"DRAFTING ENFORCEABLE INDEMNIFICATION PROVISIONS FOR THE OIL FIELD"

SECOND CONTRACT RISK MANAGEMENT SYMPOSIUM
STRATEGIC RESEARCH INSTITUTE

APRIL 8 and 9, 1997

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Points Of Discussion

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II. COMPARISON OF TEXAS AND LOUISIANA INDEMNITY LAW

III. INDEMNITY AND ANTI-INDEMNITY LAW

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III. INDEMNITY AND ANTI-INDEMNITY LAW

A significant concern confronting parties operating in the Gulf Coast area is whether their indemnity provisions conform with, and thus are enforceable under, differing Texas and Louisiana oilfield anti-indemnity statutes and jurisprudentially-created rules concerning indemnity against the consequences of one's own negligence. Because failure to comply with these requirements may render such indemnities ineffective, care should be given in drafting such provisions to comply with these rules. In Texas, to be enforceable, an indemnity agreement seeking to protect a party against the consequences of its own negligence must meet two fair notice requirements: the express negligence rule and the conspicuousness requirement. *See* **Dresser Indus., Inc. v. Page Petroleum, Inc.**, 853 S.W.2d 505, 508 (Tex. 1993). The express negligence

exceptions to, or gaps in, the agreement. *Id.* Recently, in the **Webb v. Lawson-Avila Constr., Inc.** case, 911 S.W.2d 457 (Tex. App.--San Antonio 1995, error dismissed), the court of appeals held that the use of the term "negligence" in an indemnity agreement indicates the intent of the parties to include indemnification from the "consequences of all shades and degrees of . . . negligence, including gross negligence." In the strict liability context, the courts rely on an "express intent Rule." *See* ***Houston Lighting & Power Co. v. Atchison, Topeka & Santa Fe Ry. Co.***, 890 S.W.2d 455, 458 (Tex. 1994). Under this test, the indemnity agreement must "clearly and specifically express[] the intent to encompass strict liability claims." *Id.*

Also relevant is the Texas Oilfield Anti-Indemnity Statute, Tex. Civ. Prac. & Rem. Code Section 127.001 *et seq.* (Vernon Supp. 1995), which renders void an oil and gas agreement pertaining to an oil or gas well if that agreement attempts to indemnify a party from the consequences of its own negligence. The statute deems such agreements as against the public policy of the state. *Id.* at § 127.002(b). Certain exceptions to the statute are allowed, including an insurance exception which permits the parties to agree in writing to support the indemnity obligation with liability insurance provided by the indemnitor. *Id.* at § 127.005 (amended by House Bill No. 1496, on May 27, 1995, to remove exception for "agreements with respect to the purchase, gathering, storage, or transportation of oil, brine water, fresh water, condensate, produced water, petroleum products, or other liquid commodities"). There are, however, some restrictions to this insurance exception. For mutual indemnity obligations, in which the parties agree to indemnify each other for loss or liability arising from injury, death, or damage to property of the respective parties (or their contractors and employees), the indemnity obligation is limited to the extent of coverage and dollar limits of insurance or qualified self-insurance each party has agreed to provide in equal amounts to the other party. *See id.* Each party must provide an equal amount of insurance to support its reciprocal indemnity obligation. Conversely, the required amount of insurance in unilateral indemnity agreements, in which the indemnitee does not make a reciprocal promise to indemnify the indemnitor, may not exceed $500,000. *Id.* It should be noted, however, that in the ***Maxus Exploration Co. v. Moran Bros., Inc.*** case, 773 S.W.2d 358, 361 (Tex. App.--Dallas 1989), *aff'd*, 817 S.W.2d 50 (Tex. 1991), the court held that there is nothing in the anti-indemnity statute which prevents an indemnitor from providing more insurance than required where such additional coverage is provided voluntarily. In the ***Getty Oil Co. v. Insurance Co. of N. Am.*** case, 845 S.W.2d 794, 803 (Tex. 1992), *cert. denied sub nom* ***Youell & Cos. v. Getty Oil Co.***, 510 U.S. 820 (1993), the court suggested that insurance provisions be kept separate in the contract from indemnity provisions to be construed as separate obligations.

Under Louisiana's general law of indemnity, a different and less stringent test than Texas's express negligence rule is used. Louisiana permits an indemnitee to provide for indemnification against the consequences of its own negligence so long as that intention is expressed in unequivocal terms. *See* ***Polozola v. Garlock, Inc.***, 343 So. 2d 1000, 1003 (La. 1977). An indemnity provision will be strictly construed, see *id.*, but neither an express reference to "negligence" nor the use of any "magic words" in such an agreement is required. *See* ***In re Incident Aboard D/B Ocean King,*** 758 F.2d 1063, 1067 (5th Cir. 1985). Rather, the inquiry

focuses on the intent of the parties, as inferred from the language of the agreement. *Id.* at 1068. Indemnity provisions that meet Texas's more rigorous test should also comport with Louisiana's clear and unequivocal standard. Second, Louisiana law does not impose the clear and unequivocal standard on indemnity provisions for strict liability claims. ***See Sovereign Ins. Co. v. Texas Pipe Line Co.***, 488 So. 2d 982, 986 (La. 1986). Rather, the court will look to the agreement as a whole to determine the parties' intent. *Id.* at 985. The court has explained that, in the case of claims arising in strict liability, "the indemnitor usually is in as good a position as the indemnitee to evaluate and protect against risk." *Id.* at 986.

The Louisiana Oilfield Anti-Indemnity Act (the "*Louisiana Anti-Indemnity Act*"), also different from its Texas equivalent, voids provisions in oilfield contracts to the extent that they provide for indemnification for losses caused by the negligence or other fault of the indemnitee. *See* La. R.S. 9.2780 (A). Any such agreement that requires waivers of subrogation, additional named insured endorsements, or "any other form of insurance protection which would frustrate or circumvent the prohibitions" of the Louisiana Anti-Indemnity Act are null and void. La. R.S. 9.2780 (G). The courts, however, have carved out an exception to this rule to permit such indemnity agreements in cases where the indemnitee pays for its own liability insurance. *See* ***Marcel v. Placid Oil Co.***, 11 F.3d 563, 569-70 (5th Cir. 1994); ***Patterson v. Conoco, Inc.***, 670 F. Supp. 182, 184 (W.D. La. 1987). The exception will not apply if the party who procures the insurance coverage indemnifying the other bears any material part of its cost. *See* ***Marcel***, 11 F.3d at 570. In adopting this exception, the ***Marcel*** court explained that the Louisiana Anti-Indemnity Act's purpose of "prevent[ing] the shifting of the economic burden of insurance coverage or liability onto an independent contractor" is not undermined in cases where the indemnitee pays for its own insurance coverage because no such shifting occurs. *Id.* at 569. In both the ***Marcel*** and ***Patterson*** cases, the indemnity agreements expressly provided for the reimbursement by the indemnitee of the cost of insurance. Moreover, the indemnitee in the ***Patterson*** case also produced affidavits, premium statements, and invoices showing the payment of the insurance premiums. *See* ***Patterson***, 670 F. Supp. at 184. If indemnity agreements do not expressly provide for the reimbursement of premiums, and such agreements are to comply with Louisiana law, as indicated by the decisions in the ***Marcel*** and ***Patterson*** cases, the parties thereto should establish a mechanism to pay the premiums of the indemnitee or provide for their reimbursement. Finally, the indemnitee should maintain a record of such payments in the event that proof of same is required.

Comparison of Texas and Louisiana Indemnity Law

I. Indemnification for One's Own Negligence

	Texas	Louisiana
Standard (different requirements)	Fair Notice ■ Express Negligence (express intent in specific terms) ■ Conspicuousness (a reasonable person against whom the provision is to operate ought to have noticed it) ***Dresser***, 853 S.W.2d 505 (Tex. 1993);[1] ***Ensearch***, 794 S.W.2d 2 (Tex. 1990); ***Ethyl***, 725 S.W.2d 705 (Tex. 1987).	Clear & Unequivocal ***Perkins***, 563 So. 2d 258 (La. 1990); ***Polozola***, 343 So. 2d 1000 (La. 1977). This standard is not as stringent as the Texas standard. ***Miller***, 680 So. 2d 52 (La. Ct. App. 5th Cir. 1996), *writ denied*, 685 So. 2d 119 (La. 1997). Contract of indemnity is construed in accordance with general rules governing contract interpretation. ***Abbott***, 2 F.3d 613 (5th Cir. 1993), *cert. denied sub nom* ***Turnbull v. Home Ins. Co.***, 510 U.S. 1177 (1994). Party seeking enforcement of indemnity agreement bears burden of proof. ***Kelly***, 660 So. 2d 118 (La. Ct. App.2nd Cir.), *writ denied*, 664 So.2d 426 (La. 1995). In construing indemnity contracts, courts should give effect to intentions of parties as expressed in instrument. ***Dupre***, 993 F.2d 474 (5th Cir. 1993). Only when express provisions of indemnification and unequivocal intention to indemnify cannot be found, may a court presume that parties did not intend to hold indemnitee harmless for his own negligence. ***McGoldrick***, 649 So. 2d 455 (La. Ct. App. 3rd Cir. 1994).

	Texas	Louisiana
Defense Costs (different requirements)	Threshold inquiry - if there is a claim of negligence, the provision must meet standard to recover defense costs, regardless of outcome of underlying suit. ***Fisk***, 888 S.W.2d 813 (Tex. 1994)	Outcome determinative - allegations of underlying suit against the indemnitee are irrelevant to the indemnitor's obligation to pay defense costs. Terms of the indemnity agreement govern the obligations of the parties. ***Meloy***, 504 So. 2d 833 (La. 1987). Attorney's fees not allowed unless specifically provided for by contract or statute. ***Perry***, 887 F.2d 624 (5th Cir. 1989). *See also* ***Burns***, 665 So. 2d 76 (La. Ct. App. 1st Cir. 1995). Indemnitee entitled to recover from indemnitor costs incurred in defending lawsuit brought by statutory employee of indemnitor, absent finding of negligence or fault against indemnitee. ***Kerr***, 896 F. Supp. 608 (E.D. La. 1995). Dismissal of plaintiff's tort action, for whatever reason, does not preclude continuation of litigation by indemnitee and indemnitor to determine presence of negligence or fault. ***Phillips Petroleum***, 657 So. 2d 405 (La. Ct. App. 3rd Cir.), *writ denied*, 661 So. 2d 1354 (La. 1995).
Strict Liability (different requirements)	Provision must meet standard if seeking indemnification of strict liability ("express intent" rule). ***HL&P***, 890 S.W.2d 455 (Tex. 1994).	Provision does not have to meet standard if seeking indemnification for strict liability. ***Sovereign***, 488 So. 2d 982 (La. 1986). ***Fontenot***, 676 So. 2d 557 (La. 1996).

	Texas	Louisiana
Gross Negligence	Issue is ripe for Texas Supreme Court review. The Texas Supreme Court has noted that public policy concerns are presented by such an issue. ***ARCO***, 768 S.W.2d 724, 726 n.2 (Tex. 1989).[2] Texas does allow insurance coverage for punitive damages.	Appellate court required the oil service contractor to indemnify Tenneco for exemplary damages where the reciprocal provision indemnified parties for gross negligence. ***Griffin***, 625 So. 2d 1090 (La. Ct. App. 4th Cir.), *writ denied*, 631 So. 2d 449 (La. 1993). Generally, indemnity provisions are void to the extent that they, in advance, excluded or limited liability for intentional or gross fault. ***Sevarg***, 591 So. 2d 1278 (La. Ct. App. 3d Cir. 1991), *writ denied*, 595 So. 2d 662 (La. 1992). *See* ***Massey***, 647 So. 2d 1196 (La. Ct. App. 2d Cir. 1994), *writ denied*, 653 So. 2d 563 (La. 1995) and *writ denied*, 653 So. 2d 564 (La. 1995).
Releases (similar requirements)	Standard applies to releases that relieve a party for its own negligence in advance of liability. ***Dresser***, 853 S.W.2d 505, 507-509 (Tex. 1993).	Standard applies to contractual exculpatory agreements like releases that are in substance comparable to an agreement to indemnify one against one's own negligence. ***Home Ins. Co.***, 588 So. 2d 361, 363 n.2 (La. 1991).
Exception Clauses (different requirements)	Must expressly state intent to indemnify for negligence in addition to exception clause. ***Payne & Keller***, 793 S.W.2d 956 (Tex. 1990) (sole negligence exception clause); ***Singleton***, 729 S.W.2d 690 (Tex. 1987).	Exclusion of sole negligence interpreted as including concurrent negligence even without express statement. ***DeWoody***, 595 So. 2d 395, 397 (La. Ct. App. 3rd Cir. 1992).

	Texas	Louisiana
Retroactivity	Express Negligence Rule applied retroactively in ***Ethyl***, 725 S.W.2d 705 (Tex. 1987).	The Louisiana Supreme Court did not expressly declare the standard to be retroactive in ***Polozola***, 343 So. 2d 1000 (La. 1977). Court found that it was the rule of law in Louisiana and cited Louisiana appellate cases that dated as far back as 1967.

II. Oil Field Anti-Indemnity Statutes

	Texas (enacted 1973) Tex. Civ. Prac. & Rem. Code Ann. §§ 127.001 - 127.008 (Vernon 1986 & Supp. 1994)	**Louisiana** (enacted 1981) La.Rev. Stat. Ann.§ 9:2780 (West 1991 & Supp. 1994)
Legislative Findings	Inequity foisted on certain contractors by the indemnity provisions in certain agreements pertaining to wells for oil, gas, or water or to mines for other minerals.	Inequity foisted on certain contractors and their employees by defense and indemnity provisions in some agreements pertaining to wells for oil, gas, or water, or drilling for minerals.
Scope	Covenant, promise, agreement or understanding contained in, collateral to, or affecting an agreement...[3]	Provision contained in, collateral to, or affecting an agreement...
	...pertaining to a well for oil, gas or water or to a mine for minerals...	...pertaining to a well for oil, gas or water or drilling for minerals which occur in a solid, liquid, gaseous or other state...[4]
	...if it purports to indemnify a person for damage that is caused by or results from the sole or concurrent negligence of the indemnitee...	...to the extent that it purports to or does provide for defense or indemnity for damage which is caused by or results from the sole or concurrent negligence or fault of the indemnitee...
	... and the damage arises from personal injury, death, or property injury.	...and the damage arises from death or bodily injury. Not property injury.

	Texas (enacted 1973) Tex. Civ. Prac. & Rem. Code Ann. §§ 127.001 - 127.008 (Vernon 1986 & Supp. 1994)	Louisiana (enacted 1981) La.Rev. Stat. Ann.§ 9:2780 (West 1991 & Supp. 1994)
Scope (Continued)		The Fifth Circuit has developed a two-part test for determining the applicability of LOAIA. First, the agreement must pertain to an oil, gas or water well. Second, the agreement must concern operations related to the exploration, development, production, or transportation of oil, gas, or water. ***Transcontinental Gas***, 953 F.2d 985 (5th Cir. 1992). The Fifth Circuit provides a multi-factor test for determining whether an agreement "pertains to a well" so as to fall under LOAIA; these ten factors, known as the ***Transco*** factors, are as follows: (1) whether the structures or facilities to which the contract applies or with which it is associated, *e.g.*, production platforms, pipelines, junction platforms, etc. are part of an in-field gas gathering system; (2) what is the geographical location of the facility or system relative to the well or wells; (3) whether the structure in question is a pipeline or is closely involved with a pipeline;

	Texas (enacted 1973) Tex. Civ. Prac. & Rem. Code Ann. §§ 127.001 - 127.008 (Vernon 1986 & Supp. 1994)	Louisiana (enacted 1981) La.Rev. Stat. Ann.§ 9:2780 (West 1991 & Supp. 1994)
Scope (Continued)		(4) if so, whether that line picks up gas from a single well or a single production platform or instead carries commingled gas originating from different wells or production facilities; (5) whether the pipeline is a main transmission or trunk line; (6) what is the location of the facility or structure relative to compressors, regulating stations, processing facilities, or the like; (7) what is the purpose or function of the facility or structure in question; (8) what if any facilities or processes intervene between the wellhead and the structure gauging installations, treatment plants, etc.; (9) who owns and operates the facility or structure in question, and who owns and operates the well or wells that produce the gas in question; and (10) any number of other details affecting the functional and geographic nexus between " a well" and the structure or facility that is the object of the agreement under scrutiny. ***Delmar***, 943 F. Supp. 764 (S.D. Tex. 1996).

	Texas (enacted 1973) Tex. Civ. Prac. & Rem. Code Ann. §§ 127.001 - 127.008 (Vernon 1986 & Supp. 1994)	Louisiana (enacted 1981) La.Rev. Stat. Ann.§ 9:2780 (West 1991 & Supp. 1994)
Examples of Facilities or Contracts Implicated	NOT APPLIED TO... -Repair of drilling rig in shipyard. ***Transworld***, 693 S.W.2d 19, 23 (Tex. App.-- Beaumont 1985, no writ). -Repair of pipe in natural gas gathering field. ***Phillips Petroleum***, 841 F. Supp. 791 (S.D. Tex. 1993). -Many activities in connection with pipelines or fixed associated facilities. *See* §127.001(4)(B). (Of the handful of cases concerning the Texas statute, most involve interpretation of the insurance provisions.)	NOT APPLIED TO... -Refinery maintenance contract. ***Hutchins***, 609 So. 2d 312 (La. Ct. App. 3rd Cir. 1992), *aff'd on other grounds*, 623 So. 2d 649 (La. 1993). -Electrical services contract at refinery. ***Griffin***, 519 So. 2d 1194 (La. Ct. App. 4th Cir.), *writ denied*, 521 So. 2d 1154 (La. 1988). -Work on a compressor station. ***Johnson***, 5 F.3d 949 (5th Cir. 1993). -Contract for construction of an intermediate gas pipeline ***Hanks***, 953 F.2d 996 (5th Cir. 1992). -Storage of oil in salt dome caverns. ***U.S. Fidelity***, 769 F. Supp. 210 (E.D. La. 1991), *aff'd*, 961 F.2d 84 (5th Cir. 1992). -Contract pertaining to construction of crude oil pipeline for refining oil. ***Jernigan***, 820 F. Supp. 1015 (W.D. La. 1991), *aff'd*, 989 F.2d 812 (5th Cir.), *cert. denied*, 510 U.S. 868 (1993). -Contract pertaining to butane transportation pipeline where pipeline connected refinery and storage facility. ***Thomas***, 815 F. Supp. 184 (W.D. La. 1993).

	Texas (enacted 1973) Tex. Civ. Prac. & Rem. Code Ann. §§ 127.001 - 127.008 (Vernon 1986 & Supp. 1994)	Louisiana (enacted 1981) La.Rev. Stat. Ann.§ 9:2780 (West 1991 & Supp. 1994)
Examples of Facilities or Contracts Implicated (Continued)		APPLIED TO... -Grounds upkeep (grass, bushes, etc.) at production facility. ***Fuselier***, 546 So. 2d 306 (La. Ct. App. 3rd Cir.), *writ denied*, 551 So. 2d 630 (La. 1989). -Construction of an offshore platform in a shipyard. ***Day***, 492 So. 2d 83 (La. Ct. App. 1st Cir.), *writ denied*, 494 So. 2d 1176 (La. 1986). -Catering services to an offshore platform. ***Broussard***, 959 F.2d 42 (5th Cir. 1992). -Renovation of portable living quarters on a stationary platform. ***Copous***, 835 F.2d 115 (5th Cir. 1988). -Contract to sandblast & paint stationary platform. ***Knapp***, 781 F.2d 1123 (5th Cir. 1986). -Work to facilitate workover operations on an offshore platform. ***Brumfield***, 1994 U.S. Dist. Lexis 8945 (E.D. La. 1994). -Construction of waste disposal system for processing & compressing of commingled gas. ***Nerco***, 816 F. Supp. 429 (W.D. La. 1993).

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Examples of Facilities or Contracts Implicated (continued)		APPLIED TO...(cont.) -Work on gas pipeline's meter which measured gas before commingling. ***Lloyds of London***, 101 F.3d 425 (5th Cir. 1996).

	Texas (enacted 1973) Tex. Civ. Prac. & Rem. Code Ann. §§ 127.001 - 127.008 (Vernon 1986 & Supp. 1994)	Louisiana (enacted 1981) La.Rev. Stat. Ann.§ 9:2780 (West 1991 & Supp. 1994)
Exceptions	-Joint operating agreements[5] -Agreements excluded from the definition of "well or mine service" (*i.e.*, transporting gas by pipeline) -Agreements supported by insurance (subject to limitations) -Insurance contracts -Benefits conferred by workers' compensation -Personal injury, death, or property damage from radioactivity -Property injury, death, or property injury from control of a wild well to protect the general public or prevent depletion of vital natural resources -Cost of control of a wild well -Surface estate owner (subject to limitations)	-Operating agreements -Farmout agreements -Insurance contracts -Benefits conferred by workers' compensation -Bodily injury or death from radioactivity -Bodily injury or death from certain clean-up subsequent to a wild well and certain failures of pipelines to protect the general public and the environment -Bodily injury or death from control of a wild well to protect the general public or prevent depletion of vital natural resources -Public utilities and the forestry industry -Sulphur industry (subject to limitations) -Owner or usufructuary of surface estates (subject to limitations) -Transferor of land with reservation of mineral rights (subject to limitations) -Exceptions to LOAIA are to be strictly construed. ***Torres***, 12 F.3d 521 (5th Cir. 1994).

	Texas (enacted 1973) Tex. Civ. Prac. & Rem. Code Ann. §§ 127.001 - 127.008 (Vernon 1986 & Supp. 1994)	Louisiana (enacted 1981) La.Rev. Stat. Ann.§ 9:2780 (West 1991 & Supp. 1994)
1995 Amendments	Deleted the language that excluded "agreements with respect to the purchase, gathering, storage, or transportation of oil, brine water, fresh water, condensate, produced water, petroleum products, or other liquid commodities" from taking advantage of the insurance exception to the statute. §127.005(a)	Substituted "the sulphur industry" for "companies that drill with the Frasch process." §9:2780(E)
Insurance	Mutual indemnification is allowed if supported by insurance provided by the parties in equal amounts. With unilateral indemnification, insurance may not exceed $500,000.	Any form of insurance protection that circumvents the prohibitions of the Statute is null & void. There is a judicially created exception that allows for additional insured provisions if the indemnitee pays for the appropriate portion of the insurance premiums. ***Marcel***, 11 F.3d 563 (5th Cir. 1994); ***Patterson***, 670 F. Supp. 182 (W.D. La. 1987); *see also* ***Hodgen***, 862 F. Supp. 1567 (W.D. La. 1994), *aff'd in part by and question certified by*, 87 F.3d 1512 (5th Cir. 1996).

	Texas (enacted 1973) Tex. Civ. Prac. & Rem. Code Ann. §§ 127.001 - 127.008 (Vernon 1986 & Supp. 1994)	Louisiana (enacted 1981) La.Rev. Stat. Ann.§ 9:2780 (West 1991 & Supp. 1994)
Conflict of Law **Maritime Law**	Citing ***Corbitt v. Diamond M. Drilling Co.***, 654 F.2d 329, 332 (5th Cir. 1981) as basis for applying federal maritime law to interpretation of indemnity provisions of Master Service Agreement to furnish a casing crew to run casing into a well located approximately 40 miles offshore Texas. ***Young v. Kilroy Oil Co. of Texas, Inc.***, 673 S.W.2d 236, 244 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.).	Contract which is maritime in nature is governed by maritime law; if contract is not maritime in nature, state law applies and indemnity agreement may be declared void under LOAIA. ***Brennan***, 612 So. 2d 929 (La. Ct. App. 4th Cir.), *writ denied*, 614 So. 2d 1268 (La. 1993).

	Texas (enacted 1973) Tex. Civ. Prac. & Rem. Code Ann. §§ 127.001 - 127.008 (Vernon 1986 & Supp. 1994)	Louisiana (enacted 1981) La.Rev. Stat. Ann.§ 9:2780 (West 1991 & Supp. 1994)
Conflict of Law **Maritime Law** **(Continued)**	Federal law on indemnity provides that "'[a] contractual provision should not be construed to permit an indemnitee to recover for his own negligence unless the court is firmly convinced that such an interpretation reflects the intentions of the parties. This principle . . . is accepted with virtual unanimity among American jurisdictions.'" ***Young, 673 S.W.2d at 244*** (citing ***United States v. Seckinger***, 397 U.S. 203, 211 (1970). "Under maritime law, a contract of indemnity must clearly and unequivocally show that the parties intended to afford protection to an indemnitee against the consequences of his own negligence." *Id.* This federal "express negligence" rule also applies where there is concurring negligence of the indemnitor and the indemnitee. *Id.*	It is well established that maritime law applies only to those cases where the subject matter bears the type of significant relationship to traditional maritime activities necessary to invoke admiralty jurisdiction. ***Laredo Offshore Constr., Inc.***, 754 F.2d 1223 (5th Cir. 1985). In ascertaining whether the subject matter of the controversy is maritime in nature, the court must look to the contract to determine whether it has a sufficient maritime nexus apart from the fact that the situs of performance is in navigable waters. ***Hollier***, 972 F.2d 662 (5th Cir. 1992). The Fifth Circuit has developed the following six-factor test for determining whether a contract is maritime: 1) What does the specific work order in effect at the time of 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?

	Texas (enacted 1973) Tex. Civ. Prac. & Rem. Code Ann. §§ 127.001 - 127.008 (Vernon 1986 & Supp. 1994)	Louisiana (enacted 1981) La.Rev. Stat. Ann.§ 9:2780 (West 1991 & Supp. 1994)
Conflict of Law **Maritime Law** **(continued)**		5) what was the principal work of the injured worker? 6) what work was the injured worker actually doing at the time of injury? ***Gulf Oil***, 919 F.2d 313 (5th Cir. 1990); *see also* ***Domingue***, 923 F.2d 393 (5th Cir.1991), *cert. denied sub nom,* ***Ocean Drilling***, 502 U.S. 1030 (1992). Maritime law generally enforces contractual indemnity. ***Randall***, 13 F.3d 888 (5th Cir.), *op. modified on denial of reh'g*, 22 F.3d 568 (5th Cir.), *cert. denied sub nom* ***Sea Savage***, 512 U.S. 1265 (1994) . Contracts for supply and use of a vessel for drilling and completing wells are maritime in nature. ***Dupre***, 788 F. Supp. 901 (E.D. La. 1992), *aff'd*, 993 F.2d 474 (5th Cir. 1993).

	Texas (enacted 1973) Tex. Civ. Prac. & Rem. Code Ann. §§ 127.001 - 127.008 (Vernon 1986 & Supp. 1994)	Louisiana (enacted 1981) La.Rev. Stat. Ann.§ 9:2780 (West 1991 & Supp. 1994)
Non-maritime Law	"The Outer Continental Shelf Lands Act makes it clear that federal law, supplemented by state law of the adjacent state, when not inconsistent with applicable federal law, is to be applied to drilling rigs as artificial islands as though they were federal enclaves in an upland state." ***Gulf Offshore Co. v. Mobil Oil Corp.***, 594 S.W.2d 496, 504 (Tex. Civ. App.--Houston [14th Dist.] 1979) (indemnity provision in contract for oil well completion operations), *aff'd in part, vacated in part, remanded by,* 453 U.S. 473 (1981), *cert. denied,* 459 U.S. 945 (1982). Federal law is exclusive in its regulation in this area and state law applies as surrogate federal law. *Id.*	Non-maritime contracts are governed by the Outer Continental Shelf Lands Acts ("*OCSLA*"). ***Dupre***, 788 F. Supp. 901 (E.D. La. 1992), *aff'd*, 993 F.2d 474 (5th Cir. 1993). Adjacent state law will apply under OCSLA if three conditions are met: "(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; and (3) The state law must not be inconsistent with Federal law." ***PLT Eng'g***, 895 F.2d 1043 (5th Cir.), *cert. denied*, 498 U.S. 848 (1990). The first prong is satisfied when an injured worker is in contact with both a platform and a boat. ***Hollier***, 972 F.2d 662 (5th Cir. 1992).

	Texas (enacted 1973) Tex. Civ. Prac. & Rem. Code Ann. §§ 127.001 - 127.008 (Vernon 1986 & Supp. 1994)	Louisiana (enacted 1981) La.Rev. Stat. Ann.§ 9:2780 (West 1991 & Supp. 1994)
Non-maritime Law (continued)		The third prong of the ***PLT*** test is met in that the adjacent state law of Louisiana regarding the enforceability of indemnification clauses is not inconsistent with federal law. ***Hodgen***, 87 F.3d 1512 (5th Cir. 1996). OCSLA is a congressionally-mandated choice of law provision requiring that the substantive law of the adjacent state is to apply even in the presence of a choice of law provision in the contract to the contrary. ***PLT Eng'g***, 895 F.2d 1043 (5th Cir.), *cert. denied*, 498 U.S. 848 (1990). OCSLA applied even though worker injured on navigable waters, a non-OCSLA situs, where substantial work under contract performed on platform and thus controversy took place on OCSLA situs. ***Wagner***, 79 F.3d 20 (5th Cir. 1996).

	Texas (enacted 1973) Tex. Civ. Prac. & Rem. Code Ann. §§ 127.001 - 127.008 (Vernon 1986 & Supp. 1994)	Louisiana (enacted 1981) La.Rev. Stat. Ann.§ 9:2780 (West 1991 & Supp. 1994)
Choice of Law	***Maxus Exploration Co. v. Moran Bros., Inc.***, 817 S.W.2d 50 (Tex. 1991): in deciding which state's law governs the construction of contractual rights, rely on principles stated in Restatement (Second) of Conflict of Laws (1971). Comment b to Section 173 states that existence of a contractual right to indemnity and the rights created thereby are determined by reference to Sections 187 and 188. *Id.* If parties have not inserted a choice of law provision, the general rule of Section 188(1) states that the "rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in §6." *Id.* Section 188(2) lists the following contacts to be taken into account in applying Section 6's principles: "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties." *Id.*	Where a case involves contacts with other states, the case is governed by the law of the state whose policies would be most seriously impaired if its laws were not applied. The policies of each potential state are evaluated in light of: (1) the pertinent contacts of each state to the parties to the transaction, including the place of negotiation, formation, and performance of the contract, the location of the contract, and the place of domicile, habitual residence, or business of the parties; (2) the nature, type, and purpose of the contract; and (3) the policies referred to in Article 3515, as well as the policies of facilitating the orderly planning of transactions, or promoting multi-state commercial intercourse, and of protecting one party from undue imposition by the other. ***Thomas***, 815 F. Supp. 184 (W.D. La. 1993); La. Civ. Code Art. 3515. Under OCSLA, choice of law provisions are trumped. ***PLT Eng'g***, 895 F.2d 1043 (5th Cir.), *cert. denied*, 498 U.S. 848 (1990).

	Texas (enacted 1973) Tex. Civ. Prac. & Rem. Code Ann. §§ 127.001 - 127.008 (Vernon 1986 & Supp. 1994)	Louisiana (enacted 1981) La.Rev. Stat. Ann.§ 9:2780 (West 1991 & Supp. 1994)
Choice of Law (continued)	Section 6 sets forth the following factors relevant to the choice of the applicable rule of law: "(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied." *Id.* Purpose of Texas' Anti-Indemnity Statute is to protect contractors who drill wells in Texas: the court rejected the suggestion that the statute was to have an "extraterritorial reach" so as to protect "Texas *contractors* who work on mineral wells and mines wherever they may be situated..." *Id.* at 57.	Under admiralty law, where parties have included a choice of law clause, the 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 purpose of maritime law. ***Stoot***, 851 F.2d 1514 (5th Cir. 1988); *see also* ***Campbell***, 979 F.2d 1115 (5th Cir. 1992).

III. Business Perspective

Drafting Effective Indemnities	A. Write indemnities to conform to the strictest language requirement
	B. One size does not fit all
	C. Language should be easily understood
	D. Clarity of intent
	E. Consider all potential exposures
	F. Be aware of governing law selected and its impact on indemnities **Texas anti-indemnity statutes** 1) Applies to bodily injury and property damage 2) Mutual indemnification permitted to the extent supported by insurance 3) Unilateral indemnification limited to $500,000 provided it is supported by insurance **Louisiana anti-indemnity statutes** 1) Applies to bodily injury only 2) Insurance cannot be used to circumvent the intent of the statutes
Balancing business needs and maximum protection	A. Avoid duplication of coverage
	B. Treat deductibles and self-insurance as true insurance coverage
	C. Minimum insurance limits will be exposed
	D. Understand the economics of cost to risk
	E. Utilize cost of risk to distinguish between safe and unsafe companies

IV. Questions and Answers

FOOTNOTES

1. In footnote two of the ***Dresser*** case, the court observes that these fair notice requirements are inapplicable when the indemnitee establishes that the indemnitor possessed actual notice or knowledge of the indemnity agreement.

2. The appellate cases on this issue do not really provide a clear-cut answer. One of the more recent cases addressing indemnification for gross negligence held that an indemnitee was entitled to indemnification for exemplary damages under an agreement that expressly included indemnification for negligence but was silent as to gross negligence. ***Webb v. Lawson-Avila Constr., Inc.***, 911 S.W.2d 457 (Tex. App.--San Antonio 1995, writ denied). The court qualified its holding, however, by noting that the contract contained a "fair and reasonable" clause and opining that this issue is better left to the legislature or the Texas Supreme Court. *See also* ***Smith v. Golden Triangle Raceway***, 708 S.W.2d 574 (Tex. App.--Beaumont 1986, no writ); ***Newman v. Tropical Visions, Inc.***, 891 S.W.2d 713 (Tex. App.--San Antonio 1994, writ denied); ***Valero Energy Corp. v. M.W. Kellogg Constr. Co.***, 866 S.W.2d 252, 258 (Tex. App.--Corpus Christi 1993, writ denied).

3. Both statutes apply to collateral acts such as furnishing or rental of equipment, incidental transportation, or other goods or services furnished in connection with such an agreement. Tex. Civ. Prac. & Rem. Code Ann. §127.001(1)(A)(ii) and La. Rev. Stat. Ann. § 9:2780(C).

4. In the ***Transcontinental Gas Pipe Line Corp. v. Transportation Ins. Co.*** case, 953 F.2d 985, 991 (5th Cir. 1992), the Fifth Circuit articulated a two-prong test for determining the applicability of the Louisiana statute: 1) the agreement must pertain to an oil, gas, or water well, and 2) if it does, examine whether the contract involves operations related to the exploration, development, production, or transportation of oil, gas, or water. In the ***Lloyds of London v. Transcontinental Gas Pipe Line Corp.*** case, 38 F.3d 193 (5th Cir. 1994), the Fifth Circuit focused on the location of the work required by the contract in determining whether the contract pertained to a well.

5. Joint operating agreements were excluded from the scope of the statute by adding subsection (c) to Section 127.002 in a 1992 Amendment. Section 127.002(c) describes joint operating agreements as: (1) commonly understood, accepted, and desired by the parties thereto; (2) encouraging mineral development; (3) not against the public policy of the state; and (4) enforceable unless such costs or losses are expressly excluded by written agreement.