Contractual Indemnity Under Maritime and Louisiana Law

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The production of oil and gas from the ocean bottom is a complex and dangerous activity. This major industry, combining the risks inherent in the drilling field with the perils of the sea, has been recognized as a maritime activity. Men and women who provide the many services required to produce oil and gas upon the navigable waters of the United States are maritime workers subject to admiralty law. When a maritime worker is injured either on a vessel or on a fixed platform beyond 3 miles offshore, his rights are regulated by the Longshoremen's and Harbor Workers' Compensation Act. Beyond the employer-employee relationship, however, are other relationships necessary to the successful undertaking of oil and gas production. Many workers go to vessels and platforms because their employers have executed contracts with the owners to provide needed services. Allocation of risk is an important element of these service contracts in this exceedingly dangerous field. Workers must be transported by vessels or helicopters to drilling locations. Vessels and fixed platforms are vulnerable to high waves and strong winds, and workers are frequently injured or killed through accidents and explosions. These risks, which are the same whether the worker is on a vessel or fixed platform, are compounded by the confusion resulting from the owner's and the contractor's shared control over the operations. The owners, generally in the more powerful bargaining position, shift their potential liability for any losses to the service contractors through indemnity agreements.

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1. "Precise figures are hard to come by, but perhaps as many as 40,000 employees are currently directly or indirectly involved in oil and gas exploration and production from United States-owned rigs." Robertson, Injuries to Marine Petroleum Workers: A Plea for Radical Simplification, 55 TEX. L. REV. 973, 973 (1977).


3. "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operation,... but such term does not include a master or member of a crew of any vessel...." Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 § 948(a), 33 U.S.C. § 9023) (1978). Maritime workers who are masters or members of a crew of a vessel are governed by the Jones Act, 46 U.S.C. § 688 (1970), rather than the Longshoremen's Act. A worker injured on a fixed platform located within three miles from the shores of Louisiana is within the territorial waters of the state and will generally be covered by the Louisiana Workmen's Compensation Act.

The Indemnity Agreement

An indemnity agreement in a service contract determines which party will bear losses incurred during the performance of the contract. The law that governs the obligations of the underlying contract also controls the scope and validity of any indemnity agreement contained therein. Therefore, before the legal effect of the indemnity provision can be determined, the contract must be classified as one governed either by maritime law or state law.

Properly categorizing a contract as one governed by maritime law or state law has become even more important since the passage of Act 427 of the 1981 Regular Session of the Louisiana Legislature. Before this legislation, the general principles applicable to maritime and Louisiana indemnity agreements, with a few narrowly drawn exceptions, were essentially the same. Under the new legislation, indemnity agreements receive very distinct treatment, depending upon whether they are contained in maritime contracts or nonmaritime con-

5. An indemnity contract is:
[a] contract between two parties whereby the one undertakes and agrees to indemnify the other against loss or damage arising from some contemplated act on the part of the indemnitor, or from some responsibility assumed by the indemnitee, or from the claim or demand of a third person, that is, to make good to him such pecuniary damage as he may suffer.
BLACK'S LAW DICTIONARY 692 (5th ed. 1979).

A hold harmless agreement is "[a] contractual arrangement whereby one party assumes the liability inherent in a situation, thereby relieving the other party of responsibility. . . ." Id. at 658.

6. Corbitt v. Diamond M. Drilling Co., 654 F.2d 329 (5th Cir. 1981). Similarly, courts have generally held that admiralty jurisdiction will not extend to torts arising out of a nonmaritime contract. Hollister v. Luke Construction Co., 517 F.2d 920 (5th Cir. 1975); Alfred v. M/V Margaret Lykes, 398 F.2d 684 (5th Cir. 1966); Frankel v. Bethlehem-Fairfield Shipyards, Inc., 132 F.2d 634 (4th Cir. 1942). But cf. Dilorenzo v. Robert E. Lee, Inc., 412 F. Supp. 1012 (E.D. La. 1976) (shipbuilder has a maritime claim for negligence against the vessel, even though the shipbuilding contract itself is not maritime); Lundy v. Litton Systems, Inc., 624 F.2d 590 (5th Cir. 1980) (although a shipbuilding contract is non maritime, a maritime negligence action against a vessel which is 95% complete is allowed under § 905(b) of the LHWCA). Regardless of whether the underlying tort is maritime or nonmaritime, the contractual indemnity provision will be interpreted in accordance with the law which governs the underlying contract.

AN ACT To amend Title 9 of the Louisiana Revised Statutes of 1950 by adding thereto a new Section, to be designated as R.S. 9:2780, to provide for the invalidity of certain indemnity agreements affecting industries engaged in the development, exploration, and exploitation of sources of energy; to provide for exceptions thereto; to provide for the applicability of the Act; and otherwise to provide with respect thereto.

tracts. Unless there is a reasonable basis for inconsistent treatment, parties to indemnity agreements should not be subject to different law based simply upon whether the contract is maritime or non-maritime. In many factual situations, however, although there is no reasonable basis for inconsistent treatment, the enforceability of the indemnity agreement does depend solely upon classification of the contract.

Indemnity agreements have been the source of much confusion and litigation in both maritime law and Louisiana law. The confusion arises because these indemnity agreements bring into conflict two equally weighty principles of law, resulting in judicial decisions which are often legally unsatisfactory and at times inequitable.

One of these principles is the basic foundation of tort law: a person should have freedom to act, but when his acts cause harm to another, he must repair the loss. This liability usually arises from negligence on the part of the actor. However, it may be imposed by operation of law, such as through vicarious liability or strict liability, even in the absence of negligence on the part of the one held responsible.

The rationale behind this tort principle is both practical and ethical. When a person can shift his negligence onto another, there is no financial motive for him to engage in activities in the safest and least wasteful manner. For example, if the indemnitee retains control over the performance of the contract, he might consider only maximum efficiency and profit and disregard potential injury or other damages which may result from his method of operations. If, however, indemnification against his own negligence is not allowed, the prudent employer will consider risk of injury as well as efficiency and profit, thereby avoiding a potential accident.

Insurance permits a person to shift the greater portion of liability for his own negligence to an insurance company. The upholding of an insurance policy, however, should not encourage the insured to be negligent. The risk of an insured suffering a financial loss due to his own

8. This principle is illustrated by La. Civ. Code art. 2315: "Every act whatever of man which causes harm to another obliges him by whose fault it occurred to repair it."

9. Vicarious liability is illustrated by La. Civ. Code art. 2320: "Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed. . . ."

10. Strict liability arises in situations where the one held liable was not negligent, e.g., La. Civ. Code art. 2322: "The owner of a building is answerable for the damage occasioned by its ruin when this is caused by neglect to repair it, or when it is the result of a vice in its original construction."
negligence is far greater than that of a company which shifts its liability for negligence to the contractor he has hired. In many instances, an insured will have to pay higher premiums once he has been negligent; if his negligent behavior is serious or recurring, he may not be able to obtain insurance at all. Frequently, a portion of the loss must be borne by the insured before he is entitled to recover from the insurance.\(^1\)

In contrast to the insurance policy is the indemnity agreement between the large and powerful oil company or vessel owner and the smaller contractor, who in most instances has no opportunity to bargain as to the terms of the contract. While the more powerful party to an insurance contract is the insurer, the more powerful party to an indemnity agreement in a service contract is the insured, or the indemnitee. Of course, if a particular company continually causes losses by its own negligence and shifts that negligence to the contractors, there is the possibility that contractors might cease to enter into contracts with that company. Because of the intense competition of the contractors in this industry, however, this would be a more unusual situation than that of the careless driver who cannot obtain insurance from the more powerful insurance company.

The principle that a person should be responsible for the damages he causes is supported by an ethical consideration as well. A person should not be able to shift legally imposed liability to someone else. Arguably, justice is something more than a large settlement coming from an anonymous source, and the one who causes the harm should bear the burden of the loss.

Balanced against this basic tenet of tort law is the legal principle that persons should be free to contract with each other. They should be allowed within certain parameters to structure their private transactions.\(^2\) Certain contracts, however, are void as against public policy\(^3\) and thus unenforceable in courts of law. Generally, indemnity agreements are not invalid \textit{per se}. But in some instances, indemnity agreements have been declared \textit{per se} null.\(^4\) This inconsistent treatment in legally indistinguishable situations illuminates the difficulty

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11. "There is a clause in insurance policies which provides that the insurance company will pay only that amount of any loss that is in excess of a specified amount. That specified amount is the deductible." M. Keim, \textit{Glossary of Insurance Language} 29 (1978).

12. \textit{La. Civ. Code} art. 11 provides that individuals can contractually renounce what the law has established in their favor "when the renunciation does not affect the rights of others and is not contrary to the public good."

13. \textit{La. Civ. Code} art. 12 provides: "Whatever is done in contravention of a prohibitory law, is void, although the nullity be not formally directed."

14. See text at notes 56 & 137, \textit{infra}. 
courts face in choosing between the values promoted by the two applicable principles of law.

A Hypothetical Contract

For the purpose of focusing on the problems involved in classifying contracts and analyzing indemnity agreements, consider the following hypothetical. This problem should illustrate the distinctions in treatment a maritime contract and a nonmaritime contract will receive, even when the same parties and similar tasks are involved in each.

A welding contractor agrees to perform services on a submersible drilling rig located in the Gulf of Mexico. Later that day, he contracts to perform services on a fixed drilling platform located five miles offshore. The same person owns both the submersible drilling rig and the fixed platform. In addition, both agreements contain a provision in which the contractor promises to indemnify the owner against any claims arising out of the performance of the welding job, regardless of whether the injuries are the result of the fault of the owner-indemnitee.

The owner of the two rigs also owns a Louisiana factory which manufactures automobile tires. Upon completion of the obligations imposed by the two offshore service contracts, the welder performs welding services in this Louisiana plant, pursuant to a contract similar to the two described above.

Different law governs each of these three agreements. The contract to perform services on the submersible rig is a maritime contract for work upon a vessel which must be interpreted in accordance with federal admiralty principles.


16. In one case, however, the Fifth Circuit held that the negligent performance of workover operations on a well, while aboard a submersible drilling barge resting on the bottom of a dead-end dredged canal slip in Louisiana and which resulted in property damages, was not a maritime tort. Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co., 644 F.2d 1132 (5th Cir. 1981). The court stated that although arguably the barge was a vessel, there was no significant relationship to maritime activity. "This case which involves a well blowout in a dead-end canal slip in Louisiana is simply not of such a character that leaving the parties to pursue state law remedies would disturb the federal interest of maintaining the uniformity of maritime law." Id. at 1138. Presumably, a contract to perform the workover operations on the well would not be maritime either, even though performance required use of the drilling barge. In light of Pippen and Boudreaux (see text at note 2, supra), which held that the search for and production of oil and gas in navigable waters of the United States is a maritime activity, Sohyde, even if upheld, will be limited to torts and con-
on the fixed offshore platform is within the jurisdiction of the Outer Continental Shelf Lands Act. As there is no federal law applicable to the contract, Louisiana law as adoptive federal law will control. The recent passage of Act 427 by the Louisiana Legislature has created an exception to the general Louisiana principles interpreting indemnity provisions when the agreement is contained in a contract pertaining to the energy industry. This legislation is applicable to the second hypothetical contract. The third contract, although governed by Louisiana law, is unaffected by the new legislation, as a contract to perform welding services in an automobile tire factory is unrelated to the exploration for, production of, or refinement of energy resources. Thus, although both the second and third contracts are controlled by Louisiana law, different rules apply to each.

During the performance of each contract, one of the contractor's employees is injured due to the negligence of the owner-indemnitee. The owner cannot expect a favorable result in all three cases when he claims his alleged right to indemnity from the welder-indemnitor. Although the three indemnity provisions are identical in language and intent, different legal principles control each underlying contract. Therefore, an understanding of these legal principles and the kinds of contracts to which they apply is essential to a resolution of the issues.

tracts arising out of the performance of certain services in the territorial waters of Louisiana. Also, Sohyde made the dubious distinction that the case was one involving property damage, rather than personal injury.

17. “It is declared to be the policy of the United States that the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter.” 43 U.S.C. § 1332(a) (Supp. 1981).

18. Fixed offshore platforms are islands, not vessels, and therefore maritime law is not applicable to transactions concerning these platforms. See Rodrigue v. Aetna, 395 U.S. 352, 355 (1969).

To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now or hereafter adopted, the civil and criminal law of each adjacent State, now in effect or hereafter adopted, amended, or repealed, are declared to be the law of the United States, for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the margin of the outer Continental Shelf . . . .


21. La. R.S. 9:2780 (Supp. 1981) prohibits only indemnity agreements in contracts relating to the “exploration for, production of, or refinement of energy resources.”
Classification of Contracts

The classification of a contract as maritime or nonmaritime is essential to an assessment of the scope and validity of any indemnity agreement contained therein. Admiralty jurisdiction over a contract depends upon the existence of maritime flavor in its subject matter.\(^2\) Admiralty jurisdiction cannot exist when the subject matter of the contract is not a maritime object.

Admiralty jurisdiction usually will attach when there is a significant relationship between the contract and a vessel,\(^2\) a term which Congress has defined broadly.\(^2\) In 1903, the Supreme Court held in The Robert W. Parsons\(^2\) that "neither size, form, equipment nor means of propulsion are determinative factors upon the question of jurisdiction, which regards only the purpose for which the craft was constructed and the business in which it is engaged."\(^2\) Therefore, according to both Congress and the Supreme Court, the question of whether

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\(^{22}\) Admiralty jurisdiction in tort, however, is determined by locality plus a significant connection with traditional maritime activity. See, e.g., Kelly v. Smith, 485 F.2d 520 (5th Cir. 1973). Because the obligation arising from an indemnity agreement is contractual, it is not important whether the actual tort indemnified against is maritime or state. If the contract is maritime and the injury occurs during the performance of the contract, it does not matter that the tort may have occurred on land.

Although the right to tort indemnity and the right to contractual indemnity arise from different legal theories, the concepts have sometimes been confused. In Reed v. Pool Offshore Co., 521 F. Supp. 324 (W.D. La. 1981), two service companies contracted separately to perform services on a barge. The barge owner was the indemnitee in identical indemnity provisions contained in each contract. When the plaintiff was injured during the performance of the services, the plaintiff was found 5% negligent, the barge owner 60% negligent, service company A 20% negligent, and service company B 15% negligent. After A and B had paid their respective tort debts, the issue centered on how the 60% liability of the barge owner should be divided between the two indemnitees, A and B. The court held that each should pay in proportion to his fault: A paid 20/35 and B paid 15/35 of the amount owed by the barge owner. However, the amount of the indemnitees' tort liability should have been irrelevant on the issue of their contractual liability. A and B had each bound themselves for the same thing and thus were solidarily liable. As between themselves, each owed one-half of the debt.

\(^{23}\) This relationship must be substantial. "The mere fact that the services to be performed under a contract relate to a ship or its business or that a ship is the object of such services, does not, in and of itself, mean they are maritime." Marchessini & Co. v. Pacific Marine Corp., 227 F. Supp. 17, 18 (S.D.N.Y. 1964).

\(^{24}\) "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3 (1977).

\(^{25}\) 191 U.S. 17 (1903).

\(^{26}\) Id. at 19.
an object is a vessel is determined by its capacity to be used in navigation as well as its actual use.

The test of both original purpose and present use was met in Dar-dar v. Louisiana,27 where a ferry which traveled along a cable was classified as a vessel. It actually floated on water and was intended and used to transport people and automobiles over water.28 Both factors, however, need not always be present. In Kenny v. New York,29 admiralty jurisdiction was extended to a suit for damage to a deck scow. The scow was capable of navigation but was being used only in displaying fireworks. The fact that the scow was originally constructed for navigation outweighed the significance of its present use.30

Moveable submersible drilling platforms, unlike permanently fixed drilling platforms, are vessels.31 A moveable drilling platform is subject to the perils of the sea, making it an appropriate object for maritime jurisdiction. A fixed drilling platform, although also subject to the perils of the sea, is considered an artificial island rather than a vessel.32 A submersible oil storage facility used in connection with offshore drilling was classified as a “vessel” in Hicks v. Ocean Drilling and Exploration Co.33 The facility had no motive power in itself, but the court looked to the purpose for which it was constructed and the business in which it was engaged.34 Floating drydocks35 generally are not vessels subject to admiralty jurisdiction,36 as they are not subject to the perils of the sea. When, however, they are treated and

28. The court cited 1 BENEDICT ON ADMIRALTY § 53, at 111 (1940): “all are ships and vessels that are manned by a master and crew and are devoted to the purposes of transportation and commerce.”
29. 108 F.2d 958 (2d Cir. 1940).
30. Cf., Ross v. Moak, 388 F. Supp. 461 (M.D. La. 1975) (Admiralty jurisdiction denied where barges originally constructed for navigation were being used as a permanently fixed store with shore-based water and electric connections; the permanent nature of their present use outweighed the factor of original purpose of construction).
33. 512 F.2d 817 (5th Cir. 1975).
34. Cf., Cook v. Belden Concrete Products, Inc., 472 F.2d 999 (5th Cir. 1973) (Floating construction platform secured by ropes to dock was legally indistinguishable from a floating drydock and was not a vessel; the platform was neither intended nor used for traditional maritime activities).
35. A floating drydock is a large dock in the form of a basin, from which water can be emptied. It is used for maintaining, repairing, and altering a ship below the water line. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 401 (5th ed. 1975).
used as vessels, they may fall within admiralty jurisdiction.\textsuperscript{37}

When a vessel is permanently withdrawn from navigation, it can no longer be the object of admiralty jurisdiction.\textsuperscript{38} When, however, the withdrawal from navigation has been only temporary, such as for repairs, a contract for services to the vessel while not in navigation is still within the admiralty jurisdiction. In this regard, courts look to the purpose and business of the vessel before its withdrawal and the use for which it is intended once repairs are completed.\textsuperscript{39}

The line dividing maritime matters from nonmaritime matters is sometimes shakily and unconvincingly drawn. For example, the jurisprudence consistently has denied maritime status to contracts for the building or sale of a ship,\textsuperscript{40} yet repeatedly has held that contracts for the repair of vessels are within maritime jurisdiction.\textsuperscript{41} Preliminary services relating to vessels are not the subject of maritime contracts. Such services include contracts to procure labor,\textsuperscript{42} charter,\textsuperscript{43} and marine insurance.\textsuperscript{44} Yet, disputes over completed contracts for insurance, labor, and charters are welcomed in the federal admiralty courts.\textsuperscript{45}

The tenuous distinction between contracts that fall on either side of the judicially-drawn line is the degree of involvement with maritime

\textsuperscript{37} Id. at 325.
\textsuperscript{38} Kilb v. Merke, 121 F.2d 1013 (5th Cir. 1941).
\textsuperscript{39} E.g., id. (large houseboat without motive power and without rudder and a steam yacht which towed the houseboat had been tied up for almost four years; they were held to be within admiralty jurisdiction because they had been engaged in navigation before they were tied up, they were not dismantled or put to any other use, and the vessels had recently been purchased with the intention of navigating them). Cfr., Jiles v. Federal Barge Lines, Inc., 365 F. Supp. 1225 (E.D. La. 1973) (Admiralty jurisdiction denied to a contractor who had been hired to paint a former steamship which no longer had shafts, wheels, rudders, engines, or boilers; the contract was merely to paint the former vessel, not to put it back into commission.).
\textsuperscript{40} The General Smith, 17 U.S. (4 Wheat.) 438 (1819); The Ada, 250 F. 194 (2d Cir. 1918).
\textsuperscript{43} The Thames, 10 F. 848 (S.D.N.Y. 1881).
\textsuperscript{44} Warner v. The Bear, 126 F. Supp. 529 (D. Alaska 1955).
\textsuperscript{45} See also P.D. Marchessini & Co. v. Pacific Marine Corp., 227 F. Supp. 17 (S.D.N.Y. 1964) (general agent who furnishes shore-side services to the vessel but takes no part in the actual operation or management of the vessel may not sue in admiralty); Hadjipateras v. Pacifica, S.A., 290 F.2d 697 (5th Cir. 1961); Economu v. Bates, 222 F. Supp. 988 (S.D.N.Y. 1963) (when the general agent must actually supervise as well as procure services and supplies, he is an active participant in the operation and management of the vessel and his contract is in admiralty).
activities and risks. A conflict exists between the need for uniformity of law governing the shipping industry and the interest of the individual states in regulating the activities of their citizens. The constitutional grant of admiralty jurisdiction to the federal courts was a response to the need for consistency in the fluid world of maritime commerce. But when vessel-related activities are centered in one place, such as the preliminary activities of agents and the repair work on vessels permanently removed from navigation, the contract becomes more amenable to local control. In such cases, the balance tips towards the interest of the state in governing its citizens' transactions.

Some contracts are governed by state law despite the fact that they affect maritime commerce and transportation. If there is no strong federal interest in resolving a particular issue and the state has a strong interest in that area, the contract is characterized as "maritime but local." Although federal courts have the power to create federal admiralty common law, they decline to do so in such cases.

Agreements to perform both maritime and nonmaritime services may be included in a single contract. Such a contract, often referred to as a "mixed contract," may contain an indemnity agreement designed to cover the performance of both maritime and nonmaritime services. Some courts have held that if the maritime duties in a contract are capable of being severed from the nonmaritime obligations so that they might be separately adjudicated, the contract is separable and the nonmaritime obligation will not come under admiralty jurisdiction.

Thus, if an injury occurs in the performance of the nonmaritime obligation, the indemnity agreement will be interpreted according to state law. Other courts, however, have held that where the dominant component of the contract is the maritime obligation, the admiralty court may take jurisdiction over the whole contract and determine the nonmaritime matter. Under this approach, the indemnity agreement will

46. U.S. CONST. art. III, § 2 provides: "The judicial Power shall extend to ... all cases of admiralty, and maritime jurisdiction ...


48. Berwind-White Coal Mining Co. v. City of New York, 135 F.2d 443 (2d Cir. 1943).


be interpreted according to maritime principles, even though the injury occurs in the performance of the nonmaritime obligation.

A contract can be properly classified and the controlling law determined through consideration of the above factors. An indemnity agreement then may be assessed within the context of the law which applies to the underlying contract. The scope of the distinction in treatment of maritime indemnity agreements and nonmaritime indemnity agreements becomes apparent as specific contractual indemnity provisions are analyzed according to the applicable law.

Indemnity Agreements in Maritime Contracts

Admiralty courts recognize that parties of relatively equal bargaining power should be allowed to negotiate the economic aspects of their contracts. Contractors and vessel owners are in a better position than the courts to balance their losses. Generally, the courts have upheld agreements in which an indemnitor promises to hold harmless the indemnitee against the indemnitee's own negligence. However, unless the language of the provision clearly and unequivocally indicates the intention to indemnify against the indemnitee's fault, the courts presume that a party does not intend to hold harmless one who was himself at fault. This presumption is not irrebuttable.

In Roberts v. Williams-McWilliams, the presumption was overcome. The contract provided that a repair service company working on the employer's barge would indemnify the barge owner for any injury "resulting from or in any way connected with the services performed, even though contributed to or in any way connected with joint or concurrent fault or negligence on the part of...[the owner]." The jury found that the indemnitor's actions were a contributing cause but neither a joint nor a concurrent proximate cause of the injury and that the owner-indemnitee's actions were the proximate cause of the injury. The court held that the vessel owner was entitled to indemnification. The language clearly evinced an intent that indemnifica-

52. Other considerations can be helpful in classifying a contract. For example, if a contract has traditionally been regarded as maritime under the general maritime common law of nations, the parties to a present contract of that nature should be able to rely upon their reasonable expectations that the agreement would be controlled by maritime law.


54. 648 F.2d 255 (5th Cir. 1981).

55. Id. at 264.
tion would be provided when the vessel owner was also at fault and did not specify that the indemnitor must have been a proximate or joint cause of the injury. Although the owner's sole negligence would have precluded indemnification, the court held that the contributing though not proximate negligence of the contractor was sufficient to render him liable under the terms of the contract.

A few exceptions have been carved out of the general rule that one may bargain away liability based upon his own strict liability or negligent acts. Under these narrowly drawn exceptions, principles of interpretation are irrelevant and the indemnity provisions are declared void as a matter of public policy.

In Bisso v. Inland Waterways, the Supreme Court held that all contracts releasing towers from liability for their negligent towing of a barge are void, as against public policy. The court noted that as there was no controlling statute, the issue would be resolved as part of the judicially-created admiralty law. The rule was established to discourage negligence by making wrongdoers pay damages and to protect those in need of goods or services from being overreached by their more powerful counterparts. The court determined that the towing contract was made by parties with unequal bargaining powers; the barge owner, requiring the service of towage, had to accept the indemnity provisions.

Four years after Bisso, the Supreme Court, in S.W. Sugar & Molasses Co. v. River Terminals Corp., refused to hold void an exculpatory provision in a public carrier's tariff. The court deferred to the Interstate Commerce Commission for a determination of the economic needs of the tugboat industry, holding that the rule of Bisso involved a private contract of towage and did not extend to common carriers regulated by the ICC. Although the court emphasized that the ICC had the ability, through regulation, to protect those in need of services from being overreached by more powerful parties, it concluded that the rationale of Bisso was not intended to be reduced to this economic consideration.

The policy of discouraging negligence by making wrongdoers pay has remained a consideration in subsequent cases. S.W. Sugar has

58. "The rule of Bisso, however applicable where the towboat owner has the 'power to drive hard bargains,' may well call for modification when that power is effectively controlled by a pervasive regulatory scheme." Id. at 418.
59. Hart v. Blakemore, 410 F.2d 218 (5th Cir. 1969); Dixilyn v. Crescent Towing Co., 372 U.S. 697 (1963); American S.S. Co. v. Great Lakes Towing Co., 333 F.2d 426
been distinguished as an instance in which the court "merely preferred
to give the ICC an opportunity to rule on an exculpatory clause
which was part of a tariff filed with the commission."\(^{60}\)

The holding of *Bisso* has been limited carefully to the unique fac-
tual situation where the tows lack power and crews and have no right
of participation in the control of the venture.\(^{61}\) The policy of allowing
indemnification against one's own negligence where the intention of
the parties is clear has been overturned only in the narrowly drawn
circumstance where there is sole negligence by one party who con-
tacted to provide a necessary service to another who had no control
over the performance of the work. This judicially-created admiralty
principle has not been extended to other express contractual
relationships.\(^{62}\)

*Bisso* was invoked in *Hicks v. Ocean Drilling & Exploration Co.*\(^{63}\)
by a supplier of labor to a fixed offshore platform, who claimed that
an indemnity agreement was invalid as against public policy. The par-
ties did not bargain or discuss any of the contract terms, and the
supplier had no opportunity to reject the indemnity provisions without
rejecting the entire work contract. The court held that *Bisso* was in-
applicable on the basis that a contract for labor on a drilling platform
is not a maritime contract and is governed by Louisiana law as federal
law through the Outer Continental Shelf Lands Act.\(^{64}\) In dictum,
however, the court stated that even if *Bisso* had been applicable, the
supplier was an experienced company of substantial size and had equal
bargaining power with the fixed platform owner. The court's assess-
ment of the parties is unconvincing, as such indemnity agreements
are standard in the industry and are thrust upon contractors by the
more powerful platform owners. Arguably, the supplier would have
to accept the terms of the contract as offered or he would lose the
opportunity to one of the many other suppliers in the field.

In addition to its inaccurate assessment of the parties, the court
overlooked the second rationale of *Bisso*: discouraging negligence by
making wrongdoers pay.\(^{65}\) The court's focus was solely on the existence

\(^{60}\) Dixilyn v. Crescent Towing Co., 372 U.S. at 698.

\(^{61}\) 349 U.S. at 95.

\(^{62}\) E.g., Dickerson v. Continental Oil, 449 F.2d 1209 (5th Cir. 1971) (*Bisso* held
not applicable to indemnity agreement between fixed offshore platform owner and
contractor).

\(^{63}\) 512 F.2d 817 (5th Cir. 1975).


\(^{65}\) 349 U.S. at 91.
of bargaining power between the parties. The court's dictum illustrates
the tendency of the admiralty courts to uphold express indemnity
agreements except in the narrow exception outlined in Bisso.

The Maritime Warranty of Workmanlike Performance

Indemnity provisions in a contract to perform services of a
maritime nature are not always express. The obligation to perform
work in a competent and safe manner is the essence of the maritime
service company's contract and implies an indemnity for the breach
of this "warranty of workmanlike performance." The indemnity
implicit in the warranty of workmanlike performance was developed in
response to the decision of Sea Shipping Co. v. Sieracki, in which
the court held that a longshoreman doing the traditional work of a
seaman had a right against the vessel on which he was working for
damages he incurred as a result of the vessel's unseaworthiness. To
ameliorate the harsh effect on a vessel when liability was based upon
negligent harm to a longshoreman, the court later held, in Ryan
Stevedoring Co. v. Pan-Atlantic Steamship Co., that a ship has a right
to indemnity from a stevedore who has breached his warranty of
workmanlike performance. This right of indemnification was not found-
ed upon tort or any duty owed by the employer-stevedore to his in-
jured employee, but was founded upon a breach of the purely con-
tractual implied obligation to perform the contract in a reasonably
safe manner.

An indemnity claim under Ryan can be reduced or defeated by
vessel negligence. In Gator Marine Service Towing v. J. Ray
McDermott, the jury determined that under maritime comparative
fault principles the stevedore was sixty percent liable and the vessel
owner was forty percent liable for the damages which occurred when
an improperly loaded ship capsized. The vessel owner claimed that
the stevedore should bear the entire loss because it breached its war-
ranty of workmanlike performance. The court, however, cast the
stevedore for only sixty percent of the damages. Thus, the warranty
is an indemnification against the negligence of the stevedore and not

67. Id. at 130.
68. 328 U.S. 85 (1946).
69. A vessel which is "unseaworthy" is one which is unable to withstand the perils
of an ordinary voyage at sea. Fireman's Fund Ins. Co. v. Compania de Navegacion,
19 F.2d 493, 495 (5th Cir. 1927).
70. 350 U.S. 124 (1956).
71. Id. at 131.
72. 651 F.2d 1096 (5th Cir. 1981).
against the vessel owner's own negligence.\textsuperscript{73} Hence, when both parties are negligent, damages are apportioned between the two.\textsuperscript{74}

The longshoreman's right to an action for unseaworthiness was legislatively overruled by the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act (LHWCA).\textsuperscript{75} Under § 905(b) of the amended act, the shipowner now may be held liable only for negligence chargeable to the vessel\textsuperscript{79} and not for negligence of the stevedore. The vessel owner's right to indemnity from an employer covered by the LHWCA was also overruled.\textsuperscript{77} Thus, as between vessels and employers covered by the act, the Ryan doctrine no longer may be invoked. However, there still may be a right of indemnification from the employer based upon the warranty of workmanlike performance owed by the service company to a third party. For example, a worker not covered by the LHWCA may sue a vessel for injuries incurred while working on the vessel, and in such an instance the vessel could seek indemnity from the employer. Another possibility is that a third party (i.e., not the employee) which is not a vessel may seek indemnity based upon the warranty of workmanlike performance.

In \textit{Stevens v. East-West Towing Co.},\textsuperscript{78} the plaintiff was a deckhand who had been employed to move a barge. Stevens tied the bowline onto a stop plate of the barge, which snapped off as the barge moved away from the tug. He was injured when the stop plate struck him in the head. The bareboat charterer of the barge claimed that the

\textsuperscript{73} For a vessel owner to be negligent, he must have either actual or constructive knowledge. "[A] vessel is not liable for injuries resulting from known or obvious dangers unless the shipowner should anticipate the harm despite the obviousness of the danger." Evans v. Transportation Maritime Mexicana, 639 F.2d 848, 855 (2d Cir. 1981).

\textsuperscript{74} 651 F.2d at 1099; Agrico Chem. Co. v. M/V Ben W. Martin, 664 F.2d 85 (5th Cir. 1981).

\textsuperscript{75} Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 § 943(a), 33 U.S.C. § 905(b) (1978) (emphasis added) provides:

\textit{In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such persons, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title }\ldots \textit{The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred }\ldots \textit{.}

\textsuperscript{76} See text at note 73, supra.

\textsuperscript{77} "[T]he 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." 33 U.S.C. § 905(b).

\textsuperscript{78} 649 F.2d 1104 (5th Cir. 1981).
plaintiff was negligent in tying the bow line to the stop plate; the plaintiff argued that the bitts and cleats on the river side of the barge were missing and there was no place to tie the barge. The Fifth Circuit found that the charterer was neither negligent nor was his vessel unseaworthy, as blueprints and photographs indicated that bitts and cleats were present. The court stated in dictum, however, that even had the bareboat charterer been negligent or his vessel unseaworthy, East-West, as the employer of the seaman plaintiff, had breached its warranty of workmanlike performance and the vessel was entitled to indemnity. Thus, the Fifth Circuit will uphold the existence of the Ryan doctrine where the injured employee is not covered by the LHWCA.

When the third party who is owed the warranty of workmanlike performance by the service company is not a vessel, § 905(a) rather than § 905(b) of the LHWCA is applicable. The liability of an employer covered by the Act is exclusive of all other liability for damages "on account of such injury or death." In Pippen v. Shell Oil Co., the Fifth Circuit held that one who was the lessee and charterer of a vessel, and not the owner of the vessel, was not precluded from enforcing an express or implied contractual indemnity agreement against the employer. The rationale was that § 905(b) cut off indemnity only to a "vessel," which the court defined as "vessel-owner," and therefore § 905(a) was the applicable provision. The exclusivity provision of § 905(a) is extended only to suits "on account of" the contract, whether it be express or implied. Although in this case no express or implied contractual indemnity was found, the decision acknowledged the possibility that a LHWCA employer could become contractually liable for indemnification of a non-vessel under § 905(a).

79. 33 U.S.C. § 905(a) provides:
The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability to the employee, ... and anyone else entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment or compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death.

80. 661 F.2d 378 (5th Cir. 1981).

81. Id. at 385. By refusing to consider 905(b) applicable to Shell, the lessee, and the charterer, the court appeared to limit the meaning of "vessel" to "vessel-owner." This limitation is inconsistent with § 902(21) of the LHWCA, which defines "vessel" to include "agent, operator, charter or bare boat charterer."

82. 33 U.S.C. § 905(a).

83. 661 F.2d at 388.
Pippen further illustrates the maritime policy of upholding indemnity agreements except where expressly prohibited by statute, as in § 905(b), or by court-created admiralty law, as in Bisso. A narrow interpretation of these exceptions is appropriate only as long as the policies behind the limitations are not ignored. The prohibition of the employer's indemnification liability to the vessel was a quid pro quo for the elimination of the warranty of seaworthiness owed by the vessel to the Sieracki seaman and the consequent limitation of the vessel's liability to negligence only. No such quid pro quo was offered to non-vessels. When, however, a charterer is considered a "non-vessel," even though it has assumed the responsibilities and liabilities of the owner and is benefitted by the elimination of the warranty of seaworthiness to longshoremen, the intention of §905(b) is circumvented.

The Ninth Circuit, in Price v. Zim-Israel Navigation Co., narrowly interpreted § 905(b) to uphold an indemnity agreement which provided that the stevedoring concern would have the vessel named as co-insured under its liability policy. The court held that the § 905(b) prohibition was inapplicable because the shipowner's suit was against the insurer, not against the stevedore. The 1972 amendments were intended merely to eliminate third party litigation between the vessel and stevedore so that financial resources, which previously were being spent on litigation, could be better utilized to pay improved compensation benefits. Although the court noted that there was no additional charge for the co-insured endorsement at the time the contract was executed, it reasoned that the economic burden of premiums could be allocated as the parties wished. This reasoning indicates that even had there been a charge by the insurance company for the endorsement, the courts would have allowed the vessel and stevedore to bargain as to that cost. The decision ignores the problem of unequal bargaining power between the vessel and the stevedore, which realistically has no opportunity to reject the economic burden of the premium if it desires to receive the contract. The Price court circumvented one of the major purposes of the amendments to §905(b), which was to prevent the more powerful vessel owner from requiring the stevedore to assume indemnity for the vessel's negligence.

85. See text at note 80, supra.
86. 616 F.2d 422 (9th Cir. 1980).
The contractor's burden of having the vessel named as coinsured is functionally no different than the requirement that the contractor indemnify the vessel. 88

The zone of responsibility undertaken by a contractor in a contract containing a warranty of workmanlike performance may extend beyond the parties to the contract. However, it cannot be divorced from the policy behind this warranty that protects the shipowner's right of indemnity. There is a strong argument, then, that when the ship is not subject to the strict liability of unseaworthiness, indemnification based upon the implied warranty should not be invoked. 89

The Second Circuit recognized the limited scope of the implied warranty of workmanlike performance in holding that in the absence of the vessel's exposure to liability regardless of fault, there was no basis for indemnity which disregarded the vessel's own fault. 90 No indemnification against the vessel's own negligence was allowed. Hence the warranty can be invoked only when a shipowner, relying on the expertise of the contractor, enters into a contract whereby the contractor agrees to perform services without the supervision or control of the shipowner.

Under certain circumstances, a worker may owe indemnity to a co-worker, even when the co-worker has been jointly negligent. In Hartnett v. Reiss Steamship Co., 91 decided prior to the 1972 amendments to the LHWCA, the supplier of a grain elevator and other machinery used to unload a vessel claimed to be the third party beneficiary of the unloading workers' warranty of workmanlike performance owed to the vessel. The court held that the grain elevator owner had substantial control over the operation and, therefore, was not owed indemnity by the other stevedoring concern. However, in dictum, the court stated that where all the control is in one stevedore, he may owe indemnity to a co-stevedore as a third party beneficiary of the warranty between the stevedore and the vessel.

A manufacturer sought to recover from the stevedore with whom it had been found jointly liable in Zapico v. Bucyrus-Arie Co. 92 The manufacturer contended that it was a third party beneficiary of an

88. See text at note 143, infra.
89. The implied warranty of workmanlike performance does not extend beyond the shipowner-stevedore originated rule to cover the relationships of contractors with the owners of fixed offshore drilling platforms. Ocean Drilling & Exploration Co. v. Berry Brothers, 377 F.2d 511 (5th Cir. 1967).
91. 421 F.2d 1011 (2d Cir. 1970).
92. 579 F.2d 714 (2d Cir. 1978).
implied warranty of workmanlike performance owed by the stevedore to the vessel. The court stated that the *Ryan* indemnity was not cut off as to non-vessels in all cases. Nevertheless, the court held that the third party plaintiff would have to be engaged in a close working relationship with the stevedore to be entitled to the implied warranty and, therefore, denied the remote manufacturer's assertion.

**Concluding Remarks on Contractual Maritime Indemnity**

The above cases illustrate that although the presumption is against the intention to indemnify against the indemnitee's own fault, maritime principles generally do not prohibit, as a matter of public policy, indemnity agreements in which the language is clear and unambiguous. There are two exceptions, however, where no indemnification is allowed. First, under *Bisso*, a tower may not contract against its own negligence in the towing of a barge whose owners have no control over the operation. Second, a vessel may not seek indemnity from the employers of injured workers covered by the LHWCA when the employee brings a § 905(b) action for negligence against the vessel. These exceptions encompass the factual circumstances where an inequality of bargaining power exists which renders the purported indemnitor incapable of protecting himself against such demands. The indemnity agreements falling under these two exceptions are also prohibited in an attempt to deter negligent behavior by making the actor responsible for his conduct.

Since the 1972 amendments, the courts have upheld all forms of indemnity agreements, express and implied, that have fallen outside the specific prohibition in § 905(b) of the LHWCA. Where the third party is a non-vessel or the plaintiff is not covered by the act, both express and implied contractual indemnity are allowed. The general disposition of the courts to allow indemnification against one's own negligence in maritime contracts remains. This tendency is illustrated by a Ninth Circuit case which allowed a vessel to receive indemnification from a stevedore's insurance company after the vessel had required that the stevedore name the vessel as a coinsured in the policy. Such a reading of § 905(b) is overly restrictive in that it defeats the policy of protecting the less powerful stevedore. Although the exceptions to the general maritime principle of allowing indemnification should be interpreted narrowly, the courts should consider

93. See text at note 56, *supra*.
94. See text at notes 75-76, *supra*.
whether allowing indemnity in a particular case would infringe upon the policies behind the exceptions.

**Indemnity Agreements Under Louisiana Law**

Louisiana law will govern contracts made within Louisiana or its territorial waters which do not concern traditional maritime activities. Even when the contract is concededly maritime, it may be governed by Louisiana law if the subject matter is of little interest to the admiralty courts in their efforts to achieve a uniform body of law in maritime transactions. Under the Outer Continental Shelf Lands Act, Louisiana law is applied as adoptive federal law when there is no applicable federal law to govern the action. Fixed platforms beyond three miles from the shores of Louisiana are considered federal enclaves or islands and are not classified as vessels. Therefore, Louisiana law applies to contracts made for the performance of the many services essential to exploration for and capture of energy resources on these platforms. These contracts are made between offshore platform owners and welders, drillers, casing crews, suppliers, caterers, and others; these contracts presumably involve none of the traditional hazards associated with vessels. The platforms are not subject to the traditional perils of the sea, and the men working on these islands are closely tied to the adjacent state to which they commute and in which their families live. The needs and problems of these relatively permanently based workers are more easily handled by local state law. Hence they do not require the more general admiralty law applicable to transitory seamen.

This reasoning, however, is not persuasive when the issue is the enforceability of an indemnity agreement between a Louisiana based contractor and the owner of a fixed platform. The welder in our hypothetical situation had a contract with a vessel owner and a contract with that same person as a fixed platform owner. A difference in the treatment of the two indemnity agreements, based on the classification of the work locale as either vessel or non-vessel, has

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97. See text at note 47, supra.
98. See text at notes 17-18, supra.
99. See text at note 19, supra.
101. Id. It should be noted that jack-up rigs are also not subject to the perils of the sea, except while being moved from one place to another. Jack-up rigs, however, are classified by the courts as vessels. See text at note 31, supra.
102. See text at note 15, supra.
no reasonable foundation. However, because indemnity provisions are controlled by the law which governs the underlying contract, the indemnity provisions contained in contracts for services on fixed platforms are interpreted according to Louisiana law.

In Louisiana, an indemnity contract will not be construed to indemnify the indemnitee against losses he suffers through his own negligent acts unless such intention is expressed in unequivocal language. This rule of interpretation consistently has been reaffirmed in the Louisiana courts and has been extended to situations involving concurrent negligence on the part of the indemnitee and indemnitor.\(^{103}\) What that "unequivocal language" must be, however, was not defined until the Fifth Circuit's decision in Cole v. Chevron.\(^{104}\)

Cole, a welder employed by a contractor to do work for Chevron's Louisiana plant, was injured when he slipped in oil on the plant floor. Chevron sought indemnity against the plaintiff's employer under a written indemnity agreement between the parties. The contract provided for indemnification for injuries caused "directly or indirectly" by the performance of the contract obligation. The trial court found that Chevron and the employer were concurrently negligent in contributing to the presence of the oil on the floor. The Fifth Circuit held that under Louisiana law, indemnity is not owed when the indemnitee is wholly or partially at fault unless the agreement expressly requires indemnification for accidents arising from the indemnitee's negligence. The indemnity agreement must contain "talismanic" words, such as "even though caused by the negligence of indemnitee."\(^{105}\) If a word such as "negligence" is not present, the presumption arises that the indemnification is applicable only to the vicarious responsibility of the indemnitee for the indemnitor's negligent acts.\(^{106}\) The provision providing for indemnification for injuries caused "directly or indirectly" was not sufficiently express to allow Chevron to receive indemnity from the welding contractor.

The Fifth Circuit applied Louisiana law as adoptive federal law in Aymond v. Texaco,\(^{107}\) in which a member of an oil drilling crew on a fixed platform beyond three miles off the coast of Louisiana brought an action for personal injury. The court, referring to Cole as authority, held that the indemnitee failed to bear its heavy burden of proof that indemnification would be provided even for its own negligence.

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104. 477 F.2d 361 (5th Cir. 1973).
105. Id. at 368.
106. Id.
107. 554 F.2d 206 (5th Cir. 1977).
The court reasoned that "[f]ailure to expressly use the word negligence is evidence of the . . . intention not to provide indemnification for the indemnitee's negligent acts." The pertinent language of the contract stated: "Contractor also agrees to protect, indemnify and save TEXACO harmless of and from all claims, demands, and causes of action in favor of Contractor's employees . . . no matter how such claim arises." Because of the failure to use "negligence," the parties were presumed only to have intended to cover those situations in which a party other than Texaco or the contractor successfully held Texaco vicariously liable for the contractor's negligence. Here, Texaco itself was found negligent and the court did not allow indemnification.

The Louisiana First Circuit Court of Appeal has not required the presence of specific words. The real question, according to the Louisiana court in Polozola v. Garlock, is the intention of the parties, and the intention to indemnify against the indemnitee's own fault can be found even in the absence of talismanic language. The court held that an indemnity agreement promising to indemnify "from and against any and all claims and causes of actions" and "arising from any sources," was sufficiently broad to cover injuries arising from the indemnitee's own negligence. The court stated that the parties should know how to write and could have written a contract specifically excluding coverage for injuries caused by the indemnitee's negligence if they had wished.

The first circuit case does not stand alone. The Louisiana Third Circuit Court of Appeal, in Deblieux v. P.S. & Sons Painting, Inc., relied on Polozola to find that the parties intended that the contractor indemnify even against the indemnitee's fault. The court held that although the contract did not contain the words "even though caused by the negligence of indemnitee," it should be interpreted to require the indemnitor to indemnify the indemnitee against its own fault.

In Battig v. Hartford Accident & Indemnity Co., the parents of a mentally retarded boy executed a release in an application to a

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108. Id. at 209.
109. Id. (emphasis added).
110. Id. at 210.
111. 334 So. 2d 530 (La. App. 1st Cir. 1976), aff'd on other grounds, 343 So. 2d 1000 (1977).
112. 334 So. 2d at 532.
113. 405 So. 2d 600 (La. App. 3d Cir. 1981).
114. Id. at 604.
boarding school which agreed to hold the school harmless for losses or claims of any kind which might be made against it. The plaintiff-parent relied on Cole, claiming that the release, to include liability for negligent acts of the school, must specifically refer to negligent acts. The defendant-school relied on Polozola, arguing that the clause need not be so specific, as long as the intent of the parties was clear. The federal court in this diversity case held that Polozola was the best statement of Louisiana law and the language of the release was broad enough to determine the intention of the parties to release the school from even its own negligent acts. Specific reference to negligent acts in order for an indemnity agreement or a release to cover claims based on the indemnitee's negligent acts is not required.

The determination that there is an intention to indemnify against the indemnitee's negligence does not mean that there is no limit upon the resulting responsibility of the indemnitee. In Mott v. Ocean Drilling & Exploration Co., a subcontractor agreed to indemnify the contractor for any and all claims arising out of the performance of the contract, including those caused by the contractor's negligence or by the unseaworthiness of the contractor's vessel. The welder-plaintiff was injured when he fell from a defective ladder joining the two levels of an offshore oil production platform. The defect in the ladder existed prior to the contract between the contractor and subcontractor. The Fifth Circuit held that the indemnity agreement did not extend to negligence caused by the indemnitee with respect to defects which existed prior to the execution of the contract, as the phrase "any and all claims" was qualified by the requirement that the claims be "incident to, arising out of, or in connection with or resulting from the activities of the Subcontractor." The Fifth Circuit reiterated, in Stephens v. Chevron, that under Louisiana law an intention to indemnify an employer for his own negligence will not be presumed in the absence of a clear and specific contractual stipulation to that effect. Stephens, an offshore worker, was injured when he disembarked from Chevron's boat and slipped on the wharf which he alleged was slick with oil. The trial court held that Chevron was not negligent and denied the plaintiff's claim. The contract with the plaintiff's employer provided indemnification for claims "in any way arising out of or connected with the performance

116. 577 F.2d 273 (5th Cir. 1978).
117. Id. at 276.
118. Id.
119. 517 F.2d 1123 (5th Cir. 1975).
of the Contractor of services hereunder.” Chevron claimed, and the Fifth Circuit agreed, that in the total absence of its negligence the intention of the parties was that the contractor would defend and indemnify against any work-connected claims.

A conflict exists for the service company bound by an indemnity agreement such as that in Stephens. If the company wins in court, by proving that the indemnitee was not negligent, it actually loses, for it now must indemnify the indemnitee under the contract for the defense of the claim. If the indemnitee is found negligent, the service company loses in its defense of the indemnitee but will not be obligated to indemnify. Presumably, the service company will be reimbursed for the expenses of the defense it provided. A conflict of interest exists between the advantage to the service company of having the indemnitee found negligent and the contractual obligation to give the indemnitee a good faith defense. The Fifth Circuit, in Stephens, recognized this potential problem but left it unanswered by stating that it would be handled better contractually by the parties, rather than by the courts.

The parties could avoid this potential conflict by providing that the indemnitee, rather than the indemnitor, choose the attorney who will defend the case. In this way, the indemnitee can protect its interest in proving it was not negligent. In many instances, however, the parties will not provide contractually for this arrangement. An argument can be made that an implied provision of the indemnity agreement is that there be a good faith defense in which the primary interest is proving that the indemnitee was not at fault. A breach of this obligation could be treated as a breach of contract claim. Lack of good faith, however, can be difficult to prove. If a subsequent case arises in which the indemnitee claims that the indemnitor intentionally avoided its burden of indemnification by not diligently defending the indemnitee, the court will have to confront the problem of what should be done when the parties have not resolved the problem contractually.

There is some Louisiana codal and jurisprudential authority supporting the existence of an implied warranty of workmanlike performance in Louisiana contracts. At least one Louisiana court has held that it is implicit in every contract that “the work of the builder be performed in a good workmanlike manner, free from defects at-

120. Id. at 1124.
tributable either to faulty material or poor workmanship." This warranty, however, has been applied only to contracts where there has been a defect in the object of the contract. It has not been extended to situations where personal injury has resulted from the performance of the contract, and there has been no shifting of loss from a negligent indemnitee to the indemnitator.

In *Ocean Drilling & Exploration Co. v. Berry Brothers*, the court considered whether the *Ryan* doctrine should be extended to an offshore platform owner's contract with a repair contractor. The court was unwilling to extend *Ryan*’s shipowner-stevedore rule to a platform case, as it had evolved under special rules of the obligation of the shipowner. The right to indemnification based upon a warranty of workmanlike performance is strictly contractual in nature and is not based on tort theories of active-passive and primary-secondary negligence. *Ocean Drilling*’s claims for indemnification when employees of the repair contractor were injured on a fixed offshore platform were founded purely in tort principles and should not be viewed as involving a breach of an implied warranty of workmanlike performance.

There is a strong argument, however, that a circumstance similar to the shipowner's liability to the stevedore for unseaworthiness prior to 1972 has evolved on a fixed offshore platform and that the warranty of workmanlike performance should be implied in such instances to alleviate the harshness of the obligation placed upon the platform owner. Under Louisiana Civil Code article 2322, the owner of a building is strictly liable for damages which occur through the ruin of his building. Strict liability of the owner of a building for harm caused by defects in its structure or appurtenances imposes a nondelegable duty upon the owner to keep his building in repair and to be responsible to third persons for harm caused by any defect. A fixed offshore platform has been held to be a “building” for purposes of article 2322. Thus, in *Olsen v. Shell Oil Co.*, the platform

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122. Rathe v. Maher, 184 So. 2d at 258.
123. 377 F.2d 511 (5th Cir. 1967).
124. See text at notes 70 & 71, supra.
125. 377 F.2d at 512.
126. *Id.* at 513.
127. LA. CIV. CODE art. 2322: "The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction."
130. 365 So. 2d 1285 (La. 1979).
owner was held liable when, due to the negligence of a contractor, the hot water heater exploded and caused the ruin of the building.

The court stated that the owner and contractor may regulate, as between themselves, duties of indemnification, but could not limit statutory liability to third persons for injuries arising from premise defects.\footnote{131} Under recent Louisiana legislation,\footnote{132} however, parties such as Olsen and Shell will not be able to contractually allocate indemnification. Thus, the fixed platform owner will be left with a duty similar to the strict liability of providing a seaworthy vessel and will be liable even for the ruin of his platform caused by the negligence of a contractor with substantial control over the fixed platform. The platform owner will be held liable to an injured third party, without any hope of contractual indemnification from the contractor, unless a warranty of workmanlike performance similar to the Ryan doctrine is extended to article 2322 liability.\footnote{133}

**Concluding Remarks on Louisiana Contractual Indemnity**

Courts applying Louisiana law have upheld contractual indemnity agreements when the language has been clear and unequivocal. The Fifth Circuit, however, has required the "talismanic word" "negligence" to overcome the presumption against the intention to indemnify against the indemnitee's own negligence. Other courts have not required this "talismanic word," looking instead to the intent of the parties as evidenced by the contractual provision as written. The Fifth Circuit approach is unnecessarily rigid and is inconsistent with the Louisiana law that courts should ascertain the intent of the parties when interpreting contracts.\footnote{134} Although the legal presumption is that parties do not intend to indemnify the indemnitee against its own negligence, specific contractual language should not be required before a court should infer a different intent.

Until the summer of 1981, both admiralty and state courts, with a few exceptions, had determined that the freedom of parties to contract outweighed the policy that one should not be allowed contractually to shift his liability to another. New legislation in Louisiana, however, applicable to contracts on fixed offshore platforms, has created a significant distinction between maritime contractual indemnity and Louisiana contractual indemnity.

\footnotetext[131]{Id. at 1292.}
\footnotetext[133]{The platform owner may be able to shift its liability under a theory of tort indemnity. This, however, can occur only through operation of law and cannot be contractually provided for.}
NOTES

Act 427 of the 1981 Louisiana Legislature

Act 427 of the 1981 Regular Session of the Louisiana Legislature\(^{135}\) legislatively overruled cases such as Cole, Dickerson, and Hicks. An owner of an offshore platform no longer may invoke the principles of contractual interpretation traditionally applied in Louisiana to determine whether he is owed indemnification against his own negligence or fault. Agreements between parties to contracts affecting the energy industry are absolutely void when they provide for indemnity against the indemnitee's sole or concurrent fault.\(^{136}\) An analysis of the pertinent provisions will assist in assessing the legislation's impact on future jurisprudence.

Paragraph (A) is a statement of legislative intent. The legislature determined that an inequity was being fostered upon "certain contractors and their employees"\(^{137}\) by defense or indemnity provisions in contracts pertaining to the energy industry. Thus, to protect these contractors, the provisions are declared absolutely void as against public policy in Louisiana when the provision requires either defense or indemnification for negligence or strict liability\(^{138}\) on the part of the indemnitee. The underlying contract, however, is still enforceable.\(^{139}\)

Paragraph (B) implements the intent of the legislature provided in paragraph (A).\(^{140}\) The prohibition is limited to indemnification against losses arising out of actions for personal injuries and wrongful death, and does not affect indemnity agreements for injury to property.

Paragraph (C) defines the term "agreement" as including agreements as to all conceivable services involved in operations


\(^{136}\) This is consistent with LA. Civ. Code art. 12, which provides: "Whatever is done in contravention of a prohibitory law, is void, although the nullity be not formally directed."

\(^{137}\) LA. R.S. 9:2780(A).

\(^{138}\) As indemnification is not allowed for the strict liability of the indemnitee, the indemnitee will be liable even for the negligent acts of contractors providing services for the platform if the ruin of the platform results. Olsen v. Shell Oil Co., 365 So. 2d 1285; LA. Civ. Code art. 2322.

\(^{139}\) LA. R.S. 9:2780(A).

\(^{140}\) Any agreement contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, is void and unenforceable to the extent that it purports to or does provide for defense or indemnity, or either, to the indemnitee against loss or liability for damages arising out of or resulting from death or bodily injury to persons which is caused by or results from the sole or concurrent negligence or fault (strict liability) of the indemnitee, or an agent, employee, or an independent contractor who is directly responsible to the indemnitee.

LA. R.S. 9:2780(B).
relating to the exploration, development, production, or transportation of oil, gas, water, or minerals in any form. The enumeration is illustrative rather than exclusive and specifically includes the furnishing or rental of equipment and transportation. The word “agreement” in this paragraph refers to the underlying contract rather than the indemnity provision.

Paragraph (D) provides that the act will not affect the validity of any insurance contract, except as otherwise provided in the act, or any workmens' compensation benefits. Also, the owner or usufructuary of a surface estate can still seek indemnity from one conducting operations for the exploration or production of minerals on the owner's land.

Paragraphs (E) and (F) enumerate the exceptions to the legislative prohibition. Timber companies and public utilities are excluded to the extent that they are not involved in the production of oil and gas. Additionally, bodily injury resulting from radioactivity or from the performance of services to control wild wells\(^\text{141}\) may be subject to an indemnity agreement.

Paragraph (G) contemplates a situation in which a company seeks to protect itself from liability through the means of the service contractor's insurance policy.\(^\text{142}\) The prohibitions of this act may not be circumvented by requiring an agreement to waive subrogation, by adding named insureds on the insurance endorsements, or by any other form of insurance protection. Agreements in insurance policies attempting to accomplish the same effect as a contractual provision requiring a contractor to hold harmless a negligent indemnitee are void.

Paragraph (H) permits a person who has conveyed land but reserved a mineral servitude to secure indemnity from a party conducting exploration or production operations for minerals. However, he may not seek indemnity if he has retained a working interest in the minerals.

Paragraph (I) addresses the problem of master service agreements, which are common in the industry. In a master service agreement, the company and the contractor agree that the contract shall govern all work between and delineate the obligations of the parties during the term of the agreement. The company, however, is not obligated

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\(^{141}\) “Wild wells” are wells which for various reasons have gone out of control. Containing these wells is very dangerous and the parties, therefore, still are allowed to allocate loss between themselves.

\(^{142}\) The Ninth Circuit has allowed this means of protection in a maritime case. Price v. Zim-Israel, 616 F.2d 422. See text at note 85, supra.
to offer employment to the contractor, and the contractor is not obligated to accept offers from the company. The agreement merely governs in the event that employment is offered and accepted. The act purports to apply to these agreements, except when they were executed before the effective date of the act and govern a terminable performance of a specified service. Arguably, there may be an unconstitutional impairment of contracts when the act prevents the parties to a master service agreement from shifting potential liability for the indemnitee's negligence to the indemnitor. The company, however, will still have the choice not to offer employment to that contractor.

Through Act 427, Louisiana law now deviates substantially from the federal approach to indemnity agreements in maritime contracts. Oil companies may not contract away their fault, and when the negligent act of a contractor triggers a situation which results in the platform owner being held strictly liable, the owner will have to bear the burden of the loss.\(^\text{43}\)

Act 427 is intended to apply as federal law to fixed offshore platforms beyond three miles, as prescribed by the Outer Continental Shelf Lands Act.\(^\text{44}\) Although different treatment is accorded those contracts made to be performed on vessels, an equal protection argument offered by the owners of the platforms will probably be unsuccessful. A similar argument, offered in Smith v. Falcon Seaboard, Inc.,\(^\text{45}\) failed. A widow claimed that provisions of the Outer Continental Shelf Lands Act violated the equal protection clause and were impermissibly discriminatory. The Act restricted recovery available to workers assigned to platforms to that offered by the LHWCA, yet made no restriction on the recovery available to the workers assigned to vessels. The court, however, held that mobility of situs is not

\text{NOTES}

\begin{itemize}
  \item 143. See Olsen v. Shell Oil Co., 365 So.2d 1285.
  \item 144. State law is applied as federal law on artificial islands on the Outer Continental Shelf, but only when there is no applicable federal law. Outer Continental Shelf Lands Act § 203(a), 43 U.S.C. § 1333(2)(A) (Supp. 1981). The Fifth Circuit has recently held that exploration for and production of oil and gas from the ocean bottom has become a maritime activity. Boudreaux v. American Workover, Inc., 664 F.2d 463, 466 (5th Cir. 1981); Pippen v. Shell Oil Co., 661 F.2d 378, 384 (5th Cir. 1981). Fixed platforms experience many of the same perils of the sea that vessels experience, and they are used for the development of oil and gas, a maritime activity. Boudreaux and Pippen may indicate a movement toward recognition of these fixed platforms as structures that should be governed by maritime law. Because there already exists federal law on the subject of maritime indemnity agreements, the federal common law would preempt the application of LA. R.S. 9:2780.
  \item 145. 463 F.2d 206 (5th Cir. 1972), cert. denied 498 U.S. 1085.
  \item 146. U.S. CONST. amend. XIV, § 1.
\end{itemize}
an arbitrary criterion and the complaint would be better handled by Congress than the courts. The same result can be anticipated in the event a fixed platform owner protests the fact that a vessel owner can contract away his liability while he, engaged in the same hazardous activities, may not.

The United States Supreme Court has held that fixed offshore platforms beyond three miles off the coast of Louisiana are federal enclaves or islands rather than vessels, and thus are deserving of treatment similar to that granted land contracts. Most jurisprudence, however, has treated maritime and land-based indemnity agreements similarly. Now, as fixed offshore platforms are isolated by the new legislation which is carefully tailored to predominantly affect them, the federal enclaves in the Gulf of Mexico will more and more become islands, for they will receive a unique treatment that neither maritime nor Louisiana contracts receive.

Conclusion

In our original hypothetical, a welder made three contracts. In his first contract, he agreed to perform services on a submersible platform in the Gulf of Mexico. He specifically agreed to indemnify the owner for claims arising out of the performance of the job, even for injuries resulting from the indemnitee's fault. The admiralty courts would uphold the contract as it contained clear and unambiguous language. Even without the express indemnity agreement, if the injured employee was not covered by the LHWCA, the admiralty courts may have found that the welding contractor owed indemnity based upon an implied warranty of workmanlike performance.

The second contract, for the performance of welding services on a fixed drilling platform beyond three miles, is controlled by the Outer Continental Shelf Lands Act. Since the passage of Act 427 of 1981, this agreement for indemnity would be considered void. Clear and unequivocal language is immaterial since the parties may not, through their contracts, derogate from public policy. The courts also have precluded indemnification based upon an implied warranty of workmanlike performance, as they declined to extend the vessel-stevedore indemnity rule to contracts between fixed platform owners and contractors.

Louisiana law also would govern the third contract, but the indemnity provision would be upheld as the work was unrelated to the

147. 463 F.2d at 208.
149. See text at notes 53 & 103, supra.
energy industry. The language is clear and unequivocal: the talismanic word of “fault,” inclusive of “negligence,” is present, as required by the Fifth Circuit. The presumption against the intention of indemnifying against the indemnitee’s fault is thereby overcome.

Determining the law which will govern a given contract is imperative. The rules employed to reach the results vary under maritime and Louisiana law, and the results themselves often will differ. The discrepancy in treatment, however, is not always supported by solid reasoning.

A moveable drilling platform is a vessel, while a fixed drilling platform is not. This difference results in one contract being controlled by maritime law and the other by Louisiana law. The people affected by the choice of law which governs the indemnity agreements are not the workers, but the parties to the contract—the owner of the rig and the contractor. There is no logical basis for a result where the contractor will be liable for contractual indemnity on the vessel but not on the fixed offshore rig.

The passage of the new legislation in Louisiana has made the discrepancy in treatment most significant. Now, the artificial islands are treated in a unique way while maritime and Louisiana contracts unrelated to the energy industry are treated similarly. The pockets of jurisdiction should be redistributed so that vessels and artificial islands will be subject to different law only when such difference is founded upon a rational relationship to the nature of the transaction involved.

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