

TEXAS CIVIL JUSTICE LEAGUE

400 West 15th Street, Suite 1400

Austin, Texas 78701

512.320.0474

www.tcjl.com

September 30, 2026

Supreme Court of Texas

P.O. Box 12248

Austin, Texas 78711

Re: No. 24-0973; *BNSF Railway Company v. Deacero, S.A.P.I. de C.V.*

To the Honorable Members of the Supreme Court of Texas:

Pursuant to Rule 11, Texas Rules of Appellate Procedure, *amicus curiae* Texas Civil Justice League files this letter in the above-referenced cause in support of Petitioner BNSF Railway Company.

Statement of Interest

The Texas Civil Justice League (“TCJL”) is a Texas non-profit association of Texas businesses, health care providers, professional and trade associations, and individuals dedicated to maintaining a fair, stable, and predictable tort liability and civil justice system. TCJL has long participated as *amicus curiae* in matters that have a significant and pervasive impact on our membership and the Texas business climate.

In our view, this case meets that criterion. The court of appeals invalidated an indemnity clause in a contract between sophisticated parties with a regular and ongoing business relationship. According to the court of appeals, an otherwise

conspicuous indemnity provision included in a “Rules Book” explicitly incorporated by reference into the parties’ contract could not be enforced because of its placement in the Rules Book rather than the contract that referred to it. Virtually every corporate member of TCJL makes contracts that incorporate by reference various types of rules, guidelines, and instruction that include indemnity provisions. If the court of appeals’ decision becomes law, it will invalidate those provisions and defeat the bargains freely made by the parties to those contracts.

This brief has been prepared in the ordinary course of TCJL’s operations. No one has paid for the preparation of this brief.

Argument

Although the court of appeals correctly stated the law, it did not apply it properly to this case. The crux of its analysis was whether an indemnity provision, or any other provision subject to fair notice requirements, incorporated into a contract by reference appears “on the face of the contract.” The court of appeals opined that it did not.

But the court of appeals’ ruling is broader than that. “Put another way,” the court stated, “BNSF seems to suggest that the ‘face’ of the contract includes the Price Authority *and* the 6100 Rules Book. However, we disagree with this contention.” Op. at 10. What does this mean? Does it mean that *none* of the rules and policies

contained in the Rules Book appear on the face of the contract? The court of appeals seemed to think so. But what constitutes the “face” of a contract in the first place?

Having made this sweeping pronouncement, the court does not go on to elaborate on it. Instead, it turns to an analysis of appellate decisions discussing the fair notice requirements in the indemnity context. In other words, it leaves the larger question hanging in the air. Why is this a problem? The court of appeals’ analysis proves too much. If it can single out an indemnity provision in a document incorporated, in this case, into the “Price Authority” (i.e., the contract) by specific reference, not once but twice in a short document, and further declare that the provision is not on the face of the contract, then what about the other 100 rules and regulations likewise contained in the Rules Book? Can BNSF enforce any of them? Does this mean that an indemnity clause *always* has to appear on the *front* page of the contract in order to be considered as on the contract’s “face”?

Of course, indemnity provisions are different than the other rules in the Rules Book because they are subject to the fair notice requirement. SCOTX has often held that such provisions must be conspicuous, which sophisticated parties in business have widely interpreted as referring to larger font, all caps, bold type, and the like. In its opinion, the court of appeals set out the indemnity clause in the Rules Book. It is in all caps and easily distinguishable from the surrounding text. Smart lawyers wrote these contracts, including the Rules Book. They had written thousands of

them, and Deacero itself had signed dozens of them already. Those lawyers knew about the conspicuousness analysis this Court conducted in *Dresser Industries*. That is why they did it that way in the Rules Book.

Deacero's lawyers also knew that. There is *no chance* they did not know what was in the Rules Book. (It would have been malpractice not to know.) They agreed to incorporate it in the first place. Does anyone really believe that sophisticated contract lawyers representing a business as big as Deacero would agree to incorporate into its contracts with BNSF the Rules Book, with its more than 100 rules and regulations, without having read it? As Keyshawn Johnson famously put it, "C'mon Man!"

But instead of deciding *first* whether the clause *would have been conspicuous* if it had appeared on the first, third, seventh, or last page of the Price Authority, as the court of appeals seems to consider as some kind of threshold question, it concentrates on explaining in extreme detail where in the Rules Book this otherwise conspicuous indemnity clause happens to be located. It appears on page 17, we are told. So, if the Price Authority specifically incorporates the Rules Book at least twice in a six-page contract, that would appear to mean that Deacero (that is, its sophisticated lawyers) had to slug through a mere 17 pages of text to get to it. How is that not "reasonable," as the court of appeals held?

There is no excuse for a sophisticated entity, especially one that has previously contracted with BNSF for the same services on the same terms at least 40 times, to disregard the Rules Book or pretend that it was not part and parcel of the contract. Put another way, what might be “reasonable” for a non-specialist in complex contracts (we are not even sure this contract was all that “complex”) is clearly unreasonable when it comes to the parties to this transaction. When in *Dresser* this Court held that “something must appear on the face of the [contract] to attract the attention of a reasonable person when he looks at it,” it did *not* say what the “face” of the contract meant. See *Storage & Processors, Inc. v. Reyes*, 134 S.W.3d 190, 192 (quoting *Dresser*, 853 S.W.2d at 508.) In our view, this Court meant that the “face” of the contract is the *entire* contract. In other words, the indemnity provision, wherever it appears in the contract, must be conspicuous. Who is to say that one provision of a contract is more important than another, so it has to be on this or that page to make sure a “reasonable person” does not overlook it? Not to mention that the concept of a “page” or even the “face” of a contract in electronic documents may well be obsolete.

Parties incorporate into contracts the type of rules manual we see in this case because it is grossly impractical not to do so. Most, if not all, TCJL member companies have to do this because if they did not, their contracts would run into the hundreds or even thousands of pages. And, like BNSF did in this case, those

incorporated documents are made easily accessible on the companies' websites. The court of appeals seemed to think it unreasonable that Deacero had to go to BNSF's website to see the Rules Book, as if it were technologically illiterate and could not navigate the site despite being told how to do so. That is simply ridiculous and cannot possibly become part of a standard of conspicuousness.

The court of appeals did not consider that issue at all, but even had it done so, it probably would have held that it is up to the incorporating party to pull one or more provisions out of its incorporated documents and stick it somewhere in the contract that does the incorporating. But where? The front page? Somewhere in the middle but nearer to the front page? Over the signature line? Wherever it goes, such a standard is overkill, to say the least.

Certainly, this Court could make explicit the location in the contract in which a conspicuous indemnity provisions must appear to pass the fair notice test and be enforceable. But to do so, it would have to graft this requirement onto § 1.201(1), Business & Commerce Code. There is nothing in the statutory definition of "conspicuous" that says anything about location in the contract documents themselves. If location is an issue at all, which we do not think it should be, should not that be an issue for the Legislature?¹

¹ We should note for informational purposes that the Legislature has chosen not to enact legislation barring enforcement of *anything* incorporated into a contract that is sourced on a party's website and not in a hard copy form appended to the contract. This last occurred in 2019. See H.B. 2268,

In any event, regardless of these other considerations, the court of appeals' opinion is far from clear and unambiguous enough to give anybody confidence that they are properly interpreting and applying the conspicuousness standard in their contracting practices. There are too many hooks and gotchas. At the very least, we urge this Court, if it feels inclined to sharpen *Dresser* in some form or fashion, to make it crystal clear what the law expects Texas businesses to do. But we do not think that necessary on these facts or any others we can think of.

Prayer

TCJL respectfully requests that this Court reverse the decision of the court of appeals and reinstate the trial court's order granting summary judgment to BNSF.

/s/ George S. Christian
Attorney for *Amicus Curiae*
Texas Civil Justice League
Bar No. 04227300
george@tcjl.com
400 West 15th, St., Ste. 1400
Austin, Texas 78701

CERTIFICATE OF COMPLIANCE

I certify that this document contains 1,526 words in the portions of the document that are subject to the word limits of Texas Rule of Appellate Procedure 9.4(i), as measured by the undersigned's word-processing software.

/s/ George S. Christian

86th Leg., Reg. Session (2019). The court of appeals does not go quite that far, but it takes a couple of steps down that road.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *amicus curiae* letter was served on counsel of record by using the Court's CM/ECF system on the 30th day of September, 2026.

/s/ George S. Christian

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George Christian on behalf of George Christian
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george@thechristiano.com
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Associated Case Party: BNSF RAILWAY COMPANY

Name	BarNumber	Email	TimestampSubmitted	Status
Caitlyn Hubbard	24097853	caitlyn.hubbard@kellyhart.com	9/29/2026 3:56:39 PM	SENT
Stacy Blanchette		stacy.blanchette@kellyhart.com	9/29/2026 3:56:39 PM	SENT
Marianne Auld	1429910	marianne.auld@kellyhart.com	9/29/2026 3:56:39 PM	SENT
Jody Sanders	24051287	jody.sanders@kellyhart.com	9/29/2026 3:56:39 PM	SENT
David Keltner	11249500	david.keltner@kellyhart.com	9/29/2026 3:56:39 PM	SENT

Associated Case Party: DEACERO, S.A.P.I. DE C.V.

Name	BarNumber	Email	TimestampSubmitted	Status
George BreckHarrison	24007325	bharrison@jw.com	9/29/2026 3:56:39 PM	SENT
Michael Roberts		mroberts@jw.com	9/29/2026 3:56:39 PM	SENT
Danica Milios		dmilios@jw.com	9/29/2026 3:56:39 PM	SENT
Cody Lee Vaughn	24115897	cvaughn@jw.com	9/29/2026 3:56:39 PM	SENT
Jeff Oldham	24051132	joldham@jw.com	9/29/2026 3:56:39 PM	SENT