

HOUSTON MARINE INSURANCE SEMINAR 2003

TEXAS, LOUISIANA, AND MARITIME ANTI-INDEMNITY ISSUES

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The courts and legislatures in Texas and Louisiana generally have been hostile to risk shifting schemes whereby one party seeks to obtain contractual indemnification for its own negligence. A number of barriers have been created by Texas and Louisiana courts and legislatures to restrict or even eliminate such risk shifting schemes. Maritime courts and Congress generally have been less hostile to such risk shifting schemes, but certain restrictions also have been created by case law or statute. This paper considers many of these barriers, so that the reader can evaluate the enforceability of the Texas, Louisiana, or maritime contractual indemnification provision at issue. This paper does not address choice of law issues which determine whether Texas, Louisiana, or maritime law governs or issues which pertain to insurance coverage for contractual indemnification provisions.

I. TEXAS ANTI-INDEMNITY ISSUES

Texas courts have used a variety of approaches to restrict contractual indemnification by one party for another party's own negligence. These approaches include the following, each of which will be discussed below: (1) the express negligence test; (2) restriction of the scope of an indemnity agreement; (3) the conspicuousness test; (4) limitation on the authority to sign a contract; (5) limitation on the parties who may be entitled to indemnity; (6) limitation on indemnification for gross negligence; and (7) limitation on indemnification following the termination of a contract. Additionally discussed are the restrictions created by the Texas Legislature in the Texas Oil Field Anti-Indemnity Act and other Texas anti-indemnity statutes.

A. Express Negligence Test

1. Ethyl Rule

For certain indemnity agreements to be enforceable, the Texas Supreme Court held in *Ethyl Corp. v. Daniel Construction Co.* that three elements must exist: (1) the intent of the parties must be clear; (2) it must be set out within the four corners of the agreement; and (3) the specific intent of the parties must be expressed.^{1/} Thus, in order for one party to indemnify another by contract for the consequences of its own negligence, the indemnity agreement must meet the “express negligence doctrine”; it must specifically state that indemnity is owed regardless of the negligence of the indemnitee. This doctrine replaced the former “clear and unequivocal” test and its three exceptions.^{2/}

In the *Ethyl* decision, the Texas Supreme Court held that the following indemnity provision was not enforceable:

Contractor [Daniel] shall indemnify and hold Owner [Ethyl] harmless against any loss or damage to persons or property as result of operations growing out of the performance of this contract and caused by the negligence or carelessness of Contractor [Daniel], Contractor’s employees, Subcontractors, and agents or licensees.

The Court found that the indemnity provision violated the express negligence test, because it did not specifically state that Daniel Construction, the indemnitor, would indemnify the Ethyl, the indemnitee, for Ethyl’s own negligence.

As an example of an enforceable provision, the Texas Supreme Court has determined that the following indemnity provision satisfied the express negligence test:

^{1/} 725 S.W.2d 705, 708 (Tex. 1987).

^{2/} *Fireman’s Fund, Ins. Co v. Commercial Standard Ins. Co.*, 490 S.W.2d 818, 822 (Tex. 1972); *Joe Adams & Son v. McCann Construction Co.*, 475 S.W.2d 721 (Tex. 1971); *Ohio Oil Co. v. Smith*, 365 S.W.2d 621 (Tex. 1963).

CONTRACTOR [PPI] agrees to hold harmless and unconditionally indemnify COMPANY [Arco] against and for all liability, costs, expenses, claims, and damages which [Arco] may at any time suffer or sustain or become liable for by reason of any accidents, damages or injuries either to the persons or property or both, of [PPI], or of the workmen of either party, or of any other parties, or to the property of [Arco], in any matter arising from the work performed hereunder, including but not limited to the any negligent act or omission of [Arco], its officers, agents or employees^{3/}

An employee of the contractor, PPI, brought an action against the company, Arco, for personal injuries, and Arco sought contractual indemnifications for its own negligence from PPI. The Texas Supreme Court held that the language, “any negligent act or omission of [Arco],” satisfied the express negligence test.

2. Sole Negligence Exception

In *Singleton v. Crown Central Petroleum Corp.*,^{4/} the indemnification agreement excepted “only claims arising out of accidents resulting from the sole negligence of Owner.” With respect to this indemnity provision, the Texas Supreme Court held that the express negligence test was not satisfied.^{5/} Since the *Singleton* case, an intermediate Texas appellate court reached the same conclusion. In *Texas Utilities Electric Co. v. Babcock & Wilcox, Inc.*,^{6/} Babcock & Wilcox was required to indemnify Texas Utilities with the exception of “causes of action resulting from [Texas Utilities’] sole negligence.” The Court of Appeals in Texarkana found that this clause did not meet the express negligence test, because “[i]t does not contain language expressly stating that the

^{3/} *Atlantic Richfield Co. v. Petroleum Personnel, Inc.*, 768 S.W.2d 724 (Tex. 1989).

^{4/} 713 S.W.2d 115, 188 (Tex. App.--Houston [1st] 1985), *rev'd*, 729 S.W. 691 (Tex. 1987).

^{5/} 729 S.W.2d 690, 691 (Tex. 1987).

^{6/} 893 S.W.2d 739 (Tex. App.--Texarkana 1995, no writ).

Babcock & Wilcox Company agrees to indemnify Texas Utilities for damages incurred by Texas Utilities if it was concurrently negligent with Babcock & Wilcox.”^{7/} If the indemnity language stated that Babcock & Wilcox must indemnify Texas Utilities for all claims, including those caused by Texas Utilities’ negligence except when Texas Utilities was solely negligent, the indemnity agreement probably would have met the Texas specificity requirement.^{8/} However, use of this language often creates a fact issue for a judge or jury to resolve regarding whether the indemnitee was solely negligent.

3. Limitation to Specified Causes of Action

In the *Houston Lighting & Power* case, the Texas Supreme Court held that a purported indemnitee was not entitled to contractual indemnity for a claim based on strict liability, because the contractual indemnity provision in the contract did not specifically include this cause of action.^{9/} As the United States Court of Appeals for the Fifth Circuit recently stated: “Texas law requires that each type of claim be separately referenced by an indemnity provision . . .”^{10/}

^{7/} 893 S.W.2d at 742.

^{8/} *Payne & Keller, Inc. v. P.P.G. Industries, Inc.*, 793 S.W.2d 956, 957-958 (Tex. 1990); *Herzog Contracting Corp. v. Burlington Northern R.R. Co.*, 1997 W.L. 473681 *3 (Tex. App.–Houston [14th Dist. 1997, no writ); *Kenneth H. Hughes Interests, Inc. v. Westrup*, 879 S.W.2d 229, 232 (Tex. App.–Houston [1st Dist.] 1994, writ denied).

^{9/} *Houston Lighting & Power Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 890 S.W.2d 455 (Tex. 1994). See *Fina, Inc. v. Arco*, 200 F.3d 266, 269 (5th Cir. 2000) (applying Texas law) (CERCLA claims based on strict liability are not included within a contractual indemnity provision unless they are specifically recited in the indemnity provision).

^{10/} *Fina, Inc. v. Arco*, 200 F.3d 266, 273 (5th Cir. 2000) (applying Texas law).

An intermediate appellate court in Houston also has found that a failure to specifically list “personal injury” as a covered claim precluded indemnity for a personal injury action.^{11/} However, an intermediate appellate court in Beaumont reached the opposite conclusion, asserting that, since the indemnity agreement referred to negligence claims, it necessarily included claims for personal injuries.^{12/} The Supreme Court has not resolved the conflict between these two cases.

In determining the parameters of this concept, the following illustration may be useful. In a plaintiff’s original petition, the plaintiff has sued a defendant for the following causes of action: negligence, negligence per se, gross negligence, and intentional conduct. The contractual indemnification agreement between the defendant and a third party specifically included negligence, but it did not mention negligence per se, gross negligence, or intentional conduct. Based on the *Houston Lighting & Power* case and its progeny, although the indemnification agreement would include the plaintiff’s claims of negligence and probably negligence *per se*, it likely would not extend to the plaintiff’s claims for gross negligence and intentional torts, since these causes of action were not recited in the contractual indemnification provision. However, for other reasons stated herein, the public policy of the State of Texas probably would invalidate any provision which seeks indemnification for an indemnitee’s gross negligence or intentional conduct, even though the provision meets the Texas specificity requirement.

^{11/} *Ard v. Gemini Exploration Co.*, 894 S.W.2d 11 (Tex. App.--Houston [14th Dist.] 1994, writ denied).

^{12/} *Faulk Management Services v. Lufkin Industries, Inc.*, 905 S.W.2d 476 (Tex. App.--Beaumont 1995, writ denied).

4. Comparative Indemnity (Contractual Contribution)

The Texas Supreme Court has twice stated that comparative indemnification provisions also must satisfy the express negligence doctrine.^{13/} Comparative indemnity, or “contractual contribution” provisions, generally require each party to provide contribution for its respective share of negligence.^{14/}

As a general rule, other than the possible recovery of defense costs, comparative indemnity does not provide an indemnitee with any more recovery than it otherwise would be entitled under tort contribution schemes. There are two exceptions: the employer context and the settlement context.

a. The Employer Context

Texas courts have specifically recognized that a third party can rely on a comparative indemnity provision to seek contractual contribution from an employer for the employer’s negligence.^{15/} Consequently, while the workers’ compensation statute generally precludes a third party’s right to recover tort contribution from an employer, a comparative indemnity provision may

^{13/} *Houston Lighting & Power Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 890 S.W.2d 455, 459 (Tex. 1994) (“Parties may provide for comparative indemnity, but must expressly state their intent to do so in the agreement.”); *Ethyl Corp. v. Daniel Construction Co.*, 725 S.W.2d 705, 708-09 (Tex. 1987) (“Parties may contract for comparative indemnity so long as they comply with the express negligence doctrine set out herein.”).

^{14/} *But see, Man GHH Logistics GmbH v. Emscor, Inc.*, 858 S.W.2d 41, 43-44 (Tex. App.--Houston [14th Dist.] 1993, no writ) (despite the Texas Supreme Court’s statements to the contrary in *Ethyl*, this court held that the express negligence test was not applicable to a claim for comparative indemnity, yet still found that the applicable indemnification provision did not provide for “contractual contribution”).

^{15/} *Ethyl Corp. v. Daniel Construction Co.*, 725 S.W.2d 705, 708-09 (Tex. 1987); *City of Houston v. Goings*, 795 S.W.2d 829 (Tex. App.--Houston [14th Dist.] 1990, writ denied); *Lyondell Petrochemical Co. v. Fluor Daniel, Inc.*, 888 S.W.2d 550 (Tex. App.--Houston [1st Dist.] 1994, writ denied).

permit the third party to obtain contractual contribution from the employer in instances where an employee has brought a personal injury action against that third party.

b. The Settlement Context

The Texas Supreme Court has held that a settling tortfeasor cannot seek contribution in tort from a non-settling tortfeasor.^{16/} In other words, a tortfeasor cannot settle a claim and pursue an action in tort against a non-settling party to obtain reimbursement for part or all of what was paid in settlement. As a basis for these decisions, the Texas Supreme Court found that the predecessor to the current proportionate responsibility statute, as well as the common law, did not allow a settling defendant to settle a plaintiff's entire claim and preserve contribution rights against non-settling parties.^{17/}

A settling tortfeasor, however, probably can seek contractual contribution from a non-settling tortfeasor based on a comparative indemnity provision in a written agreement between the parties for the following reasons. First, although no court in Texas has specifically held that a settling tortfeasor can rely on a comparative indemnity provision to obtain contribution from a non-settling tortfeasor, the Fourteenth Court of Appeals in Houston and the Dallas Court of Appeals have impliedly reached this result.^{18/} Second, the El Paso Court of Appeals also has noted that parties can

^{16/} *Beech Aircraft Corporation v. Jinkins*, 698 S.W.2d 722 (Tex. 1987); *International Proteins Corporation v. Ralston Purina Company*, 744 S.W.2d 932 (Tex. 1988). The reciprocal is also true: a non-settling party cannot obtain contribution from a settling party. TEX. CIV. PRAC. & REM. CODE § 33.015 (Vernon 1995).

^{17/} 739 S.W.2d at 21-22; *Ralston Purina*, 744 S.W.2d at 934.

^{18/} *Man GHH Logistics GmbH v. Emscor, Inc.*, 858 S.W.2d 41, 43-44 (Tex. App.--Houston [14th Dist.] 1993, no writ); *Aerospatiale Helicopter Corp. v. Universal Health Services, Inc.*, 778 S.W.2d 492 (Tex. App.--Dallas 1989), *cert. denied*, 112 L. Ed. 2d 115 (1990).

enter into a settlement agreement that permits the settling defendants to seek contractual contribution from each other after the settlement.^{19/} The court stated that, while the contribution statute does not provide a settling party with this right, the statute does not preclude a contractual contribution claim “agreed to” by the parties.^{20/} Third, Texas courts have recognized an indemnitee’s right to obtain indemnity for its own negligence after a settlement,^{21/} and the same rationale should apply to comparative indemnity if the parties agreed to it in their contract. Fourth, as a matter of public policy, by removing the injured party from the litigation, a post-settlement suit to enforce a comparative indemnity provision often can simplify and reduce the exposure of litigation resulting from serious losses or casualties.

Although Texas case law suggests that contractual contribution can be recovered by an indemnitee following settlement, an indemnitor can assert several legal arguments in order to avoid responsibility under a comparative indemnity provision. The indemnitor can attempt to distinguish the El Paso Court of Appeals decision on the basis that the settling parties in that case specifically agreed in a lawsuit following the accident to preserve their contribution rights.^{22/} Also, as a matter of policy, the Texas Supreme Court has expressed a concern that may mitigate against a party’s right

^{19/} *Southwestern Bell Telephone Co. v. General Cable Industries, Inc.*, 966 S.W.2d 166 (Tex. App.--El Paso 1988, no writ).

^{20/} 966 S.W.2d at 171.

^{21/} *Fireman’s Fund Ins. Co. v. Commercial Standard Ins. Co.*, 490 S.W.2d 818, 825 (Tex. 1972); *Aerospatiale Helicopter Corp. v. Universal Health Services, Inc.*, 778 S.W.2d 492 (Tex. App.--Dallas 1989), *cert. denied*, 112 L. Ed. 2d 115 (1990); *Getty Oil Corp. v. Duncan*, 721 S.W.2d 475, 477 (Tex. App.--Corpus Christi 1986, writ ref’d n.r.e.); *Pan American Gas Co. v. Natural Gas Const. Corp.*, 418 S.W.2d 380, 381 (Tex. Civ. App.--Waco 1967, writ ref’d n.r.e.).

^{22/} *Southwestern Bell*, 966 S.W.2d at 171.

to seek comparative indemnity following a settlement.^{23/} Recent decisions by the Texas Supreme Court have sought to prevent satellite litigation that results from settlements or assignments by parties involved in litigation.^{24/}

B. Restriction of the Scope of the Indemnity Agreement - “Arising Out Of” Language

A number of cases exist in Texas which state that, even when employees are on duty, their injuries may be outside the scope of an indemnification agreement. A typical case is *Employers’ Casualty Co. v. Howard P. Foley Co.*^{25/} In *Foley*, an employee was injured in a dressing room before work started when a gas explosion occurred. The court held that this accident did not occur in the performance of the contract by the indemnitor, and as a result, the indemnification obligation did not apply. The court stated: “The contract related only to the installation of electric work and none was going on in the dressing room.”^{26/} Another similar case is *Sun Oil Co. v. Renshaw Well Service, Inc.*,^{27/} where an employee was injured when he was driving a well service truck on a dirt access road leading away from the well site. The court noted: “The fact that an employee was injured while ‘at work’ does not necessarily answer the question of whether his injury arose out of the performance of that work, or resulted from or in connection with the work contemplated under the indemnity

^{23/} *State Farm Fire & Casualty Co. v. Gandy*, 925 S.W.2d 696, 704 (Tex. 1996); *Fisk Electric Company v. Constructors & Associates, Inc.*, 888 S.W.2d 813, 815 n.2 (Tex. 1994); *International Proteins Corporation v. Ralston Purina Company*, 744 S.W.2d 932, 933-934 (Tex. 1988); *Beech Aircraft Corporation v. Jinkins*, 698 S.W.2d 722 (Tex. 1987).

^{24/} *Id.*

^{25/} 58 F.2d 363 (5th Cir. 1947) (applying Texas law).

^{26/} 158 F.2d at 365.

^{27/} 571 S.W.2d 64 (Tex. Civ. App.--Tyler 1978, writ ref’d n.r.e.).

provision.”^{28/} The court then concluded that the accident occurred due to negligent maintenance of the access road, and since road maintenance was the responsibility of the indemnitee and was unrelated to and had no connection with the well servicing work, the indemnification agreement was not applicable.^{29/} Other Texas cases have reached a similar conclusion.^{30/}

C. Requirement of Conspicuousness

To be valid in Texas, an indemnification provision also must be conspicuous. In *Dresser Industries, Inc. v. Page Petroleum, Inc.*,^{31/} the Texas Supreme Court adopted the standards for conspicuousness set out in the Texas Uniform Commercial Code. Section 1.201(10) of the Texas Uniform Commercial Code provides, in pertinent part, with respect to conspicuousness as follows:

A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. The language in the body of a form is “conspicuous” if it is in larger or other contrasting type or color.^{32/}

In *Dresser*, the Texas Supreme Court found that the requirement of conspicuousness was not satisfied when the indemnification provision was located on the back side of a work order in a series of numbered paragraphs without headings or contrasting type.

^{28/} 571 S.W.2d at 69.

^{29/} 571 S.W.2d at 71.

^{30/} *Martin Wright Electric Co. v. W. R. Grimshaw Co.*, 419 F.2d 1381 (5th Cir. 1969); *cert. denied*, 397 U.S. 1002 (1970) (applying Texas law); *Westinghouse Electric Corp. v. Childs-Bellows*, 352 S.W.2d 806 (Tex. Civ. App.--Fort Worth 1961, writ ref’d).

^{31/} 853 S.W.2d 505, 511 (Tex. 1993).

^{32/} TEX. BUS. & COMM. CODE ANN. § 1.201(10) (Vernon 1997).

In the case of *Littlefield v. Schaefer*,^{33/} the Texas Supreme Court held that a six-paragraph release for motorcycle racing printed in small typeface on the front of a one-page form did not satisfy the conspicuous requirement, because “the language in the body of this release is smaller than other language in the forms and has no contrasting type or color.”

The lack of conspicuousness can be overcome if the indemnitee can establish that the indemnitor “possessed actual notice or knowledge of the indemnity agreement.”^{34/} One court recently held that actual notice can be satisfied if the president of a company testified that he read the agreement before signing it.^{35/} The indemnitee has the burden of establishing actual notice or knowledge.^{36/}

The Texas Supreme Court has held that the requirement of conspicuousness does not extend to “no-damages-for-delay” clauses in construction contracts, in part because “*Dresser* concerned the shifting of tort and negligence damages, whereas the no-damages-for-delay clause shifts economic damages resulting from a breach of contract”^{37/} and therefore does not involve the same extraordinary risk transfer.^{38/} Similarly, in another case, a Texas intermediate appellate court limited the application of the conspicuousness requirement to indemnification for future acts of negligence;

^{33/} 955 S.W.2d 272 (Tex. 1997).

^{34/} *Page Petroleum*, 853 S.W.2d at 508 n.2.

^{35/} *Coastal Transport Co. v. Crown Central Petroleum Corp.*, 20 S.W.3d 119, 126 (Tex. App.--Houston [14th Dist.] 2000, pet. denied).

^{36/} *Id.*

^{37/} *Green Int’l, Inc. v. Solis*, 951 S.W.2d 384, 387 (Tex. 1997).

^{38/} *Id.*

if an agreement were limited to acts or omissions which occurred before the contract was signed, the requirement of conspicuousness would not be applicable.^{39/}

D. Requirement of Authority

A signatory's authority to bind an indemnitor to an indemnification agreement was first discussed in the case of *Rourke v. Garza*.^{40/}

In this case, a pipe fitter-welder employed by Har-Con Engineering was injured when he fell from scaffolding which had been supplied by Rourke Rental at Har-Con's job site in Galveston, Texas. It was determined by the jury that the failure to supply cleats made the scaffolding defective. When Rourke Rental delivered the unassembled scaffold, it was received by Har-Con's superintendent for the Galveston area. The superintendent signed a delivery ticket which stated that the equipment was received "in good order subject to the terms and conditions on the reverse side." The reverse side of the delivery ticket contained an indemnification agreement requiring Har-Con to indemnify Rourke Rental for any liability that Rourke Rental would have to Har-Con's employees. At trial, the jury found that Har-Con's superintendent did not have the actual authority to execute an indemnity agreement on behalf of Har-Con; however, the jury also found that the superintendent did have apparent authority to do so. The trial court disregarded the jury's second finding and entered judgment in favor of Har-Con.

^{39/} *Lexington Ins. Co. v. W.M. Kellogg Co.*, 976 S.W.2d 807, 809 (Tex. App.–Houston [1st Dist.] 1998, writ denied). *But see Fina, Inc. v. Arco*, 200 F.3d 266, 272 n.21(5th Cir. 2000)(applying Texas law).

^{40/} 530 S.W.2d 794 (Tex. 1975).

The Texas Supreme Court agreed with the trial court's action, based on the following evidence: (1) the officers and agents of Har-Con did not have actual knowledge of the existence of the indemnity provision at the time the superintendent signed the delivery ticket; (2) there had been no discussions or negotiations regarding the indemnity provision or any of the terms located on the reverse side of the delivery ticket; (3) Har-Con's order for the scaffolding equipment was not placed by the superintendent or any employee at the Galveston job site, but rather was placed through Har-Con's Houston office; (4) Rourke Rental never gave any indication at the time the order was placed and accepted that the delivery would be subject to any additional terms; (5) Har-Con's superintendent testified that, when he signed the delivery ticket, he thought he was simply acknowledging receipt of it; and (6) the individual delivering the scaffolding on behalf of Rourke Rental testified that it did not make any difference to him who signed the ticket, so long as he worked for Har-Con. Based on these facts, the Texas Supreme Court concluded:

We believe that, as a matter of law, the signing of such broad indemnity contracts is not a duty ordinarily entrusted to a person of [the superintendent's] position. . . . Contracts indemnifying one against his distribution of defective products should be viewed as exceptions to the usual business practice, in the same manner as those indemnifying one against his own negligence. [Citation omitted.] As evidenced from the facts in this case, they may have a great financial impact on the parties, and are therefore not of the kind ordinarily executed by a superintendent of job sites.^{41/}

^{41/} 530 S.W.2d at 804.

The *Rourke* case indicates that the burden of proof probably would be placed on the indemnitee to establish the authority of the indemnitor's employee to sign an indemnification agreement.^{42/} Other more general case law also suggests that the burden of proof would be placed upon the indemnitee.^{43/}

E. Naming the Indemnitee Specifically

Where an indemnity agreement requires an indemnitor to indemnify for “the negligence of any party or parties”, Texas courts generally have found such language to be specific enough to include the indemnitee.^{44/}

When an indemnity agreement requires an indemnitor to provide indemnity for the personal injuries of the employees of its subcontractors, an indemnitor is not obligated to indemnify an indemnitee for personal injuries to certain independent contractors. This distinction was addressed by the Texas Supreme Court in *Ideal Lease Service, Inc. v. Amoco Production Co., Inc.*^{45/} In that case, the court refused to require an indemnitor to indemnify an indemnitee, because the injury was to a sole proprietor who worked as an independent contractor for the indemnitor.

^{42/} 530 S.W.2d at 802.

^{43/} *City of Corpus Christi v. Bayfront Associates, Ltd.*, 814 S.W.2d 98, 103 (Tex. App.--Corpus Christi 1991, writ denied); *Incorporated Carriers, Ltd. v. Crocker*, 639 S.W.2d 338, 340 (Tex. App.--Texarkana 1982, no writ); *Howell v. Kelly*, 534 S.W.2d 737 (Tex. Civ. App.--Houston [1st Dist.] 1976, no writ).

^{44/} *Atlantic Richfield Oil & Gas Co. v. McGuffin*, 773 S.W.2d 711, 713 (Tex. App.--Corpus Christi 1989, writ dismissed by agreement); *Adams Resources Exploration Corp. v. Resource Drilling, Inc.*, 761 S.W.2d 63, 65 (Tex. App.--Houston [14th Dist.] 1988, no writ).

^{45/} 662 S.W.2d 951 (Tex. 1983).

However, a contractor that has not signed the contract generally can rely on a contractual indemnity provision to obtain indemnity if the provision specifically includes the non-signatory contractor as an indemnitee. The Court of Appeals for the Fifth Circuit has addressed and approved indemnity for a non-signatory party to a contract where the indemnity provision included a reference to “contractors”. In *Campbell v. Sonat Offshore Drilling, Inc.*, a casing contractor, Frank’s, entered into an agreement with an operator, UTP, in which Frank’s agreed to indemnify UTP and UTP’s contractors when injuries occurred to Frank’s employees.^{46/} The Fifth Circuit, applying Texas law, held that Frank’s owed indemnity to UTP’s drilling contractor, Sonat, even though Sonat was not a party to the Frank’s/UTP contract.^{47/}

Further examples of the issue of naming an indemnitee specifically are addressed in the context of releases, which are similar, although of course not identical, instruments.^{48/} In the context of releases, numerous Texas courts have held that, unless a party is identified in a release, the party is not released.^{49/} Although a party must be specifically identified, the party can be identified by a category, as long as the category is sufficiently specific to inform the releasing party of whom it is releasing.

^{46/} 979 F.2d 1115, 1125 (5th Cir. 1992)(applying Texas law).

^{47/} *Id.* See also *Babcock v. Continental Oil Co.*, 792 F.2d 1346 (5th Cir. 1986) (indemnity was owed to employees of an unnamed and non-signatory “contractor”); *Lirette v. Popich Bros. Water Transport, Inc.*, 699 F.2d 725 (5th Cir. 1983) (indemnity owed to non-signatory “affiliated companies”).

^{48/} *Derr Construction Co. v. City of Houston*, 846 S.W.2d 854 (Tex. App.--Houston [14th Dist.] 1992, no writ) (although they are similar, Texas courts have held that releases and contractual indemnification provisions have distinctive characteristics which distinguish one from the other).

^{49/} *Angus Chemical Co. v. IMCFertilizer, Inc.*, 939 S.W.2d 138 (Tex. 1997); *McMillen v. Klingensmith*, 467 S.W.2d 193 (Tex. 1971).

In the following cases, Texas courts have found categories of released parties to be sufficiently specific: *Randall v. Dallas Power & Light Co.*:^{50/} “We hold that a release of an employer and its ‘agent, servant’ from damages arising from a motor vehicle collision between the claimant and the employer refers to the employee tortfeasor with such particularity that his identity or connection with the tortious event cannot be doubted.”; *Winkler v. Kirkwood Atrium Office Park*:^{51/} “In releasing ‘the Club’ from any injuries suffered while participating in the center’s programs, it is clear that [the plaintiff] intended to release any claim against all individuals and entities involved in the operation, maintenance, and administration of the center.”

In contrast, in the following cases, Texas courts have held that categories of released parties were not sufficiently specific: *Duncan v. Cessna Aircraft Co.*:^{52/} the term “any other corporations” in a release was not sufficiently specific to include the manufacturer of the plane when the owner of the plane was being released; *Bowman v. Charter General Agency, Inc.*:^{53/} a release identifying the tortfeasor driver and “all other persons, firms or corporations who might or could claim to be liable therefor” did not include the insurer of the tortfeasor driver; *Illinois National Ins. Co. v. Perez*:^{54/} a release specifically naming an employer, as well as “their officers, agents, servants, employees, privies, successors, insurers, related concerns, and assigns” did not include the employer’s workers’ compensation carrier.

^{50/} 745 S.W.2d 397 (Tex. App.--Dallas 1987), *rev’d on other grounds*, 752 S.W.2d 4 (Tex. 1988).

^{51/} 896 S.W.2d 111 (Tex. App.--Houston [14th Dist.] 1991, writ denied).

^{52/} 665 S.W.2d 414 (Tex. 1984).

^{53/} 799 S.W.2d 377 (Tex. App.--Corpus Christi 1990, writ denied).

^{54/} 794 S.W.2d 373 (Tex. App. -- Corpus Christi 1990, writ denied).

F. Statutes in Texas

1. Texas Oil Field Anti-Indemnity Statute

The Texas Oilfield Anti-Indemnity Statute (hereinafter sometimes referred to as “the TOIA” or “the Act”) invalidates certain contractual indemnification provisions contained in contracts pertaining to a well for oil or gas where the provision seeks indemnity for occurrences “caused by or result[ing] from the sole or concurrent negligence of the indemnitee, his agent or employee, or an individual contractor directly responsible to the indemnitee.”^{55/}

a. Agreements Covered by the TOIA

The TOIA applies to agreements pertaining to a well for oil, gas, or water or to a mine for a mineral.^{56/} A “well or mine service” is defined to include:

(i) drilling, deepening, reworking, repairing, improving, testing, treating, perforating, acidizing, logging, conditioning, purchasing, gathering, storing, or transporting oil, brine water, fresh water, produced water, condensate, petroleum products, or other liquid commodities, or otherwise rendering services in connection with a well drilled to produce or dispose of oil, gas, other minerals or water; and

(ii) designing, excavating, constructing, improving, or otherwise rendering services in connection with a mine shaft, drift, or other structure intended for use in exploring for or producing a mineral.^{57/}

A “well or mine service” specifically does not include:

(i) purchasing, selling, gathering, storing, or transporting gas or natural gas liquids by pipeline or fixed associated facilities; or

^{55/} TEX. CIV. PRAC. & REM. CODE § 127.003(a)(1) (Vernon’s Supp. 1999).

^{56/} *Id.*, § 127.003(a)

^{57/} *Id.*, § 127.001(4)(A).

(ii) construction, maintenance, or repair of oil, natural gas liquids, or gas pipelines or fixed associated facilities.^{58/}

In determining the parameters of the catchall phrase “or otherwise rendering services in connection with a well”, the United States Court of Appeals for the Fifth Circuit has held that the services called for by a contract must bear a “close nexus to the well” and must be considered as “directed toward the goal of obtaining and maintaining production from a well.”^{59/} In light of this principle, Texas courts have determined that the following activities were beyond the scope of the TOIA: repairs to an offshore drilling rig that were performed in a shipyard;^{60/} construction work undertaken inside an oil company’s plant;^{61/} and transportation services by a trucking company pursuant to an oil terminal loading agreement.^{62/}

^{58/} *Id.*, § 127.001(4)(B).

^{59/} *John E. Graham & Son v. Brewer*, 210 F.3d 333, 343 (5th Cir. 2000).

^{60/} *Transworld Drilling Co. v. Levingston Shipbuilding Co.*, 693 S.W.2d 19 (Tex. App.--Beaumont 1985, no writ).

^{61/} *Singleton v. Crown Central Petroleum Corp.*, 713 S.W.2d 115 (Tex. App.--Houston [1st Dist.] 1985), *rev'd on other grounds*, 729 S.W.2d 690 (Tex. 1987).

^{62/} *Coastal Transport Co. v. Crown Central Petroleum Corp.*, 2000 W.L. 330062 (Tex. App.--Houston [14th Dist.] 2000, no writ history available).

The TOIA also is limited to claims for personal injury, death, and property damage^{63/} and expressly does not extend to losses resulting from radioactivity,^{64/} control of pollutants,^{65/} reservoir or underground damage,^{66/} wild well claims,^{67/} and, as noted above, certain pipeline contracts.^{68/}

b. Rules of Construction

The Fifth Circuit Court of Appeals, when interpreting the TOIA, also has held that the Act “is to be strictly construed to permit parties to contract freely with regard to agreements not covered by the statutory language.”^{69/}

c. Mutual Indemnity Obligations

The TOIA creates several exceptions to the general prohibition, and one of them is that the statute will not invalidate any agreement with respect to a mutual indemnity obligation.^{70/} The Act defines a “mutual indemnity obligation” as one where the parties “agree to indemnify each other and each other’s contractors and their employees against loss, liability, or damages arising in connection

^{63/} TEX. CIV. PRAC. & REM. CODE § 127.003(a)(2) (Vernon’s Supp. 1999).

^{64/} *Id.*, § 127.004(1).

^{65/} *Id.*, § 127.004(2).

^{66/} *Id.*, § 127.004(3).

^{67/} *Id.*, § 127.004(4) and (5).

^{68/} *Id.*, § 127.001(4)(B). In interpreting the pipeline exclusion, the Fifth Circuit noted that the Texas Legislature only intended to exempt those agreements which, in their entirety, contemplate “work within the exclusion and not those agreements which include additional activities beyond just pipeline work.” *John E. Graham & Sons v. Brewer*, 210 F.3d 333, 343-344 (5th Cir. 2000).

^{69/} *John E. Graham & Sons v. Brewer*, 210 F.3d 333, 338 (5th Cir. 2000).

^{70/} *Id.* § 127.005(b).

with bodily injury, death and damage to property of their respective employees, contractors, or their employees.”^{71/}

(1) Scope

In a recent case from the Fifth Circuit Court of Appeals, a party argued that an indemnity obligation was not mutual unless the contract defined the indemnitor and the indemnitee in the same manner.^{72/} In the contract, the indemnitor, or “Contractor Group”, was defined to include the contractor’s “parents, subsidiaries, affiliates and partnerships, and their respective officers, directors, employees, and insurers”. However, the indemnitee, or “Company Group”, included all entities in the “Contractor Group”, plus “those with whom Company, its parent, subsidiaries, affiliates, and partnerships may be associated as co-lessees, partners, or joint venturers”. Thus, the “Company Group” included more entities than the “Contractor Group”. The Fifth Circuit rejected the argument that this difference destroyed the mutuality of the indemnity agreement, stating that, by industry practice, an operator’s group would always be larger than a contractor’s group, and that the full indemnity contemplated by the parties could not occur unless the parties were defined as provided in the Master Service Agreement at issue.^{73/} Thus, this lack of equality in the definitions of the Contractor Group and the Operator Group did not destroy the mutuality of the indemnity obligation.^{74/}

^{71/} *Id.* § 127.001(3).

^{72/} *Mid-Continent Cas. Co. v. Swift Energy Co.*, 206 F.3d 487, 495 (5th Cir. 2000) (applying Texas law).

^{73/} 206 F.3d at 495.

^{74/} The mutual indemnity obligation of the Texas Oilfield Anti-Indemnity Statute is limited to the indemnitee and its contractors and their employees. TEX. CIV. PRAC. & REM. CODE § 127.001(3) (continued...)

(2) **Insurance Coverage for Mutual Indemnity Obligations**

(a) **Texas Case Law**

Before 1989, the TOIA required each party to agree in writing to support its respective indemnity obligation with “available liability insurance”. In 1989, however, regarding indemnity obligations otherwise prohibited by the Act, the Legislature agreed to allow the enforceability of mutual indemnity obligations “to the extent of the coverage and dollar limits of insurance or qualified self-insurance each party as indemnitor has agreed to provide in equal amounts to the other party as indemnitee.” In *Greene’s Pressure Testing & Rentals, Inc. v. Flournoy Drilling Co.*, the Fifth Circuit Court of Appeals interpreted the “equal amounts” language literally.^{75/} In *Greene’s*, the contract required a service company to obtain \$500,000 of insurance coverage, but there was no similar requirement in the agreement for the drilling contractor to obtain insurance coverage in an equal amount. However, the drilling contractor voluntarily purchased \$10 million worth of insurance coverage. The Fifth Circuit refused to enforce the drilling contractor’s indemnity obligation to the service contractor, because the contract did not specifically require both parties to obtain equal amounts of insurance coverage.^{76/} Two subsequent intermediate appellate cases from Texas followed *Greene’s*.^{77/}

^{74/}(...continued)

(Vernon’s Supp. 1999).

^{75/} 113 F.3d 47 (5th Cir. 1997) (applying Texas law).

^{76/} 113 F.3d at 51 and 52.

^{77/} *Weber Energy Corp. v. Grey Wolf Drilling Co.*, 976 S.W.2d 766 (Tex. App.–Houston [1st Dist.] 1998), *reversed*, 24 S.W.3d 344 (Tex. 2000); *Ken Petroleum Corp. v. Questor Drilling Corp.*, 976 S.W.2d 283 (Tex. App.–Corpus Christi 1998), *reversed*, 24 S.W.3d 344 (Tex. 2000).

On June 29, 2000, the Texas Supreme Court decided the *Ken Petroleum* case^{78/} which rejected the Fifth Circuit's reasoning in the *Greene's* case. In *Ken Petroleum*, the Texas Supreme Court held as follows: (1) that a mutual indemnity agreement is not voided if the parties agree to provide insurance coverage for their indemnity obligations in differing amounts; (2) that, if one party provides more insurance coverage than the other, the party providing the higher amount of insurance may not enforce its right to indemnity beyond the amount of coverage that the other party agreed to obtain; (3) that a party providing a lower amount of insurance coverage may not enforce its right to indemnity beyond the amount of insurance it agreed to obtain; and (4) that the amount of insurance coverage each party agrees to provide need not be specified in the contract that contains the indemnity agreement.

(b) 1999 Amendment to the TOIA

Prior to the Texas Supreme Court's decision in the *Ken Petroleum* case, Section 127.005(b) of the TOIA was amended in 1999 by H.B. 2853 to state as follows:

With respect to a mutual indemnity obligation, the indemnity obligation is limited to the extent of the coverage and dollar limits of insurance or qualified self-insurance each party as indemnitor has agreed to obtain for the benefit of [~~provide in equal amounts to~~] the other party as indemnitee.

In the bill analysis which accompanied the legislation, it is stated in the "Background and Purpose" section of the legislation as follows:

A federal court has interpreted this statutory language to mean that a contract must provide for equal amounts of insurance. If it provides for "available" amounts of insurance, the indemnity agreement is void because it does not conform to the requirements of the Act.

^{78/} *Ken Petroleum Corp. v. Questor Drilling Corp.*, 24 S.W.3d 344 (Tex. 2000).

H.B. 2853 amends the Act to limit the mutual indemnity agreement in a mineral contract to the extent of coverage and dollar amounts of insurance that each party as indemnitor has agreed to obtain for its benefit or the benefit of the other party as indemnitee.

The bill analysis accompanying the legislation appears to refer specifically to the *Greene's* case. H.B. 2853 thus appears to be an effort by the Legislature to reject the Fifth Circuit's interpretation of *Greene's* and the other intermediate Texas appellate court cases that followed it. As noted above, the Texas Supreme Court also recently rejected the analysis of *Greene's* in the *Ken Petroleum* case,^{79/} and held that the "equal amounts" language of a previous version of Section 127.005(b) was not invalidated even if the parties to an agreement obtained differing amounts of insurance. For example, under the reasoning in the *Ken Petroleum* case, if a party seeking indemnity agreed to obtain insurance coverage of \$1,000,000 and the party owing the indemnity secured insurance coverage for \$5,000,000, the mutual indemnity agreement could be enforceable, but only to the extent of \$1,000,000. Thus, the need for the new amendment largely disappeared when the Texas Supreme Court decided the *Ken Petroleum* case. Using the same example, however, the new amendment would appear to go beyond the *Ken Petroleum* case and would allow the party seeking indemnity to enforce the obligation up to \$5,000,000 if the party owing the indemnity actually agreed to obtain this amount of insurance coverage for the benefit of the other party.^{80/} In other

^{79/} 24 S.W.3d 344 (Tex. 2000).

^{80/} It is not clear whether the new amendment requires the dollar amount of the insurance obligation of both parties to be expressly stated in the contract. The amended statutory language implies that each party's insurance obligation must be stated in the contract, because it specifically refers to the insurance each party "has agreed to obtain". On the other hand, the Legislature appears to be rejecting the analysis of the Fifth Circuit in *Greene's*. In that case, one party (Flournoy Drilling) did not agree in the contract to obtain any insurance coverage, although it voluntarily purchased a substantial amount. *Greene's Pressure Testing & Rentals, Inc. v. Flournoy Drilling Co.*, 113 F.3d (continued...)

words, the new amendment appears to permit the enforcement of indemnity obligations in differing or unequal amounts as long as the parties to the contract agreed to obtain this insurance coverage for the benefit of the other.

(c) Application of the Amendment to Contracts Entered into before August 30, 1999

It is not at all clear whether the Legislature intended for the new amendment to the TOIA to apply retroactively.

The following arguments support retroactive application. First, based upon the bill analysis accompanying the legislation, as noted above, the Legislature's apparent purpose in enacting H.B. 2853 was to correct, in its view, a misinterpretation of Texas law by the Fifth Circuit Court of Appeals in the *Greene's* case. Because H.B. 2853 is an apparent attempt to overrule a prior judicial decision, the Legislature likely intended for H.B. 2853 to apply to agreements entered into on or before August 30, 1999.^{81/} Second, even if the Texas Legislature wanted H.B. 2853 to be applied retroactively, the Texas Constitution specifically prohibits retroactive laws which impair a vested or substantive right.^{82/} If, on the other hand, a statute or amendment is procedural or remedial, it may

^{80/}(...continued)

47 (5th Cir. 1997) (applying Texas law). The Legislature's apparent rejection of *Greene's* may support the interpretation of "agreed to obtain" as including voluntary insurance, since the voluntarily acquired CGL insurance almost certainly would include contractual liability coverage which would benefit an indemnitee. Further, in *Ken Petroleum*, the Texas Supreme Court recently decided that a prior version of the TOIA did not require the amounts of coverage that each party agreed to provide to be specified in the written contract. 24 S.W.3d 344 (Tex. 2000).

^{81/} See *Bank One, Texas v. Ikard*, 885 S.W.2d, 183, 185 (Tex. App.—Austin, 1994, writ denied) (explaining that a curative statute, such as one overruling an incorrect judicial decision, will be given the most comprehensive and liberal construction possible).

^{82/} See *Texas Water Rights Commission v. Wright*, 464 S.W.2d 642, 648 (Tex. 1971); *Reames v. Police* (continued...)

be applied retrospectively.^{83/} The term “vested right” is amorphous and has proven difficult to define. One commentator has said that “the most important single inquiry to be made, from the standpoint of the individual and aside from the public interest, is whether the retroactive law gives effect to or defeats the bona fide intentions or reasonable expectations of the persons effected.”^{84/} Another commentator has explained that “[w]here a statute has become a likely basis for substantial reliance by people who may have changed their positions to reap its benefits, the policy against retroactive change is strong.”^{85/} A remedial statute, in contrast, is defined as one which, among other purposes, is intended to correct defects, mistakes, and omissions in the laws of the state.^{86/} A remedial statute may amend an erroneous statutory interpretation made by a court.^{87/} Since the Legislature’s stated purpose in enacting H.B. 2853 was to overrule a federal decision, the amendment may have retroactive application.

^{82/}(...continued)

Officers’ Pension Board, 928 S.W.2d 628, 631 (Tex. App.--Houston [14th Dist.] 1996, no writ).

^{83/} See *Sims v. Adoption Alliance*, 922 S.W.2d 213, 217 (Tex. App.–San Antonio 1996, writ denied).

^{84/} *Sims*, 922 S.W. at 217, *citing* Smith, “Retroactive Laws and Vested Rights,” 6 *Tex. L. Rev.* 409, 427 (1928).

^{85/} *Sims*, 922 S.W. at 217, *citing* Greenblatt, “Judicial Limitations on Retroactive Civil Legislation,” 51 *Northwestern L. Rev.* 540, 566 (1956).

^{86/} See *Sims*, 922 S.W.2d at 217.

^{87/} See *Bank One, Texas v. Ikard*, 885 S.W. 183, 185 (Tex. App.–Austin 1994, writ denied).

The following arguments support the view that H.B. 2853 applies prospectively only. First, under Texas law, a statute is presumed to operate prospectively, not retroactively.^{88/} The same presumption applies to statutory amendments.^{89/} Second, in prior legislation, amendments to the TOIA all have contained specific provisions stating whether they were to be applied prospectively or retrospectively. For example, when the TOIA was enacted in 1973, the legislation specifically stated that it would apply prospectively.^{90/} The 1989 amendments to Section 127.005 of the TOIA applied to an indemnity agreement “whether the obligation was entered into before, on, or after the effective date” of the amendment.^{91/} In 1991, revisions to the TOIA also stated that the amendments applied to all indemnity agreements, regardless of when the agreement was entered into.^{92/} In 1995, Section 127.005 was again amended with the Legislature stating that the changes would apply only to agreements entered into on or after the amendment’s effective date.^{93/} Since the 1999 amendment contains no language regarding retroactive or prospective application, a second argument could be made that, under Texas law, the statute is presumed to operate prospectively. Third, an argument additionally could be made that the amendment impairs vested rights, since all contracts entered into between 1989 and the effective date of H.B. 2853 were predicated upon the “equal amounts”

^{88/} See TEX. GOV’T CODE ANN. § 311.022 (Vernon 1998).

^{89/} See *Russell v. Board of Trustees of Firemen*, 968 F.2d 489 (5th Cir.1992).

^{90/} TEX. CIV. PRAC. & REM. CODE ANN. § 127 (revisor’s note) (Vernon 1998).

^{91/} TEX. CIV. PRAC. & REM. CODE ANN. § 127.005 (historical and statutory notes) (Vernon 1998) [Acts 1989, 71st Leg., ch. 1102, § 4].

^{92/} See *id.* at § 127.001 (historical and statutory notes) [Acts 1991, 72nd Leg., ch. 36, § (5)].

^{93/} *Id.* at § 127.005 (historical and statutory notes) [Acts 1995, 74th Leg., ch. 679, § (2)].

language; therefore, H.B. 2853 may effect the reasonable expectations of the parties to a contract. Fourth, even if H.B. 2853 operates prospectively, the amendment might be applied to individual work orders entered into on or after August 30, 1999 even if the work or service agreement predates August 30th.

In conclusion, whether H.B. 2853 applies prospectively or retrospectively will have to be determined by Texas courts.

d. Unilateral Indemnity Obligations

A unilateral indemnity provision is an indemnity obligation where the indemnitor only agrees to indemnify the other party, but the other party does not make the reciprocal agreement.^{94/} The amount of insurance required to secure this indemnity obligation cannot exceed \$500,000.^{95/}

e. Effect of Anti-Indemnity Statutes on Additional Insured Provisions

In *Getty Oil Co. v. Insurance Co. of North America*, the Texas Supreme Court held that independent additional insured provisions are not addressed by the Texas Oilfield Anti-Indemnity statute.^{96/}

In determining the parameters of the *Getty* case, the following example is considered. Assume that Oil Company has contracted with Contractor for certain service work. The contract between Oil Company and Contractor contains indemnification provisions which violate the Texas Oilfield Anti-Indemnity Act. The contract also has an additional insured provision which states that,

^{94/} TEX. CIV. PRAC. & REM. CODE § 127.005(c) (Vernon's Supp. 1999).

^{95/} *Id.*

^{96/} 845 S.W.2d 794 (Tex. 1992).

with respect to Contractor's CGL policy, Oil Company "shall be declared as an additional insured with respect to obligations which Contractor has agreed to assume under the indemnity terms of the contract." The issue then becomes whether the language "with respect to obligations which Contractor has agreed to assume under the indemnity terms of this contract" is a separate and independent additional insured obligation as contemplated by the *Getty* case.

The *Getty* case would suggest that the pertinent language is not a separate and independent additional insured obligation. The *Getty* opinion stated as follows:

We further conclude that the language of Article 2212(b) [the prior Texas Oilfield Anti-Indemnity Statute] applies exclusively to indemnity agreements. Section 4(c) [of the prior Texas Oilfield Anti-Indemnity Act] does not prohibit "insurance shifting" schemes that do not fall within its parameters; rather it *permits* certain indemnity agreements if they are supported by liability insurance and meet the other section's requirements. Art. 2212(b) § 4(c) [now codified and amended at Tex. Civ. Prac. & Rem. Code § 127.005]. The Anti-Indemnity statute does not purport to regulate any agreements for the purchase of insurance unless they are in support of indemnity agreements.

* * *

The indemnity provision in paragraph 3-4 of HB-5357 [the purchase order at issue in the *Getty* case] is supported by an insurance provision separate from and additional to the additional insured provision in paragraphs 1-2. The last sentence of paragraph 3 provides that "[i]nsurance covering this indemnity agreement shall be provided by Seller." This provision, not the first sentence of paragraph 2, which begins "All insurance coverage carried by Seller . . . shall extend to and protect Purchaser," supports the indemnity agreement. Moreover, the additional insured provision requires that NL [the indemnitor] extend insurance coverage to Getty [the indemnitee] 'whether or not required [by the other provisions of the contract].' Thus, the additional insured provision of the contract does not support the indemnity agreement, but rather is a separate obligation. We disagree with the concurring and dissenting opinion that the contract is susceptible to any other reasonable interpretation.

The additional insured provision, which does not support any indemnity agreement, is not prohibited by the language of the Anti-Indemnity Statute.^{97/}

For at least the following reasons, the above quote sections of the *Getty* case appear to support the position that the additional insured provision contained in the agreement is not a separate and independent additional insured obligation but rather is dependent upon the validity of the contractual indemnification provisions. First, in the *Getty* case, there apparently were two additional insured provisions in the purchase order: one provision required insurance covering the indemnity agreement, and a second provision in another section of the purchase order stated that *Getty* would be an additional insured “whether or not required [by the other provisions of the contract].”^{98/} In the above hypothetical, there is no additional insured obligation in the Oil Company/Contractor agreement similar to the second provision in the NL/*Getty* purchase order. Second, the *Getty* case specifically states that “[t]he Anti-Indemnity Statute does not purport to regulate any agreements for the purchase of insurance unless they are in support of indemnity agreements.” The additional insured provision in the Oil Company/Contractor agreement specifically states that Oil Company shall be declared an additional insured with respect to “obligations which Contractor has agreed to

^{97/} 845 S.W.2d at 804.

^{98/} This argument was echoed in *Greene’s Pressure Testing & Rentals, Inc. v. Flournoy Drilling Co.*, 113 F.2d 47, 51 (5th Cir. 1997), where the Fifth Circuit stated: “Furthermore, the insurance requirement in paragraph 6.1 does not support the indemnity obligations, as required by subsection 127.005(a), because that paragraph explicitly states that the insurance obligation contained therein must be maintained ‘[w]ithout affecting the indemnity obligations or liability’ of Greene [the indemnitee].”

assume under the indemnity terms of the contract.” Thus, the additional insured provision appears to be in support of the indemnity agreements and appears not to be a separate obligation.^{99/}

Although the language in the *Getty* case suggests support for this position, several recent cases from the Fifth Circuit are to the contrary. In *Certain Underwriters at Lloyds v. Oryx Energy Co.*,^{100/} the additional insured provision in the drilling agreement provided as follows:

^{99/} Two other Texas cases also address this issue in a context that did not involve the Texas Oilfield Anti-Indemnity Statute and determined that additional insured provisions were not separate and independent obligations. In *Emery Air Freight Corp. v. General Transport Systems, Inc.*, General Transport contractually agreed to indemnify Emery under certain circumstances and also to name Emery as an additional insured in its GL policy. 933 S.W.2d 312 (Tex. App.–Houston [14th Dist.] 1996, no writ). One of General Transport’s employees was hurt, and he sued Emery. General Transport had failed to have Emery named as an additional insured. Emery then sued General Transport for breach of contract. The intermediate Texas appellate court found that the indemnity agreement was unenforceable, since it did not meet the Texas express negligence test. The court also found that the additional insured provision, although appearing in a separate section of the contract, only was intended to assure the performance of the indemnity agreement and thus was not activated by an unenforceable indemnity agreement. 933 S.W.2d at 315. Similarly, in *Fireman’s Fund Ins. Co. v. Commercial Standard Ins. Co.*, a party was contractually required to obtain insurance in order to “protect the Owner . . . against all liabilities, claims, or demands for injuries or damages to any person or property growing out of the performance of work under this specification.” 490 S.W.2d 818, 821 (Tex. 1972). However, there was no requirement to name Owner as an additional insured. The indemnity provision in the contract was found to be unenforceable. The Texas Supreme Court then stated:

While the meaning of the contract provision relating to liability insurance [is] not clear, the most reasonable construction is that they were to assure performance of the indemnification agreement as entered into by the parties. Such provisions are often required to guard against the insolvency of the indemnitor, and they should not be considered as evidence of intent to broaden the contractual indemnity obligation.

490 S.W.2d at 823.

^{100/} 142 F.2d 255 (5th Cir. 1998).

[t]he policy (or policies) of insurance obtained by [Mallard], except Workers' Compensation, and Protection and Indemnity shall provide that [Oryx is] . . . additional insured for all coverages to the extent of the indemnity provided by [Mallard] under this Contract.^{101/}

With almost no discussion, the Fifth Circuit held that the additional insured provision in the Mallard/Oryx contract was a separate and independent insurance obligation and was not in support of the indemnity agreements. Similarly, in *Mid-Continent Casualty Co. v. Swift Energy Co.*, the additional insured provision in a master service agreement stated that the contractor agreed to add the operator as an additional insured “for liabilities and indemnities assumed by” the contractor under the agreement.^{102/} Although the indemnity provision in the agreement was invalidated by the Texas Oilfield Anti-Indemnity Statute, the Fifth Circuit again held that the additional insured provision was enforceable and was not invalidated by the Texas Oilfield Anti-Indemnity Act.^{103/} As part of its reasoning, the Fifth Circuit noted that the language of the insurance policy, and not the language of a master service agreement, should control the issue of whether the additional insured provision would be enforced.^{104/}

^{101/} 142 F.2d at 258.

^{102/} *Mid-Continent Cas. Co. v. Swift Energy Co.*, 206 F.3d 487, 492 (5th Cir. 2000)(applying Texas law).

^{103/} 206 F.3d 487, 494 n.8.

^{104/} *Id.* Additionally, in *Coastal Transport Co. v. Crown Central Petroleum Corp.*, 20 S.W.3d 119, 129, a contract between a trucking company and a petroleum products loading terminal stated that the loading terminal would be named as an additional insured in a CGL policy for liability assumed in the contractual indemnity obligation, including “liability arising out of loading and unloading.” 20 S.W.3d 119, 129 (Tex. App.--Houston [14th Dist.] 2000, pet. denied). The Texas intermediate appellate court held that the additional “loading and unloading” language amounted to “an obligation separate from merely providing coverage for indemnification.” *Id.*

One recent Fifth Circuit case, although applying general maritime law, suggested a potential solution to this problem. In *LeBlanc v. Global Marine Drilling Co.*, Frank's Casing agreed to contractually indemnify Marine Drilling and name Marine Drilling as an additional insured in certain insurance policies.^{105/} The indemnification agreement was invalidated by Section 905(b) of the Longshoremen's Act. Frank's asserted that its additional insured obligation was dependent upon the enforceability of the contractual indemnity provision based upon the following language in the contract: "[T]o the extent [Frank's] assumes liability hereunder, and agrees to indemnify [Marine], [Marine] shall be named an additional insured in [certain] insurance policies."^{106/} The Fifth Circuit disagreed, finding that the language of the indemnification agreement, even if unenforceable, defined the parameters of the additional insured obligation. Additionally, the Fifth Circuit stated:

However, Frank's could have accomplished its desired result by better contract drafting: the contractual interpretation advanced by Frank's would have significant force if the MSA required a valid indemnity agreement as a precondition to one obtaining [additional] assured status. Such is not the situation before us If the parties had determined to condition Marine's [additional] assured status upon the legal enforceability of the indemnity agreement, they very easily could have done so.^{107/}

In conclusion, the language of the *Getty* case appears to support the position that the additional insured provision contained in the Oil Company/Contractor agreement is in support of the indemnity agreements. However, several Fifth Circuit cases have held to the contrary. A solution to this dilemma may rest with the contract drafter. If the contract specifically states that any

^{105/} 193 F.3d 873 (5th Cir. 1999), *reh'g en banc denied*, 203 F.3d 826 (5th Cir. 1999).

^{106/} 193 F.3d at 874.

^{107/} *Id.*

additional insured obligation is specifically limited to the scope of the contractual indemnity obligation undertaken by Contractor and that, as a precondition to obtaining additional insured status, the Contractor's indemnity obligation must be valid and enforceable, then the additional insured provision likely would be dependent upon, and would not be a separate and independent obligation from, the contractual indemnity provision.

2. Texas Architect/Engineers Anti-Indemnity Statute

The Texas Architects and Engineers Anti-Indemnity Statute (hereinafter sometimes referred to as "the TAEI") voids certain contractual indemnity provisions in construction contracts that require a contractor to indemnify or hold harmless a registered architect, registered engineer, or an agent, servant or employee of a registered architect or registered engineer.^{108/} The TAEI prohibits contractual indemnity for personal injury, death, or property damage caused by or resulting from: (1) defects in plans, designs, or specifications prepared, approved, or used by an architect or engineer; or (2) negligence of an architect or engineer in the rendition or conduct of professional duties called for or arising out of the construction contract and the plans, designs, or specifications that are a part of the construction contract.^{109/} There are, however, several instances when the TAEI does not apply.

^{108/} TEX. CIV. PRAC. & REM. ANN. § 130.002 (Vernon 1987). Section 130.001 of the TAEI defines a "construction contract" as a contract or agreement made and entered into by an owner, contractor, sub-contractor, or supplier concerning the construction, alteration, repair, or maintenance of a building, structure, appurtenance, road, highway, bridge, dam, levee, or other improvement to or on real property, including moving, demolition, and excavation connected with the real property. TEX. CIV. PRAC. & REM. ANN. § 130.001 (Vernon 1987).

^{109/} TEX. CIV. PRAC. & REM. CODE ANN. § 130.002(1)(A), (1)(B), (2)(A) & (2)(B) (Vernon 1987). Section 130.002(2)(C) also prohibits indemnity for any other expense that arises from personal injury, death, or property damage caused by or resulting from the defects or negligence described in Section 130.002(1)(A) & (B).

a. Contractor's Negligence

The TAEI does not prohibit an agreement in which an architect, engineer or their agent, servant or employee is indemnified for negligent acts of a contractor, subcontractor, or any person for whose acts the contractor or subcontractor may be liable.^{110/} This exception also extends to negligent acts of any person directly or indirectly employed by the contractor or subcontractor.^{111/}

In construing this exception, the Texas intermediate court of appeals in El Paso held that a contractor was required to indemnify an architect for an incident caused by the contractor's negligence.^{112/} The contractual indemnity provision was limited to indemnity for claims or expenses attributable to the destruction of property caused by the contractor's negligent act or omission.^{113/} A jury found that the contractor was primarily responsible for flooding that occurred to property adjacent to a construction site. The architect that designed the building under construction was exonerated from liability. The Court of Appeals held that Section 130.002 of the TAEI did not apply to the indemnity provision in question for two reasons.^{114/} First, Section 130.002 of the TAEI only voids indemnity agreements when the damage in question is caused by the conduct of the architect.^{115/} Second, Section 130.005 of the TAEI specifically excepts indemnity agreements in

^{110/} TEX. CIV. PRAC. & REM. CODE ANN. § 130.005 (2) (Vernon 1987).

^{111/} *Id.*

^{112/} *Foster, Henry, Henry & Thorpe, Inc. v. J.T. Construction, Inc.*, 808 S.W.2d 139 (Tex. App. -- El Paso 1989, writ denied).

^{113/} 808 S.W.2d at 140.

^{114/} 808 S.W.2d at 141.

^{115/} *Id.*

which an architect is indemnified from liability for the negligent acts of a contractor.^{116/} Thus, the architect was allowed to recover his attorney's fees from the contractor for defending the case.

b. Owner of Real Property

The TAEI does not apply to an owner of an interest in real property or persons employed solely by that owner.^{117/} Furthermore, the TAEI does not invalidate indemnity agreements that indemnify or hold harmless an owner of real property or person employed solely by the owner.^{118/} The TAEI also does not apply to agreements that “allocate, release, liquidate, limit, or exclude liability” in connection with a construction contract between an owner or other person for whom a construction contract is being performed and a registered architect or engineer.^{119/}

c. Other Negligent Acts Not Enumerated in the Statute

A registered architect or engineer can be entitled to indemnity for negligent acts that are not caused by or result from: (1) defects in plans, designs, or specifications prepared, approved or used by the architect or engineer; or (2) negligence of the architect or engineer in their rendition of conduct of professional duties called for or arising out of the construction contract and the plans or specifications that are part of the construction contract.^{120/}

^{116/} *Id.*

^{117/} TEX. CIV. PRAC. & REM. CODE ANN. § 130.004(a) (Vernon 1997).

^{118/} TEX. CIV. PRAC. & REM. CODE ANN. § 130.004(b)(1) (Vernon 1997).

^{119/} TEX. CIV. PRAC. & REM. CODE ANN. § 130.004(b)(2) (Vernon 1997).

^{120/} TEX. CIV. PRAC. & REM. CODE ANN. §§ 130.002(1)(A) & (B) and 130.005(1) (Vernon 1997).

d. Insurance Contracts and Workers' Compensation

The TAEI also does not apply to insurance contracts or a workers' compensation agreement.^{121/}

G. Indemnification for Gross Negligence in Texas

Texas intermediate appellate courts have split on whether an indemnitor can be required to indemnify an indemnitee for the indemnitee's own gross negligence. Texas courts have considered two principal issues: specificity and public policy.

Regarding the specificity issue, in the *Crown Central* case, the First Court of Appeals in Houston has held that an indemnity provision which specifically excluded an indemnitee's sole negligence did not require the indemnitor to provide indemnity for an indemnitee's gross negligence.^{122/} The court reasoned that, since the parties specifically excluded the indemnitee's sole negligence from the indemnity agreement, it logically followed that gross negligence also would be excluded.^{123/} The San Antonio Court of Appeals, however, has held that an indemnitor can be required to indemnify an indemnitee for the indemnitee's gross negligence.^{124/} The San Antonio Court of Appeals distinguished the *Crown Central* case on the basis that the indemnity provision in

^{121/} TEX. CIV. PRAC. & REM. CODE ANN. § 130.003(1) and (2) (Vernon 1997).

^{122/} *Crown Central Petroleum Corp. v. Jennings*, 727 S.W.2d 739 (Tex. App.--Houston [1st Dist.] 1987, no writ).

^{123/} 727 S.W.2d at 741-742.

^{124/} *Webb v. Lawson-Avila Const., Inc.*, 911 S.W.2d 457 (Tex. App.--San Antonio 1995, writ dismissed). The San Antonio Court of Appeals also has held that a properly drafted pre-injury release of a potential negligence claim also released a cause of action for gross negligence, because negligence and gross negligence are not separable. *Newman v. Tropical Visions, Inc.*, 891 S.W.2d 713 (Tex. App.--San Antonio 1994, writ denied).

Crown Central violated the express negligence test and therefore could not require indemnity for an indemnitee's own negligence.^{125/} The court concluded that, when the parties to an agreement use the term "negligence", it is assumed that the parties mean all shades of negligence including gross negligence.^{126/}

Regarding the public policy issue, the Texas Supreme Court has noted that indemnity for one's own gross negligence or intentional injury does present public policy concerns.^{127/} However, the Supreme Court refused to address this issue since it was not raised by the parties as part of the appeal.^{128/} Texas intermediate appellate courts have split on the issue.^{129/} The primary concern involves the policy justification for awarding punitive damages.^{130/} Punitive damages that are awarded after a finding of gross negligence or malice serve the public purpose of punishment and deterrence.^{131/} If parties are allowed to shift responsibility for gross negligence or malice with

^{125/} 911 S.W.2d at 461.

^{126/} *Id.*

^{127/} *Atlantic Richfield v. Petroleum Personnel, Inc.*, 768 S.W.2d 724, 726 (Tex. 1989).

^{128/} *Id.*

^{129/} The Beaumont Court of Appeals has held that a pre-injury release attempting to exempt one from liability for gross negligence is against public policy. *Smith v. Golden Triangle Raceway*, 708 S.W.2d 574 (Tex. App.–Beaumont 1986, no writ). The San Antonio and Corpus Christi Courts of Appeals has held to the contrary. *Webb v. Lawson-Avila Const., Inc.*, 911 S.W.2d 457, 461-462 (Tex. App.–San Antonio 1995, writ dism'd); *Valero Energy Corp. v. M.W. Kellogg Const. Co.*, 866 S.W.2d 252, 257-258 (Tex. App.–Corpus Christi 1993, writ denied).

^{130/} The public policy concerns for and against indemnification for gross negligence are also raised in the context of whether a pre-injury release of gross negligence is unenforceable as against public policy. See Holcomb, *The Validity and Effectiveness of Pre-injury Releases of Gross Negligence in Texas*, 50 Baylor L. Rev. 233 (1998).

^{131/} *Transportation Ins. Co. Moriel*, 879 S.W.2d 10, 16-17 (Tex. 1994).

indemnity provisions, the party that avoids responsibility for its gross negligence or malice would not be punished or deterred.^{132/} The conflicting policy concern which would justify such a provision is freedom of contract.

H. Contractual Indemnification Following Termination of the Contract

Many contracts containing contractual indemnification provisions also have termination clauses stating that the agreement will expire after a specific period of months or years or on a specific date. Under these circumstances, a question may arise as to the enforceability of the indemnity provisions when an event potentially triggering indemnification occurs after the termination of the contract. One Texas court recently held that any indemnification obligation expires when the contract terminates. In *Griffin Industries, Inc. v. Foodmaker, Inc.*, Griffin contractually agreed to provide certain food services for Foodmaker and also agreed to indemnify Foodmaker for any injuries to Foodmaker's employees.^{133/} The contract terminated on March 22, 1994, although Griffin subsequently continued to provide many of the same services to Foodmaker. In September, 1996, a Foodmaker employee was injured and the injury was allegedly caused by Griffin's failure to respond to one or more service requests in a timely manner. Foodmaker sought indemnification from Griffin. A Houston intermediate appellate court held that no indemnification was owed because the contract had terminated: "Unlike the mythical Phoenix, contracts that terminate by their express terms do not rise again. There is no evidence that Foodmaker tried to

^{132/} Commentators generally support the view that indemnification for gross negligence is against public policy. Restatement (2d) Contracts § 195(1) (1979); 6A Corbin on Contracts § 1472 (Supp. 1999); 8 Williston on Contracts § 19:23 (4th Ed. 1998); Prosser & Keeton, Torts § 68 at 484 (5th Ed. 1984).

^{133/} *Griffin Industries, Inc. v. Foodmaker, Inc.*, 22 S.W.3d 33, 35 (Tex. App--Houston [14th Dist.] 2000, pet. denied.)

renew or revive its indemnity agreement.”^{134/} A counter argument, not addressed by the *Griffin* case, is that parties may extend a contract by implied agreement through continued performance under the terms of the contract.^{135/}

This problem probably can be avoided by adding at least one of two common provisions to a contract. A termination clause can be written so that the contract terms, including any indemnity agreements, will continue until either party provides advance written notice of termination. Alternatively, or additionally, a provision can be added to the indemnity section of the contract expressly stating that the indemnification obligations survive the termination of the contract.

II. LOUISIANA ANTI-INDEMNITY ISSUES

Several excellent papers have been written with respect to Louisiana anti-indemnity laws. One paper was presented by Frank Neuner for the 1999 Houston Marine Insurance Seminar. Another paper was presented by Ed Johnson at the 1999 Southeastern Admiralty Law Institute, which subsequently was published in *The Maritime Lawyer*.^{136/} Both Mr. Neuner and Mr. Johnson are Louisiana lawyers who are very knowledgeable regarding the application of Louisiana anti-indemnity laws. We wish to acknowledge the assistance provided by their papers in the development of this section.

^{134/} *Id.* at 36.

^{135/} *Fenno v. Jacobe*, 657 S.W.2d 844 (Tex. App.--Houston [1st Dist.] 1983, writ ref'd n.r.e.); *Gafnea v. Pasquale Food Co., Inc.*, 454 So.2d 1366 (Ala. 1984) (citing Corbin, *Contracts* § 684 and Williston, *Contracts* § 90).

^{136/} 24 Mar. Law. 85 (Winter, 1999).

The following issues are addressed in this paper regarding Louisiana anti-indemnity laws and are illustrated by the most recent cases decided in the last several years: (1) applicability of the Louisiana Oil Field Anti-Indemnity Act (hereinafter referred to as the “LOIA”); (2) the limitation of additional insured provisions by the LOIA; (3) the limitation of waiver of subrogation provisions by the LOIA; and (4) an exception to the LOIA if the party seeking indemnity is without fault.

A. Applicability of the LOIA

The LOIA is a broader statute than the Texas Oil Field Anti-Indemnity Act. It not only prohibits most contractual indemnification provisions; it also voids “waivers of subrogation, additional named insured endorsements, or any other form of insurance protection which would frustrate or circumvent prohibitions of [the LOIA]. . .”^{137/}

The LOIA additionally has a wider scope than the TOIA, stating that it extends to the following agreements:

“The term ‘agreement,’ as it pertains to a well for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, as used in this Section, any agreement or understanding, written or oral, concerning any operations related to the exploration, development, production, or transportation of oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, including but not limited to drilling, deepening, reworking, repairing, improving, testing, treating, perforating, acidizing, logging, conditioning, altering, plugging, or otherwise rendering services in or in connection with any well drilled for the purpose of producing or excavating, constructing, improving, or otherwise rendering services in connection with any mine shaft, drift, or other structure intended for use in the exploration for or production of any mineral, or any agreement to perform any portion of any such work or services or any act collateral thereto, including the furnishing or rental of equipment, incidental

^{137/} La. R.S. 9:2780(G)(2003).

transportation, and other goods and services furnished in connection with any such service or operation.^{138/}

Numerous state and federal cases from Louisiana have addressed the scope of this language. For example, in *Transcontinental Gas Pipe Corp. v. Transportation Insurance Co.*, the United States Court of Appeals for the Fifth Circuit considered the issue of whether the LOIA applied to a contract for sandblasting and painting services on a platform utilized for the transportation of natural gas.^{139/} The Fifth Circuit developed a 10-factor test to determine when gas transmission no longer “pertains to a well” as required by the LOIA.^{140/} The *Transcontinental Gas* case was cited by approval by the Louisiana Supreme Court in *Fontenot v. Chevron U.S.A., Inc.*^{141/}

^{138/} La. R.S. 9:2780(C)(2003).

^{139/} 953 F.2d 985 (5th Cir. 1992).

^{140/} These factors are: (1) whether the structures or facilities to which the contract applies or with which it is associated, e.g. production platforms, pipelines, junction platforms, etc., are part of an in-field gas gathering system; (2) what is the geographical location of the facility or system relative to the well or wells; (3) whether the structure in question is a pipeline or is closely involved with a pipeline; (4) if so, whether that line picks up gas from a single well or a single production platform or instead carries commingled gas originating from different wells or production facilities; (5) whether the pipeline is a main transmission or trunk line; (6) what is the location of the facility or structure relative to compressors, regulating stations, processing facilities or the like; (7) what is the purpose or function of the facility or structure in question; (8) what if any facilities or processes intervene between the wellhead and the structure or facility in question, e.g., “heater treaters,” compressor facilities, separators, gauging installations, treatment plants, etc.; (9) who owns and operates the facility or structure in question, and who owns and operates the well or wells that produce the gas in question; (10) and any number of other details affecting the functional and geographical nexus between “a well” and the structure or facility that is the object of the agreement under scrutiny. *Transcontinental* at 994-995.

^{141/} 676 So.2d 557 (La. 1996).

The application of the general statutory guidelines thus has been achieved on a case by case basis. The application is illustrated by the recent Fifth Circuit case of *Verdine v. Ensco Offshore Co.*^{142/} In *Verdine*, the court considered whether the LOIA applied to an agreement for repairs on a dismantled fixed platform rig. After analyzing the *Transcontinental Gas* case, the *Fontenot* case, and a number of other prior cases considering the scope of the LOIA, the Fifth Circuit held as follows:

The Louisiana Legislature clearly envisioned the Act’s application to agreements for services on structures that were not developing, producing, or transporting oil or gas or geographically connected to a specific well. We do not interpret the Legislature’s requirement that an agreement pertain to a well in such a restrictive manner that we overlook agreements to which the Act was intended to apply. The Act encompasses agreements for services on structures intended for use in the oil and gas industry, so long as the agreement pertains to a well or wells.^{143/}

The *Verdine* case is an example of the broad scope given to the applicability of the LOIA by Louisiana courts.

B. Application of the LOIA to Additional Insured Provisions

As noted above, the LOIA specifically voids any additional insured endorsements “which would frustrate or circumvent prohibitions of [the LOIA] . . .”^{144/} As a result, numerous courts have held that additional insured provisions generally are invalid under the LOIA because they would frustrate the purpose of the Act.^{145/} However, in *Marcel v. Placid Oil Co.*,^{146/} the Fifth Circuit

^{142/} 255 F.3d 246 (5th Cir. 2001).

^{143/} 255 F.3d at 253-254.

^{144/} La. R.S. 9:2780(G)(2003).

^{145/} See, e.g., *Roberts v. Energy Development Corp.*, 235 F.3d 935 (5th Cir. 2000); *Hodgen v. Forest Oil* (continued...)

recognized an exception to this general rule and determined that, when an additional insured paid the entire cost of obtaining the additional insured coverage in the other contracting party's policy, the purposes of the LOIA would not be frustrated and the additional provision would be valid and enforceable. If the person seeking additional insured status did not actually pay for the coverage, then the *Marcel* exception would not apply.^{147/}

The recent case of *Rogers v. Samedan Oil Corp.*^{148/} further addresses the *Marcel* exception. In the *Rogers* case, Samedan sought coverage from a liability policy issued to Pride Offshore by Lexington Insurance Company. The Lexington CGL policy contained an endorsement entitled "Louisiana Anti-Indemnity Statute Coverage" which stated that Samedan was an "Indemnified Party (Anticipated)" and that Samedan therefore was a named insured in the Lexington policy, "but only as to those claims and liabilities as to which the parties have stated in the Contract their intent (independent of issues regarding enforceability) are borne by Contractor."^{149/} Lexington charged Samedan \$2,000 per year for the coverage provided by this endorsement, and Samedan paid the premium with no contribution from Pride Offshore. Lexington later argued that the endorsement naming Samedan as an indemnified party was voided under the LOIA. After reviewing the *Marcel*

^{145/}(...continued)

Corp., 87 F.3d 1512 (5th Cir. 1996); *Davis v. Mobil Oil Exploration & Producing Southeast, Inc.*, 864 F.2d 1171 (5th Cir. 1989).

^{146/} 11 F.3d 563 (5th Cir. 1994).

^{147/} *See Patterson v. Conoco, Inc.*, 670 F.Supp. 182 (W.D. La. 1987).

^{148/} 308 F.3d 477 (5th Cir. 2002).

^{149/} 308 F.3d at 480.

case, the Fifth Circuit found that the Lexington endorsement fell within the purview of the *Marcel* exception and therefore did not violate the LOIA.^{150/}

C. Application of the LOIA to Waivers of Subrogation

As noted above, the LOIA voids “waivers of subrogation . . . which would frustrate or circumvent prohibitions of [the LOIA]. . .”.^{151/} In *Fontenot v. Chevron U.S.A., Inc.*,^{152/} the Louisiana Supreme Court considered whether a waiver of subrogation provision contained in a worker’s compensation policy violated the LOIA. The court determined that the waiver of subrogation provision would not frustrate the purpose of the LOIA, because Chevron, the party attempting to enforce the waiver of subrogation provision, was not seeking contractual indemnification and also because Chevron was never adjudicated at fault in the underlying bodily injury claim.^{153/} Under these circumstances, a waiver of subrogation clause, when used alone, would not violate the LOIA; rather, a waiver of subrogation clause only would be voided by the Act when a party sought to enforce it in conjunction with the enforcement of a contractual indemnification provision.

This principle was again recently illustrated in the case of *Hudson v. Forest Oil Corp.*^{154/} In this case, the United States District Court for the Eastern District of Louisiana stated as follows:

^{150/} 308 F.3d at 482.

^{151/} L. R.S. 9:2780(G)(2003).

^{152/} 676 So.2d 557 (La. 1996). *But see Amoco Prod. Comp. v. Lexington Ins. Co.*, 745 So.2d 676 (La. App. 1999), *writ denied*, 755 So.2d 253 (La. 2000).

^{153/} 676 So.2d at 565.

^{154/} 2003 U.S. Dist. LEXIS 9218 (E.D. La. 2003).

Both cases [*Fontenot* and *Forest Oil*] involve indemnification agreements between an oil company and a contractor, as well as a waiver of subrogation clause included in the worker's compensation insurance policy. Like in *Fontenot*, Ace agreed to waive its subrogation rights for reimbursement in exchange for an increased premium paid by Coastal. Ace argues that *Fontenot* is factually dissimilar because Forest Oil actually made a claim for indemnification from Coastal, where Chevron did not. It is clear that Forest Oil did originally seek indemnification from Coastal for and against Hudson's [the plaintiff's] tort claim. However, Coastal rejected Forest Oil's demand and Forest Oil proceeded to defend the claim on its own. No third-party demand was ever filed against Coastal by Forest Oil. . . . Like in *Fontenot*, Forest Oil was never adjudicated at fault. As a result, there was no shifting of liability under the indemnification clause and Coastal thus was never on the hook for any tort damages suffered by Hudson. As in *Fontenot*, the waiver of subrogation clause in the Ace policy does not appear to frustrate the purposes of the LOIA. Therefore, the LOIA is inapplicable to the instant case.^{155/}

D. Limited Exception to the LOIA When an Indemnitee is Found to be Without Fault

In the case of *Meloy v. Conoco, Inc.*, the Louisiana Supreme Court determined that an indemnitee found to be without fault could recover its costs of defense.^{156/} In order for the exception to apply, there must be a determination that the party seeking indemnity was without fault. Thus, if the party seeking indemnity settled the underlying case prior to any determination of fault being made, that party would be precluded from seeking the exception and its claim for defense costs would be nullified by the LOIA.^{157/}

^{155/} 2003 U.S. Dist. LEXIS 9218 at *20-*21.

^{156/} 504 So.2d 833, 839 (La. 1987).

^{157/} *Tanksley v. Gulf Oil Corp.*, 848 F.2d 515 (5th Cir. 1988); *Melancon v. Amoco Production Co.*, 834 F.2d 1238 (5th Cir. 1988); *Morgan v. Rowan Cos.*, 2002 U.S. Dist. LEXIS 17920 (E.D. La. 2002).

This exception to the LOIA recently was considered in a different context by the United States District Court for the Eastern District of Louisiana in the case of *American Home Assurance Co. v. Chevron U.S.A., Inc.*^{158/} In this case, Blackmon, an employee of M-1, was injured while working with personnel from Halliburton Energy Services on a rig operated by Chevron U.S.A. AIG, the employer's worker's compensation carrier for M-1, settled the Blackmon litigation for \$2,000,000. As part of the settlement, M-1 assigned its rights to AIG, and AIG then sought to recover the \$2,000,000 from Chevron and Halliburton. The court refused to allow this approach to void the contractual indemnification to which Chevron and Halliburton claimed to be entitled, stating as follows:

However, where this case differs factually from *Tanksley*^{159/} is that Chevron and Halliburton chose litigation over settlement in this matter. Both defendants declined to participate in the settlement of this matter with full knowledge that an adjudication of no fault would allow them to uphold the indemnity agreements and preclude the application of the LOIA; this decision not to participate was essentially swept out from under them by the compensation insurer of M-1. . . . If Chevron and Halliburton had chosen to settle the Blackmon matter and then sought to have their respective fault adjudicated, they too would have be foreclosed from pursuing their matter, as Chevron was in *Tanksley*. Such is not the case here. Chevron and Halliburton chose litigation, and the attempt by AIG to pay the settlement, acquire M-1's rights, and to pursue contribution from Chevron and Halliburton, was merely an end-around attempt to void the indemnity agreements under the veil of jurisprudential precedent which is factually different from the Blackmon matter.^{160/}

^{158/} 2003 U.S. Dist. LEXIS 15401 (E.D. La. 2003).

^{159/} *Tanksley v. Gulf Oil Corp.*, 848 F.2d 515 (5th Cir. 1988).

^{160/} 2003 U.S. Dist. LEXIS 15401 at *19.

III. MARITIME ANTI-INDEMNITY ISSUES

Contractual indemnity agreements are generally valid and enforceable under maritime law.^{161/} However, Congress has created certain prohibitions to contractual indemnity agreements in the Longshoremen's & Harbor Workers' Compensation Act ("LHWCA"). The following additional prohibitions or restrictions have been created by maritime courts: (1) the requirement of specificity; (2) restrictions in the scope of the indemnity agreement; (3) the requirement of conspicuousness; (4) restrictions on "flow through" contractual indemnity; (5) limitation on indemnification for gross negligence; and (6) restrictions on contractual indemnity provisions in towage contracts (the *Bisso* doctrine). Also discussed will be the effect on additional insured provisions by the contractual indemnity restrictions of the LHWCA and the *Bisso* doctrine.

A. Requirement of Specificity

An indemnity clause in a maritime contract will be enforceable when the language of the indemnity provision is clear and unequivocal. The Fifth Circuit expressed this principle in the *Transcontinental Gas* case as follows:

While it need not be done in any particular language or form, unless the intention is unequivocally expressed in the plainest of words, the law will consider that the parties did not undertake to indemnify one against the consequences of his own negligence. . . . The purpose to impose this extraordinary liability on the Indemnitor must be spelled out in an unmistakable term. It cannot come from reading into the general words used the fullest meaning which lexicography would permit.^{162/}

^{161/} *Lirette v. Popich Bros. Water Transp., Inc.*, 699 F.2d 725, 728 (5th Cir. 1983); *Laughlin v. Falcon Operators, Inc.*, 2002 U.S. Dist. LEXIS 23394 (E.D. La. 2002).

^{162/} *Transcontinental Gas Pipeline Corp. v. Mobil Drilling Barge MR. CHARLIE, et al*, 424 F.2d 684, 692 (5th Cir. 1970), *cert. denied*, 400 U.S. 832 (1970).

In *Transcontinental Gas*, Transco sued for damage to a pipeline as a result of a drilling rig moving onto location. A federal district court determined the operator (Signal Oil & Gas) and the drilling contractor (ODECO) were both negligent in causing the damage. The issue concerned the obligation of ODECO to indemnify Signal in accordance with a contractual indemnity provision contained within the contract between them. The Fifth Circuit noted that the relative percentage of the parties' fault was not important in determining contractual indemnity. Also, the court stated that the contract need not contain "the talismanic words 'even though caused, occasioned or contributed to by the negligence, sole or concurrent, of the Indemnitee' or like expressions"; however, the language must express this intention.^{163/}

Thus, although it is not necessary to use any particular words such as negligence, the indemnity language in the contract must clearly demonstrate that the parties agreed for one party to indemnify the other party even for the consequences of the indemnitee's own negligence. The Fifth Circuit has continued to adhere to this general rule of specificity regarding construction of indemnity agreements in maritime contracts.^{164/}

^{163/} 424 F.2d at 692.

^{164/} See *Theriot v. Bay Drilling Corp.*, 783 F.2d 527 (5th Cir. 1986); *Corbitt v. Diamond M Drilling Co.*, 654 F.2d 329 (5th Cir. 1981); *Dow Chemical Co. v. Dixie Carriers, Inc.*, 463 F.2d 120 (5th Cir. 1972); *Lanasse v. Travelers Insurance Co.*, 450 F.2d 580 (5th Cir. 1971).

B. Restrictions in the Scope of the Indemnity Agreement

Under maritime law, the incident giving rise to the injury or damage must be performed under the contract in order to trigger any indemnity obligation. The Fifth Circuit Court of Appeals, however, has interpreted language such as “arising in connection herewith” in a broad manner.^{165/}

In the *Fontenot* decision, the Fifth Circuit Court of Appeals held as follows:

... [W]here the presence of the injured party at the scene of the injury is attributable to or might reasonably be anticipated by his employment responsibilities, then his injuries occur “in connection with” those responsibilities. It is irrelevant that the person is not at that moment performing services or that the injury results from an activity not encompassed by the employer’s contractual undertakings.^{166/}

In *Fontenot*, the employee of an oil company’s contractor was injured on a drilling vessel’s heliport while in en route to perform work on a fixed platform that was under contract to the oil company.^{167/} The drilling vessel where the injury occurred was also under contract to the oil company.^{168/} The owner of the drilling vessel demanded indemnity from the oil company based on an indemnity provision in the charter agreement for the drilling vessel.^{169/} The trial court denied indemnity on the basis that injured party’s claim was not one “arising in connection herewith”

^{165/} *Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207 (5th Cir. 1986); *Wilson v. Job, Inc.*, 958 F.2d 653 (5th Cir. 1992). *But see Marathon Pipe Line Co. v. M/V Sea Level II*, 802 F.2d 585 (5th Cir. 1986) (“occurring in connection with, arising out of, or in any wise incident or related to contractor’s performing services and operations” language did not include damage to underwater pipeline that resulted from re-positioning of vessel’s anchor, which did not fall within the indemnitor’s obligation under the contract to mark the pipeline that was damaged).

^{166/} *Fontenot v. Mesa Petroleum Co.*, 791 F.2d at 1210.

^{167/} *Id.*

^{168/} *Id.*

^{169/} *Id.*

because the use of the heliport was only incidental to the business of drilling an oil well, the stated purpose of the contract.^{170/} The Fifth Circuit reversed the trial court's decision and enforced the indemnity provision, because the indemnity provision contemplated the operation of a heliport on board the drilling vessel, and the accident in question occurred "in connection []with" the operation of the heliport.

Other indemnity provisions with more restrictive language have been interpreted to be more limited in scope. For example, in *Lanasse v. Travelers Insurance Co.*,^{171/} a vessel owner's employee was injured on a fixed platform by the negligence of a crane operator. The indemnity provision in question limited the indemnity to claims arising in connection with the possession, navigation, management and operation of a vessel.^{172/} Contractual indemnity was denied because the indemnity agreement in the time charter was limited to operations of the vessel, and it did not extend to the operation of a crane on a fixed platform. Other federal courts have reached a similar conclusion when applying maritime law.^{173/}

^{170/} *Id.*

^{171/} 450 F.2d 850 (5th Cir. 1971), *cert denied*, 406 U.S. 921 (1972).

^{172/} *Id.* at 852.

^{173/} *Gaspard v. Offshore Crane & Equipment, Inc.*, 106 F.2d 1232 (5th Cir. 1997); *Randall v. Chevron USA, Inc.*, 13 F.3d 888 (5th Cir. 1994); *Wilson v. Jobe, Inc.*, 958 F.2d 653 (5th Cir. 1992); *Smith v. Tenneco Oil Co.*, 803 F.2d 1386 (5th Cir. 1986).

A decision by the Louisiana Supreme Court discussed the *Fontenot* and *Lanasse* decisions and cautioned: “Neither of these cases, however, create concrete rules of law regarding the applicability of indemnity provisions. Rather, each was decided based upon the language of the contract at issue.”^{174/}

C. Requirement of Conspicuousness

An indemnity or exculpatory provision must be conspicuous to be enforceable under maritime law.^{175/} The Fifth Circuit Court of Appeals has held that to be enforceable, clauses exempting liability from one’s own negligence must be “specific and conspicuous.”^{176/} In *Coastal Iron Works, Inc. v. Petty Ray Geophysical*^{177/}, the Fifth Circuit Court of Appeals appeared to adopt the standard that indemnity agreements are considered conspicuous when a reasonable person against whom the clause is to operate should have noticed the clause.^{178/} A federal district court has found

^{174/} *Rodrique v. Legros*, 563 So.2d 248 (La. 1990).

^{175/} *Orduna S.A. v. Zen-Noh Grain Corp.*, 913 F.2d 1149, 1153 (5th Cir. 1990); *Coastal Iron Works, Inc. v. Petty Ray Geophysical*, 783 F.2d 577, 582 (5th Cir. 1986); *Harrison v. S/V WANDERER*, 25 F. Supp.2d 754 (S.D. Tex. 1998).

^{176/} 913 F.2d at 1153-1154 (citing *Restatement Second of Contracts* § 195, *comment b* (1981)). In *Orduna*, the shipowner’s agent signed a berth application that incorporated the terms of a dock tariff by reference, but did not identify by either date or number the specific dock tariff reported to exculpate the dock owner from its own negligence. Based on the “specific and conspicuous” requirement, the Fifth Circuit Court of Appeals affirmed the district court’s finding that the exculpatory provision was unenforceable because the dock owner failed to prove that the shipowner received or consented to the terms of the tariff.

^{177/} 783 F.2d 577.

^{178/} 783 F.2d at 582. In the *Coastal Iron Works* case, the Court found that a reasonably prudent person should have noticed a red letter clause in a ship repair contract that limited the shipyard’s liability. The provision was clearly displayed on the back page of the repair contract, and there was prominent language at the bottom of the contract’s front page informing a prospective signer of the existence of important terms and conditions on the contract’s reverse side. The Court further noted that
(continued...)

that the terms of a release provision were conspicuous by their segregation on an isolated, single sheet of paper that was separate and apart from the other terms of the contract.^{179/}

D. Flow Through Indemnity - The Corbitt Problem

The Fifth Circuit Court of Appeals has decided several cases that consider whether an indemnitor would be responsible for an indemnitee's contractual undertakings of indemnification to third parties. In *Corbitt v. Diamond M Drilling Co.*, an employee of Sladco was injured.^{180/} Sladco owed Shell Oil contractual indemnification for injuries to its employees. Shell in turn owed contractual indemnification to Diamond M Drilling for injuries to the employees of its subcontractors, like Sladco. The Fifth Circuit held that the contract between Sladco and Shell did not expressly provide that Sladco would indemnify Shell for Shell's contractual liability to third parties; thus, Sladco was not required to indemnify Shell for Shell's contractual obligation to Diamond M Drilling.^{181/} A similar result was obtained in *Foreman v. Exxon Corporation*.^{182/}

More recently, the Fifth Circuit Court of Appeals distinguished the *Corbitt v. Diamond M. Drilling Co.* decision and held that a contract did require one party to indemnify another for its contractual liability owed to third parties. In *Sumrall v. Ensco Offshore Co.*^{183/}, an employee of

^{178/}(...continued)

previous contracts between the same parties contained the same provision.

^{179/} 25 F. Supp. 2d at 757-758.

^{180/} 654 F.2d 329 (5th Cir. 1981).

^{181/} 654 F.2d at 333.

^{182/} 770 F.2d 490, 495-498 (5th Cir. 1985).

^{183/} 291 F.3d 316 (5th Cir. 2002).

Premiere was injured. Premiere owed contractual indemnification to Santa Fe for injuries to its employees. Like Shell Oil in the *Corbitt v. Diamond M. Drilling Co.* decision, Santa Fe in turn owed contractual indemnification to EnSCO for injuries to the employees of its contractors, like Premiere. However, the Fifth Circuit held that Premiere was required to indemnify Santa Fe for Santa Fe's contractual indemnity obligation owed to EnSCO for the following reasons. First, unlike the contract in *Corbitt v. Diamond M. Drilling Co.*, the indemnity provision in the Santa Fe/Premiere contract contained languages that required Premiere to indemnify Santa Fe for claims "whether arising in tort or contract." The Fifth Circuit found that this language reflected an intent on the part of Premiere to indemnify Santa Fe for Santa Fe's contractual obligations to indemnify third parties. Second, the Fifth Circuit also found further evidence of such an intent in language that required Premiere to indemnify Santa Fe for "all claims . . . of whatsoever nature or character... whether or not caused by the legal duty of [Santa Fe]. . .". Third, the Fifth Circuit also relied on language in the Santa Fe/Premiere contract that expressly indicated Premiere's intent to indemnify not only Santa Fe, but also Santa Fe's "contractors and subcontractors." Fourth, in at least six cases since the *Corbitt* decision, the Fifth Circuit has found that a party similarly situated to Premiere owed contractual indemnity to a party such as Santa Fe when the agreement required a party like Premiere to indemnify third party contractors, subcontractors, and/or invitees of a party like Santa Fe.^{184/}

^{184/} *Demette v. Falcon Drilling Co., Inc.*, 280 F.3d 492 (5th Cir. 2002); *Campbell v. Sonat Offshore Drilling, Inc.*, 27 F.3d 185 (5th Cir. 1994); *Campbell v. Sonat Offshore Drilling Inc.*, 979 F.2d 1115 (5th Cir. 1992); *Babcock v. Cont'l Oil Co.*, 792 F.2d 1346 (5th Cir. 1986) (per curiam); *Mills v. Zapata Drilling Co., Inc.*, 722 F.2d 1170 (5th Cir. 1983), overruled on other grounds, *Kelly v. Lee's Old Fashioned Hamburgers, Inc.*, 908 F.2d 1218 (5th Cir. 1990) (per curiam); *Lirette v. Popich Bros. Water Transp., Inc.*, 699 F.2d 725 (5th Cir. 1983).

E. Indemnification for Gross Negligence

There is limited case law discussing the issue of contractual indemnification for punitive damages under the general maritime law. The few federal courts that have addressed the issue have held that it is against the public policy of the general maritime law to allow an indemnitee to obtain indemnity for punitive damages assessed against the indemnitee.^{185/} The Ninth Circuit recently stated: “We are persuaded . . . that a party to a maritime contract should not be permitted to shield itself contractually from liability for gross negligence.”^{186/} Similarly, a federal district court from Louisiana held as follows:

. . . in the case at bar we are confronted with contractual indemnification. No clearer example of a situation which would subvert the purposes of awarding punitive damages can be imagined than to permit such indemnification. To require a party, without recompense, to shoulder the burden of egregious conduct by another and hence permit the other to avoid punitive damage liability would make a mockery of the very concept. In situations where the defendant’s conduct is so extreme as to merit an award of punitive damages, the cost of such must be placed upon the party responsible, and not transferred to a party innocent of any wrongdoing. Accordingly, this Court feels that, even if indemnification is allowed, liability for punitive damages will not be compensable.^{187/}

^{185/} *Royal Ins. Co. of Am. v. Southwest Marine*, 194 F.3d 1009 (9th Cir. 1999); *Daughdrill v. Ocean Drilling & Exploration Co.*, 665 F. Supp. 477 (E.D. La. 1987).

^{186/} *Royal Ins. Co. of Am. v. Southwest Marine*, 194 F.3d 1009 (9th Cir. 1999).

^{187/} *Daughdrill v. Ocean Drilling & Exploration Co.*, 665 F. Supp. 477 (E.D. La. 1987).

The Fifth and First Circuits have indicated in *dicta* that indemnification agreements or exculpatory clauses extending to gross negligence may be against public policy, but both courts concluded that gross negligence had not been established in these cases.^{188/}

A federal district court from Rhode Island, applying the general maritime law, determined that a party could not obtain “contribution and indemnity” from another party for any punitive damages that had been assessed against it.^{189/} However, in this case, it appears that the court was referring to some type of tort indemnification as opposed to contractual indemnification. Nevertheless, the court cited the same policy:

Given the policies supporting punitive damages, contribution and indemnity cannot be maintained for such awards. . . . [punitive damages] are awarded to punish the wrongdoer for its actions and to deter it and others from similar acts. . . . Indemnity and contribution would subvert the purposes of punitive damages.^{190/}

In another related case, the Eleventh Circuit Court of Appeals decided that an indemnitee could not obtain contractual indemnity for penalty wages, because allowing a vessel owner to shift the effect of the penalty wage statute would violate public policy.^{191/}

Thus, the existing case law has uniformly held that it is against the public policy of the general maritime law for a party to obtain indemnification for any punitive damages assessed against it.

^{188/} *Todd Shipyards Corp. v. Turbine Serv., Inc.*, 674 F.2d 401, 411 (5th Cir. 1982); *La Esperanza De P.R., Inc. v. Perez y Cia. De Puerto Rico, Inc.*, 124 F.3d 10, 19 (1st Cir. 1997).

^{189/} *Rollins v. Peterson Builders, Inc.*, 761 F. Supp. 918 (D.R.I. 1990).

^{190/} 761 F. Supp. at 929.

^{191/} *Chung, Yong Il v. Overseas Navigation Co., Ltd.*, 774 F.2d 1043, 1051-53 (11th Cir. 1985).

F. The Longshoremen's & Harbor Workers' Compensation Act

1. Section 905(a)

Employees that fall within the scope of the Longshore & Harbor Workers' Compensation Act (hereinafter referred to as "the LHWCA") are entitled to receive compensation and medical benefits from their employer under the LHWCA.^{192/} In general, Section 905(a) of the LHWCA bars claims by third parties against a LHWCA employer for contribution or indemnity in tort.^{193/}

2. Section 905(b)

Section 905(b) provides a maritime worker covered by the LHWCA with a negligence cause of action against vessels.^{194/} Specifically, Section 905(b) provides in pertinent part, that:

[i]n the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and *any agreements or warranties to the contrary shall be void.*^{195/} (emphasis supplied)

^{192/} 33 U.S.C. § 904 & § 907 (Supp. IV 1986).

^{193/} *Ketchum v. Gulf Oil Corp.* 798 F.2d 159 (5th Cir. 1986); *Moore v. Phillips Petroleum Co.*, 912 F.2d 789 (5th Cir. 1990); Yeates, Dye and Garcia, *Contribution and Indemnity in Maritime Litigation*, 30 S. Tex. L. J. 215, 257 (1989).

^{194/} *Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115, 1124 (5th Cir. 1992). Section 902(21) defines vessel as a vessel owner, owner *pro hac vice*, agent, operator, charter or bare boat charterer, master, officer, or crew member. 33 U.S.C. § 902(21) (Supp. IV 1986).

^{195/} 33 U.S.C. § 905(b) (Supp. IV 1986).

Except as provided by Section 905(c), an employer of a maritime worker under the LHWCA cannot be required to contractually indemnify a vessel owner, operator or charterer.^{196/} However, a non-vessel party, *i.e.* a party other than a vessel owner, operator or charterer, can obtain contractual indemnity from an employer of a maritime worker under the LHWCA.^{197/} In this circumstance, Section 905(b) has been held by the Fifth Circuit Court of Appeals to allow contractual indemnity between a non-vessel party and a LHWCA employer.^{198/}

3. **Section 905(c)**

Section 905(c) narrows the scope of Section 905(b)'s prohibition against indemnity agreements between LHWCA employers and vessel owners, operators or charterers.^{199/} Congress enacted Section 905(c) to make clear that certain indemnity contracts between an LHWCA employer and a vessel owner, operator or charterer on the Outer Continental Shelf are not voided by Section 905(b).^{200/} Section 905(c) provides as follows:

Nothing contained in subsection (b) of this Section shall preclude the enforcement according to its terms of any *reciprocal* indemnity provision whereby the employer a person entitled to receive benefits under this chapter by virtue of Section 1333 of Title 43 and the vessel

^{196/} *Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d at 1124; *Wagner v. McDermott, Inc.*, 79 F.3d 20, 22 (5th Cir. 1996).

^{197/} *Wagner v. McDermott, Inc.*, 79 F.3d at 22-23.

^{198/} *Olsen v. Shell Oil Co*, 595 F.2d 1099 (1979), *cert. denied*, 444 U.S. 979, 100 S. Ct. 480, 62 L. Ed. 2d (1979); *Pippen v. Shell Oil Co.*, 661 F.2d 378, 386-87 (5th Cir. 1981); *Avondale Shipyards v. Insured Lloyd's*, 786 F.2d 1265, 1274 (5th Cir. 1986); *Tran v. Manitowac Eng'g Co.*, 767 F.2d 223, 228 (5th Cir. 1985).

^{199/} *Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115, 1124 (5th Cir. 1992).

^{200/} *Id* at 1125, n.14. The Outer Continental Shelf describes the area located greater than three (3) miles from shore except in Texas where the Outer Continental Shelf begins ten (10) miles from the shore.

agreed to defend and indemnify the other for cost of defense and loss or liability for damages arising out of or resulting from death or bodily injury to their employees.^{201/} (emphasis supplied)

Section 905(c) permits contractual indemnity between an LHWCA employer and a vessel owner, operator or charterer if: (1) the LHWCA is applicable pursuant to the Outer Continental Shelf Lands Act (“OCSLA”) based on a two step inquiry; and (2) the provision is a reciprocal indemnity provision of the knock-for-knock variety pursuant to which the employer and the vessel owner agree that each will indemnify the other for claims by their respective employees.^{202/}

In *Demette v. Falcon Drilling Co., Inc.*, the Fifth Circuit Court of Appeals recently held that for OCSLA to apply, it must first be determined whether the worker’s injury occurred on an OCSLA situs.^{203/} If the injury occurred on an OCSLA situs, an analysis must be performed to ascertain whether OCSLA makes state law applicable.^{204/} As part of the second step, a determination also must

^{201/} 33 U.S.C. § 905(c) (Supp. IV 1986).

^{202/} *Demette v. Falcon Drilling Co., Inc.*, 280 F.3d 492, 500 (5th Cir. 2002).

^{203/} OCSLA applies to the following locations: 1) the subsoil and seabed of the OCS; 2) any artificial island, installation, or other device if (a) permanently or temporarily attached to the seabed of the OCS; and (b) it has been erected on the seabed of the OCS; and (c) its presence or the OCS is to explore for, develop, or produce resources from the OCS; (3) any artificial island, installation, or other devices if (a) it is permanently or temporarily attached to the seabed of the OCS, and (b) it is not a ship or a vessel, and (c) its presence on the OCS is to transport resources from the OCS. *Demette v. Falcon Drilling Co., Inc.*, 280 F.3d 492 (5th Cir. 2002) *Id.* A jack-up drilling and semi-submersible rig, when attached to the Outer Continental Shelf, is considered to be an OCSLA situs. *Id.* at 498-500. *See also Diamond Offshore Co. v. A&B Builders, Inc.*, 302 F.3d 531 (5th Cir. 2002).

^{204/} To determine whether state law applies, the Fifth Circuit Court of Appeals has fashioned the following three part test for state law to apply: 1) the controversy must arise on a situs covered by OCSLA (i.e., the subsoil, seabed, or artificial structure permanently or temporarily attached thereto); 2) federal maritime law not apply of its own force; 3) the state law must not be inconsistent with federal law. *Demette v. Falcon Drilling Co., Inc.*, 280 F.3d 492, 500 (5th Cir. 2002). The primary factor is whether maritime law applies of its own force. *Id.* at 500. In personal injury cases, the Fifth Circuit Court of Appeals uses a two-step test under the decision of *Davis & Sons, Inc. v. Gulf* (continued...)

be made as to whether the injured party's status makes the LHWCA applicable under OCSLA.^{205/}

If the two step test is satisfied, Section 905(c) potentially provides a important exception to the prohibition against indemnity provisions between the employer of the LHWCA worker and a vessel owner, charterer or operator.

Campbell v. Sonat Offshore Drilling, Inc.^{206/} is one of the principal Fifth Circuit Court of Appeals cases to interpret what is considered to be a reciprocal indemnity provision under Section 905(c). The injured party in *Campbell*, an employee of Frank's Casing, brought a personal injury action against Sonat and UTP. Frank's had contracted with UTP to defend and indemnify UTP and its contractors, but Frank's had no agreement with Sonat. Based on Frank's contract with UTP, Sonat, the drilling contractor for UTP, sought indemnity from Frank's, the LHWCA employer, as a contractor of UTP. The Fifth Circuit responded to Frank's argument that the indemnity agreements were not reciprocal in the following manner:

^{204/}(...continued)

Oil Corp., 919 F.2d 313, 315 (5th Cir. 1990) to determine whether a contract is maritime. *Id.* First, the contract's historical treatment in the jurisprudence must be considered. *Id.* Second, a six factor inquiry must be conducted to analyze whether the contract has sufficient "salty flavor" to be deemed a maritime contract. *Id.* If a contract is a maritime contract, federal maritime law applies of its own force, and state law does not apply. *Id.* A contract to provide offshore casing services on a jack-up drilling rig has been found to be a maritime contract, principally because casing is an integral part of drilling, the primary purpose of the jack-up drilling vessel. *Id.* at 501.

^{205/} For the LHWCA to apply by virtue of OCSLA, the injury must occur as a result of operations conducted on the [OCS] for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources... of the [OCS]." *Demette v. Falcon Drilling Co., Inc.*, 280 F.3d 492, 501 (5th Cir. 2002). An injury while performing casing services on a jack-up drilling rig has been found to satisfy the status test. *Id.* at 501-502.

^{206/} *Id.* See also *Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207, 1213, n.3 (5th Cir. 1986).

Although Sonat may not have agreed to directly indemnify Frank's pursuant to the UTP-Frank's agreement, it did agree to do so pursuant to the drilling contract entered into by Sonat and UTP. Specifically, just as Frank's expressly agreed to indemnify Sonat and UTP's other contractors for claims brought by Frank's employees, Sonat agreed to hold Frank's and UTP's other contractors "harmless"

In sum, Sonat and Frank's were brought together by UTP solely for the purpose of carrying out UTP's oil-drilling operation. In contracting with UTP, Frank's and Sonat explicitly agreed to indemnify each other, and these agreements are unambiguous and completely reciprocal.^{207/}

In view of the Fifth Circuit's conclusion, the reciprocity requirement under Section 905(c) does not require absolute privity between the employer and the vessel.^{208/}

In a more recent decision, the Fifth Circuit Court of Appeals held that the fact that a subcontractor of a drilling contractor agreed to indemnify parties for whom the drilling contractor was working had no effect on whether the drilling contractor and subcontractor agreed to indemnify each other for claims brought on behalf of their employees.^{209/} The subcontractor argued that Section 905(b) voided its obligation to indemnify the drilling contractor for injuries to one of its employees, because only the subcontractor had the obligation to indemnify parties for whom the drilling contractor worked. The Fifth Circuit rejected this argument on the basis that each party agreed to indemnify the other for injuries to their respective employees, and that as a result, the indemnity provisions at issue were reciprocal under 905(c). The Fifth Circuit also has found that a one-sided contractual obligation that requires a party's subcontractor to agree to indemnify the other party does

^{207/} *Id.*

^{208/} *Id.*

^{209/} *Diamond Offshore Co. v. A&B Builders, Inc.*, 302 F3d. (5th Cir. 2002).

not destroy the reciprocal nature of the indemnity provisions.^{210/} The specific indemnity provision at issue obligated one party to require its subcontractors to contractually agree to indemnify the other party for injuries to the subcontractor's employees. However, there was no obligation in the contract that required the other party to require its subcontractors to agree to the same indemnity obligation.

Again, however, Section 905(b)'s proscription against indemnity and Section 905(c)'s exception to the proscription do not apply on the Outer Continental Shelf when the indemnity agreement is between a LHWCA employer and a non-vessel.^{211/} If the contracting party seeking indemnity does not contract in its capacity as a vessel owner, operator or charterer, Section 905(c) will not apply and the Texas or Louisiana Oil-field Anti-Indemnity statutes may void or limit the effect of the indemnity provision in question.^{212/} For example, in *Wagner v. McDermott, Inc.*^{213/}, McDermott entered into a contract to build an offshore platform on the Outer Continental Shelf. An employee of one of McDermott's contractors was injured at the worksite and brought a Section 905(b) claim against McDermott. McDermott sought indemnity from the injured employee's LHWCA employer based on Section 905(c); however, the Fifth Circuit Court of Appeals held that Section 905(c) did not apply, because McDermott contracted with the employer not as a vessel owner but as a contractor who incidentally utilized a vessel to accomplish its work. As a result, the Louisiana Oil Field Anti-Indemnity Act applied to the contract by virtue of the Outer Continental

^{210/} *Sumrall v. Ensco Offshore Co.*, 291 F.3d 316 (5th Cir. 2002).

^{211/} *Wagner v. McDermott, Inc.*, 79 F.3d 20 (5th Cir. 1996).

^{212/} *Wagner v. McDermott, Inc.* 79 F.3d at 22-23; *Knapp v. Chevron USA, Inc.*, 71 F.2d 1123 (5th Cir. 1986); *Doucet v. Gulf Oil Corp.*, 73 F.2d 518 (5th Cir. 1986).

^{213/} 79 F.3d 20 (5th Cir. 1996). *See also*, *Scott v. Delmar Offshore Services, Inc.*, 943 F. Supp. 764 (S.D. Tex. 1996), *aff'd*, 116 F.2d 478 (5th Cir. 1997).

Shelf Lands Act, and the indemnity provision was rendered void under the Louisiana Oil-Field Anti-Indemnity statute.

G. Towage Contracts - Bisso

Exculpatory and indemnity provisions in towage contracts that shift responsibility from the towing vessel to the tow have been found to be unenforceable as against public policy.^{214/} These provisions have been held to be invalid as against public policy for two principal reasons: (1) to discourage negligence by making wrongdoers pay damages; and (2) to protect those requiring services from being “over-reached” by another who has the power to drive hard bargains.^{215/} Pilotage clauses in towing contracts, however, have been considered enforceable when a tug’s captain is onboard the assisted vessel for the purpose of piloting the vessel at least partially under the vessel’s own power.^{216/}

^{214/} *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955); *United States v. Nielson*, 349 U.S. 129 (1955); *Boston Metals Co. v. The Winding Gulf*, 349 U.S. 122 (1955); *Dixilwyn Drilling Corp. v. Crescent Towing & Salvage Co.*, 372 U.S. 697 (1963).

^{215/} Parks, *The Law of Tug, Tow and Pilotage*, 70 (1982).

^{216/} *Sun Oil Co. v. Dowzell Towing Co.*, 287 U.S. 291 (1932).

H. Effect of the Longshoremen's & Harbor Workers' Compensation Act and Bisso on Additional Insured Provisions

The prohibition against indemnity between LHWCA employers and vessel owners, operators or charterers under § 905(b) can be circumvented by inserting an additional insured provision in the applicable contract. In the decision of *Voisin v. ODECO Drilling Co.*,^{217/} the Fifth Circuit Court of Appeals held that Section 905(b) of the LHWCA invalidated a contractual indemnity provision flowing from the employer of the maritime worker covered by the LHWCA to the vessel owner. The Fifth Circuit in *Voisin*, however, also held that the contractual obligations to name the vessel owner as an additional insured in an insurance policy and to waive subrogation rights are not barred by Section 905(b).^{218/} As noted above, however, with careful contract drafting, the additional insured provision can be conditioned upon the scope and legal enforceability of the contractual indemnity agreement.^{219/}

Exculpatory and indemnity provisions in towage contracts that shift responsibility from the towing vessel to the tow have been found to be unenforceable as against public policy.^{220/} However, the Fifth Circuit Court of Appeals has held that cross-insurance endorsements or other insurance provisions in towing agreements which require each party to fully insure its vessel, to obtain waivers

^{217/} 744 F.2d 1174 (5th Cir. 1984), *cert denied*, 470 U.S. 1053 (1955).

^{218/} *Id.* at 1178.

^{219/} See Section III, L, 1 and the discussion of *LeBlanc v. Global Marine Drilling Co.*, 193 F.3d 873 (5th Cir. 1999), *reh'g en banc denied*, 203 F.3d 873 (5th Cir. 1999).

^{220/} *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955); *United States v. Nielson*, 349 U.S. 129 (1955); *Boston Metals Co. v. The Winding Gulf*, 349 U.S. 122 (1955); *Dixilwyn Drilling Corp. v. Crescent Towing & Salvage Co.*, 372 U.S. 697 (1963).

of subrogation, and to name the other party as an additional insured, are not exculpatory clauses and therefore will be upheld.^{221/}

^{221/} *Twenty Grand Offshore, Inc. v. West Indies Carriers, Inc.*, 492 F.2d 679 (5th Cir. 1974); *Fluor Western, Inc. v. G & H Offshore Towing Co.*, 447 F.2d 35 (5th Cir. 1972). See also *Dillingham Tug v. Collier Carbon & Chemical Corp.*, 707 F.2d 1086 (9th Cir. 1983). However, the drafting of such provisions must be precise in order to protect the towing company from liability. *Dow Chemical Co. v. Ashland Oil, Inc.*, 570 F.2d 902 (5th Cir. 1978); *Dow Chemical Co. v. M/V CHARLESDETMAR, JR.*, 545 F.2d 1091 (7th Cir. 1976).