Contractual Indemnity in Maritime Law

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Repository Citation
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I. INTRODUCTION

The issue which defendant is liable to a plaintiff in maritime litigation often merely scratches the surface of the legal issues that will have to be addressed in a final determination of which party or which insurer ultimately bears the cost of any settlement or judgment. This is because of the plethora of contractual relationships among what is often numerous participants in maritime operations. As a result, contractual indemnity in maritime law is an area of extensive litigation. This article addresses many of the issues that arise in litigating indemnity obligations in the maritime setting.

The number of issues arising from a single indemnification provision in a contract can be complex and may not be easily resolved by existing case law. One of the most litigated issues in this area of the law is the threshold issue whether maritime law will apply to a specific contract. The resolution of this issue depends upon the nature of that contract. This issue is addressed in part II. Part III addresses the type of language required in indemnification agreements under Louisiana, Texas, and maritime law for those agreements to be enforced to require an indemnitor to indemnify an indemnitee for the indemnitee's own negligence or fault. Part IV notes a statutory restriction on maritime indemnification agreements and an exception to that restriction. Part V discusses the situation that arises when more than one party agrees to defend and indemnify an indemnitee. Whether a waiver of subrogation in a contract affects rights of indemnity is discussed in part VI. Part VII outlines some particularly complicated insurance issues that may arise in the maritime contractual indemnity setting. Finally, a special appellate rule applicable to maritime indemnity claims is pointed out in part VIII.

II. DOES MARITIME OR STATE LAW APPLY TO THE CONTRACT?

A. Maritime or Non-Maritime Nature of Contract

Perhaps the best starting point in an examination of contractual indemnity in maritime law is, unfortunately, also a very troublesome analysis for the practitioner. The issue whether a contract is maritime is most often litigated in the context of marine oil and gas exploration or production. The resolution of
that issue usually determines whether the Louisiana Oilfield Anti-Indemnity Act\(^1\) or the Texas Oilfield Indemnity Act\(^2\) will apply to negate or limit the indemnity sought, or whether an indemnification agreement will be enforced under maritime law.

When are activities maritime? The United States Fifth Circuit Court of Appeals has addressed this question in numerous decisions without supplying a bright-line test. One need only examine recent Fifth Circuit opinions to see that the court recognizes the difficulty in making the distinction between maritime and non-maritime activities.

In 1990, Circuit Judge Alvin B. Rubin authored *Davis & Sons, Inc. v. Gulf Oil Corp.*\(^3\) and began by stating, "Whether a contract is or is not maritime in nature is a quotidian issue whose resolution is governed by no broad rubric discernable from the numerous decided cases."\(^4\) Likewise, Circuit Judge John R. Brown began his opinion in *Domingue v. Ocean Drilling & Exploration Co.*\(^5\) approximately one year later by noting, "Once more we embark on a voyage through the familiar marshland area of the law set aside for classifying the oil and gas exploration services contract as wet or dry."\(^6\)

*Davis & Sons, Inc.*, *Domingue*, and *Campbell v. Sonat Offshore Drilling, Inc.*\(^7\) are an excellent trilogy to demonstrate the issues that arise in determining whether a contract is maritime.

The court in *Davis & Sons, Inc.* warned, "For those looking for a bright line delineating the boundary between maritime and non-maritime contracts, our previous cases offer little assistance . . . ."\(^8\) Judge Rubin noted the following specific factual circumstances previously addressed and ruled upon by the Fifth Circuit, commenting that the rulings were "apparent inconsistencies": "Oil and gas drilling on navigable waters aboard a vessel is recognized to be maritime commerce";\(^9\) "a turnkey contract to drill an offshore well" is maritime;\(^10\) "a contract to furnish a casing crew to a submersible drilling barge [is] maritime in nature";\(^11\) and, in contrast, "[other case law] states that there is nothing

\(^3\) 919 F.2d 313 (5th Cir. 1990).
\(^4\) Id. at 313.
\(^6\) Id. at 393-94.
\(^7\) 979 F.2d 1115 (5th Cir. 1992).
\(^8\) Davis & Sons, Inc. v. Gulf Oil Corp., 919 F.2d 313, 315 (5th Cir. 1990).
\(^9\) Id. (quoting Theriot v. Bay Drilling Corp., 783 F.2d 527, 538-39 (5th Cir. 1986)).
\(^10\) Id. (citing Lewis v. Glendel Drilling Co., 898 F.2d 1083 (5th Cir. 1990), cert. denied, 502 U.S. 857, 112 S. Ct. 171 (1991)).
inherently maritime about the activities involved in offshore oil production.”

The court explained that the apparent inconsistent results were traceable to the highly fact-specific inquiry required to classify activities as maritime. The court noted that while it could discern no single method of analysis in the many cases addressing this subject, it would now articulate what it perceived as a “fairly consistent underlying approach” used by the Fifth Circuit in these cases.

The court noted that often the contracts in dispute are comprised of two separate components. First, there is some form of master service agreement that usually includes a defense and indemnity agreement and other general terms without referencing a specific job. Second, a supplementary contract, such as a work order, is entered into which provides for the specific services requested. The two documents must be interpreted together in evaluating whether maritime or “land law” applies. Such contracts may contain both maritime and non-maritime obligations. “If separable maritime obligations are imposed by the supplementary contracts, or work orders, these are ‘maritime obligations [that] can be separately enforced [in admiralty] without prejudice to the rest,’ [and] hence [are] subject to maritime law.” If an injury occurs in the performance of a separable maritime obligation (even though the blanket contract was principally non-maritime) the complete contract is subject to maritime law.

After explaining this generalization, the *Davis & Sons, Inc.* court emphasized that the classification of the contract as maritime depends on the “nature and character of the contract,” rather than on the place of execution or performance. Furthermore, determination of the “nature of the contract” depends in part on historical treatment in the jurisprudence and in part on a fact-specific inquiry.

The six factors to be considered in characterizing a contract were identified in *Davis & Sons, Inc.:

1) what does the specific work order in effect at the time of the injury provide? 2) what work did the crew assigned under the work order actually do? 3) was the crew assigned to work aboard a vessel in navigable waters? 4) to what extent did the work being done relate to the mission of that vessel? 5) what was the principal work of the

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14. *Id.*

15. *Id.* at 315-16 (quoting Compagnie Francaise De Navigation A Vapeur v. Bonnasse, 19 F.2d 777, 779 (2d Cir.), *cert. denied*, 275 U.S. 551, 48 S. Ct. 114 (1927)).

16. *Id.* at 316 (citing Lefler v. Atlantic Richfield Co., 785 F.2d 1341 (5th Cir. 1986)).

17. *Id.* (quoting North Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co., 249 U.S. 119, 125, 39 S. Ct. 221, 223 (1919)).

18. *Id.*
injured worker? and 6) what work was the injured worker actually doing at the time of injury? 19

After establishing the analysis to be used, the Davis & Sons, Inc. court began its "voyage through the familiar marshland" by examining the specific facts before it.

Davis & Sons, Inc. (Davis), entered into a master service agreement with Gulf Corporation to provide labor and general contracting services for onshore and offshore facilities. 20 Davis contended that approximately seventy percent (70%) of the labor provided under the contract was land-based, and that the contract's principal obligation was demonstrably non-maritime. The master service agreement, however, did not specify any particular work to be performed by Davis. It did include an indemnity clause. 21

The court expressly noted that even if most of the work under the contract was land-based, the activities underway at the time of the accident at issue had to be evaluated. Pursuant to work orders issued weekly, Davis supplied labor for two barge crews and two individual pumpers to work in Black Bay Field. 22 The self-propelled barges had spuds but no jack-up facilities. It had no quarters and the crew was land-based. Any work performed on the barge was done either while it was afloat or spudded down next to the small work platforms that surrounded the producing wells in the field.

Brenaman, the decedent, was a Davis employee assigned to one of the barges as a "pusher." His primary responsibility was to supervise other Davis employees. The barge made daily maintenance runs throughout the field "to make repairs, lay pipe, and work on flow lines; it also transported chemicals and supplies." 23 Since the work platforms around the wellheads did not provide adequate work space, the majority of service work was performed on the barge itself. Davis employees also were responsible for such activities as painting, inspecting and repairing equipment, and operating and navigating the barge. 24

The work order governing the period during which the accident occurred provided only: "Vendor: Davis; Service Description: Labor Gang 11171." 25 At the time of the accident, the crew was working on the barge while it was spudded down adjacent to a fixed platform. The crew members were building a walkway to be placed on a tank battery, filling a pollution tank with water, and checking the tank for leaks. Brenaman was supervising the crew's work as well

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19. Id.
20. Id. at 314.
21. Id. at 316.
22. Id. at 314.
23. Id.
24. Id.
25. Id.
as fitting paneling for an office being built on the barge. He left the area and, several hours later, was discovered drowned in nearby waters.\textsuperscript{26}

The court, applying the six-factor analysis to these facts, concluded:

\textit{(Factor 1: Specific Work Order.)} The service order did not specify details of the assigned work, but simply assigned the crew to Barge 11171.\textsuperscript{27}

\textit{(Factor 2: Actual Work Performed.)} Employee time sheets indicate that during the week in question the crew repaired leaks on wells and tanks, repaired and replaced flowlines, transported materials, and built a walkway.\textsuperscript{28}

\textit{(Factor 3: Aboard a Vessel.)} The crew traveled aboard the barge from one site to another performing the majority of their work on the barge, and the terrain and production equipment involved required the use of a "special purpose vessel,"\textsuperscript{29} such as this barge, that could function as a mobile work platform. Its transportation function was more than "merely incidental"\textsuperscript{30} to its primary purpose of serving as a work platform.

\textit{(Factor 4: Relationship of the Work to the Mission of the Vessel.)} The mission of the vessel, therefore, was "to serve as a mobile maintenance unit,"\textsuperscript{31} and in light of that function or mission, the crew attached to that vessel served in a capacity that contributed to its mission. The work done by the crew was inextricably intertwined with maritime activities since it required the use of a vessel and its crew.

\textit{(Factor 5: Principal Work of the Injured Employee.)} Brenaman's principal work "was to supervise Davis' employees in the accomplishment of the vessel's mission."\textsuperscript{32} He had been assigned to the barge for more than eighteen months, and performed a substantial part of his work on the barge itself.

\textit{(Factor 6: Actual Work Being Performed When Injured.)} He was overseeing Davis' employees (the crew of the vessel) at the time of his death and, additionally, temporarily helping to build an office on board.\textsuperscript{33}

The court then summarily concluded based upon this analysis that the entire agreement specified in the work order for the work in question was a maritime contract. Therefore, the indemnity agreement contained in the blanket contract

\begin{itemize}
\item[26.] \textit{Id.}
\item[27.] \textit{Id.} at 316.
\item[28.] \textit{Id.} at 316-17.
\item[29.] \textit{Id.} at 317.
\item[30.] \textit{Id.} (quoting Sharp v. Johnson Bros. Corp., 917 F.2d 885, 888 (5th Cir. 1990)).
\item[31.] \textit{Id.}
\item[32.] \textit{Id.}
\item[33.] \textit{Id.}
\end{itemize}
must be interpreted under maritime law. The court reversed the district judge’s ruling to the contrary.  

Approximately two months later, the Fifth Circuit again ruled upon a classification of a contract as “wet or dry.” In Domingue v. Ocean Drilling & Exploration Co., the court examined a blanket service contract between Dimensional Oil Services, Inc. (Dimensional) and Ocean Drilling and Exploration Company, Inc. (ODECO), and a subsequent oral work order requesting Dimensional to perform wireline services on an ODECO jack-up drilling rig. Domingue, a Gulf Coast Well Tester employee, was performing well testing services unrelated to Dimensional’s wireline operations when he sustained injuries after tripping over a piece of equipment placed on the rig’s deck by the Dimensional crew. Domingue filed suit against ODECO and later joined Dimensional. ODECO filed a cross-claim against Dimensional seeking indemnity under the 1983 blanket contract.  

Judge Brown acknowledged this case was identical in several respects to Davis & Sons, Inc. However, he noted two major distinctions. First, in Davis & Sons, Inc., indemnity was sought for claims made by representatives of an employee of Davis, the indemnitor. In Domingue, the injured party was not an employee of Dimensional, the indemnitor, and his work was unrelated to Dimensional’s wireline operation. The second difference, which the court believed even more significant, was that in Davis & Sons, Inc., Davis was required to perform the maintenance work in question “primarily through the use of self-propelled work barges.” In contrast, “Dimensional supplie[d] no vessel as such when executing an ODECO work order” (although jack-up rigs are judicially characterized as vessels).  

Guided by Davis & Sons, Inc., the court devoted the majority of its opinion to the fact-specific application of the six-factor analysis to the Dimensional-ODECO contract and activities. The analysis, in pertinent part, was as follows:

(Factor 1: Specific Work Order.) Dimensional’s sole obligation under the work order was to perform wireline services. ODECO requested no other services.  

(Factor 2: Actual Work Performed.) It was undisputed that only wireline operations, and no other work, were performed by the Dimensional crew on the pertinent dates of September 14-15, 1987.
(Factor 3: Aboard a Vessel.) Wireline operations were performed exclusively on a single jack-up drilling unit, which has been characterized as a vessel.42

(Factor 4: Relationship of the Work to the Mission of the Vessel.) This factor garnered the most in-depth analysis. The court immediately noted "[i]t should no longer be open to dispute that wireline services are peculiar to the oil and gas industry and, viewed apart from the circumstances under which they are performed, are distinctly non-maritime in nature."43 Furthermore, the Dimensional-ODECO contract did not become maritime simply because the wireline services performed under the contract were aboard a vessel. The court cited Davis & Sons, Inc. for the proposition whether a contract is maritime "depends on the ‘nature and character of the contract’ rather than on its place of execution or performance."44 The court went on to note that a contract would take on a salty flavor when the performance of the contract is more than incidentally related to the execution of the vessel’s mission, and discussed how this distinction was addressed previously by the Thurmond v. Delta Well Surveyors45 court.46

In Thurmond, the Fifth Circuit determined that in analyzing a contract to provide a work barge and crew to perform wireline services

42. Id. (citing Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959); Houston Oil & Minerals Corp. v. American Int’l Tool Co., 827 F.2d 1049 (5th Cir. 1987), cert. denied, 484 U.S. 1067, 108 S. Ct. 1031 (1988)). See also Vickers v. Chiles Drilling Co., 822 F.2d 535 (5th Cir. 1987); Wallace v. Oceanering Int’l, 727 F.2d 427 (5th Cir. 1984).

43. Domingue v. Ocean Drilling & Exploration Co., 923 F.2d 393, 396 (5th Cir. 1991), cert. denied, 502 U.S. 1033, 112 S. Ct. 874 (1992) (citing Thurmond v. Delta Well Surveyors, 836 F.2d 952, 955-56 (5th Cir. 1988)). The court acknowledged in footnote 6 that Thurmond did not mention the Fifth Circuit’s earlier opinions of Pippen v. Shell Oil Co., 661 F.2d 378 (5th Cir. 1981) and Boudreaux v. American Workover, Inc., 664 F.2d 463 (5th Cir. 1981), reh’g en banc, 680 F.2d 1034 (5th Cir. 1982), cert. denied, 459 U.S. 1170, 103 S. Ct. 815 (1983), which held “offshore wireline services were maritime in nature.” Domingue, 923 F.2d at 396 n.6. In Pippen, the Fifth Circuit opined:

Since offshore drilling . . . is maritime commerce, it follows that the purpose of Pippen’s [wireline operations] work was to facilitate maritime commerce. . . . [W]e are [therefore] compelled to conclude that the work performed by Pippen had a realistically significant relationship to maritime commerce. Thus, Pippen was engaged in maritime employment at the time of his injury. Pippen, 661 F.2d at 384 (footnote omitted).

The Domingue court noted the vitality of the Pippen-Boudreaux holdings may continue to be in doubt after the Supreme Court’s decision in Herb’s Welding, Inc. v. Gray, 470 U.S. 414, 418-19, 105 S. Ct. 1421, 1424-25 (1985), in which the Supreme Court rejected the Fifth Circuit’s expansive view of maritime employment in decisions such as Pippen and Boudreaux. Domingue, 923 F.2d at 396 n.6.

44. Domingue, 923 F.2d at 396 (quoting Davis & Sons, Inc. v. Gulf Oil Corp., 919 F.2d 313, 316 (5th Cir. 1990)).

45. 836 F.2d 952 (5th Cir. 1988).

46. Domingue, 923 F.2d at 396-97.
“the use of the work barge was only incidental to the performance of the contract.” 47 Thurmond distinguished itself from Theriot v. Bay Drilling Corp., 48 in which the Fifth Circuit determined that “a contract to furnish the equipment, materials, supplies, and services necessary to drill an oil well was maritime because the supply of a vessel was central to the contract.” 49 The court noted the supply of a vessel was central to the contract in Theriot, but the contract in Thurmond did not require the contractor to provide a vessel (although the court acknowledged the contract may have even contemplated the hiring of vessels and seamen). The court cited Thurmond’s conclusion that the use of a vessel was, at best, incidental to the performance of the contract. 50

The court determined that the Domingue facts were more analogous to Thurmond. ODECO owned and provided the jack-up rig. The Dimensional employees used this vessel merely as a work platform to execute the wireline services. The Domingue court therefore concluded, “The fact of the [jack-up rig] being a vessel is nothing more than incidental to its purpose here of serving as a work platform for the execution of this particular service contract.” 51

(Factors 5 & 6: The Work of the Injured Employee.) The second distinction between Davis & Sons, Inc. and Domingue, that the injured party was not an employee of Dimensional nor was his work related to Dimensional’s wireline operations, became significant for the application of these two factors. Under Davis & Sons, Inc., these factors aided in classifying the contract as maritime because as an employee of the party performing the services under the contract, the work performed by the employee would help define the nature of the contract. In contrast, in Domingue the work performed by the injured party was immaterial to defining the Dimensional-ODECO contract because the injured party was performing well-testing operations as an employee of a third party. Therefore, the court determined that Davis & Sons, Inc. factors five and six had little, if any, relevance. 52

Left with the other applicable factors, the Domingue court held Thurmond was controlling, and the Dimensional-ODECO service contract was non-maritime. 53 The Fifth Circuit again reversed the lower court, which had reached an opposite conclusion. For practitioners, Domingue appeared to provide an outline of the analysis the Fifth Circuit mandated for future use. This outline

47. Id. at 397 (citing Thurmond, 836 F.2d at 956) (emphasis added).
48. 783 F.2d 527 (5th Cir. 1986).
49. Domingue, 923 F.2d at 397 (citing Theriot, 783 F.2d at 538-39).
50. Id.
51. Id. (emphasis added).
52. Id. at 398.
53. Id.
consisted of taking the six *Davis & Sons, Inc.* factors and applying them to the facts of each case/contract. The "rules of the game" were set, but along came *Campbell v. Sonat Offshore Drilling, Inc.* and, to quote a prominent American auto manufacturer, "the rules [appear to] have changed."

In *Campbell*, Union Texas Petroleum Corporation (UTP) contracted with Sonat Offshore Drilling, Inc. (Sonat) to drill a well on the outer continental shelf off the coast of Louisiana utilizing Sonat's drilling vessel, the Offshore Taurus. Additionally, UTP entered into an agreement with Frank's Casing Crew and Rental Tools, Inc. (Frank's) for Frank's to provide drive pipe, hammer work, and casing services for the project. Campbell, a member of Frank's casing crew, was injured as he attempted to transfer from the M/V Trudy Bruce, a transport vessel, to Sonat's drilling vessel.

The court first addressed the preliminary issue whether the agreement between UTP and Frank's constituted a contract. The court then considered the issue whether the Outer Continental Shelf Lands Act (OCSLA) was applicable. The court noted the district court had focused on the second prong of the three-part test used to determine the applicability of the OCSLA. Under the test used to decide whether state law applies under the OCSLA as set forth in *Smith v. Penrod Drilling Corp.*, the second factor requires that federal

54. 979 F.2d 1115 (5th Cir. 1992).
55. *Id.* at 1117-18.
56. The agreement in question was a purchase order issued to Frank's by UTP thirteen days after the accident occurred. The court noted Frank's had admitted a contract existed between the parties. Further:

1. UTP and Frank's [had] conducted business on a regular, continuous basis for years;
2. it [was] common practice between UTP and Frank's for individual purchase orders to postdate the services rendered;
3. (the basic indemnity language in these UTP-Frank's contracts [had] remained constant; and
4. as for the specific contract at issue, UTP paid Frank's in accordance with the contract's terms and Frank's accepted that payment without objection.

*Id.* at 1119-20. Therefore, since the parties shared a history of business dealings and since standardized provisions were part of those dealings, the provisions were binding when accepted without objection. *Id.* at 1120 (citing *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217, 220 (5th Cir. 1991); *M/V American Queen v. San Diego Marine Constr. Corp.*, 708 F.2d 1483, 1488-89 (9th Cir. 1983); *Hudson Waterways Corp. v. Coastal Marine Serv.*, Inc., 436 F. Supp. 597, 604-05 (E.D. Tex. 1977)).

57. To determine whether state law applies under the OCSLA, the following test has been established by the Fifth Circuit:

1. For adjacent state law to apply as surrogate federal law under OCSLA, three conditions are significant. (1) The controversy must arise on a situs covered by OCSLA (i.e. the subsoil, seabed, or artificial structures permanently or temporarily attached thereto). (2) Federal maritime law must not apply of its own force. (3) The state law must not be inconsistent with Federal law.

58. 960 F.2d 456 (5th Cir. 1992).
maritime law must not apply of its own force. The Fifth Circuit in *Campbell* stated the district court focused on this factor by “[a]pplying a two part test introduced by the Fifth Circuit in *Davis & Sons, Inc.* to determine whether a contract is maritime.”

*Campbell* might be considered somewhat confusing not only because it determined after *Thurmond* and *Domingue* that providing certain oilfield services is a maritime activity, but arguably also because of its description and application of the *Davis & Sons, Inc.* test. Why was the Fifth Circuit, for the first time, referring to the *Davis & Sons, Inc.* test as “two part”? In the four decisions rendered between *Davis & Sons, Inc.* and *Campbell* on the issue of a maritime versus non-maritime contract, the Fifth Circuit made no reference to a two-part test. However, *Davis & Sons, Inc.* did preface the six factors delineated therein by stating, “Determination of the nature of a contract depends in part on historical treatment in the jurisprudence and in part on a fact-specific inquiry.”

*Davis & Sons, Inc.*, however, appears not to provide any comparison of its facts to historical treatment in the jurisprudence in the text of the opinion. *Campbell* implies that the *Davis & Sons, Inc.* language creates a two-part test: (1) historical treatment in the jurisprudence; and (2) a fact-specific inquiry using the six-factor analysis.

The Fifth Circuit decisions prior to *Campbell*, arguably, did not interpret the *Davis & Sons, Inc.* language to set up such a two-part test. *Domingue* summarized the *Davis & Sons, Inc.* language by stating: “[I]t set forth six factors which [were] crystallized from this Circuit’s jurisprudence directing the fact-specific inquiry . . . .” In *Smith* and *Hollier*, the opinions simply stated, “In determining whether a contract is maritime, this court in *Davis & Sons, Inc. v. Gulf Oil Corp.* outlined the following test,” and proceeded to quote the six factors. At the district court level in *Hollier*, the district court explained the *Davis & Sons, Inc.* language as follows:

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61. Davis & Sons, Inc. v. Gulf Oil Corp., 919 F.2d 313, 316 (5th Cir. 1990).
62. Id.
63. Campbell, 979 F.2d at 1121 (“In accordance with the first part of the *Davis* test, the district court looked to this court’s established jurisprudence and found precedent . . . . The district court then applied the fact-specific inquiry prescribed in *Davis* . . . .”).
64. Domingue, 923 F.2d at 395.
In [Davis & Sons, Inc.] the court reviewed the jurisprudence in this area of the law and listed the six factors considered to be controlling in making the determination of whether or not the work done under an oil well service contract embracing onshore and offshore drilling and production activities is or is not maritime in character.67

Review of the text of these opinions indicates that, at least prior to Campbell, the test did not consist of two separate parts. The court appeared to apply the Davis & Sons, Inc.'s six factors as a single prong. The "in part on historical treatment in the jurisprudence" and "in part on a fact-specific inquiry" language in Davis & Sons, Inc. was apparently presumed to mean that relevant jurisprudence and the specific facts of each case were both considered together under each of the six factors.68

Arguably, Dupont v. Sandefer Oil & Gas, Inc.69 is most in line with Campbell's emphasis on historical treatment in the jurisprudence. In Dupont, the court did not refer to the applicable test as having two parts. In fact, the six-factor analysis was not even applied. The Dupont court only discussed prior jurisprudence in determining that a contract to provide a vessel for use in drilling and workover services was maritime.70 The court cited Smith v. Penrod Drilling Corp.71 as controlling because it stood for the proposition that the use of a jack-up rig was incidental to the completion of a well. The court noted that both Thurmond and Domingue relied heavily on the fact that the contracts at issue in those cases did not require a vessel to be provided; thus, furnishing a vessel could not have been a principal obligation of either contract.72

In any event, the Campbell court, upon discerning the test as two-part, relied on Corbitt v. Diamond M. Drilling Co.73 to conclude that providing casing services had previously been considered by the court to be maritime in nature. The Campbell court pointed out74 that Corbitt was cited (along with many other cases) in a footnote in Davis & Sons, Inc. (at a point where the Davis & Sons, Inc. court was apparently making the point that prior jurisprudence on the issue of maritime versus non-maritime contract was confusing).75

The court apparently gave great weight to the "historical treatment in the jurisprudence" accorded to casing services by Corbitt. The court supported its reliance on Corbitt by stating: "It has been long established that a legally

68. See Domingue, 923 F.2d at 396-97 (analyzing jurisprudence under factor (4)); Smith, 960 F.2d at 460 (analyzing jurisprudence under factors (1), (3), and (5)).
69. 963 F.2d 60 (5th Cir. 1992).
70. Id. at 62.
71. 960 F.2d 456 (5th Cir. 1992).
72. Dupont, 963 F.2d at 62. The court obviously believed furnishing a vessel was still a vital consideration by continuing to list it as a factor in subsequent decisions.
73. 654 F.2d 329 (5th Cir. 1981).
75. Davis & Sons, Inc. v. Gulf Oil Corp., 919 F.2d 313, 315 & n.5 (5th Cir. 1990).
indistinguishable decision of this court must be followed by other panels of this court and district courts unless overruled en banc or by the United States Supreme Court.\textsuperscript{76} The court specifically rejected the argument that \textit{Herb's Welding} had impliedly overruled \textit{Corbitt}. The court construed the rejection by the United States Supreme Court in \textit{Herb's Welding} of the circuit's expansive views of maritime employment, regarding activities associated with the exploration and development of oil and gas, as limited to platform related activities.\textsuperscript{77}

Notably, the six-factor analysis was contained within one paragraph in \textit{Campbell}, as compared to occupying almost half the text of the \textit{Domingue} opinion. The court was apparently not persuaded by the following analysis of the \textit{Davis & Sons, Inc.} factors and comparison with the \textit{Domingue} analysis of these factors which was included in appellant's brief to the court:\textsuperscript{78}

\begin{tabular}{p{0.8\textwidth}p{0.8\textwidth}}
\textbf{Domingue} & \textbf{Campbell} \\
1. \textit{The specific work order}: To provide wireline services aboard the Conquest (rather than a contract to provide or operate any vessel) & To provide hammer operations aboard the Ocean Taurus, hammering drive pipe into the subsoil (rather than a contract to provide or operate any vessel) \\
2. \textit{Actual work performed}: Only wireline services were performed aboard the ODECO rig. & Only hammer services were performed aboard the Taurus. \\
3. \textit{Aboard a vessel?} The wireline services were performed exclusively on the Ocean Conquest, a jack-up drilling unit & The hammer services were performed exclusively on the Taurus, a movable jack-up drilling unit. \\
4. \textit{Relationship of the work to the mission of the vessel}: The wireline services were distinctly non-maritime in nature. The fact that the Ocean Conquest was a vessel was nothing more & The hammer operations were distinctly non-maritime in nature. The fact that the Taurus was a vessel was
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\textsuperscript{76} \textit{Campbell}, 979 F.2d at 1121 n.8 (citing, for example, Sturgeon v. Strachan Shipping Co., 698 F.2d 798, 800 (5th Cir. 1983), \textit{cert. denied}, 469 U.S. 883, 105 S. Ct. 251 (1984); United States v. Kirk, 528 F.2d 1057, 1063 (5th Cir. 1976)).

\textsuperscript{77} \textit{Id.}

\textsuperscript{78} Brief of Appellants at 20-21, \textit{Campbell v. Sonat Offshore Drilling, Inc.}, 979 F.2d 1115 (5th Cir. 1992) (No. 91-4934).
than incidental to the performance of the wireline services on the Ocean Conquest.

5. **Principal work of the injured worker:**
   Not applicable. Felix Campbell was a welder (as was the worker in *Herb's Welding*)—a traditionally non-maritime activity.

6. **Work the injured worker was engaged in:**
   Not applicable. Felix Campbell was transferring, by personnel basket, to the Taurus preparatory to beginning his work. He was not engaged in the operation of any vessel.

Later in the opinion, the court distinguished *Domingue* from the facts in *Campbell* on several bases. In *Domingue*, the vessel had merely served as a work platform. The court then noted, “Although it is conceivable that a vessel such as [the jack-up rig in *Campbell*] may be used as a mere work platform . . . , this is not the case before us.” The court had also noted the wireline services performed in *Domingue* were only incidentally related to the mission of the vessel. In contrast, the court pointed out that Campbell and the rest of the crew performed their work from a vessel whose mission was to drill oil and gas wells. The work performed was “inextricably intertwined with maritime activities since it required the use of a vessel and its crew.”

The *Campbell* court focused on the use of the equipment that was part of the drilling vessel (e.g., derrick and draw works) to complete the casing crew’s operations.

The parameters of this distinction would appear likely to be the focus of much attention in future litigation on the issue of maritime versus non-maritime contracts. How far this distinction can be stretched would appear to be an obvious concern. What work in future cases will be determined to be inextricably intertwined with maritime activities due to the use of a vessel and crew, and what work will be considered only incidentally related to the mission of the vessel?

What direction have the decisions taken since *Campbell*? Has the Fifth Circuit been consistent in its analysis after its apparent reclassification of the *Davis & Sons, Inc.*’s test as two-part? What interpretation have the district courts given the *Campbell* decision?

79. *Campbell*, 979 F.2d at 1123 (citation omitted).
80. *Id.* (quoting *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313, 317 (5th Cir. 1990)).
Logically, one could assume after Campbell that we now have a two-part test, at least in personal injury cases—or do we? In Dupre v. Penrod Drilling Corp., the only Fifth Circuit opinion rendered since Campbell on this issue, the Fifth Circuit failed to refer to the Davis & Sons, Inc.'s test as two-part. The court simply combined its analysis of "historical treatment in the jurisprudence" within the six-factor analysis. Additionally, the court once again dedicated a substantial portion of its opinion to this six-factor analysis.

Judge Putnam of the Western District of Louisiana recently ruled on a Motion for Reconsideration in Hodgen v. Forest Oil Corp. and appeared to follow the two-part analysis by evaluating the historical treatment in the jurisprudence independently from the six-factor analysis. In Freeport McMoRan Resource Partners, Ltd. Partnership v. Kremco, Inc., Judge Livaudais determined that the six-factor test set forth in Davis & Sons, Inc. used to determine whether a contract is maritime applies only in cases involving personal injury.

The confusion in the case law regarding how the maritime/non-maritime distinction is made should serve as notice that the six-factor Davis & Sons, Inc. analysis may not always be conclusive in determining the nature of the contract. The practitioner must be aware that the existence of "historical jurisprudence" from the previous "marshland" of cases may result in a court emphasizing the historical treatment in the jurisprudence over the six-factor analysis.

Perhaps Judge Smith, in Smith v. Penrod Drilling Corp., stated the current situation best:

After Herb's Welding, our cases that propound the maritime nature of offshore drilling-related contracts have been limited to their facts. In each new case, a panel of this court must comb through a bewildering array of cases that rely upon inconsistent reasoning in the hope of finding an identical fact situation. Absent en banc reconciliation, cases thus are decided on what seems to be a random factual basis.

B. Application of State Law Under OCSLA

Whether maritime law or state law will apply to a contract may be determined by the application of the Outer Continental Shelf Lands Act (OCSLA). The OCSLA mandates that adjacent state law be declared the law of the United States
for controversies arising on a situs such as the subsoil, seabed, or artificial structure permanently or temporarily attached thereto. To determine whether the OCSLA applies, the Fifth Circuit has developed a three-prong test: "(1) The controversy must arise on a situs covered by [the] OCSLA . . . ; (2) Federal maritime law must not apply of its own force; and (3) The state law must not be inconsistent with Federal law." The factual circumstances of a recently decided district court opinion provide an appropriate setting for a brief discussion of the test for the application of the OCSLA to a contractual indemnity claim. In Hodgen v. Forest Oil Corp., the plaintiff was injured after making a swing rope transfer from a fixed platform on the outer continental shelf off the coast of Louisiana onto a vessel to be transported to another field platform in the Gulf of Mexico. The work of the plaintiff and his crew was performed on a fixed platform. Hodgen determined that only the first two factors warranted discussion since the Fifth Circuit has expressly held in previously applying the third factor that the Louisiana Oilfield Anti-Indemnity Act was not inconsistent with federal law when applied to contractual disputes arising under the OCSLA.

In applying the first factor, the Hodgen court addressed prior jurisprudential interpretation of the situs requirement. Union Texas Petroleum v. PLT Engineering and Domingue v. Ocean Drilling & Exploration Co., were cited by the court to emphasize that a vessel’s use in carrying out a contract is not determinative. Union Texas Petroleum stressed that "the OCSLA situs requirement is met when the location where a substantial amount of work under the contract is done [is] on covered situses." A previous Fifth Circuit decision in Hollier v. Union Texas Petroleum Corp. had held that the OCSLA situs requirement was met because the plaintiff was "in physical contact with the platform at the time of his injury." The defendants in Hodgen attempted to argue, based upon this language, that contact with the seabed or a platform was necessary to meet the situs requirement. They contended that since the accident occurred entirely on a vessel, there was no controversy arising on an OCSLA situs that could implement the Louisiana Oilfield Anti-Indemnity Act. The Hodgen court chose to regard the

86. Id. § 1333 (1988).
89. Id. at 1562.
94. Id. at 1566 (citing Union Tex. Petroleum, 895 F.2d at 1047-48).
95. 972 F.2d 662 (5th Cir. 1992).
96. Id. at 665.
Hollier language, at best, as dicta and followed the Union Texas Petroleum rule of law regarding the situs requirement.97

In the text of his opinion, Judge Putnam distinguished application of maritime law to the tort claim from the proper law to be applied to the contractual claim. He noted there were separate controversies in the case, one involving the maritime tort claim of the plaintiff against the vessel owner and charterer, and the second controversy arising from the application of the indemnification provisions of a contract for platform services. The first prong of the three-prong test mandating that the controversy must arise on a situs covered by the OCSLA was met, since the work performed under the contract was on a covered situs. He then concluded in applying the second prong of the test that maritime law did not apply of its own force, the test for applying the OCSLA was met, and Louisiana law and the Louisiana Oilfield Anti-Indemnity Act applied.98


Which law will govern the interpretation of a contract may be determined by a choice-of-law provision in the contract. Stoot v. Fluor Drilling Services, Inc.99 addressed this issue. In Stoot, an employee of a drilling contractor sued the drilling contractor for injuries that resulted from an attack on the employee by an employee of the rig’s caterer. The drilling contractor sought indemnity from the caterer pursuant to the catering contract.

The district court relied on Lefler v. Atlantic Richfield Co.100 to determine that the contract was maritime in nature.101 The district court then ruled, following Theriot v. Bay Drilling Corp.,102 that maritime law should govern the interpretation of the indemnity agreement.103 On appeal, the Fifth Circuit noted that the district court’s analysis of the maritime nature of the catering contract was correct. However, the Stoot court stated, “[I]t does not automatically follow that maritime law applies.”104 The court noted that the contract contained a Louisiana choice-of-law provision. Thereafter, the court explained:

In the absence of a choice of law clause, the construction of indemnity provisions in a contract involving maritime obligations is governed by maritime law. However, under admiralty law, where the parties have

98. Id. at 1566-67.
99. 851 F.2d 1514 (5th Cir. 1988).
100. 785 F.2d 1341 (5th Cir. 1986).
101. Stoot, 851 F.2d at 1517 (citing Lefler v. Atlantic Richfield Co., 785 F.2d 1341 (5th Cir. 1986), which held a catering services contract includes maritime obligations when the contractor agrees to provide household services to barges or other seagoing vessels).
102. 783 F.2d 527 (5th Cir. 1986) (holding the construction of indemnity provisions in maritime contracts is governed by maritime law).
103. Stoot, 851 F.2d at 1517.
104. Id.
included a choice of law clause, that state’s law will govern unless [1] the state has no substantial relationship to the parties or the transaction or [2] the state’s law conflicts with the fundamental purposes of maritime law.105

The State of Louisiana was determined to have a substantial relationship to the parties in this case. One party was qualified to do business in Louisiana. More importantly, the party seeking protection of Louisiana law was a Louisiana corporation. The court noted that Louisiana had declared a strong interest in protecting resident independent contractors from the inequities of indemnity clauses that require the contractor to indemnify the vessel owner against its own negligence.106

Recently, two decisions have addressed choice-of-law provisions and the effect such provisions may ultimately have on the obligations alleged to be imposed upon the parties by an indemnity agreement. Both decisions, Campbell v. Sonat Offshore Drilling, Inc.107 and Dupre v. Penrod Drilling Corp.,108 cite Stoot in support of maritime law enforcing state choice-of-law provisions.109 In Campbell, the indemnity contract between Union Texas Petroleum and Frank’s Casing Crew contained a Texas choice-of-law clause. The Fifth Circuit applied the Stoot test and concluded that because Union Texas Petroleum was headquartered in Texas, there was a substantial relationship between the contracting parties and Texas. The court further concluded the application of Texas law would not conflict with the fundamental purpose of maritime law.110 Likewise, in Dupre, the contract also contained a Texas choice-of-law provision. The parties had further stipulated that if the contract was determined to be maritime, Texas law would govern.111 The court did not discuss the relationship of the parties to the State of Texas since the parties had agreed if the contract was maritime the indemnity agreement would be governed by Texas law pursuant to the choice-of-law provision in the contract.

III. INTERPRETATION OF INDEMNITY AGREEMENTS UNDER LOUISIANA, TEXAS, AND MARITIME LAW

A Louisiana practitioner will most often deal with indemnification agreements that are governed by either Louisiana, Texas, or maritime law based

106.  Id.
107.  979 F.2d 1115 (5th Cir. 1992).
108.  993 F.2d 474 (5th Cir. 1993).
109.  Campbell, 979 F.2d at 1126; Dupre, 993 F.2d at 476 n.4.
110.  Campbell, 979 F.2d at 1126.
111.  Dupre, 993 F.2d at 478.
upon the location of the accident and/or choice-of-law stipulations in the pertinent contracts.

Until 1987, Texas determined the enforceability of indemnity agreements under the “clear and unequivocal” test expressed in *Joe Adams & Son v. McCann Construction Co.* However, in *Ethyl Corp. v. Daniel Construction Co.*, the Texas Supreme Court overruled *Joe Adams & Son* and its progeny. The court noted a “plethora” of lawsuits resulting from the “clear and unequivocal” test. It held the better policy was to eliminate ambiguity and adopt the “express negligence test.”

The test Texas courts use to determine whether an indemnity agreement is enforceable consists of three elements derived from the *Ethyl Corp.* decision: (1) the intent of the parties must be clear; (2) it must be set forth within the four corners of the agreement; and (3) the specific intent of the parties must be expressed. Texas courts have interpreted many indemnity agreements under the new three-prong test. The only indemnity agreements meeting the test and requiring indemnification for an indemnitee’s own negligence have expressly referenced a form of the word “negligence.”

113. 725 S.W.2d 705 (Tex. 1987).
114. Id. at 707-08.
116. See, e.g., Maxus Exploration Co. v. Moran Bros., Inc., 817 S.W.2d 50, 56 (Tex. 1991) (invoking an indemnity clause that stated, “without limit and without regard to the cause or causes thereof or the negligence of any party or parties” (emphasis added)); Enserch Corp. v. Parker, 794 S.W.2d 2, 6-7 (Tex. 1990) (invoking an indemnity clause that stated, “regardless of whether such claims or actions are founded in whole or in part upon alleged negligence of [indemnitee]” (emphasis added)); Payne & Keller, Inc. v. P.P.G. Indus., Inc., 793 S.W.2d 956, 957 (Tex. 1990) (invoking an indemnity clause that stated, “arising out of . . . the act or omissions . . . of [indemnitor] or its . . . employees . . . in the performance of the work . . . irrespective of whether [indemnitee] was concurrently negligent” (emphasis added)); Atlantic Richfield Co. v. Petroleum Personnel, Inc., 768 S.W.2d 724, 726 (Tex. 1989) (invoking an indemnity clause that stated, “[indemnitor] agrees to . . . indemnify . . . [indemnitee] . . . in any matter arising from the work performed hereunder, including but not limited to any negligent act or omission of [indemnitee]” (emphasis added)); Boyd v. Amoco Prod. Co., 786 S.W.2d 528, 529 (Tex. Ct. App. 1990) (invoking an indemnity clause that stated, “whether or not such losses . . . are occasioned by or incident to or the result of the negligence of [indemnitee], its joint owner or owners, if any, and its agents” (emphasis added)); Amoco Oil Co. v. Romaco, Inc., 810 S.W.2d 228, 229 (Tex. Ct. App. 1989) (invoking an indemnity clause that stated, “whether caused by a negligent act or omission of either party hereto” (emphasis added)); Gulf Oil Corp. v. Ford, Bacon & Davis, Tex., Inc., 782 S.W.2d 28, 30 (Tex. Ct. App. 1989) (invoking an indemnity clause that stated, “whether arising out of concurrent negligence on the part of [indemnitee] or otherwise” (emphasis added)); Permian Corp. v. Union Tex. Petroleum Corp., 770 S.W.2d 928, 929 (Tex. Ct. App. 1989) (invoking an indemnity clause which stated, “whether the same is caused or contributed to by the negligence of [indemnitee], its agent or employees” (emphasis added)); Adams Resources Exploration Corp. v. Resource Drilling, Inc., 761 S.W.2d 63, 64 (Tex. Ct. App. 1988) (invoking an indemnity clause that stated, “without limit and without regard to the cause or causes thereof or the negligence of any party or parties” (emphasis added)); B-F-W Constr. v.
Many indemnity agreements have been held unenforceable because of what the court perceives as "vague" language. Some examples of clauses held unenforceable include:

(1) contractor agrees to indemnify and save harmless from any and all loss sustained by owner by reason of damage to owner's property or operations, and . . . arising out of or in any way connected with or attributable to the performance of or non-performance of work hereunder by contractor . . . ;\(^{117}\)

(2) any loss . . . as a result of operations growing out of the performance of this contract and caused by the negligence or carelessness of [indemnitor] . . . ;\(^{118}\)

(3) for whose acts the Contractor [indemnitee] or the Subcontractor [indemnitor] may be liable or for which the Subcontractor is liable or responsible . . . ;\(^{119}\)

(4) from and against any and all damages, claims, demands and expenses for or on account of damage of property or death of or injury to any person or persons . . . directly or indirectly arising out of, or caused by, or in connection with the performance of or failure to perform any work provided for hereunder by the Contractor [indemnitor] . . . ;\(^{120}\)

(5) Contractor and his surety will indemnify and fully save harmless the City from any loss, damage or claim on account of any damages or injuries . . . ;\(^{121}\)

(6) against any and all action or causes of action, claims, demands, liabilities, loss, damage, injury, cost or expense of whatever kind or nature, . . . brought or presented by any person, firm, or corporation . . . .

Garza, 748 S.W.2d 611, 614 (Tex. Ct. App. 1988) (involving an indemnity clause that stated, "regardless of cause or of any fault or negligence of contractor [indemnitee]" (emphasis added)). Additionally, indemnity clauses meeting the express negligence test under a federal court's interpretation of Texas law have also included some form of the word "negligence." See, e.g., Dupre v. Penrod Drilling Corp., 993 F.2d 474, 478 (5th Cir. 1993) (involving an indemnity clause that stated, "[o]perator agrees to protect, defend, indemnify, and save Contractor . . . harmless from and against all claims . . . without regard to the cause or causes thereof or the negligence of any party or parties" (emphasis added)); Patch v. Amoco Oil Co., 845 F.2d 571, 572 (5th Cir. 1988) (involving an indemnity clause that stated, "seller agrees to indemnify and save buyer harmless from any loss, damage or liability for injuries . . . arising out of or in connection with the services . . . whether caused by negligence of either party" (emphasis added)); Dupont v. TXO Prod. Corp., 663 F. Supp. 56, 57 (E.D. Tex. 1987) (involving an indemnity clause that stated, "contractor agrees to protect, defend, indemnify, and save operator . . . harmless from and against all claims . . . of every kind and character without limit and without regard to the cause or causes thereof or the negligence of any party or parties" (emphasis added)).

\(^{117}\) Gulf Coast Masonry, Inc. v. Owens-Illinois, Inc., 739 S.W.2d 239, 239 (Tex. 1987).


whatsoever, . . . for injuries to or the death of any person, or damage to or loss of property alleged or claimed to have been caused by, or to have arisen out of or in connection with, or to be incidental to any of the work . . . .122

(7) from any liability or expense on account of property damage or personal injury (including death resulting therefrom) sustained or alleged to have been sustained by any person or persons, . . . arising out of or in any way connected with or attributable to the performance or non-performance of work hereunder by contractor . . . .122 and

(8) from any and all claims, demands, liabilities, judgments, actions or causes of action of any nature whatsoever . . . .124

Interestingly, the Texas Supreme Court has applied the "express negligence" test retroactively to contracts entered into prior to the 1987 Ethyl Corp. decision. Furthermore, the Texas Supreme Court even concluded a "sole negligence" exception, such as "excepting only claims arising out of accidents resulting from the sole negligence of [indemnitee]." did not meet the "express negligence" test.125 The court stated the "sole negligence" exception merely indicates for what the indemnitor was not responsible.126 The clause did not indicate when indemnity was required.

Louisiana's test for allowing recovery under a contract of indemnity for the consequences of one's own negligence was clearly set out by the Louisiana Supreme Court in Polozola v. Garlock, Inc.127 The court held "such a contract will not be construed to indemnify an indemnitee against losses resulting to him through his own negligent act, unless such an intention was expressed in unequivocal terms."128 This test seems analogous to the prior Texas rule of "clear and unequivocal." The Louisiana First Circuit Court of Appeal, following the supreme court's ruling in Polozola, has described the Louisiana test as follows in Wallace v. Slidell Memorial Hospital.129 "An indemnity contract will be construed to indemnify an indemnitee against losses resulting to him

126. Id.
127. 343 So. 2d 1000 (La. 1977).
129. 509 So. 2d 69 (La. App. 1st Cir. 1987).
partially through his own negligence where such intention is expressed in *clear and unequivocal* terms."\(^{130}\) Both *Polozola* and *Wallace* determined that the indemnity clauses in question satisfied the unequivocal standard. However, both of the clauses also specifically referred to indemnification for the indemnitee’s negligent acts.

Language in recent federal cases interpreting Louisiana law suggests the Louisiana test is less stringent than the current Texas mandate. In *Amoco Production Co. v. Forest Oil Corp.*\(^{131}\) the Fifth Circuit was applying Louisiana law to interpret an indemnity agreement in a case in which the accident occurred on the outer continental shelf. The court cited *Polozola* for Louisiana’s general rule and then stated:

> [Louisiana’s] rule does not require any “magic words” for an agreement to cover the indemnitee’s negligence, nor does it necessarily require an express reference to “negligence” as such. But an agreement whereby one party purportedly agrees to indemnify another against his negligence must be strictly construed, and in the absence of clear, express, and specific language plainly demonstrating that this was the parties’ intention, such an agreement will not be read to include the indemnitee’s own negligence.\(^{132}\)

Under this test, an indemnity provision meeting the “express negligence” test in Texas should also meet the Louisiana requirements. However, the converse will not always be true.

The Fifth Circuit, in *Randall v. Chevron U.S.A., Inc.*\(^{133}\) recently clarified what had been previously described as a distinction between maritime and Louisiana law regarding interpretation of indemnity agreements. The Eastern District of Louisiana determined in *Randall* that “Louisiana law requires more specificity in indemnity clauses and is more restrictive in allowing indemnification for an indemnitee’s own negligence than maritime law.”\(^{134}\) In reversing

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\(^{130}\) *Id.* at 74 (citing *Polozola* v. Garlock, Inc., 343 So. 2d 1000 (La. 1977); *Robinson v. State*, 454 So. 2d 257 (La. App. 1st Cir.), writ denied, 458 So. 2d 122 (1984)) (emphasis added).

\(^{131}\) 844 F.2d 251 (5th Cir. 1988).

\(^{132}\) *Id.* at 254 (citations omitted). See *Battig v. Hartford Accident & Indem. Co.*, 482 F. Supp. 338, 343-44 (W.D. La. 1977), *aff’d*, 608 F.2d 119 (5th Cir. 1979), which additionally provided:

> Louisiana does not require a specific reference to negligent acts in order for an indemnity agreement or a release to cover claims based on negligent acts. However the intention of the parties, as inferred from the language of their agreement, must clearly indicate an intention to include negligent acts within the indemnity agreement or the release.

See also *Knapp v. Chevron U.S.A., Inc.*, 781 F.2d 1123, 1127-28 (5th Cir. 1986); *In re Incident Aboard D/B Ocean King*, 758 F.2d 1063, 1068 (5th Cir. 1985); *Hyde v. Chevron U.S.A., Inc.*, 697 F.2d 614, 633 (5th Cir. 1983).


that part of the decision regarding indemnity provisions, the Fifth Circuit advised that it was not convinced the district court was correct in assuming federal law construed indemnity clauses more generously than Louisiana law. The appellate court determined that many federal cases have held "[l]ong-established general principles of interpreting indemnity agreements require that indemnification for an indemnitee's own negligence be clearly and unequivocally expressed."135 After a brief discussion of the test applied under Louisiana law, the Fifth Circuit found the applicable standard appeared to be the same under both Louisiana and federal law—"clear and unequivocal."136

Of course, the Louisiana137 and Texas138 Oilfield Anti-Indemnity Acts prohibit or restrict indemnification, as a matter of public policy, in certain agreements pertaining to wells and relating to exploration, development, production, or transportation of oil and gas. Obviously, there is a great deal of case law that has been developed interpreting these Acts, which is beyond the scope of this article.

In the lower court, Randall noted that maritime law has carved out only two recognized instances where an indemnitee cannot seek indemnification for its own negligence. First, contracts that release a towing company from all liability arising out of services performed under the contract are prohibited.139 The other exception is the Section 905(b) prohibition, which precludes a vessel from seeking indemnification from a longshore and harbor worker employer.140

IV. LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT SECTIONS 905(B) AND (C)

The Longshore and Harbor Workers' Compensation Act (LHWCA)141 provides a restriction upon certain indemnity agreements, and an exception to that restriction, which must be understood by the practitioner. Title 33, section 905(b), of the United States Code prohibits indemnification of a vessel by a longshore and harbor worker employer. Section 905(b) provides, in pertinent part:

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise

498 (1994).
135. Randall, 13 F.3d at 905 (quoting Theriot v. Bay Drilling Corp., 783 F.2d 527, 540 (5th Cir. 1986)) (emphasis added).
136. Id.
140. Id. at 1396-97 (citing Pippen v. Shell Oil Co., 661 F.2d 378 (5th Cir. 1981)).
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.\textsuperscript{142}

Notably, courts have not interpreted Section 905(b) to prohibit enforcement of additional assured endorsements in favor of a vessel.\textsuperscript{143} In 1984, Section 905(c) was enacted to provide an exception to the limitation of Section 905(b). This exception allows enforcement of indemnification agreements in favor of the vessel when employers and the vessel enter into a reciprocal indemnity agreement. Section 905(c) provides:

Nothing contained in subsection (b) of this Section shall preclude the enforcement according to its terms of any reciprocal indemnity provision whereby the employer of a person entitled to receive benefits under this chapter by virtue of Section 1333 of Title 43 and the vessel agree 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.\textsuperscript{144}

\textit{Campbell v. Sonat Offshore Drilling, Inc.}\textsuperscript{145} is the only Fifth Circuit case to interpret what is to be considered a reciprocal indemnity provision under Section 905(c). Again, in \textit{Campbell}, Sonat had supplied a drilling vessel pursuant to its contract with Union Texas Petroleum (UTP). Campbell, the injured party, was an employee of Frank's Casing Crew (Frank's). Frank's had contracted with UTP to defend and indemnify UTP and its contractors, but had no agreement with Sonat. Sonat, the vessel, sought indemnity from Frank's, the longshoreman's employer, as a third party beneficiary of the Frank's/UTP contract. Frank's argued that there was no reciprocal indemnity provision between the employer and the vessel, as there was no contract between Frank's and Sonat.\textsuperscript{146} The Fifth Circuit disagreed.

The court noted Section 905(c) requires reciprocity between employers and vessels, not privity.\textsuperscript{147} Furthermore, to explain how the reciprocity requirement was met the court stated:

\begin{itemize}
\item \textsuperscript{142} Id. § 905(b).
\item \textsuperscript{143} Voisin v. O.D.E.C.O. Drilling Co., 744 F.2d 1174, 1178 (5th Cir. 1984), cert. denied, 470 U.S. 1053, 105 S. Ct. 1757 (1985) (citing Price v. Zim Israel Navigation Co., 616 F.2d 422, 428 (9th Cir. 1980)).
\item \textsuperscript{144} 33 U.S.C. § 905(c) (1988).
\item \textsuperscript{145} 979 F.2d 1115 (5th Cir. 1992).
\item \textsuperscript{146} Id. at 1117-18.
\item \textsuperscript{147} Id. at 1125.
\end{itemize}
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.\textsuperscript{148}

Accordingly, the court concluded that absolute privity between the vessel and the employer was not required by Section 905(c). Sonat's and Frank's individual agreements with UTP were sufficient to satisfy Section 905(c). In so holding, the Fifth Circuit did not give strict credence to the Section 905(c) requirement of "[a] reciprocal indemnity provision,"\textsuperscript{149} whereby the employer and the vessel agree to indemnify the other.

V. CO-INDEMNITY

Co-indemnity is another issue that often arises in the contractual indemnity setting. This issue was also recently addressed by the Fifth Circuit in \textit{Campbell v. Sonat Offshore Drilling, Inc.}\textsuperscript{150} To assist the reader in understanding the \textit{Campbell II} decision, the following diagram of the contractual relationships among the parties in \textit{Campbell II} and the contractual relationships among the parties in cases hereinafter discussed that were analyzed within \textit{Campbell II} is provided:

\begin{center}
\begin{tikzpicture}
    \node (uti) at (0,0) {UTP};
    \node (sonat) at (-3,0) {Sonat};
    \node (franks) at (1,0) {Frank's};
    \path[->] (uti) edge node {\footnotesize (indemnification for liability of Sonat is at issue)} (sonat);
    \path[->] (uti) edge node {\footnotesize (indemnification for liability of Sonat is at issue)} (franks);

caption{Campbell II}
\end{tikzpicture}
\end{center}

UTP contracted with Sonat to indemnify Sonat. Frank's separately contracted with UTP and its contractors (i.e., Sonat). Frank's did not agree to indemnify UTP for its contractual obligations to Sonat.

\textsuperscript{148} \textit{Id.}  \\
\textsuperscript{149} 33 U.S.C. § 905(c) (1988) (emphasis added).  \\
\textsuperscript{150} 27 F.3d 185 (5th Cir. 1994) (hereinafter \textit{Campbell II}). This is a separate, though related, case from the \textit{Campbell} case discussed \textit{supra} notes 54-59 and accompanying text, notes 145-149 and accompanying text.
Teledyne and Oil Well each entered into separate contracts with Chevron wherein each agreed to indemnify Chevron.

Shell contracted with Diamond M. to indemnify Diamond M. Sladco separately contracted with Shell to indemnify Shell. Sladco did not agree to indemnify Shell for its contractual obligation to Diamond M.

Popich contracted with Otto Candies to indemnify Otto Candies and Exxon. Otto Candies contracted with Exxon to indemnify Exxon. Popich did not agree to indemnify Otto Candies for its contractual obligation to Exxon.

In Campbell II, Frank's had been held liable to defend and indemnify Sonat under Frank's contract with UTP. Frank's claimed that UTP was jointly liable for any defense and indemnity obligation owed to Sonat by Frank’s pursuant to UTP’s separate contract with Sonat, which also contained an indemnification agreement in favor of Sonat. Frank's argued it and UTP were solidary obligors

of Sonat but, as between themselves, each was liable for only half. Accordingly, Frank's should be entitled to contribution from UTP.

The Fifth Circuit found Frank's reliance on Hobbs v. Teledyne Movable Offshore, Inc. was misplaced. Hobbs was distinguishable in that both co-indemnitors in Hobbs had contracted separately with the indemnitee. In contrast, Frank's and UTP did not separately contract with Sonat. Frank's obligation to indemnify Sonat arose out of the UTP-Frank's agreement, which included as indemnitees any contractors secured by UTP—i.e., Sonat. The court felt any application of Hobbs would overlook that Frank's obligation arose out of its contract with UTP.

Frank's further relied on Corbitt v. Diamond M. Drilling Co. In Corbitt, the plaintiff was employed by Sladco. Sladco had contracted with Shell and agreed to indemnify Shell “against all claims ... on account of personal injury.” Furthermore, Shell had separately contracted with Diamond M. and, additionally, agreed to indemnify Diamond M. under this contract. The Fifth Circuit determined that Sladco did not have to indemnify Shell for Shell's liability to Diamond M. because Shell's liability to Diamond M. was not "on account of personal injury. Rather, [Shell's liability to Diamond M. was] on account of its agreement to indemnify Diamond M. under ... the [Shell/Diamond M.] Contract." Likewise, Frank's argued UTP independently contracted with Sonat and the wording of the Frank's/UTP indemnity agreement was not broad enough to include UTP's contractual obligations to Sonat.

The Fifth Circuit cited one notable distinction between the two cases. In Corbitt, Sladco did not agree to indemnify both Shell and Diamond M. in its contract with Shell. However, as the court had previously concluded, the Frank's/UTP clause did require Frank's to indemnify both UTP and Sonat.

154. Campbell II, 27 F.3d at 187 (citing Hobbs, 632 F.2d at 1241).
155. 632 F.2d 1238 (5th Cir. 1980).
156. Campbell II, 27 F.3d at 187.
157. 654 F.2d 329 (5th Cir. 1981).
158. Id. at 333.
159. Id.
160. The district court had concluded that in the Frank's/UTP agreement, Frank's expressly agreed to indemnify UTP for UTP's contractual obligations. The Fifth Circuit disagreed by way of footnote. The Fifth Circuit explained its analysis as follows:

A provision in an indemnity agreement adding a subcontractor as indemnitee has been interpreted as providing indemnity of another's contractual indemnity exposure in Foreman v. Exxon Corp. We do not consider the indemnity provision herein broad enough to indemnify against contractual obligations, despite the inclusion of Sonat as an indemnitee. The promise to indemnify against personal injuries is plainly intended to encompass tortious, not contractual, injuries. Accordingly, we disagree with the district court's holding that Frank's expressly agreed to indemnify UTP for UTP's contractual obligations to Sonat. We reach the same result, however, as we also conclude that Frank's contribution claim fails.

Campbell II, 27 F.3d at 188 n.4 (citations omitted).
Therefore, the court held Frank’s could not “insulate itself from paying its full indemnity obligation on the basis that [UTP’s] liability to Sonat is contractual.” In support of this determination, the court cited Lirette II. Lirette II presents a similar contractual setting. In Lirette II, two parties had been adjudged liable to Exxon for indemnification. Otto Candies was liable under its contract with Exxon (just as UTP was liable to Sonat pursuant to its contract). Additionally, Popich was liable because of its agreement with Otto Candies to indemnify both Otto Candies and Exxon (just as Frank’s was obligated to defend and indemnify UTP and Sonat pursuant to the UTP/Frank’s agreement). Otto Candies sought indemnity from Popich. The Fifth Circuit concluded that Otto Candies was entitled to indemnification from Popich, not because of Otto Candies’ contractual obligation to Exxon, but because of Popich’s own express relationship with Exxon through the Popich/Otto Candies agreement.

The Lirette II/Campbell II rule could perhaps best be stated as follows: Where an indemnity agreement provides for indemnification of a principal and its subcontractors, this indemnity obligation to the subcontractors supersedes any separate obligation the principal may owe to these subcontractors by virtue of a separate contract with the subcontractors. This is so despite the fact that the contracts do not so stipulate.

The Lirette II decision may have dictated the end result in Campbell II. However, the result is that the UTP contract with Sonat is not given effect. Arguably, UTP obligated itself just as clearly as did Frank’s to indemnify Sonat. We again note that in its August, 1994 Campbell II decision, the Fifth Circuit expressly disagreed with the district court’s holding that Frank’s agreed to indemnify UTP for UTP’s contractual responsibility to Sonat.

Therefore, it appears a principal can effectively eliminate its contractual liability to indemnify its contractors by entering into a separate contract with another contractor in which that other contractor agrees to indemnify the principal and its contractors.

161. Id. at 188 (citing Lirette v. Popich Bros. Water Transp., Inc., 699 F.2d 725 (5th Cir. 1983)).
162. 699 F.2d 725 (5th Cir. 1983).
163. The court explained its decision as follows:

Popich was not, as in Corbitt, being subjected to a liability arising from and imposed by a completely separate contract between two outsiders. Rather, it was called upon to make good its contractual obligation to hold Candies (and Exxon) harmless from claims, suits or damage “arising out of, or in any way connected [with] the operation of the vessel under this charter.” Popich’s obligation to reimburse Candies for amounts due Exxon arose, not because of the separate agreement Candies had with Exxon, but because of Popich’s express undertaking to make good to Exxon all such losses. Candies['] acting as a conduit did not alter that obligation.

Campbell II, 27 F.3d at 188 (citing Lirette II, 699 F.2d at 728).
164. See supra text accompanying note 158.
VI. WAIERS OF SUBROGATION

Contracts that include defense and indemnification and/or additional assured endorsement provisions often also include requirements of waivers of subrogation. Does a waiver of subrogation in a contract bar a claim for co-indemnity against another based upon the theory of contribution? In other words, is a contribution claim founded upon subrogation, and is that claim barred by a broadly worded waiver of subrogation? This was an issue also raised in Campbell II, but not reached by the court.\(^\text{165}\)

Maritime case law has not yet addressed this point in the contractual setting. Maritime law has recognized a right of contribution among joint tortfeasors. In Lanasse v. Travelers Insurance Co.,\(^\text{166}\) the Fifth Circuit held a waiver of subrogation prevented a claim for reimbursement of settlement proceeds in a situation where a vessel operator settled the plaintiff's tort claims against it and then sought recovery from a non-settling defendant.\(^\text{167}\) Presumably, a contribution claim based upon contractual relationships would be the vehicle by which co-indemnity is sought under maritime law. This contribution claim should be considered founded upon the theory of subrogation.

Under Louisiana law, the answer appears clear. In Hobbs v. Teledyne Movible Offshore, Inc.,\(^\text{168}\) the Fifth Circuit applied Louisiana Civil Code articles 2091, 2103, and 2161 to reach the conclusion that under Louisiana law contractual co-indemnitors are bound in solido.\(^\text{169}\) As between themselves, each is liable for one-half of the debt, and one indemnitor can recover one-half of the debt from the other by way of legal subrogation.

A broadly worded waiver of subrogation that does not limit itself, for instance, to recovery of worker's compensation paid, should prohibit claims for co-indemnity. Also, in situations where an insured has a large deductible or retention, it would become significant whether the contract requires both the insurer and the insured to waive subrogation.

VII. INSURANCE ISSUES

What policy or policies cover contractual indemnity claims? Contractual coverage is traditionally purchased as part of a Comprehensive General Liability (CGL) policy, and is also often provided for in Protection and Indemnify (P&I) policies. In a situation where both CGL and P&I policies may apply, the CGL policy may not cover the contractual indemnity at issue if the policy states it does not provide any coverage to the extent a risk may be covered by a P&I

\(^{165}\) Appellee's Original Brief at 28, Campbell v. Sonat Offshore Drilling, Inc., 27 F.3d 185 (5th Cir. 1994) (No. 93-4893).

\(^{166}\) 450 F.2d. 580 (5th Cir. 1971), cert. denied, 406 U.S. 921, 92 S. Ct. 1779 (1972).

\(^{167}\) Id. at 583.

\(^{168}\) 632 F.2d 1238 (5th Cir. 1980).

\(^{169}\) Id. at 1241-42.
policy. Otherwise, the “other insurance” clauses of the two policies may ultimately determine how the policies apply or are ranked.

The following hypothetical, involving Maritime Employer’s Liability (MEL) and CGL policies, illustrates other complicated insurance coverage issues that may arise in the context of contractual indemnity in maritime law. Daigle, Inc. (Daigle) contracts with Maraist, Inc. (Maraist) for Maraist to perform maritime services offshore. Daigle requires Maraist to defend and indemnify Daigle and to list Daigle as an additional assured under Maraist’s MEL and CGL policies. Those policies are required to provide primary coverage to Daigle. Additionally, assume Maraist’s employees are considered borrowed employees of Daigle.

As to the specific policies, assume that Maraist’s MEL and CGL policies provide Daigle with additional assured status and are stated to be primary in relation to Daigle’s own policies. Likewise, the MEL policy contains an alternate employer endorsement, and the CGL policy’s employee exclusion is not deleted and is enforceable. Finally, the CGL policy provides coverage for any contractual indemnity owed to Daigle by Maraist.

The facts regarding the hypothetical claim are as follows. The plaintiff is an employee of Maraist and is a seaman. After being injured while working on the Maraist/Daigle project, he sues both Maraist and Daigle. He claims that Daigle is his borrowing employer. Which policy or policies should cover the claim against Daigle?

Plaintiff’s claim against Daigle based upon seaman status will be covered by Maraist’s MEL policy. The MEL underwriter acknowledges coverage, but claims it “steps into the shoes” of Daigle and can pursue Daigle’s claim against Maraist for contractual indemnity. Can Maraist’s MEL underwriters shift the Jones Act exposure of Daigle to Maraist’s CGL underwriters by asserting Daigle’s contractual indemnity rights against Maraist because contractual indemnity is covered by Maraist’s CGL policy?

The Fifth Circuit has repeatedly held an insurer may not sue its own insured to receive any part of its payment for a risk covered by the policy. This principle should not be applicable to the instant hypothetical because MEL underwriters are asserting its insured’s rights against another party which happens to be also insured by MEL underwriters. Likewise, MEL underwriters should not be considered in violation of Lanasse v. Travelers Insurance Co., which provided that an insurer could not recover by way of subrogation against its insured. Again, MEL underwriters are seeking recovery from Maraist by way of subrogation to Daigle’s rights. That Maraist happens to also be insured by MEL underwriters should be of no moment.

A recent Fifth Circuit decision addressed another issue that often arises in the maritime contractual setting—the extent to which a P&I policy may provide

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170. See Peavey Co. v. M/V ANPA, 971 F.2d 1168 (5th Cir. 1992); Dow Chem. Co. v. M/V Roberta Tabor, 815 F.2d 1037 (5th Cir. 1987).
171. 450 F.2d 580 (5th Cir. 1971).
additional assured coverage to a time charterer of a vessel. In *Randall v. Chevron U.S.A., Inc.*, the Fifth Circuit held a P&I policy naming Chevron (time charterer) as an additional assured covered Chevron's negligence to the extent that Chevron negligently exercised its right to direct the movement of the vessel. The court believed this theory of liability fell within the terms of the P&I policy that covered "all such loss... the Assured shall as owners of the vessel... have become liable to pay."173

VIII. APPEAL OF RULINGS ON MARITIME CONTRACTUAL INDEMNITY CLAIMS

*Campbell II* dealt with yet another issue critical to contractual indemnity litigation: When is a ruling that addresses the contractual rights of the parties appealable? The court determined the ruling dismissing Frank’s and Underwriters’ cross claims for co-indemnity against UTP was an interlocutory order in an admiralty case determining the rights and liabilities of the parties such that 28 U.S.C. § 1292(a)(3) applied. The ruling therefore would become immediately appealable.174 In *Stoot v. Fluor Drilling Services, Inc.*, the Fifth Circuit had previously held an order enforcing a contractual defense and indemnification provision was immediately appealable, and the appeal must be filed within thirty (30) days under Federal Rule of Appellate Procedure 4(a)(1).

IX. CONCLUSION

Some of the more clearly defined principles applied in the maritime contractual indemnity setting have been discussed. However, as is implicit in much of the discussion, many issues addressed in the context of interpretation and application of contractual indemnification obligations remain open for argument and further delineation. Stability and consistency in applying rules that govern contractual relationships is an admirable goal pursued by all jurists who address these legal issues. However, this goal has not necessarily been accomplished in many of the above defined areas.

This article makes no effort to resolve the issues addressed, but may serve to highlight some potential problem areas and areas of concern that must be dealt with by many maritime law practitioners. The future promises to bring further twists and turns in this interesting and complicated area of the law.

173. *Id.* at 907.
175. 851 F.2d 1514 (5th Cir. 1988).