analytical premise." Adloo v. H.T. Brown Real Estate, Inc., 344 Md. 254, 264 n.7, 686 A.2d 298, 303 n.7 (1996).

24. KEETON ET AL.,*supra* note 2, § 68, at 482.

25. *See* Hornbeck v. All Am. Indoor Sports, Inc., 898 S.W.2d 717, 721 (Mo. Ct. App. 1995).

three exceptional circumstances. In *Wolf v. Ford*,[26] the Court of Appeals of Maryland focused on the enforceability of an exculpatory contract clause in an agreement between an investor and a securities investment firm.[27] The clause at issue relieved the investment firm, Legg Mason, from liability for losses resulting from its negligence.[28] The court held that the exculpatory clause was valid; therefore, Legg Mason was exculpated from liability arising from a negligent act by its broker.[29] In formulating its opinion, the court of appeals relied on the rationale in *Winterstein v. Wilcom*[30]—a seminal case on the modern law of exculpatory contracts decided by the Court of Special Appeals of Maryland.

Citing *Winterstein*, the *Wolf* court reiterated the general rule that, absent a law that prohibits the exculpatory clauses at issue,[31] there are three exceptional circumstances when an exculpatory clause may be invalidated and unenforceable: intentional harm or extreme forms of negligence, unequal bargaining power, and those adverse to the public interest.[32]

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26. 335 Md. 525, 644 A.2d 522 (1994).
27. *See id.* at 527, 644 A.2d at 523. Wolf entered an investment agreement with a broker at Legg Mason to earn money for college and preserve the bulk of her investment. *See id.* at 528, 644 A.2d at 524. Throughout the year, Wolf withdrew large sums of money which required the prompt sale of one or more of the stocks from her portfolio. *See id.* at 529, 644 A.2d at 525. The prompt sale caused losses for Wolf, and she filed suit. *See id.* at 530, 644 A.2d at 525.
28. *See id.* at 528, 644 A.2d at 524. The Agreement provided:

> You are hereby authorized to buy, sell and generally trade in securities, on margin, in cash or otherwise in accordance with your terms and conditions for my account and risk. . . . I hereby exonerate you from any and all liability for losses which may occur while you are acting on my behalf except for such as may result from your gross negligence or wilful misconduct.

Id.
29. *See id.* at 527-28, 644 A.2d at 524.
30. 16 Md. App. 130, 293 A.2d 821 (1972).
31. *See* MD. CODE ANN., REAL PROP. § 8-105 (1988) (declaring exculpatory clauses in real property leases to be void as against public policy); *see also* MD. CODE ANN., CTS. & JUD. PROC. § 5-305 (1989 & Supp. 1993) (providing that an indemnity provision in a contract for "the construction, alteration, repair, or maintenance of a building, structure, appurtenance or appliance, including moving, demolition and excavating connected with it . . . is against public policy and is void and unenforceable"); *supra* notes 21-23 and accompanying text.
32. *See Wolf*, 335 Md. at 531-32, 644 A.2d at 525-26 (citing *Winterstein*, 16 Md. App. at 135-36, 293 A.2d at 824).

1. Intentional Harm or Extreme Negligence

The first circumstance, intentional harm or extreme forms of negligence, exists when a party to a contract attempts to avoid liability for intentional conduct or harm caused by reckless, wanton, or gross behavior.[33] This rule finds its premise in the disdain for bad faith in the performance of contractual duties.[34] Indeed, the Court of Appeals of Maryland held that bad faith subjects the actor to liability regardless of the language of an exculpatory provision.[35]

2. Grossly Unequal Bargaining Power

The second circumstance occurs when the contract is the result of grossly unequal bargaining power between the parties.[36] The *Winterstein* court explained that "[w]hen one party is at such an obvious disadvantage in bargaining power that the effect of the contract is to put him at the mercy of the other's negligence, the agreement is void."[37] Agreements procured through unequal bargaining power violate public policy.[38] Courts consider the surrounding circumstances of the agreement in determining whether unequal bargaining power existed at the time of the agreement's acceptance.[39] If the ex-

33. *See id.* at 531, 644 A.2d at 525.

34. *See* Dorothy C. Alevizatos, *Contracts, Developments in Maryland Law, 1992-93*, 53 MD. L. REV. 733, 742 (1994); *see also* Hupp v. George R. Rembold Bldg. Co., 279 Md. 597, 603, 369 A.2d 1048, 1052 (1977) (explaining that bad faith may be demonstrated by a refusal to perform when there is the ability to do so); Charles County Broad. Co., Inc. v. Meares, 270 Md. 321, 333-34, 311 A.2d 27, 35 (1973) (holding that bad faith was evidenced by the failure to effectuate the necessary FCC document).

35. *See* Sullivan v. Mosner, 266 Md. 479, 496, 295 A.2d 482, 491 (1972) (explaining that an exculpatory provision does not protect a person from liability when a breach is intentional or occurs as a result of bad faith or reckless indifference).

36. *See Wolf*, 335 Md. at 531, 644 A.2d at 525-26.

37. *Winterstein*, 16 Md. App. at 135-36, 293 A.2d at 824.

38. *See id.*

39. *See* Boucher v. Riner, 68 Md. App. 539, 550, 514 A.2d 485, 491 (1986). Compulsion is one factor looked upon by courts as evidence of an unequal bargaining position. *See id.* According to the *Boucher* court, "[a]n agreement will be invalid if . . . one party is at an obvious disadvantage in bargaining at the time the contract is entered so that . . . [the party is] at the mercy of the other's negligence." *Id.* at 548-49, 514 A.2d at 490; *see also* Flow Indus., Inc. v. Fields Constr. Co., 683 F. Supp. 527, 531 (D. Md. 1988) (holding that there was not unequal bargaining solely based upon the difference in sizes of two companies); Schrier v. Beltway Alarm Co., 73 Md. App. 281, 297, 533 A.2d 1316, 1324 (1987) (concluding there was no unequal bargaining between a cli-

culpatory clause was the product of unequal bargaining power between the parties, a court will not honor it.[40]

3. The Public Interest Exception

Finally, an exculpatory clause may be held invalid and unenforceable when the clause adversely affects the public interest.[41] The public interest exception "includes the performance of a public service obligation [such as] public utilities, common carriers, innkeepers, and public warehousemen."[42] The public interest quandary also encompasses "those transactions . . . that are so important to the public good that an exculpatory clause would be 'patently offensive,' such that 'the common sense of the community would pronounce it' invalid."[43]

The Court of Appeals of Maryland has not specifically defined this public interest exception, but rather has described it as a "shifting and variable notion appealed to only when no other argument is available, and which, if relied upon today, may be utterly repudiated tomorrow."[44] The public interest exception is ambiguous and obscure. Consequently, courts have been hesitant to invalidate clauses on the sole premise that they adversely affect public interest.[45]

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ent and a business where the business provided a non-essential service and where alternatives were available).

40. *See Boucher*, 68 Md. App. at 550, 514 A.2d at 491.

41. *See* Wolf v. Ford, 335 Md. 525, 532, 644 A.2d 522, 526 (1994).

42. *Id.*

43. *Wolf*, 335 Md. at 532, 644 A.2d at 526 (quoting Maryland Nat'l Cap. Park & Planning Comm. v. Washington Nat'l Arena, 282 Md. 588, 606, 386 A.2d 1216, 1228 (1978) (quoting Estate of Woods, Weeks & Co., 52 Md. 520, 536 (1879))).

44. Kenneweg v. County Comm'rs, 102 Md. 119, 125, 62 A. 249, 251 (1905).

45. *See Maryland Nat'l Cap. & Planning*, 282 Md. at 606, 386 A.2d at 1228.

> Fearing the disruptive effect that invocation of the highly elusive public policy principle would likely exert on the stability of commercial and contractual relations, Maryland courts have been hesitant to strike down voluntary bargains on public policy grounds, doing so only in those cases where the challenged agreement is patently offensive to the public good, that is, where "the common sense of the entire community would . . . pronounce it" invalid.

Id. (quoting Estate of Woods, Weeks & Co., 52 Md. 520, 536 (1879)); *see also* Trupp v. Wolff, 24 Md. App. 588, 616, 335 A.2d 171, 188 (1975) (illustrating the reluctance of the judiciary to nullify contractual arrangements on public policy grounds).

In *Winterstein*, the Court of Special Appeals of Maryland determined the validity of an exculpatory clause that released the owner of a speed raceway from negligence liability.[46] In determining whether providing speed raceway accommodations to the public was an act affecting the public interest, the court of special appeals cited the six-factor test set forth in *Tunkl v. Regents of the University of California*.[47] The six-factor test, explained in Part IV of this Note,[48] provides a framework for analyzing transactions that affect the public interest.

The *Winterstein* court noted that the *Tunkl* test should only be used as a "rough outline of that type of transaction in which exculpatory provisions will be held invalid."[49] In *Wolf*, the court of appeals expressly declined to adopt the *Tunkl* test as a conclusive method to determine what acts affect the public interest.[50] The court of appeals agreed that the *Tunkl* factors should be considered, but that "[t]he ultimate determination of what constitutes the public interest must be made considering the totality of the circumstances of any given case against the backdrop of current societal expectations."[51]

C. *Contractual Adequacy*

Before considering the three exceptional circumstances when otherwise valid exculpatory clauses are ineffective,[52] the *Adloo* court framed a threshold inquiry—whether a valid exculpatory clause existed, from a contractual standpoint.[53] In other words, the court considered whether the exculpatory provisions were sufficiently

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46. *See* Winterstein v. Wilcom, 16 Md. App. 130, 131-32, 293 A.2d 821, 822 (1972). Winterstein was timing an acceleration run of his car when he hit a cylinder head left on the track by Wilcom's employees. *See id.* at 133, 293 A.2d at 823. Winterstein lost control of his car and sustained serious, painful, and permanent injuries. *See id.*

47. 383 P.2d 441, 445-46 (Cal. 1963).

48. See *infra* text accompanying notes 193-97 for a discussion of the six-factor public interest analysis test set forth by *Tunkl*.

49. *Winterstein*, 16 Md. App. at 136-37, 293 A.2d at 825; *see also* Baker v. Roy H. Haas Assoc., 97 Md. App. 371, 380, 629 A.2d 1317, 1322 (1993) (identifying the six-factor test as a rough outline).

50. *See* Wolf v. Ford, 335 Md. 525, 535, 644 A.2d 522, 527 (1994).

51. *Id.*

52. See *supra* notes 31-45 and accompanying text for a discussion of the three exceptions presented in *Winterstein*.

53. *See* Adloo v. H.T. Brown Real Estate, Inc., 344 Md. 254, 261, 686 A.2d 298, 301 (1996).

drafted to insulate the broker from liability for its own negligence.[54] Whether a clause is sufficient to shield a party from liability depends on the intent of the parties.[55]

When courts construe contractual terms, their role is to "ascertain and effectuate the intention of the parties, as [it] appears from the whole agreement."[56] In determining the intent of the parties, the contract must be viewed in light of the circumstances under which it was entered.[57] As with the rules of statutory construction, the intent of the parties to a contract is derived from the language of the contract itself.[58]

Exculpatory clauses are contractual agreements. Thus, Maryland contract law will govern how a court interprets and construes exculpatory clauses. It is well established that Maryland courts apply an objective standard when interpreting and construing contracts.[59] When objectively interpreting exculpatory clauses, "[i]t is the degree of clarity that the language must convey in order to achieve a particular legal result which is the crucial question."[60]

In *General Motors Acceptance Corp. v. Daniels*,[61] the court of appeals explained that when a contract's language is expressed in clear and unambiguous terms, the court will not engage in construction, but will look solely to what was written as conclusive of the parties' intent.[62] The court set forth the standard as follows:

> A court construing an agreement under this test must first determine from the language of the agreement itself what a reasonable person in the position of the parties would have

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54. *See id.*

55. *See id.*

56. Highley v. Phillips, 176 Md. 463, 471, 5 A.2d 824, 828 (1939). In *Highley*, an action was brought to recover the value of sand which was allegedly not included in the contract for the sale of dirt. *See id.* at 466-67, 5 A.2d at 826-27. The *Highley* court was faced with interpreting the term "dirt" in the sales contract between a landowner and a contractor. *See id.* at 466, 5 A.2d at 826. *Id.* at 471, 5 A.2d at 828.

57. *See, e.g., id.* at 463, 5 A.2d at 824; Fidelity & Deposit Co. v. Mattingly Lumber Co., 176 Md. 217, 222, 4 A.2d 447, 450 (1939); Rollins v. Bravos, 80 Md. App. 617, 626, 565 A.2d 382, 386 (1989).

58. *See, e.g., Adloo*, 344 Md. at 261, 686 A.2d at 301.

59. *See, e.g.*, GMAC v. Daniels, 303 Md. 254, 261, 492 A.2d 1306, 1310 (1985); Aetna Cas. & Sur. Co. v. Insurance Comm'r, 293 Md. 409, 420, 445 A.2d 14, 19 (1982).

60. Colgan v. Agway, Inc., 553 A.2d 143, 145 (Vt. 1988).

61. 303 Md. 254, 492 A.2d 1306 (1985).

62. *See id.* at 261, 492 A.2d at 1310.

> meant at the time it was effectuated. In addition, when the language of the contract is plain and unambiguous there is no room for construction, and a court must presume that the parties meant what they expressed.[63]

When there is no ambiguity, the appropriate test of a contract's meaning is what a reasonable person would interpret the contract to mean rather than what the parties to the contract actually intended it to mean.[64] Thus, when a contract is drafted with clear and unambiguous language, the language will not yield "to what the parties thought that the agreement meant or intended it to mean."[65]

If a contract is unambiguous, parol evidence[66] is inadmissible "to show the intention of the parties or to vary, alter, or contradict the terms of that contract,"[67] provided that there is no evidence of fraud, duress, or mistake.[68] Conversely, when the language of a contract is unclear, relevant parol evidence may be introduced to explain the parties' intentions.[69] If the parol evidence fails to resolve the ambiguity, the clause will be strictly construed against its author.

D. Pivotal Cases

The Court of Appeals of Maryland construed the meaning of an exculpatory clause in *Home Indemnity Co. v. Basiliko.*[70] The issue was whether a clause in a lease absolved the lessors from liability for property damage caused by a leaking air conditioner.[71] The clause at issue provided:

> Landlord shall not be responsible for loss of or damage to property of Tenant in said building caused by fire or other

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63. *Id.*
64. *See id.*
65. *Id.*; *see* Board of Trustees v. Sherman, 280 Md. 373, 380, 373 A.2d 626, 629 (1977).
66. Parol evidence is "[o]ral or verbal evidence . . . and with reference to contracts . . . is the same as extraneous evidence or evidence *aliunde.*" BLACK'S LAW DICTIONARY 1117 (6th ed. 1990).
67. *GMAC*, 303 Md. at 261-62, 492 A.2d at 1310.
68. *See* Truck Ins. Exch. v. Marks Rentals, Inc., 288 Md. 428, 433, 418 A.2d 1187, 1190 (1980); Equitable Trust Co. v. Imbesi, 287 Md. 249, 271-72, 412 A.2d 96, 107 (1980); Glass v. Doctors Hosp., Inc., 213 Md. 44, 57-58, 131 A.2d 254, 261 (1957); Markoff v. Kreiner, 180 Md. 150, 155, 23 A.2d 19, 23 (1941).
69. *See* Dialist Co. v. Pulford, 42 Md. App. 173, 177, 399 A.2d 1374, 1378 (1979).
70. 245 Md. 412, 226 A.2d 258 (1967).
71. *See id.* at 416, 226 A.2d at 260.

> casualty, or by any acts of negligence of co-tenants or other occupants of said building or any other person, or by rain or snow or water or steam that may leak into or flow from said building through any defects in the roof or plumbing or from any other source.[72]

The court held that the language used in the exculpatory clause was unambiguous.[73] The court noted that although "the clause was not skillfully drawn,"[74] the water emitted from the air conditioning unit reasonably fell under the "any other source"[75] provision.[76] The court explained that "it is clear, since the meaning of the words in the third category of causes is neither doubtful nor susceptible of more than one construction, that the lessors were not responsible for the damage suffered by the lessees."[77]

In *Crockett v. Crothers*,[78] the court was petitioned to interpret an *indemnification* clause.[79] The issue was whether a contractor that agreed to an indemnification clause[80] was obligated to indemnify an engineer against the engineer's own negligence.[81] In interpreting the clause, the court noted the general rule that "contracts will not be construed to indemnify a person against his own negligence unless an intention to do so is expressed in those very words or in other unequivocal terms."[82]

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72. *Id.* at 414-15, 226 A.2d at 259.
73. *See id.* at 417, 226 A.2d at 260.
74. *Id.*
75. *See supra* text accompanying note 72.
76. *See Home Indem. Co.*, 245 Md. at 417, 226 A.2d at 261.
77. *Id.* at 417, 226 A.2d at 260-61.
78. 264 Md. 222, 285 A.2d 612 (1972).
79. *See id.*
80. While an exculpatory clause insulates a party from liability, an indemnification clause merely shifts liability to another party—the indemnitor. *See* Valhal Corp. v. Sullivan Assoc., 44 F.3d 195, 202 (3d Cir. 1995). "The difference between the two clauses 'is . . . a real one.' " *Id.* (citing Posttape Assocs. v. Eastman Kodak Co., 537 F.2d 751, 755 (3d Cir. 1976)).
81. *See Crockett*, 264 Md. at 223, 285 A.2d at 613 (examining the liability of a building contractor who damaged a water line while performing pursuant to specifications prepared by an engineer who negligently omitted the pipe from the plans).
82. *Id.* at 227, 285 A.2d at 615 (citing Blockston v. United States, 278 F. Supp. 576, 591 (D. Md. 1968); Farrell Lines, Inc. v. Devlin, 211 Md. 404, 421-22, 127 A.2d 640, 648-49 (1956); Sheila K. Sachs, *Interpretation of Indemnity Clauses in Construction Contracts*—Macon v. Warren Petroleum Corp., 24 MD. L. REV. 66 (1964)).

The court held that the clause did not satisfy this general rule—the *indemnification* clause failed to unequivocally express that the engineer was indemnified against his own negligence.[83] Analogous to *Crockett,* the *Adloo* decision provided insight into how an *exculpatory* clause can unequivocally express the intent to absolve a party from their own negligence.

III. INSTANT CASE

A. *Facts and Procedural History*

Adloo v. H.T. Brown Real Estate, Inc.,[84] addressed the sufficiency of the language required to create an operative exculpatory clause in Maryland.[85] As previously discussed, broad language used in a release may not always be sufficient to exculpate a party from liability.[86] In *Adloo,* a homeowner directly challenged the exculpatory clauses contained in two standard real estate contracts.[87]

Abdolrahman and Monireh Adloo signed two separate contracts with H.T. Brown Real Estate, Inc. ("H.T. Brown"), a real estate listing contract and lock-box[88] agreement.[89] The exculpatory clauses in each of these contracts formed the basis of the dispute between the parties.[90]

This listing contract appointed H.T. Brown as the exclusive selling agent of the Adloo's home.[91] Within the listing contract, there was an exculpatory clause that attempted to release H.T. Brown from any future loss of property.[92] The listing contract contained the following clause:

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83. *See id.* at 228, 285 A.2d at 615.
84. 344 Md. 254, 686 A.2d 298 (1996).
85. *See id.* at 256-57, 686 A.2d at 299.
86. *See supra* notes 7, 17 and accompanying text.
87. *See Adloo,* 344 Md. at 256-57, 686 A.2d at 299.
88. The lock-box, which contains a key to the house, is a device placed on an entrance door of a house that is for sale. Upon entering the correct combination, an agent can gain access to the house to show a prospective buyer the property without requiring the homeowner to be present. *See id.* at 259 n.3, 686 A.2d at 300 n.3.
89. The real estate listing contract and the lock-box agreement were standardized contracts which were used in Montgomery and Prince George's Counties, respectively. *See id.* at 257 n.2, 686 A.2d at 300 n.2.
90. *See id.* at 257, 686 A.2d at 300.
91. *See id.*
92. *See id.*

> Neither REALTOR nor his agents or sub-agents are responsible for vandalism, theft or damage of any nature whatsoever to the property, nor is REALTOR responsible for the custody of the property, its management, maintenance, upkeep or repair.[93]

The listing contract identified H.T. Brown as the Realtor.[94] The listing contract also provided that the Adloo's home would be available for showing "at all reasonable hours."[95]

For the convenience of the parties and to facilitate the sale of the home, the Adloos signed an additional agreement that authorized the use of a lock-box on their home.[96] The lock-box enabled real estate brokers to obtain access to the home when the Adloos were not present.[97]

The lock-box agreement advised the Adloos to *safeguard* their valuables and contained the following language:

> SELLER further acknowledges that neither Listing or Selling BROKER nor their agents are an insurer against the loss of personal property; SELLER agrees to waive and releases BROKER and his agents and/or cooperating agents and brokers from any responsibility therefore [sic].[98]

After the Adloos executed both contracts, a client coordinator employed at H.T. Brown received a phone call from a man who purported to be an agent of Shannon & Luchs, another real estate brokerage firm.[99] The man inquired about the combination to the lock-box on the Adloo's home for the purpose of showing it to a prospective buyer.[100] After complying with H.T. Brown's established policy of verifying the caller and the caller's affiliation with the

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93. *Id.*

94. *See* Brief for Respondent at 2, Adloo v. H.T. Brown Real Estate, Inc., 344 Md. 254, 686 A.2d 298 (1996) (No. 143).

95. *Adloo*, 344 Md. at 257, 686 A.2d at 300.

96. *See id.* at 257-58, 686 A.2d at 300. The listing contract was a standardized realtor contract used in Montgomery County. *See id.* at 258 n.2, 686 A.2d at 300 n.2; *supra* note 89. The lock-box agreement was a standardized contract used in Prince George's County. *See Adloo*, 344 Md. at 258 n.2, 686 A.2d at 300 n.2; *supra* note 89. Both forms are copyrighted agreements provided by the respective County Association Board of Realtors. *See* Brief for Petitioners at 5, Adloo v. H.T. Brown Real Estate, Inc., 344 Md. 254, 686 A.2d 298 (1996) (No. 143).

97. *See Adloo*, 344 Md. at 258, 686 A.2d at 300.

98. *Id.*

99. *See id.*

100. *See id.*

named agency, the employee gave the caller the combination to the lock-box on the Adloo's home.[101]

Subsequently, H.T. Brown learned that the caller was not an agent of Shannon & Luch's.[102] Moreover, no license had ever been issued by the Maryland Real Estate Commission in the caller's name.[103] The caller was an imposter who entered the Adloo's home by way of the key in the lock-box and absconded with cash, jewelry, and other property totaling approximately $40,000.[104]

The Adloos filed suit against H.T. Brown in the Circuit Court for Montgomery County to collect damages arising from H.T. Brown's alleged negligence.[105] Despite H.T. Brown's argument that the exculpatory clauses released it from liability, the jury returned a verdict in favor of the Adloos for $20,000.[106] The Court of Special Appeals of Maryland reversed the judgment of the circuit court.[107] In an unreported opinion,[108] the court of special appeals held that the exculpatory clause in the lock-box agreement exonerated H.T. Brown from any liability.[109]

B. The Holding and Rationale

The Court of Appeals of Maryland granted certiorari and rejected the intermediate court's holding.[110] The court of appeals held that unless a clause "clearly, unequivocally, specifically, and unmistakably expressed the parties' intention to exculpate [H.T. Brown] from liability resulting from its own negligence, the clause is insufficient for that purpose."[111] The *Adloo* court concluded that the contract clauses at issue failed to clearly exculpate H.T. Brown from liability resulting from its own negligence.[112] The *Adloo* court announced that an exculpatory clause must manifest the parties' in-

101. *See id.* The policy did not call for an independent investigation, but rather a simple phone call to the number that the caller gave to H.T. Brown Real Estate, Inc. *See id.*
102. *See id.*
103. *See id.*
104. *See id.* at 258-59, 686 A.2d at 300.
105. *See id.* at 259, 686 A.2d at 300. The filing of the suit came after the Adloos filed and settled a claim with their insurance company. *See id.*
106. *See id.*
107. *See id.*
108. *See* Adloo v. H.T. Brown Real Estate, Inc., 106 Md. App. 765 (1995).
109. *See Adloo*, 344 Md. at 259, 686 A.2d at 300.
110. *See id.* at 259, 267, 686 A.2d at 300, 305.
111. *Id.* at 267, 686 A.2d at 305.
112. *See id.* at 268, 686 A.2d at 305.

tentions in clear, unequivocal, specific, and unmistakable language,[113] thereby adopting a more exacting standard than had previously been applied by Maryland courts.

Judicial scrutiny is heightened when courts interpret exculpatory clauses.[114] Exculpatory clauses are strictly construed against the drafter. An elevated degree of clarity is necessary to make an exculpatory clause functional.[115] This is a higher standard than courts apply to other types of contractual provisions.[116] To survive a court's heightened level of scrutiny, the contractual language disclaiming tort liability must be, among other things, unmistakable.[117]

Although *Adloo* involved two separate contracts that each included exculpatory provisions, the court of appeals identified the provision in the lock-box agreement as critical and examined that provision first.[118] After careful analysis, the court determined that the exculpatory provision in the lock-box agreement was ambiguous, and its scope was at best unclear.[119] Therefore, the provision was insufficient for the purpose of exculpating the real estate agency from liability resulting from its own negligence.[120]

The court analyzed the two exculpatory clauses in the lock-box agreement separately. The first clause, "SELLER further acknowledges that neither Listing or Selling BROKER nor their agents are an insurer against the loss of personal property,"[121] placed the homeowner on notice that any loss of personal property will not be

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113. *See id.* at 267-68, 686 A.2d at 305.

114. *See supra* note 16 and accompanying text; *see also* Doyle v. Bowdoin College, 403 A.2d 1206, 1207-08 (Me. 1979) (applying a heightened level of scrutiny when construing a clause that attempted to relieve a hockey clinic from liability for its own negligence); Gross v. Sweet, 400 N.E.2d 306, 308 (N.Y. 1979) (recognizing that an exculpatory clause set forth in a parachute training center's contract was subject to close judicial scrutiny); Dilks v. Flohr Chevrolet, Inc., 192 A.2d 682, 687-88 (Pa. 1963) (construing a contractual clause strictly against the party seeking its protection).

115. See *supra* text accompanying notes 16-25 for a discussion of the level of scrutiny courts employ when construing exculpatory clauses.

116. *See* Colgan v. Agway, 553 A.2d 143, 145 (Vt. 1988).

117. *See id.* A leading commentator explained: "If an express agreement exempting the defendant from liability for his negligence is to be sustained, it must appear that its terms were brought home to the plaintiff . . . . It is also necessary that the expressed terms of the agreement be applicable to the particular misconduct of the defendant . . . ." KEETON ET AL., *supra* note 2, § 68, at 483-84.

118. *See Adloo*, 344 Md. at 267, 686 A.2d at 305.

119. *See id.*

120. *See id.*

121. *Id.* at 258, 686 A.2d at 300.

compensated for by the listing agent.[122] The second clause, "SELLER agrees to waive and releases BROKER and his agents and/or cooperating agents and brokers from any responsibility therefore [sic],"[123] works to clear the real estate agency from any loss of personal property that may result from the use of their services.[124]

The court found that the exculpatory clauses in the lock-box agreement could be interpreted to apply only to those situations where, without the negligence of the broker, personal property is stolen from the seller.[125] In other words, a reasonable person may logically interpret these clauses to apply only where a potential buyer wanders through the house and pilfers certain personal property from the seller, without the knowledge or negligence of the broker. The *Adloo* court determined that these clauses do not suggest a broader intent—they cannot be construed to exclude theft resulting from the broker's own negligence.[126]

The court then analyzed the exculpatory clause in the listing contract.[127] The court concluded that the exculpatory clause in the listing contract was insufficient because "there simply [was] no clear, unequivocal expression of the parties' intention" that the exclusion applied to "damage or injury caused by the [broker's] own negligence."[128]

The *Adloo* court pointed out that the word "negligence" does not need to be present in an exculpatory provision, nor is any other talismanic phrase required to connote the idea of negligence.[129] An exculpatory provision is sufficient to relieve one party from their liability for its own negligence as long as the provision is a "clear, unequivocal expression of the parties' intention that include[s] in that exclusion . . . damage or injury caused by the [party's] own negligence."[130]

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122. *See supra* text accompanying note 98.
123. *Adloo*, 344 Md. at 258, 686 A.2d at 300.
124. *See supra* text accompanying note 98.
125. *See id.* at 267-68, 686 A.2d at 305.
126. *See id.* at 268, 686 A.2d at 305.
127. *See supra* text accompanying note 93.
128. *Adloo*, 344 Md. at 268, 686 A.2d at 305.
129. *See id.* at 266, 686 A.2d at 304 (citing Hardage Enters. v. Fidesys Corp., 570 So. 2d 436, 437 (Fla. Dist. Ct. App. 1990); Alack v. Vic Tanny Int'l, Inc., 923 S.W.2d 330, 335-36 (Mo. 1996); Audley v. Melton, 640 A.2d 777, 778-79 (N.H. 1994)).
130. *Adloo*, 344 Md. at 268, 686 A.2d at 305.

Accordingly, the sufficiency of the exculpatory provisions in the lock-box agreement and the listing contract turned on the intention of the parties. Under Maryland's objective law of contracts, the intent of the parties is ascertained by the nomenclature of the provisions.[131] The court concluded that the exculpatory provisions in the lock-box agreement and the listing contract were insufficient to exculpate the broker from liability for its own negligence because neither clearly, unequivocally, specifically, and unmistakably expressed this intent.[132]

IV. ANALYSIS

The following analysis concentrates on the standard adopted by the *Adloo* court. The analysis begins with a discussion of the minimal level of guidance provided to practitioners by the court, then advocates an alternative, bright-line rule similar to precedents espoused in other jurisdictions. The analysis concludes with proposed language for exculpatory clauses that should comply with the new standard adopted in *Adloo.*

A. *The* Adloo *Standard*

The *Adloo* court attempted to create a more exacting standard for evaluating exculpatory clauses.[133] When a party desires to insulate itself from liability for its *own* negligent acts, the language used in the exculpatory clause must specifically, and in certain terms, exculpate that party from *its own* conduct.[134] While the *Adloo* court alerted contracting parties of the necessity to include precise exculpatory language in contracts, the court did not offer any intelligible guidance for the decreed standard. The *Adloo* holding seems to create a concrete standard. However, the court failed to develop the standard beyond its vague command that the language used in exculpatory clauses must "clearly, unequivocally, specifically, and unmistakably"[135] convey the parties' intent to exculpate one party from its own negligence liability. Thus, even after *Adloo,* the Maryland standard on the law of exculpatory clauses still remains amorphous.

Applying the *Adloo* standard may produce inconsistent and unforeseeable outcomes. Regardless of how clear contract language appears to the parties, courts will continue to split hairs over the spe-

131. *See id.* at 267, 686 A.2d at 305; *supra* text accompanying note 58.
132. *See id.* at 267-68, 686 A.2d at 305.
133. *See id.*
134. *See id.*
135. *Id.*

cific words used.[136] In construing the language of a contract, courts should keep in mind that "[c]larity of language, like ambiguity, is a relative and not an absolute concept."[137] As *Adloo* demonstrates, with a little imagination, a skillful litigator can create a plausible argument that seemingly straightforward language is ambiguous. The more exacting standard created in *Adloo* is concrete only on its face. Under *Adloo*, a practitioner cannot be certain that the contract drafted contains the level of clarity required to effectively exculpate a party from liability arising from the party's own negligence. Instead, drafters must decipher the standard using a trial and error approach until the courts provide more useful guidance. Thus, the amorphous standard adopted provides little more than a judicial caveat to future drafters.

B. Approaches in Other Jurisdictions

1. Decisions Persuasive to the *Adloo* Court

Other jurisdictions have also addressed the validity of exculpatory clauses and the precise language required to create an effective exculpatory clause. Several courts apply the same analysis as used by the *Adloo* court.[138] The standard set forth in these jurisdictions, as in

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136. *See* Colgan v. Agway, Inc., 553 A.2d 143, 145 (Vt. 1988).

137. *Id.* (citing SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 609, at 402-04 (W. Jaeger ed., 3d ed. 1961)).

138. *See* Michel v. Merrill Stevens Dry Dock Co., 554 So. 2d 593, 595 (Fla. Dist. Ct. App. 1989) (recognizing that a clause conveying clear and unequivocal intent to relieve a party from liability due to negligence is valid and enforceable); Larsen v. Vic Tanny Int'l, 474 N.E.2d 729, 731 (Ill. App. Ct. 1984) (reiterating that an exculpatory clause follows the general rule of being construed against its author); Baker v. Stewarts', Inc., 433 N.W.2d 706, 709 (Iowa 1988) (holding that a clause attempting to absolve a party from liability due to his own negligence would not "cover such negligence unless the intention to do so is clearly expressed"); Alack v. Vic Tanny Int'l, Inc., 923 S.W.2d 330, 334 (Mo. 1996) (explaining that, because exculpatory clauses are strictly construed against the author, a contract which exonerates a party from acts of negligence must contain clear and explicit language to that effect); Audley v. Melton, 640 A.2d 777, 779 (N.H. 1994) (holding that an exculpatory clause must clearly and specifically indicate the intent to release a party from liability due to that party's own negligence; a general release will not suffice); Colgan v. Agway, Inc., 553 A.2d 143, 145 (Vt. 1988) (stating that "a greater *degree* of clarity" is required for an exculpatory clause than is required for other variations of contract clauses); *see also* University Plaza Shopping Ctr., Inc. v. Stewart, 272 So. 2d 507, 509 (Fla. 1973) (applying the same strict analysis of an exculpatory clause to an indemnity clause in an indemnity contract).

Adloo, can be characterized as "a stringent and exacting one, under which the clause must not simply be unambiguous but also understandable."[139] In these jurisdictions, courts are extremely reluctant to use longstanding rules of contractual construction to find an implicit meaning of an exculpatory provision—the meaning must be specifically stated in the contract.[140]

In reaching its holding, the *Adloo* court found several cases from other jurisdictions persuasive. To fully appreciate the standard adopted by the *Adloo* court, a complete analysis requires a brief discussion of these cases.

The *Adloo* court first discussed *Audley v. Melton,*[141] a case brought by a fashion model to recover damages against a photographer.[142] While posing during a photo shoot at the photographer's studio, an adult male lion being used in the shoot bit the fashion model's head.[143] The fashion model sued on grounds alleging negligence, and the photographer moved to dismiss the complaint based on an exculpatory clause in their contract.[144]

The *Audley* court found that the exculpatory clause was insufficient to protect the photographer from liability resulting from his own negligence because "[q]uite simply, the general release language [did] not satisfy the . . . requirement that 'the contract must clearly state that the defendant is not responsible for the consequences of his negligence.' "[145] The contract failed to clearly excul-

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139. *Adloo,* 344 Md. at 264, 686 A.2d at 303 (citing *Alack,* 923 S.W.2d at 334).

140. *See* Poslosky v. Firestone Tire & Rubber Co., 349 S.W.2d 847, 850 (Mo. 1961) (citing Meyer Jewelry Co. v. Professional Bldg. Co., 307 S.W.2d 517, 520-21 (Mo. Ct. App. 1957); 17 C.J.S. *Contracts* § 262, at 644 (1963)).

141. 640 A.2d 777 (N.H. 1994).

142. *See id.* at 778.

143. *See id.*

144. *See id.* The exculpatory clause at issue provided:

> I *Shannon Audley* realize that working with the [*sic*] wild and potentially dangerous animals (i.e. lion, white tiger, hawk) can create a hazardous [*sic*] situation, resulting in loss of life or limb. I take all responsibility upon myself for any event as described above that may take place. I hold Bill Melton and T.I.G.E.R.S. or any of their agents free of any or all liability. I am signing this of my on [*sic*] free will.

Id.

145. *Id.* at 779 (quoting Barnes v. New Hampshire Karting Ass'n, 509 A.2d 151, 154 (N.H. 1986)); *see also* Wenzel v. Boyles Galvanizing Co., 920 F.2d 778, 781 (11th Cir. 1991); O'Connell v. Walt Disney World Co., 413 So. 2d 444, 447 (Fla. Dist. Ct. App. 1982) (holding that in order to be enforceable, an exculpatory clause must unambiguously indicate which risks are assumed); Baker v. Stewarts', Inc., 433 N.W.2d 706, 709 (Iowa 1988); Brown v. Racquetball Ctrs., Inc., 534

pate the photographer "because no *particular* attention [was] called to the notion of releasing the [photographer] from liability for his own negligence."[146] The general language used in the clause did not effectively put the party it was used against, the fashion model, on clear notice of this intent.[147]

The *Adloo* court also relied on *Baker v. Stewarts', Inc.*[148] The *Baker* court addressed the sufficiency of an exculpatory clause relied on by a cosmetology school in an effort to relieve itself from liability for the negligence of its supervisory personnel.[149] A cosmetology student, under the supervision of two instructors, applied a chemical to straighten a customer's hair.[150] The customer sued for damages when her hair fell out, alleging that the supervisors were negligent.[151] The court found the exculpatory clause insufficient to exonerate the school from liability for the negligence of its supervisory personnel because it lacked a clear and unequivocally expressed intent to do so.[152] The court reasoned that a casual reader asked to sign the written waiver would not find it apparent that the waiver absolved the school from liability based upon the acts or omissions of its professional, supervisory staff.[153]

The *Adloo* court's reliance on the holdings in *Audley* and *Baker* implies that Maryland demands language comparable to the language required in these respective jurisdictions. Moreover, the *Adloo* court's stringent and exact language requirement will be applied to *all* types of exculpatory contract clauses, not simply exculpatory clauses in real estate contracts.

A.2d 842, 843 (Pa. Super. Ct. 1987) (stating that in order to find an exculpatory clause enforceable, the language must spell out the intention of the parties with the greatest of particularity).

146. *Audley*, 640 A.2d at 779.

147. *See id.*

148. 433 N.W.2d 706 (Iowa 1988).

149. The clause provided:

> I . . . do hereby acknowledge that this is a student training facility and thus there is a price consideration less than would be charged in a salon. Therefore, I will not hold the Stewart School, its management, owners, agents or students liable for any damage or injury, should any result from this service.

Id. at 706-07.

150. *See id.* at 707.

151. *See id.*

152. *See id.* at 709.

153. *See id.* ("To construe the agreement in this light would be contrary to the requirement . . . that such intention must be clearly and unequivocally expressed.").

2. Decisions Contrary to *Adloo*

Other jurisdictions take a different approach from *Adloo* when interpreting the language of exculpatory clauses.[154] The decisions discussed below are frequently cited by other courts and legal authors, thus exemplifying a differing philosophy of judicial thinking. In these jurisdictions, the *Adloo* standard is simply inadequate.

For instance, in *Dresser Industries, Inc. v. Page Petroleum, Inc.*,[155] the Texas Supreme Court addressed whether the fair notice requirements of the conspicuousness doctrine and the express negligence doctrine applied to the exculpatory clause in dispute.[156] The court held that a valid exculpatory clause requires fair notice, which in turn requires a court to consider both the conspicuousness and express negligence doctrines.[157]

In order to create a valid exculpatory clause under the express negligence doctrine, the intent to exculpate one party from its own negligence must be expressed in specific terms within the four corners of the contract.[158] The conspicuousness doctrine "mandates 'that something must appear on the face of the [contract] to *attract the attention* of a reasonable person when [the person] looks at it.' "[159] The standards announced by the Texas court, although similar in substance, are more demanding and concrete than those promulgated in *Adloo*. A party seeking to release itself from liability must explicitly state that intention in the contract, and express the intention in a way that alerts a reasonable person.

In *Gross v. Sweet*,[160] the Court of Appeals of New York held that a valid exculpatory provision requires the word "negligence" or "words conveying a similar import."[161] The court indicated that without these words, it would not infer that an injured party "was aware of, much less intended to accept, any *enhanced* exposure to injury occasioned by the carelessness of the very persons on which he depended for his safety."[162]

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154. *See infra* notes 155-72 and accompanying text.
155. 853 S.W.2d 505 (Tex. 1993).
156. *See id.* at 507.
157. *See id.* at 508.
158. *See id.* (citing Enserch Corp. v. Parker, 794 S.W.2d 2, 8 (Tex. 1990); Ethyl Corp. v. Daniel Const. Co., 725 S.W.2d 705, 707-08 (Tex. 1987)).
159. *Id.* at 508 (quoting Ling & Co. v. Trinity Sav. & Loan Ass'n, 482 S.W.2d 841, 843 (Tex. 1972)) (emphasis added).
160. 400 N.E.2d 306 (N.Y. 1979).
161. *Id.* at 311.
162. *Id.* at 310-11.

The New York court revisited the topic of exculpatory contracts in *Geise v. County of Niagara.*[163] In *Geise,* the court relied on the opinion in *Gross,* and held that because words referring to the "neglect" or "fault" of the defendant were not in the clause, the exculpatory provision was invalid.[164] The absence of these words resulted in an uninformed plaintiff—one that could not appreciate which enhanced risks he has agreed to absolve.[165]

Maine courts have also addressed similar exculpatory clause issues. In *Doyle v. Bowdoin College,*[166] a contract containing a release, executed by the parents of a child injured during a hockey clinic, did not expressly refer to Bowdoin College's liability for their own negligence.[167] The Supreme Judicial Court of Maine held that the clause failed to fulfill the court's required standard of stating, "with the greatest particularity," the intent to release a party from liability for negligence.[168] Furthermore, the court noted that the clause was insufficient because it failed to mention that it immunized Bowdoin College or its agents from claims of negligence.[169]

Delaware's high court addressed exculpatory clauses and espoused a clearer standard of the requisite language than that set forth in *Adloo.* In *Blum v. Kauffman,*[170] the Supreme Court of Delaware held that a contract must clearly and unequivocally express the parties' intent to grant immunity from one party's negligence.[171]

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163. 458 N.Y.S.2d 162 (1983).

164. *See id.* at 164 (citing *Gross,* 400 N.E.2d at 309-10).

165. *See id.*

166. 403 A.2d 1206 (Me. 1979).

167. *See id.* at 1208. The clause provided:

> I understand that *neither Bowdoin College nor anyone associated with the Hockey Clinic will assume any responsibility for accidents and medical or dental expenses* incurred as a result of participation in this program. . . . I understand that I must furnish proof of health and accident insurance coverage acceptable to the College. . . . [signed] Leonard F. Doyle (emphasis added). I fully understand that *Bowdoin College, its employees or servants will accept no responsibility for* or on account of *any injury or damage sustained by Brian* arising out of the activities of the said THE CLINIC. *I do, therefore, agree to assume all risk of injury or damage* to the person or property of Brian arising out of the activities of the said THE CLINIC. . . . [signed] Margaret C. Doyle (emphasis added).

Id. at 1207.

168. *See id.* at 1208.

169. *See id.* at 1209.

170. 297 A.2d 48 (Del. 1972).

171. *See id.* at 49.

The court held that the contract could not be a clear and unequivocal expression of the intent to exculpate a party from its own negligence without using the word "negligence."[172]

Although Maryland's common law on exculpatory clauses became more demanding after *Adloo*, it has not reached the pinnacle of exactness required for effective exculpatory language as compelled by Texas, New York, Maine, and Delaware. The aforementioned cases in those states demonstrate a more exacting, bright-line standard than that adopted by the *Adloo* court.

Arguably, the more appropriate standard for the *Adloo* court to have adopted would have been a bright-line test similar to those discussed above.[173] A strict, clear, and exact rule would alleviate Maryland's amorphous standard on exculpatory clauses. Moreover, a bright-line standard would allow Maryland courts to rule on exculpatory clause issues without the need to interpret both the inconsistent dictates of the *Adloo* decision and the clause at issue.

Recently, in *Cornell v. Council of Unit Owners Hawaiian Village Condominiums, Inc.*,[174] the United States District Court for the District of Maryland reviewed an exculpatory clause and applied Maryland law.[175] In applying the *Adloo* standard,[176] the court held that the language "any other person"[177] contained in the disputed clause was sufficient to release the party relying on the clause from its own negligence liability.[178] The *Cornell* court reasoned that the *broad* language, "any other person," evinced a clear intent to absolve the party from its own negligence.[179]

The underlying theory behind the *Adloo* decision was to discourage general release language in exculpatory clauses to ensure that a party could reasonably interpret the terms of the clause. Clearly, the phrase "any other person" is general release language. In *Adloo*, similarly *broad* language, "any nature whatsoever" and "any responsibility therefore," was held insufficient to exculpate a party

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172. *See id.*
173. *See supra* text accompanying notes 155-72.
174. 983 F. Supp. 640 (D. Md. 1997).
175. *See* Cornell v. Council of Unit Owners Hawaiian Village Condominiums, Inc., 983 F. Supp. 640 (D. Md. 1997); *see also infra* notes 238-43 and accompanying text.
176. *See Cornell*, 983 F. Supp. at 644.
177. *See infra* note 239 and accompanying text.
178. *See Cornell*, 983 F. Supp. at 644.
179. *See id.*

from liability for its own negligence.[180] However, the *Cornell* court found that the phrase "any other person" was sufficiently precise to exculpate a party to the contract from its own negligence under the *Adloo* standard.[181] This recent federal court decision indicates that the *Adloo* standard did little to clarify Maryland's common law on exculpatory clauses.

The confusion stems from inconsistencies in the *Adloo* court's holding. The *Adloo* court held that an exculpatory clause must "clearly, unequivocally, *specifically*, and unmistakably express the parties' intention to exculpate the [party] from its own negligence."[182] However, the decision proceeded to explain that if the language of the clause at issue had suggested a "*broader* intent," it would have sufficed to exculpate H.T. Brown from their own negligence.[183] Thus, the inconsistency that the *Adloo* court's holding created was the idea that broader language could be more specific.

The logical way to put a party on notice as to the other party's intent is to expressly state that intent as required by the express negligence doctrine.[184] Well-defined, explicit terms are more likely to alert all parties involved that one party is being released from future liability for their own negligent acts.[185] Without requiring the word "negligence" or words of similar import, a requirement which the *Adloo* court expressly refused to adopt,[186] it is uncertain how there can be a clear, specific, unequivocal, and unmistakable expression of the parties' intent.[187] Moreover, a party should be re-

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180. Adloo v. H.T. Brown Real Estate, Inc., 344 Md. 254, 267-68, 686 A.2d 298, 305 (1996).

181. *See Cornell*, 983 F. Supp. at 644. The *Cornell* court read *Adloo* to stand for the following:

> Although the clause does not use the word "negligence", under *Adloo* any substantial equivalent will suffice, and the *broad* language of the clause exempting the Council from liability for personal injuries caused by "any other person" evinces the Council's *clear* intention to absolve itself from liability for its negligent actions. Accordingly, this case is distinguishable from *Adloo* . . . because the clause's language *broadly* covers all personal injuries caused by any person . . . .

Id. The *Cornell* court relied on *Home Indemnity Co. v. Basiliko*, 245 Md. 412, 226 A.2d 258 (1967), to reconcile its outcome with the *Adloo* court's decision. *See id.*

182. *Adloo*, 344 Md. at 267, 686 A.2d at 305 (emphasis added).

183. *Id.* at 268, 686 A.2d at 305 (emphasis added).

184. *See supra* note 158 and accompanying text.

185. *See* Alack v. Vic Tanny Int'l, Inc., 923 S.W.2d 330, 337 (Mo. 1996).

186. *See Adloo*, 344 Md. at 266, 686 A.2d at 304.

187. *See* Blum v. Kauffman, 297 A.2d 48, 49 (Del. 1972) (explaining that without

quired to specifically set forth the intent to be released from liability for their own negligent acts. In an effort to preserve the parties' freedom of contract, the *Adloo* court's refusal to adopt a bright-line standard effectively postponed, and perhaps multiplied the instances when courts will be called upon to interpret contracts containing exculpatory clauses.[188]

C. *Invalidation Based on Policy and the* Tunkl v. Regents of the University of California *Analysis*

As a threshold matter, the *Adloo* court construed the language of the contract to determine if the exculpatory clause was sufficiently crafted.[189] Initially, the court could have examined the three exceptional circumstances when an exculpatory clause is invalid as discussed in *Winterstein*.[190] These three exceptions may have enabled the *Adloo* court to reach the same conclusion by invalidating the clause on policy grounds. However, in order to invalidate an exculpatory clause based on one of the three *Winterstein* exceptions, the court must first presume or find that a valid exculpatory clause exists. Thus, the *Adloo* court correctly recognized that the threshold issue of determining the sufficiency of the language of the exculpatory clause logically must precede analyzing the clause's validity as there is no need to determine whether an exculpatory clause is void under an exceptional circumstance if no exculpatory clause exists for the purpose asserted.[191]

Other courts fail to treat language as a threshold issue. Instead, these courts begin their analysis by questioning whether an exculpatory clause would be valid from a policy standpoint, regardless whether the language of the clause was sufficiently precise to exculpate the party relying on it.[192] In doing so, these courts initially look

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the word "negligence" the Agreement does not "clearly and unequivocally spell[] out [such] intent"); *see also Alack*, 923 S.W.2d at 337 (explaining that without the words " 'negligence' or 'fault' or their equivalents," there is no clear and unmistakable waiver).

188. *See supra* note 1 and accompanying text.

189. *See Adloo*, 344 Md. at 261, 686 A.2d at 301-02 (identifying the construction of the language of the exculpatory clause as the threshold issue).

190. *See* Winterstein v. Wilcom, 16 Md. App. 130, 135-36, 293 A.2d 821, 824-25 (1972).

191. *See Adloo*, 344 Md. at 261, 686 A.2d at 301.

192. *See* Wolf v. Ford, 335 Md. 525, 644 A.2d 522 (1994); *see also Winterstein*, 16 Md. App. 130, 293 A.2d 821 (1972) (assessing the validity of an exculpatory clause before discussing the language that leads to the existence of a valid exculpatory clause).

to the exceptional circumstances that act to invalidate exculpatory provisions.

One of the three circumstances discussed at length in *Winterstein* was the public interest exception. In discussing the public interest exception, the *Winterstein* court adopted the six-factor test[193] formulated in *Tunkl v. Regents of the University of California.*[194]

In *Tunkl*, the California Supreme Court held that an exculpatory clause signed by a patient that released a charitable hospital from future negligence was invalid because it violated the public's interest.[195] To determine whether the exculpatory clause violated the public's interest, the court viewed the circumstances of the contract in light of the following six-factor test: whether (1) the type of business was generally thought suitable for public regulation; (2) the party seeking relief from liability was performing an important service for the public, or providing the public with a necessity; (3) the party presented itself as willing to perform the service to any member of the public, or those that met certain criteria; (4) the party seeking relief from liability was at a bargaining advantage due to the nature or economics of the service; (5) due to the superior bargaining power, the party presented a standardized contract of adhesion that contained no provision for the buyer to obtain protection from the seller's negligence; and (6) as a result of the agreement, the person or property of the buyer was placed under the seller's control and subjected to the risk and carelessness of the seller.[196] In order for an activity to rise to the level of one that affects the public interest under the *Tunkl* analysis, "the agreement need only fulfill some of the characteristics"[197] of the six-factor test.

Although the Court of Appeals of Maryland has expressly rejected the *Tunkl* analysis as a definitive public interest test,[198] other

193. *See Winterstein*, 16 Md. App. at 136-37, 293 A.2d at 825.

194. 383 P.2d 441, 445-46 (Cal. 1963).

195. *See Tunkl*, 383 P.2d at 441-42.

196. *See id.* at 445-46; *see also* Alevizatos, *supra* note 34, at 741 & n.74 (citing *Tunkl*, 383 P.2d at 445-46).

197. *Tunkl*, 383 P.2d at 447.

198. *See* Wolf v. Ford, 335 Md. 525, 535, 644 A.2d 522, 527 (1994) (explaining that the court expressly declined to adopt the six-factor test set forth in *Tunkl*, but it is not to say that the factors listed cannot be considered by a court in determining whether a transaction affects public interest). This six-factor test includes two of the three exceptions announced by the *Adloo* court—the public interest exception and the unequal bargaining power exception. *See* Adloo v. H.T. Brown Real Estate, Inc., 344 Md. 254, 260, 686 A.2d 298, 301 (1996).

jurisdictions continue to strictly apply the factors.[199] For example, in *Wagenblast v. Odessa School District*,[200] the Washington Supreme Court "sought to establish a principled basis" for determining whether a school district could contract out of negligence liability in interscholastic athletics using an exculpatory clause.[201] In resolving the issue, the court adopted the *Tunkl* test, as did numerous other jurisdictions.[202]

Other jurisdictions that have declined to adopt the *Tunkl* test do not apply uniform sets of criteria to the public interest exception. For example, Idaho bans exculpatory clauses only when they are the product of unequal bargaining power or involve a public duty, not considering the remaining four *Tunkl* criteria.[203] Likewise, Kansas has enumerated an open-ended test where an exculpatory clause is found invalid if it harms "the interests of the public, contravenes some established interest of society, violates some public statute, or tends to interfere with the public welfare or safety."[204] New Hampshire courts take an extreme approach and disallow all exculpatory clauses under the rationale that contracts which bargain away common law duties of care are invalid.[205] The disparity between the states on the public interest exception illustrates the difficulties courts face in dealing with exculpatory clauses.[206]

Although Maryland rejected the *Tunkl* test as determinative, the test continues to be used as an aid in determining whether a trans-

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199. *See* Alevizatos, *supra* note 34, at n.17. In addition to California, other states follow the *Tunkl* test. *See, e.g.*, Morgan v. South Cent. Bell Tel. Co., 466 So. 2d 107, 117 (Ala. 1985); Municipality of Anchorage v. Locker, 723 P.2d 1261, 1265 (Alaska 1986); Porubiansky v. Emory Univ., 275 S.E.2d 163, 167-68 (Ga. Ct. App. 1980), *aff'd*, 282 S.E.2d 903 (Ga. 1981); LaFrenz v. Lake County Fair Bd., 360 N.E.2d 605, 608-09 (Ind. Ct. App. 1977); Lynch v. Santa Fe Nat'l Bank, 627 P.2d 1247, 1251-52 (N.M. Ct. App. 1981); Lee v. Consolidated Edison Co., 407 N.Y.S.2d 777, 787 (N.Y. Civ. Ct. 1978), *rev'd on other grounds*, 413 N.Y.S.2d 826 (N.Y. App. Term. 1978); Olson v. Molzen, 558 S.W.2d 429, 431 (Tenn. 1977); Wagenblast v. Odessa Sch. Dist., 758 P.2d 968, 973 (Wash. 1988).

200. 758 P.2d 968 (Wash. 1988).

201. *See* Recent Case, *Negligence—Exculpatory Clauses—School Districts Cannot Contract Out of Negligence Liability in Interscholastic Athletics*—Wagenblast v. Odessa School District, 102 HARV. L. REV. 729, 730 (1989).

202. *See supra* note 199 and accompanying text.

203. *See* Rawlings v. Layne & Bowler Pump Co., 465 P.2d 107, 111 (Idaho 1970).

204. Hunter v. American Rentals, Inc., 371 P.2d 131, 133-34 (Kan. 1962).

205. *See* Papakalos v. Shaka, 18 A.2d 377, 379 (N.H. 1941) (referring to the general rule that one may not contractually relieve himself from the consequences of the future nonperformance of his common law duty of care).

206. *See supra* notes 41-45 and accompanying text.

action affects public interest.[207] If the *Adloo* court had conducted a *Tunkl* analysis, perhaps the outcome would have been the same, but for a different reason. Applying the *Adloo* facts to the *Tunkl* test illustrates that the exculpatory clause may have violated the public interest standard.

First, the real estate industry is suitable for public regulation; indeed, it is currently regulated in Maryland.[208] Second, the practical necessity of a real estate agency is clear. Although it is entirely possible to sell a home privately, the substantial advantage one receives from a multiple real estate listing is usually accessible by brokers only. Third, a real estate agency will provide service to any member of the public. Anti-discrimination statutes[209] and anti-discrimination policies adopted by agencies reflect the willingness to provide service to all members of the public. The fourth factor involves bargaining power. Real estate contracts are standardized, copyrighted form agreements used by most brokers in each county. Arguably, the Adloos had an avenue of relief because they were free to negotiate the exculpatory clause in their contract. Even if negotiation was possible, however, simply failing to establish one of the factors of the *Tunkl* test is not determinative,[210] as the test is somewhat malleable.

Clearly, the fifth factor could have been established under the facts of *Adloo* because no clause in the Adloos' standard contract of adhesion enabled them to buy insurance for the broker's negligence.[211] It follows that the final factor could be satisfied because the installation of the lock-box allowed the broker control over entrance into the dwelling. Therefore, the Adloos were at the mercy of the broker's negligence.

If the *Adloo* court presumed that the language conclusively established an exculpatory clause, it might have looked to the exceptions that invalidate these clauses. Had the *Adloo* court applied the *Tunkl* test to the facts of the case, it is likely that the court would have concluded that the clause was void because it violated the public's interest. Instead, the court correctly precluded this type of analysis by electing to construe the language of the exculpatory clause

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207. *See* Wolf v. Ford, 335 Md. 525, 535, 644 A.2d 522, 527 (1994) (explaining that the test can be considered as one of many factors by a court).

208. *See* MD. CODE ANN., BUS. OCC. & PROF. §§ 17-100 to -702 (1995).

209. *See id.* §§ 17-525 to -526.

210. *See supra* note 197 and accompanying text.

211. *See* Adloo v. H.T. Brown Real Estate, Inc., 344 Md. 254, 257, 686 A.2d 298, 300 (1996).

first, to determine whether the clause was sufficient for the purpose that it was asserted.

D. Impact of Adloo *in Maryland*

Adloo is a significant development in Maryland law because the court clearly announced that it was necessary to express the parties' intentions with unambiguous language in order for an exculpatory contract clause to be operative.[212] After *Adloo,* Maryland real estate agents must spell out to homeowners the desire to be released from liability caused by their own negligence. Currently, real estate brokers may be reluctant to state this desire in clear, unambiguous language because prospective sellers may find the terms offensive and one-sided. Thus, brokers' concerns that sellers may be unwilling to enter into a listing agreement with agencies that include explicit exculpatory language in their contracts may cause real estate agencies to abandon these clauses entirely.

Moreover, the *Adloo* court's demand for clarity has broad implications on future exculpatory clauses. The *Adloo* court was most concerned with eliminating a party's effort to camouflage the true intent of the exculpatory clause. In *Adloo,* the contract at issue was a standardized contract. Thus, numerous outstanding contracts may be insufficient for the purpose of exculpating a broker, and redrafting may be necessary to accomplish the desired result of insulating brokers from liability.

The nature of the activities that exculpatory clauses are intended to cover differ widely. Accordingly, a wide variety of language is used when drafting exculpatory clauses. The court in *Adloo* made it clear that whatever language is used, it must be clear, unequivocal, specific, and unmistakable to be effective.

The scope of the *Adloo* opinion far exceeds the boundaries of real estate contracts. Exculpatory contracts surface in many other transactions. Participants in many recreational activities must sign waiver release forms. These forms routinely contain exculpatory provisions. For instance, ski resorts attempt to insulate themselves from liability,[213] as do health clubs,[214] horse riding stables,[215] white-

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212. *See id.* at 267, 686 A.2d at 305.

213. *See* Dalury v. S-K-I, Ltd., 670 A.2d 795, 796 (Vt. 1995) (reviewing an exculpatory clause when a skier sustained injuries from hitting a metal pole on a ski slope); Yauger v. Skiing Enters., 557 N.W.2d 60, 61 (Wis. 1996) (addressing an exculpatory provision when a skier collided with a ski lift tower after signing a waiver).

214. *See* Alack v. Vic Tanny Int'l, Inc., 923 S.W.2d 330, 332 (Mo. 1996) (reviewing

water rafting outfitters,[216] water ski clubs,[217] scuba diving shops,[218] parachuting operations,[219] schools with athletic clubs,[220] and organizations hosting athletic events.[221]

In addition to the sample of recreational activities mentioned above, exculpatory provisions are also used in other routine transactions such as medical visits,[222] leases,[223] construction agreements,[224]

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an exculpatory clause in a health club membership contract after a member was injured using an exercise machine).

215. *See* O'Connell v. Walt Disney World Co., 413 So. 2d 444, 445 (Fla. Dist. Ct. App. 1982) (examining an exculpatory provision when a visitor was injured during a stampede of horses); Merten v. Nathan, 321 N.W.2d 173, 175 (Wis. 1982) (reviewing an equestrian release that contained an exculpatory clause after a rider brought an action against a riding stable for injuries sustained while riding a horse); Ruppa v. American States Ins. Co., 284 N.W.2d 318, 320 (Wis. 1979) (reviewing an exculpatory provision signed prior to a participant's injury in a horse show).

216. *See* Murphy v. North Am. River Runners, Inc., 412 S.E.2d 504, 507 (W. Va. 1991) (addressing an exculpatory clause signed by a participant prior to being injured during a white-water rafting expedition).

217. *See* Dobratz v. Thomson, 468 N.W.2d 654, 655 (Wis. 1991) (examining an exculpatory provision when a water ski boat ran over a skier).

218. *See* Hewitt v. Miller, 521 P.2d 244, 244-45 (Wash. Ct. App. 1974) (considering an exculpatory provision signed by a scuba diving student who disappeared during a diving class).

219. *See* Jones v. Dressel, 623 P.2d 370, 372 (Colo. 1981) (reviewing an exculpatory provision that a parachuter signed before the airplane that was transporting him crashed); Boucher v. Riner, 68 Md. App. 539, 539, 514 A.2d 485, 486 (1986) (examining an exculpatory clause in a contract signed by a parachuting school student prior to being electrocuted when he collided with a power line).

220. *See* Wagenblast v. Odessa Sch. Dist., 758 P.2d 968, 969 (Wash. 1988); *see also supra* text accompanying notes 200-02.

221. *See* Hiett v. Lake Barcroft Community Ass'n, 418 S.E.2d 894, 894 (Va. 1992) (addressing an exculpatory provision in a pre-injury release form signed by a competitor in a Triathalon competition).

222. *See* Tunkl v. Regents of Univ. of Cal., 383 P.2d 441, 441-42 (Cal. 1963); Thorton v. Charleston Area Med. Ctr., 213 S.E.2d 102, 104 (W. Va. 1975).

223. *See* Key Biscayne Divers, Inc. v. Marine Stadium Enters., 490 So. 2d 137, 137-38 (Fla. Dist. Ct. App. 1986); Kuzmiak v. Brookchester, 111 A.2d 425, 426 (N.J. Super. Ct. App. Div. 1955); Bowlby-Harman Lumber Co. v. Commodore Servs., 107 S.E.2d 602, 604 (W. Va. 1959); College Mobile Home Park & Sales, Inc. v. Hoffman, 241 N.W.2d 174, 175 (Wis. 1976).

224. *See* Hardage Enters. v. Fidesys Corp., 570 So. 2d 436, 436 (Fla. Dist. Ct. App. 1990); Colgan v. Agway, Inc., 553 A.2d 143, 144 (Vt. 1988) (discussing whether a paragraph in a contract in fact released the contractor from liability); Reeder v. Western Gas & Power Co., 256 P.2d 825 (Wash. 1953); Cassella v. Weirton Constr. Co., 241 S.E.2d 924, 925 (W. Va. 1978).

investments,[225] burglar alarm services,[226] banking,[227] sale of goods,[228] public transportation,[229] personal services,[230] and waivers covering passengers in a vehicle.[231] As illustrated, numerous exculpatory agreements are created everyday in the course of ordinary dealing. *Adloo* works to invalidate those that do not conform to Maryland's new stringent and exacting standard.

E. Guidance for Drafters

When the *Adloo* standard is applied to particular contract language, it does not necessarily yield an obvious result. With that in mind, varying degrees of language are applicable in different instances. Thus, the following proposals are not intended as absolute rules to be applied to all circumstances.

Implicitly, the standard announced by the *Adloo* court was that the word "negligence" or words of similar import must be used to exculpate negligence, despite the court's reluctance to declare that any particular word embodies talismanic qualities.[232] A risk adverse drafter should use the word "negligence" in all exculpatory clauses dealing with negligence. By and large, if the intent of the parties is to relieve one party from negligence, the fairest course of action is for a drafter to explicitly provide that negligence claims are included.[233] To avoid "hiding" the intent of one party, it is necessary

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225. *See* Wolf v. Ford, 335 Md. 525, 527-28, 644 A.2d 522, 523-24 (1994) (addressing an exculpatory clause in a broker engagement form after an investor sued for lost value in her portfolio).

226. *See* Continental Video Corp. v. Honeywell, Inc., 422 So. 2d 35, 36 (Fla. Dist. Ct. App. 1982); Ace Formal Wear, Inc. v. Baker Protective Serv., 416 So. 2d 8, 9 (Fla. Dist. Ct. App. 1982); Schrier v. Beltway Alarm Co., 73 Md. App. 281, 286, 533 A.2d 1316, 1318 (1987).

227. *See* Western Union Tel. Co. v. Nester, 309 U.S. 582, 585 (1940); Sporsem v. First Nat'l Bank, 233 P. 641, 642 (Wash. 1925).

228. *See* McBride v. Minstar, Inc., 662 A.2d 592, 596 (N.J. Super. Ct. App. Div. 1994); Haugen v. Ford Motor Co., 219 N.W.2d 462 (N.D. 1974).

229. *See* Horelick v. Pennsylvania R.R., 99 A.2d 652 (N.J. Super. Ct. App. Div. 1953).

230. *See* Baker v. Stewarts', Inc., 433 N.W.2d 706, 706-07 (Iowa 1988) (pertaining to an exculpatory provision in a hair stylist training center form signed by a customer).

231. *See* Richards v. Richards, 513 N.W.2d 118, 119 (Wis. 1994) (addressing an exculpatory provision within a passenger authorization form signed by a truck driver's wife so that she could accompany him on his route).

232. *See* Adloo v. H.T. Brown Real Estate, Inc., 344 Md. 254, 266, 686 A.2d 298, 304 (1996) (stating that "the exculpatory clause need not contain or use the word 'negligence' or any other 'magic words' ").

233. *See* Ciofalo v. Vic Tanney Gyms, Inc., 220 N.Y.S.2d 962, 964 (1961) (analyzing a

to expressly state that intent within the four corners of the document.[234]

The most common word of similar import to negligence is "fault."[235] If a drafter does not include the word "negligence," then the closest phrase on the negligence continuum that will convey the same theme is fault. The use of the word fault has been interpreted as an equivalent of "negligence"; therefore, clauses containing fault should be valid.[236] The term fault, when used conspicuously, creates a clear and unmistakable waiver,[237] likely to satisfy the *Adloo* standard.

Cornell v. Council of Unit Owners Hawaiian Village Condominiums, Inc.,[238] as discussed previously, was the first case to apply the *Adloo* standard to an exculpatory clause. In applying *Adloo* to a bylaw provision,[239] the United States District Court for the District of Maryland held that the language which exempted the council from liability caused by "any other person" was a substantial equivalent to the word "negligence."[240] The court rationalized that the phrase "evinces the [drafter's] clear intention to absolve itself from liability for its negligent actions."[241] However, the court also noted that this

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clause where plaintiff agreed to assume full responsibility for any injuries that might occur to her in or about defendant's premises, "including but without limitation, any claims for personal injuries resulting from or arising out of the negligence" of the defendant).

234. *See* Dresser Indus. v. Page Petroleum, Inc., 853 S.W.2d 505, 508 (Tex. 1993) (commenting that because exculpatory clauses are extraordinary attempts at shifting risk, fair notice requirements must guide the analysis).

235. *See* Theroux v. Kedenburg Racing Ass'n, 269 N.Y.S.2d 789, 792 (1965) (examining an exculpatory clause which provided for release of liability for injury "regardless of how such injury . . . may arise, and regardless of who is at fault . . . and even if the loss is caused by the neglect or fault of [the defendant]").

236. *See* Alack v. Vic Tanny Int'l, Inc., 923 S.W.2d 330, 337 (Mo. 1996).

237. *See id.*

238. 983 F. Supp. 640 (D. Md. 1997). For a further discussion of *Cornell*, see *supra* notes 174-81 and accompanying text.

239. *See id.* at 643. The clause provides:

> The Council shall not be liable . . . for injury or damage to persons or property caused by the elements, or by the Unit Owner of any unit, or any other person, or resulting from electricity, water, snow, or ice, which may leak or flow from any pipe, drain, conduit, appliance, or equipment.

Id.

240. *Id.* at 644 (citing Adloo v. H.T. Brown Real Estate, Inc., 344 Md. 254, 686 A.2d 298 (1996)).

241. *Id.*

case was distinguishable from *Adloo* because the language broadly covered all personal injuries caused by any person.[242] Once again, language is relevant to the circumstances and cannot be relied upon as an absolute concept.[243]

While the *Adloo* decision does not require the use of monosyllabic words, drafters should use simple words in an exculpatory clause to avoid confusion. The language employed should be well within the scope of common knowledge and usage.[244] In addition, exculpatory clauses should not contain legalese.[245]

If a party intends on exculpating itself from liability, language indicating that the party is not "assuming" or "accepting" responsibility should be avoided. These words could be interpreted as merely indicating an "unwillingness to shoulder any additional obligation which the [drafter] would not otherwise bear."[246] This interpretation is reasonable because the use of this language leads one to believe that the party relying on the exculpatory clause is agreeing to accept responsibility for his negligent conduct, a liability for which that party already has responsibility.[247]

Similarly, a drafter should not attempt to release himself from liability for any "accidents" because this term is ambiguous. A reasonable interpretation of the word accident precludes negligence because an accident is an occasion "which could not have been prevented by exercise of due care by both parties under circumstances prevailing."[248]

Releases containing general phrases such as a release "[from] any and all responsibility or liability of any nature whatsoever for any loss of property or personal injury"[249] or to "hold [drafter] harmless on account of any injury incurred"[250] are normally held unenforceable because their meanings are ambiguous and unclear.[251] Therefore, it behooves the drafter to use "negligence,"

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242. *See id.*
243. *See supra* note 140 and accompanying text.
244. *See* Colgan v. Agway, Inc., 553 A.2d 143, 148 (Vt. 1988) (Peck, J., dissenting).
245. *See id.*
246. Doyle v. Bowdoin College, 403 A.2d 1206, 1208 (Me. 1979).
247. *See id.*
248. BLACK'S LAW DICTIONARY 15 (6th ed. 1990) (defining unavoidable accident in those terms); *see also Doyle*, 403 A.2d at 1208.
249. Kaufman v. American Youth Hostels, 177 N.Y.S.2d 587, 592 (1958).
250. Yauger v. Skiing Enters., 557 N.W.2d 60, 61 (Wis. 1996).
251. *See* Audley v. Melton, 640 A.2d 777, 778-79 (N.H. 1994) (citing Barnes v. New Hampshire Karting Ass'n, 509 A.2d 151, 154 (N.H. 1986)); *see also* Wenzel v. Boyles Galvanizing Co., 920 F.2d 778, 781 (11th Cir. 1991) (explaining that a

"fault," or words of similar import to satisfy the *Adloo* standard, even though the court did not require the use of any particular term.[252] Otherwise, the drafter risks failing to convey the desired intent to the other party.

An exculpatory clause should be fashioned in a manner that draws attention to the reader. Although conspicuousness was not addressed by the court in *Adloo*, it may be persuasive in determining the intent of a party. Simply put, "a provision that would exempt its drafter from any liability occasioned by [the drafter's] fault should not compel resort to a magnifying glass and lexicon."[253] If a clause is distinct from other general contract language—placed in a separately titled section, standing out from surrounding print in a larger font size, a colored print, capital letters, a boldface print, or a combination of these[254]—a court may be more inclined to infer that the signing party acknowledged the intent of the clause. The waiver should be easy to find, preferably on the first page of the document, and phrased in clear, non-misleading language without the use of legal jargon.[255] Alternatively, the clause could be placed as the last section prior to the signatures so that it is in plain view of

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clause simply disclaiming liability in general terms is insufficient); O'Connell v. Walt Disney World Co., 413 So. 2d 444, 447 (Fla. Dist. Ct. App. 1982) (holding that in order to be enforceable, the agreement must unambiguously indicate which risks are assumed); Baker v. Stewarts', Inc., 433 N.W.2d 706, 709 (Iowa 1988) (requiring an expression of a clear intent to cover negligence); Brown v. Racquetball Ctrs., Inc., 534 A.2d 842, 843 (Pa. Super. Ct. 1987) (requiring that the clause spell out the intent of the parties with the greatest of particularity). *But see* Cornell v. Council of Unit Owners Hawaiian Village Condominiums, Inc., 983 F. Supp. 640 (D. Md. 1997).

252. *See* Adloo v. H.T. Brown Real Estate, Inc., 344 Md. 254, 266, 686 A.2d 298, 304 (1996) (stating that "the exculpatory clause need not contain the word 'negligence' or any other 'magic words' ").

253. Gross v. Sweet, 49 N.Y.2d 102, 107 (1979) (citing Rappaport v. Phil Gottlieb-Sattler, Inc., 114 N.Y.S.2d 221 (1952)).

254. *See* Stephanie J. Greer & Hurlie H. Collier, *The Conspicuousness Requirement: Litigating and Drafting Contractual Indemnity Provisions in Texas After Dresser Industries, Inc. v. Page Petroleum, Inc.*, 35 S. TEX. L. REV. 243, 265-70 (1994). This article reviews the status of liability indemnification and release in Texas after the Texas Supreme Court delivered its opinion in *Dresser Industries v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993), which cast doubt on the validity of the clauses. The court ruled that the clauses must meet the UCC standard of conspicuousness, even in non-UCC transactions. *See Dresser*, 853 S.W.2d at 511. The article sets forth suggestions extracted from various UCC cases discussing the conspicuousness requirement.

255. *See* Greer & Collier, *supra* note 254, at 265.

the signer. Further, to ensure that the clause was brought to the reader's attention, the exculpatory provision could be separately signed or initialed.[256] The collective effect of these proposals is to add clarity and conspicuousness to an exculpatory clause, and it may persuade a court reviewing the clause to acknowledge that a party knew of the nature and consequences of signing the document.

V. CONCLUSION

Adloo v. H.T. Brown Real Estate, Inc., emphasized what type of language is necessary to sufficiently create an effective exculpatory clause. The *Adloo* court protected homeowners seeking to sell their homes by requiring that real estate agencies clearly express their intent to avoid liability due to their own negligence.[257] Moreover, by invalidating the contested real estate listing contract clause,[258] the Court of Appeals of Maryland may have unknowingly destroyed countless exculpatory clauses that contain language similar to that of the clause in *Adloo*, including those outside the real estate spectrum.[259]

The *Adloo* court based its decision on the objective law of contract interpretation and construction.[260] As *Adloo* emphasized, an exculpatory clause must clearly, unequivocally, specifically, and unmistakably express the parties' intent to exculpate a party from liability resulting from that party's negligence.[261] However, the court failed to give drafters any intelligible guidance as to the requisite language needed to meet this standard. Rather than adopting a bright-line standard,[262] the court announced a standard that remains amorphous.

Injured parties to a contract will use this opinion in an effort to invalidate exculpatory clauses because of their use of general release language.[263] *Adloo* will also require drafters of contracts to be more meticulous in drafting and redrafting contracts containing exculpatory clauses. The court's reluctance to interfere with the freedom to contract is admirable. However, by avoiding the opportunity

256. *See id.* at 270.
257. *See supra* note 130 and accompanying text.
258. *See supra* note 128 and accompanying text.
259. *See supra* notes 213-31 and accompanying text.
260. *See supra* notes 59-65 and accompanying text.
261. *See supra* note 135 and accompanying text.
262. *See supra* note 173 and accompanying text.
263. *See supra* notes 136-40 and accompanying text.

to adopt a bright-line approach and provide a clear, specific, unequivocal, and unmistakable standard, the court may have unwittingly postponed the inevitable. Despite the *Adloo* court's attempt to preserve the freedom to contract,[264] courts will be forced to continue to interfere with private contract negotiations in order to answer the questions left unanswered in *Adloo.*

Kevin G. Hroblak

264. *See supra* note 1 and accompanying text.