

CONTRACTUAL INDEMNITIES:

GETTING THE OTHER GUY TO PAY YOUR LEGAL
LIABILITY

PRESENTED BY:

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I. INTERPRETING INDEMNITIES

A. General

1. The general rules that govern the interpretation of other contracts apply in construing a contract of indemnity. *Soverign Ins. Co. v. Texas Pipeline Co.*, 488 So.2d 982 (La. 1986).
2. Contracts have the force of law between the parties, and the courts are bound to interpret them according to the common intent of the parties. La.Civ.Code art. 1983 & 2045.
3. If the words of the contract are clear, unambiguous, and lead to no absurd consequences, the court need not look beyond the contract language to determine the true intent of the parties. La.Civ.Code art. 2046.
4. Each provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole. La.Civ.Code art. 2050.
5. “In case of doubt that cannot be otherwise resolved, a contract must be interpreted against the obligee and in favor of the obligor of a particular obligation.” La.Civ.Code art. 2057.
6. “Yet, if the doubt arises from lack of a necessary explanation that one party should have given, or from negligence or fault of one party, the contract must be interpreted in a manner favorable to the other party whether obligee or obligor.” *Id.*

B. Whether an indemnity provision is applicable involves a two-pronged inquiry:

1. Is the party asserting a right to indemnification included in the definition of the indemnitee group?; and
2. Is the claim, loss, liability or expense for which indemnification is sought within the scope of risks covered by the indemnity provision?

C. By broadly defining the “indemnified” group, the scope of persons entitled to indemnity may be increased significantly.

1. The court declined to extend indemnity protection with a narrow definition of the protected group in *Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329 (5th Cir. 1981).
 - a. Shell Oil Company (“Shell”) entered into an “Offshore Drilling Workover Contract” with Diamond M. Drilling Company (“Diamond M.”) under which Diamond M. agreed to furnish labor,

materials, and equipment for drilling, completing, working over, or deepening wells on Shell's leaseholds.

- b. Shell also hired Sladco, Inc. (“Sladco”) as an independent contractor. On November 21, 1975, Sladco executed a blanket “Purchase Order” under which Sladco agreed to furnish personnel, equipment, and supplies for casing services as required by Shell. This Purchase Order incorporates the indemnification provision which is in dispute here. In pertinent part, it reads as follows:

... Contractor (Sladco) shall indemnify Shell against all loss or damage arising out of the negligence, of Contractor or any sub-contractor and not within the Contractor's indemnity in the next sentence. Contractor shall indemnify and defend Shell Oil Company and its employees and agents against all claims, suits, liabilities and expenses on account of injury or death of persons (including employees of Shell or Contractor, and sub-contractor and their employees) or damage of property arising out of or in connection with performance of this Order, and not caused solely by Shell's negligence without any contributory negligence or fault of Contractor or any sub-contractors.

- c. This litigation stems from the injury of a Sladco employee who was working on one of Diamond M.’s drilling rigs. Shell then brought its own third-party action against Sladco, asserting a right of indemnification under the terms of the Purchase Order. Diamond M. and Shell subsequently settled with Corbitt, and Sladco moved for summary judgment on Shell's third-party claim. The district court granted Sladco's motion and dismissed the action, concluding “the language of the indemnity agreement does not require Sladco to indemnify Shell for Shell's contractual liability to Diamond M.”
- d. On appeal, Shell argued that Shell and Sladco intended the Purchase Order to give Shell a right of indemnification for its contractual liability to Diamond M.
- e. Rejecting Shell’s arguments, the court stated:

The Purchase Order, however, does not expressly provide that Sladco will indemnify Shell for Shell's contractual liability to third persons. The Sladco-Shell agreement simply provides for indemnity “against all claims, suits, liabilities and expenses on account of personal injury ... arising out of or in connection with performance of this Order ...” (emphasis supplied). **But Shell's liability to Diamond M is not on account of personal injury. Rather, it is on account of its agreement to indemnify Diamond**

M under Article X of the Offshore Drilling Workover Contract. Since the Purchase Order does not specifically provide that Sladco assumes claims arising from Shell's own separate contractual obligations, such indemnification is not required.

Nor can it be said that Shell's contractual duty to indemnify Diamond M. is the kind of liability which the parties to the Purchase Order intended to include within the scope of Sladco's duty to indemnify Shell. Apart from any contractual undertaking to the contrary, Sladco's exposure to liability for injuries sustained by its own employees would be limited by the relevant workers' compensation scheme. **If Shell had intended that Sladco forego its limited liability for such injuries, Shell should have said so in clear, specific terms. In the absence of such explicit language, it is unreasonable to assume that Sladco intended to undertake such an unusual and surprising obligation.**

(Emphasis added).

2. In contrast, in *Phillips v. Williams Oil Field Serv.-Gulf Coast Co.*, 2006 WL 1098923 (W.D.La.), the court held that, due to the broad definition of the protected group contained in an indemnity, a company who was not a party to a Master Service Agreement (“MSA”) was entitled to defense and indemnity under the MSA indemnity provisions.
 - a. While working for General Maritime Leasing, LLC (“GML”) as a galley hand, Phillips was injured when he slipped and fell on the top deck of a platform owned by Williams OilField Services-Gulf Coast Co. (“Williams”).
 - b. Total E & P USA, Inc. (“Total”) was the producer on the platform, who entered an agreement with GML to provide catering services.
 - c. After Phillips sued Williams, Williams filed a third party demand against Total for defense and indemnity. In turn, Total, on behalf of Williams and itself, tendered defense of the suit to GML, but GML refused the tender.
 - d. The indemnity of the MSA read as follows:

5.1 Contractor's Indemnification. Contractor agrees to RELEASE, DEFEND, INDEMNIFY, and HOLD HARMLESS Company and its parent, subsidiary, related and affiliated corporation(s), partnership(s), and limited liability companies, and its and all of their co-owners, co-lessees, partners, co-contractors, and joint venturers, and the officers, directors, employees, agents, assigns,

representatives, managers, consultants, insurers, subrogees, and other contractors and subcontractors (with the exception of Contractor and its subcontractors) of all of the foregoing and any **other person and entity to the extent Company is contractually obligated to provide indemnity or insurance protection (individually and collectively referred to as “Company Group”)** from and against any and all claims, losses and expenses, including, without limitation, all costs, demands, damages, suits, judgments, fines, penalties, liabilities, debts, attorneys' fees, and causes of action of whatsoever nature or character, and further including, without limitation, any and all claims, losses and expenses for property damage, bodily injury, illness, disease, death, or loss of services, wages, consortium or society (the foregoing being herein individually and collectively referred to as “Claims, Losses and Expenses”) directly or indirectly arising out of or related to bodily injury, illness, disease or death of, or damage to property of, Contractor or its subcontractors, or its or their employees, in any way directly or indirectly, arising out of, or related to, the performance or subject matter of this Agreement or the ingress, egress, loading, or unloading of cargo or personnel, or any presence on any premises (whether land, building, vehicle, platform, aircraft, vessel or otherwise) owned, operated, chartered, leased, used, controlled or hired by **Company Group** or Contractor or its subcontractors, and expressly including any sole or concurrent negligence, fault or strict liability (of whatever nature or character, including unseaworthiness, preexisting conditions, and/or premises defects) of **Company Group** or any other person or entity. The indemnity obligations set forth in this Section shall include any medical, compensation or other benefits paid by Company or any member of Company Group in connection with employees of Contractor (or its subcontractors, if any) and shall apply even if the employee is determined to be the statutory or borrowed employee of Company or any member of Company Group. **IT IS THE EXPRESS INTENTION OF THE PARTIES HERETO, BOTH COMPANY AND CONTRACTOR, THAT THE INDEMNITY PROVIDED FOR IN THIS SECTION IS AN INDEMNITY BY CONTRACTOR TO INDEMNIFY AND PROTECT COMPANY GROUP FROM THE CONSEQUENCES OF COMPANY GROUP'S OWN NEGLIGENCE, FAULT OR STRICT LIABILITY, WHETHER THAT NEGLIGENCE, FAULT, OR STRICT LIABILITY IS THE SOLE, JOINT OR CONCURRING CAUSE OF THE BODILY INJURIES, ILLNESS, DISEASE OR DEATH OR PROPERTY DAMAGE.**

(Emphasis added.)

- e. GML argued that, since Total was not contractually obligated to defend and indemnify Williams, it should not be required to defend and indemnify Williams.
 - f. However, due to the expansive definition of the protected group in the indemnity, the court found a direct obligation of GML to defend and indemnify Williams.
 - g. As a result, the court reasoned that it did not need to consider whether there was separate agreement between Total and Williams. Rather, since Williams is a contractor of Total, the court concluded that Williams was entitled to defense and indemnity from GML.
- F. If properly drafted, an indemnity may provide reimbursement for both the direct and consequential damages suffered or incurred by an indemnitee.
- 1. In *Cox Communications v. Tommy Bowman Roofing, LLC*, 929 So.2d 161 (La.App. 4 Cir. 3/15/06), the court held that the indemnity provision of a roofing contract between Cox Communications and a roofing contractor required the contractor to indemnify Cox for all losses resulting from the contractor's negligent performance of roofing work.
 - a. Cox entered into a contract with Tommy Bowman Roofing, LLC, ("Bowman") to replace the roof on its office building located at 2120 Canal Street in New Orleans.
 - b. After Cox was forced to evacuate the building due to vapor from the asphalt surface primer entering the building through an air intake vent on the roof, Cox filed suit against Bowman, seeking to recover the lost of revenue and profits, lost wages, medical expenses, attorneys' fees, and litigation cost that it incurred as a result of the evacuation.
 - c. The Cox-Bowman indemnity read as follows:

Contractor shall indemnify, defend and hold harmless Cox, its officers, directors, shareholders, employees, agents and representatives, from any and all claims, demands, **losses, costs (including attorney's fees), expenses and liabilities of any nature whatsoever** in connection with or resulting from Contractor's performance under this Agreement, the fulfillment of Contractor's obligations or failure to fulfill its obligations under this Agreement, the breach of any representation or warranty made by Contractor under this Agreement, the conduct of Contractor's

employees or agents, and/or the breach of any Applicable Laws by Contractor, its employees or agents.

- d. Bowman argued that the indemnity provision only required it to indemnify, defend and a hold harmless Cox for third party claims.
 - e. On the other hand, Cox argued that the indemnity did not express any such limitation, and, therefore, Bowman must indemnify Cox for its own losses resulting from the roofing contractor's negligence, including lost revenue, attorneys' fees and litigation expenses incurred to recover those losses.
 - f. Applying the general rules that govern the interpretation of contracts, the court found that Cox was seeking indemnification for all claims resulting from Bowman's negligent performance under contract. In light of the absence of any limiting language in indemnity, the court concluded that the indemnity required Bowman to fully indemnify Cox for both its direct and consequential damages.
- D. Imprecise or narrow language in the indemnity provision may also result in a court finding that a loss is not encompassed by an indemnity.
- 1. In *Leaming v. Century Vina, Inc.*, 908 So.2d 21 (La.App. 4 Cir. 6/1/05), the court held that a lessor had no cause of action for contractual indemnity from the lessee or the lessee's insurer.
 - a. This suit arose from a slip and fall accident, which occurred in the Centre Plaza Strip Mall parking lot in Slidell, LA. While walking to a Semolina Restaurant located there, the plaintiff slipped and fell, allegedly as a result of stepping into an unseen trench drain in the parking lot.
 - b. After the plaintiffs sued the lessor of the property, Century Vina, Inc. ("Century Vina"), Century Vina filed a third-party demand against the owner and operator of Semolina and its insurer.
 - c. The Century Vina indemnity and insurance provision stated, in part, as follows:

12.1 INDEMNITY. Tenant hereby agrees to hold harmless, indemnify and protect and, at Landlord's option, defend Landlord, his mortgagees, his agents, successors and assigns from all injuries, losses, claims, or damages to any person or property **while on the Leased Premises or any other part of the Retail Complex** occasioned by any act or omission or negligence of Tenant, or any

party from [sic] whom Tenant is responsible. Such indemnity shall include all costs and attorney fees incurred in any such claim, proceeding, or litigation and the defense thereof.

12.2 TENANT'S LIABILITY INSURANCE. Tenant shall maintain in responsible companies, approved by Landlord, public liability insurance insuring Landlord, and if so requested, Landlord's mortgagees, as their interests may appear against all claims, demands, or actions for injury to, or death, in an amount of not less than that set forth in Article 1.1.u. arising out of any one occurrence and for damage to property in an amount of not less than that set forth in Article 1.1.u. arising out of any one occurrence, made by or on behalf of any person, firm, or corporation, **arising from, related to, or connected with the conduct and operation of Tenant's business in the Leased Premises....**

(Emphasis added).

- d. After observing that the lease specifically defined the parking lot as a common area, the court found that the injury did not occur on the leased premises.
 - e. Consequently, the court concluded that the lessee had no obligation to indemnify the lessor. Further, the court found that the Century Vina could not maintain an action against the lessee's insurer.
- E. When the indemnitee seeks indemnification against the consequences of its own negligence, the indemnity is not enforceable unless such an intention is expressed in unequivocal terms.
- 1. In *Harris v. Agrico Chemical Co.*, 570 So.2d 474 (5th Cir. 1990), the court held that an indemnification agreement unequivocally expressed an intent to provide indemnification for all acts of negligence, including but not limited to, the indemnitee's sole negligence.
 - a. An industrial contractor, Manufacturer's Enterprises, Inc. ("MEI"), had contracted with Agrico Chemical Company ("Agrico"), for MEI to supply personnel for maintenance work and machinery.
 - b. The plaintiff in the case, Harris, was on Agrico's property to pick up a piece of heavy equipment. He was injured when the loading machine owned by Agrico and operated by an MEI employee malfunctioned because its internal gears broke.

c. The indemnity provided that the MEI agreed:

to protect, indemnify and save Agrico harmless from and against all claims, demands, and causes of action, suits or other litigation ... of every kind and character, on account of personal injuries or death or damage to property, whether arising out of negligence on the part of Agrico or otherwise, in any way occurring, incident to, or arising out of the work performed by Contractor hereunder, and particularly, but not by way of limitation, against any loss or damage whatsoever caused by fire, explosions, or accidents of any kind during the performance of and until the completion of said work and the acceptance thereof by Agrico.

2. In *Ranger Ins. Co. v. Shop Rite, Inc.*, 921 So.2d 1040 (5th Cir. 2006), the court held that a lease did not require the lessee to indemnify the lessor for the lessor's own negligence or strict liability, where the indemnity did not express a clear intent for the lessee to indemnify the lessor for the consequences of the lessor's negligence.

a. When reading the contract as a whole, the court found that the indemnity did not express in unequivocal terms an intention to indemnify the indemnitee against the consequences of its own negligence.

F. When the indemnitee seeks indemnification against the consequences of its own negligence, the indemnity provision will be strictly construed.

1. In *Dean v. Griffin Crane & Steel, Inc.*, 935 So.2d 186 (La.App. 1 Cir. 5/5/06), the court held that the indemnity provision in a lease did not unequivocally obligate the lessee to indemnify the lessor for liability for the lessor's own negligence for any activity arising from the lease of a crane.

a. The plant engineer for Abita Brewing Company, LLC ("Abita") secured services of a large crane from Griffin Crane & Steel, Inc. ("Griffin") for the purpose of moving and positioning large fermentation tanks at the brewery.

b. After the task of moving the tanks was complete, the crane struck the rear of a school bus when Griffin was returning it to Griffin's principal place of business.

c. The driver of the school bus subsequently sued Griffin and its insurer who, in turn, served a third party demand upon Abita,

alleging that they were entitled to indemnity from Abita for plaintiff's claims under the terms of the lease contract.

- d. The Abita-Griffin indemnity provided the following:

3. LIABILITY OF LESSEE

Liability for injury, disability and death of workmen and other persons caused by the operation or handling of the equipment during the period shall be assumed by the Lessee, and he shall indemnify that [sic] Lessor against all such liability. **Lessee also agrees to indemnify and hold Lessor and Lessor's Insurance Carrier harmless against any loss, damage, claims or liability however caused, even if caused by Lessor's sole negligence, arising out of the performance of the work while using Lessor's equipment.** Griffin Crane Service assumes no liability for any type of damages and/or injuries caused by the actions of customer [sic], including customer's [sic] negligence, willful misconduct and/or strict liability.

(Emphasis added).

- e. The court noted that when the indemnitee is indemnified against the consequences of its own negligence, the indemnity is not enforceable unless such an intention is expressed in unequivocal terms. Even when such a contract is enforceable, the indemnity shall be strictly construed insofar as the scope of the claims covered.
- f. Although Griffin argued that the accident was arising out of its lease with Abita, the court found that the indemnity was limited in scope to "the work."
- g. In strictly construing the indemnity, the court concluded that, since the accident at issue occurred away the work location, the indemnity did not encompass the accident at issue and that Abita had no obligation to indemnify Griffin or its insurer.

II. KNOCK FOR KNOCK INDEMNITY

- A. The two policy considerations underpinning the use of "knock for knock" or reciprocal indemnity agreements are: (1) the elimination of the expense of redundant insurance coverage; and (2) a reduction in unnecessary litigation and its expense. *See Darty v. Transocean Offshore U.S.A., Inc.*, 875 So.2d 106 (La.App. 4 Cir. 2004)(citing *Cormier v. Rowan Drilling Co.*, 549 F.2d 963 (5th Cir. 1977)).

- B. The basic approach in a “knock for knock” contract is: “I’ll take care of mine and you take care of yours.” However, what is “mine” and “yours” can be quite confusing.
- C. In *Darty v. Transocean Offshore U.S.A., Inc.*, 875 So.2d 106 (La.App. 4 Cir. 2004), the court held that, regardless of whether a worker was the owner’s borrowed servant for worker’s compensation purposes, the worker remained the operator’s employee under the parties reciprocal indemnity agreement.
1. Darty, an employee of Tom’s Welding Services, was injured during the transfer of cargo from a materials barge to Falcon Drilling USA, Inc.’s (“Falcon”) submersible rig, where Darty was working.
 2. Darty subsequently filed suit against Transocean Offshore U.S.A., Inc.(“Transocean”), Bay Coquille, Inc. (“Bay Coquille”) and Falcon.
 3. Falcon filed a cross claim against Bay Coquille, arguing that Darty was an employee of Tom’s Welding Services and that Tom’s Welding Services was retained by Bay Coquille. Since Darty was working for Bay Coquille’s subcontractor, Falcon maintained that Bay Coquille was required to indemnify it from Darty’s claim.
 4. Bay Coquille answered with its own claim for indemnity arguing that, at the time of Darty’s injury, he was Falcon’s borrowed employee.
 5. Both the claim of Falcon and Bay Coquille was based on a ‘knock for knock’ indemnity.
 6. The court found that, in order to avoid redundant insurance coverage, the liability for Darty’s injuries had to be solely assigned to either Falcon or Bay Coquille.
 7. The court stated:

The retention of Tom's Welding by Bay Coquille along with the payment to Tom's Welding for Darty's services by Bay Coquille takes precedence under the indemnity contract over Falcon's alleged status as Darty's borrowing employer as the most likely intention of the parties and as the most effective means of achieving the purposes of the reciprocal indemnity agreements, the elimination of redundant insurance coverage and a reduction in the expense of litigation.
 8. Hence, the court concluded that, under the “knock for knock” agreement, Bay Coquille was required to indemnify Falcon.

III. CONTRACTUAL INDEMNITY VS. ADDITIONAL INSURED STATUS: WHAT'S THE DIFFERENCE

- A. The primary difference between a claim for contractual indemnity which is covered by the indemnitor through contractual liability coverage under the CGL policy and a claim as an additional insured under the indemnitor's CGL policy is in the rights and remedies of the indemnitee.
1. In *Suire v. Lafayette City-Parish Consolidated Government*, 907 So.2d 37 (La. 4/12/05), the court held that, although the claim of the City of Lafayette (the "City") for defense and indemnity under the contractor's indemnity agreement was premature, the City was nonetheless entitled to a defense as an additional insured.
 - a. After his home was damaged during a project to dredge and line an adjacent drainage channel, Suire sued the City, the contractor, and engineering firm, alleging that the defendants were solidarily liable.
 - b. Thereafter, the City and the engineering firm filed cross-claims against the contractor, seeking defense and indemnity under the terms of the contract between City and the contractor.
 - c. The City and engineering firm also filed a third party demand against the contractor and its insurers, seeking defense and indemnity as additional insureds under the contractor's insurance policy.
 - d. The court initially noted that, under Louisiana law, an indemnitor is not liable under an indemnity agreement until the indemnitee actually makes payment or sustain a loss.
 - e. Thus, a cause of action for indemnification for cost of defense does not arise until the lawsuit is concluded and defense costs are paid. Consequently, the court concluded that any request for contractual indemnity in defense of the contract was premature.
 - f. However, the court next addressed the issue of whether the City and the engineering firm were additional insureds and the impact of this status.
 - g. In the court's words: "[T]he duty to defend does not depend upon the outcome of the suit, as it does where the purported source of the duty is an indemnity agreement; rather, where the pleadings disclose 'even a possibility of liability' under the contract, the duty

is triggered.” *Id.* at 52 (quoting *Steptore Masco Constr. Co.*, 643 So.2d 1213, 1218 (La. 8/18/94)).

- h. The blanket additional insured provision in the contractor’s policy stated that “[a] person or organization required in a written contract to name as an insured” shall be considered to be an additional insured.
- i. In the contract with the City, the contractor was required to name the City as an additional insured, but not the engineering firm. Accordingly, the court concluded that the City was entitled to a defense as an additional insured, while the engineering firm was not.

IV. ADDITIONAL INSURED STATUS

A. As noted above, a contract requiring that a party be named as an additional insured confers greater rights than a contract simply requiring contractual liability coverage.

1. In *Jessop v. City of Alexandria*, 871 So.2d 1140 (La.App. 3 Cir. 3/31/04), the court held that the City of Alexandria (the “City”) and the Convention and Visitor’s Center were additional insureds under the promoters’ CGL policy.

a. Melba and Richard Jessop initiated this lawsuit for damages claiming that Melba tripped and fell, injuring herself while at a show at the River Front Center (the “Arena”).

(1) The Jessops filed suit against the Arena, the promoters of the show, the promoters’ insurer, the Alexandria Convention and Business Bureau (the “Convention Bureau”), and the City.

(2) The Convention Bureau and the City filed a third party demands against the Arena, the promoters and the promoters’ insurer requesting defense and indemnification, arguing that they were additional insureds under the promoters’ policy.

b. The promoters’ policy provided blanket additional insured provision, which provided the following:

WHO IS AN INSURED (SECTION II) is amended to include as an insured any person or organization (called additional insured) whom you are required to add as an additional insured on this

policy under a written contract, agreement or permit which must be:

- a. currently in effect or becoming effective during the term of the policy; and
 - b. executed prior to the “bodily injury,” “property damage,” “personal injury,” or “advertising injury.”
- c. Despite the fact that the promoters’ lease was somewhat ambiguous, the court found sufficient evidence to find that the promoters were required to add the Arena, the Convention Bureau, and the City as additional insureds.
- d. Further, the court found that there was clearly an oral agreement to list the Arena, the Convention Bureau, and the City as additional insureds, and this oral agreement was followed by a written confirmation.
- e. Since the insurance policy language automatically included these parties as additional insureds since they were required to be named as such by a written contract, the court concluded that the Arena, the Convention Bureau, and the City were, in fact, additional insureds under the promoters’ insurance policy and, as such, were entitled to a defense and indemnity.

V. INDEMNITOR MAY HAVE INSURANCE COVERAGE FOR ITS CONTRACTUAL LIABILITY

- A. Most CGL policies also address contractual liability coverage.
- B. While many CGL policies provide exclusions for contractual liability, many of those policies still provide coverage where the insured contractually assumes the tort liability of another.
- C. In *Burlington Resources, Inc. v. United National Ins. Co.*, 2007 WL 496859 (E.D.La.), the court held that the non-operator to a Joint Operating Agreement (“JOA”) was entitled to recover from its CGL insurer amounts it was required to pay under the JOA as the result of a settlement.
1. Burlington executed a JOA with Meridian Resources & Exploration Company (“Meridian”), wherein Burlington acquired a 26% non-operating interest in three oil wells in Assumption Parish.
 2. Although Burlington did not have any operational or supervisory control, the JOA required Burlington to reimburse Meridian for damages arising from well operations.

3. After a blowout occurred at one of the wells, a group of mineral interest owners and landowners filed suit against Burlington, Meridian and others.
 - a. Meridian settled the claims of the mineral interest owners and land owners for \$10,865,384.
 - b. As a result, Burlington was obligated to pay \$2,565,000, which correlated to the percentage of its non-operating interest.
 - c. After Burlington's primary insurer paid the first \$2,000,000, Burlington asserted a claim against United National Insurance Company ("United National") for the remaining \$565,000.
 - d. However, United National denied coverage, asserting that Burlington was paying its share of liability pursuant to the JOA, rather than assuming the legal liability of Meridian.

3. The Burlington policy provided, in pertinent part, as follows:

1. Coverage

United National ... hereby agrees, subject to the limitations, terms and conditions hereinafter mentioned, to **indemnify** the Insured for **all sums** which the Insured shall be obligated to pay **by reason of the liability**;

A. Imposed upon the Insured by law; or

B. Assumed under contract or agreement by the Named Insured and/or any officer, director, stockholder, partner or employee of the Named Insured, while acting in his capacity as such.

For damages on account of:

1. Personal Injury

Property Damage ...

caused by or arising out of each occurrence happening anywhere in the world.

(Emphasis added).

4. The court found that Louisiana law specifically provides that a non-operator of a well is not liable for the tortious acts of the operator, unless otherwise agreed.
5. As such, the court reasoned that Burlington would not be liable for any of Meridian's actions, absent Burlington's agreement to pay 26% of Meridian's liability for any settlement amount.

6. Thus, the court concluded that Burlington had assumed the tort liability of Meridian and that the United National policy provided coverage.

VI. WAIVERS OF SUBROGATION

- A. A waiver of subrogation provision in a contract precludes an insurer from recovering from an otherwise negligent party who has been granted the waiver.
 1. In *The Gray Ins. Co. v. Old Tyme Builders, Inc.*, 878 So.2d 603 (La.App. 1 Cir. 4/2/04), the court held that a waiver of subrogation clause in a construction contract precluded a general contractor's insurer, as subrogee, from recovering payments for water damage to property resulting from a subcontractor's faulty workmanship.
 - a. After the Discon Law Firm entered a construction contract with Grimaldi Construction, Inc. ("GCI"), GCI entered into a subcontract with Old Tyme Builder, Inc. ("Old Tyme").
 - b. GCI issued a certificate of substantial completion in June of 1996, and the Discon Law Firm immediately moved into the building. However, in the fall of 1996, the building and its contents sustained water damage during normal rainfalls.
 - c. The superintendent for Old Tyme subsequently admitted that its work was deficient and that its deficient work had caused the water damage.
 - d. GCI nonetheless bore the expense of the damages caused by the water leaks and was subsequently reimbursed by its insurer, The Gray Insurance Company ("Gray").
 - e. Gray then instituted an action against Old Tyme and its insurer, seeking reimbursement for payments made to GCI.
 - f. However, after filing responsive pleadings, Old Tyme and its insurer filed motions for summary judgment, contending that a waiver of subrogation clause in the contract between GCI and the Discon Law Firm precluded any subrogation recovery by Gray.
 - g. The court initially recognized that a subrogee acquires no greater rights than those possessed by its subrogor. Further, the court noted that the subrogee is subject to all limitations applicable to the original claim of the subrogor.

- h. The court found that the parties to the construction contract each waived their right of subrogation, with no exception for claims by the owner or contractor against their own subcontractor's negligence.
- i. Therefore, despite the numerous arguments raised by Gray in opposition, the court ruled that Gray had no right of subrogation to assert against Old Tyme and its insurer.

VII. LOUISIANA OILFIELD ANTI-INDEMNITY ACT ("LOIA") LA. R.S. 9:2780

- A. In order to protect small contractors engaged in oil and gas service industries, Louisiana passed the LOIA.
- B. La.R.S. 9:2780(B) provides:

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

- C. However, most oil and gas exploration occurring in the Gulf of Mexico is governed by the Outer Continental Shelf Lands Act ("OCSLA").
 - 1. Under OCSLA, if the alleged bodily injury occurs on a vessel, maritime law will apply, rather than OCSLA or Louisiana law.
 - 2. Although the courts presently employ a confusing, convoluted, and complex analysis, the crux of the determination of whether to apply maritime law or federal law (which, in turn, adopts the adjacent state's law as federal surrogate law to the extent not inconsistent with federal law), usually depends on the characterization of the contract being performed at the time of the injury, maritime or non-maritime.
 - 3. For example:
 - a. In *Mears v. Commercial General Liability Ins.*, 926 So.2d 754 (La.App. 3 Cir. 4/5/06), the court held that a contract to perform welding services in connection with the construction of an offshore platform was non-maritime, and, therefore, LOIA invalidated a contract's defense and indemnity provisions to the extent it sought to protect the indemnitee from its own negligence.

- b. In *Hoda v. Rowan Cos.*, 419 F.3d 379 (5th Cir. 2005), the court held that an oil and gas services contract requiring the torquing up and down of blow-out preventer stacks from a jack-up drilling rig constituted a maritime contract and that the contract's indemnity provision was enforceable under general maritime law.

APPENDIX – INDEMNITIES

SAMPLE INDEMNITY NO. 1

12. LIABILITY INDEMNITY

- 12.1 CONTRACTOR shall indemnify and hold harmless the COMPANY, its officers, employees, and agents (the “COMPANY Group”), from all claims, loss, damages, costs (including legal costs), expenses and liabilities of every kind and nature, arising out of or in connection with the performance of the Contract, in respect of any and all of the following;
- (a) personal injury, including fatal injury, mental anguish, illness or disease, to any of CONTRACTOR Group;
 - (b) loss of or damage to any property of CONTRACTOR Group, including without limitation all Aircraft provided by the CONTRACTOR. This indemnity extends without limitation to any claims which may be made by any Party who has an interest in any such Aircraft;
 - (c) personal injury, including fatal injury, mental anguish, illness or disease, to any of COMPANY Group being transported in aircraft operated by CONTRACTOR but limited to the period such persons are being transported in aircraft operated by CONTRACTOR, to the extent and only to the extent that such injury, illness or disease is caused by the negligence or fault of any of CONTRACTOR Group; and
 - (d) loss of or damage to any property of COMPANY Group with respect to equipment or other property of COMPANY Group being transported in aircraft operated by CONTRACTOR, but limited to the period that such equipment or other property is being transported in aircraft operated by CONTRACTOR, to the extent and only to the extent that such loss or damage is caused by the negligence or fault of any of CONTRACTOR Group.
- 12.2 COMPANY shall indemnify and hold harmless CONTRACTOR from all claims, loss, damages, expenses and liabilities of every kind and nature, due to gross negligence of COMPANY, while CONTRACTOR is on COMPANY property.
- 12.3 CONSEQUENTIAL DAMAGES – Neither Party shall be liable to the other Party for special, indirect, or consequential damages resulting from or arising out of this Contract, including without limitation; loss of profit, production, or business interruption, howsoever they may be caused including the sole or joint negligence of either Party.
- 12.4 The Indemnities contained in Clause 12.1 (a), (b), 12.3, 12.5, 12.7, 12.8 and 12.9 shall be applicable regardless of who may be at fault or otherwise responsible under any other contract, or statute, rule or theory of law, including but not

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limited to theories of strict liability, and even though the subject loss, damage, injury, illness or death may have been caused in whole or in part by: (1) the sole, concurrent, active or passive negligence of COMPANY Group, the CONTRACTOR Group or a third party, (2) the unairworthiness of an aircraft hired by or on behalf of either party; or (3) a defect in the property or equipment of any person. The indemnified Party shall have the right at its expense but not the duty to participate in the defense of any such claim or suit with attorneys of its own selection without relieving such indemnified Party of any obligations hereunder. The obligations, indemnities, and liabilities assumed by CONTRACTOR or COMPANY under this Clause 12 shall not be limited by any provisions or limits of insurance required by Clause 13 below and shall survive the termination of this CONTRACT. If it is judicially determined that any of the indemnity obligations under this CONTRACT are invalid, illegal or unenforceable in any respect, said obligations shall automatically be amended to conform to the maximum monetary limits and other provisions in the applicable law for so long as the law is in effect.

12.5 Except as provided in Clause 12.1(c) and (d), Company shall indemnify and hold harmless the CONTRACTOR, its officers, employees, and agents (the “CONTRACTOR Group”), from all claims, loss, damages, costs (including legal costs), expenses and liabilities of every kind and nature, arising out of or in connection with the performance of the Contract, in respect of any and all of the following;

- (a) Personal injury, including fatal injury, mental anguish, illness or disease, to any COMPANY Group; and
- (b) Loss of or damage to any property of COMPANY Group. This Indemnity extends without limitation to any claims which may be made by any Party who has an interest in any such property.

....

12.8 CONTRACTOR shall assume all responsibility for, including control and removal of pollution and/or contamination, and shall release, defend, indemnify and hold COMPANY harmless from and against any and all losses, damages, claims, suits, liabilities, judgments, causes of action and expenses (including attorneys' fees and other costs of litigation as well as any fees and costs to enforce the provisions of this Contract) caused by, arising out of, in connection with or incidental to any operations conducted pursuant to this Contract, or resulting from the work performed hereunder for pollution or contamination which emanates from CONTRACTOR's aircraft or from spills or leaks of fuels, lubricants, motor oils, pipe dope, paints, solvents, ballasts, bilge, garbage, sewerage, and other materials, in CONTRACTOR's possession and control.

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- 12.9 Except as provided in Clause 12.8, COMPANY shall assume all responsibility for, including control and removal of pollution and/or contamination, and shall release, defend, indemnify and hold CONTRACTOR harmless from and against any and all losses, damages, claims, suits, liabilities, judgments, causes of action and expenses (including attorneys' fees and other costs of litigation as well as any fees and costs to enforce the provisions of this Contract) caused by, arising out of, in connection with or incidental to any operations conducted pursuant to this Contract, or resulting from the work performed hereunder for pollution or contamination which emanates from COMPANY'S property and equipment or from spills or leaks of fuels, lubricants, motor oils, pipe dope, paints, solvents, ballasts, bilge, garbage, sewerage, and other materials, in COMPANY's possession and control.

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SAMPLE INDEMNITY NO. 2

6. Principal shall defend, protect, indemnify, and hold harmless COMPANY, its subsidiaries, affiliated companies, joint venturers, partners, subcontractors, customers, agents, passengers, invitees, and all of their respective officers, directors and employees (hereinafter sometimes collectively referred to as the “COMPANY Group”) from and against all suits, actions, claims, liabilities, damages, and demands based upon personal injury or death or property damage or loss, whenever occurring (collectively, “Claims”), suffered by any of the COMPANY Group, where the Claim arises out of, is connected with, incident to, or is directly or indirectly resulting from or relating to the utilization the Fuel or the Fueling Facilities by any of the Principal Group or out of any related activities by any of the Principal Group in the vicinity thereof, whether the Claim is groundless or not, and whether the loss or injury is caused in whole or in part by the sole, concurrent, active or passive negligence or fault of any of the COMPANY Group, or the gross negligence or willful misconduct of any of the COMPANY Group or the condition of the Fuel or the Fueling Facilities or any aircraft or equipment or by defect in any equipment or property of any of the COMPANY Group.
7. Principal hereby agrees to release, defend, indemnify and hold harmless the COMPANY Group from all Claims for leakage, contamination, pollution, spillage or cleanup that may occur in connection with or incidental to the use of the Fuel or the Fueling facilities by any of the Principal Group, whether the Claim is groundless or not, and whether the Claim is caused in whole or in part by the sole, concurrent, active or passive negligence or fault of any of the COMPANY Group, or the gross negligence or willful misconduct of any of the COMPANY Group or the condition of the Fuel or the Fueling Facilities or any aircraft or equipment or by defect in any equipment or property of any of the COMPANY Group.
8. Principal hereby agrees to maintain in force, with insurance companies with a Best rating of “A”, at their sole cost and expense the following insurance:
 - a. Worker’s compensation insurance under all applicable federal, state and local statutes, covering employees of Principal and employer’s liability insurance in an amount of \$5,000,000 per person/ \$5,000,000 per occurrence.
 - b. Comprehensive/Commercial General Liability Insurance, with limits of liability of at least \$50,000,000 Combined Single Limit of Bodily Injury and Property Damage, including Ground Operations, Products and Contractual Liability and specifically insure the contractual obligations assumed herein.
 - c. Aircraft Hull and Liability Insurance with limits of liability of at least

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\$50,000,000 Combined Single Limit of Bodily Injury and Property Damage on all aircraft.

- d. The COMPANY Group shall be included as additional insureds under the insurance referred to in Paragraphs (b) and (c) above to the extent of the liabilities assumed by Principal herein, and such insurance shall be primary to any insurance maintained by such additional insureds for their own account.
- e. Underwriters shall waive subrogation against all members of the COMPANY Group in connection with the insurance referred to in Paragraphs (a), (b), and (c) above.
- f. The policies referred to herein shall not be canceled or modified in any material respect without thirty (30) days advance written notice to COMPANY detailing the modification or cancellation. A Certificate of Insurance shall be furnished to COMPANY prior to commencement of utilization of the Fuel or the Fueling Facilities in accordance with this Agreement.
- g. Should any insurance policy referred to above have a deductible, such deductible shall be for the sole account of Principal.
- h. The release, indemnity, defense and hold harmless obligations of Principal set forth above shall not be limited by the insurance requirements.

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SAMPLE INDEMNITY NO. 3

ENVIRONMENTAL LAWS. Lessee shall, at Lessee’s own expense, comply with all present and hereinafter enacted environmental laws, and any amendments thereto, affecting Lessee’s operation on the leased premises, with respect to and limited to Lessee’s activities and operations on the leased Premises occurring after the Effective Date.

(a) Definitions.

The term “environmental laws” means any one or all of the following as the same are amended from time to time: (i) the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C., Section 9601, et seq.; (ii) the Toxic Substance Control Act, 15 U.S.C., Section 2601, et seq.; (iii) the Safe Drinking Water Act, 42 U.S.C., Section 300h, et seq.; (iv) the Clean Water Act, 33 U.S.C., Section 1251, et seq.; (v) the Clean Air Act, 42 U.S.C., Section 7401, et seq.; and (vi) the regulations promulgated thereunder and any other laws, regulations and ordinances (whether enacted by the local, state or federal government) now in effect or hereinafter enacted that deal with the regulation or protection of the environment, including the ambient air, ground water, surface water, and land use, including substrata land.

The term “hazardous material” includes: (i) those substances included within the definitions of hazardous substance, hazardous material, toxic substance, regulated substance, or solid waster in the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C., Section 9601, et seq.; the Resource Conservation and Recovery Act, 42 U.S.C., Section 6901, et seq.; and the Hazardous Materials Transportation Act, 49 U.S.C., Section 1801, et seq. And the regulations promulgated thereto: (ii) these substances listed in the United States Department of Transportation Table (49 C.F.R., Section 172.101 and amendments thereto) or by the Environmental Protection Agency as hazardous substances (40 C.F.R., part 302, and amendments thereto; and, (iii) all substances, materials and wastes that are, or that become, regulated under, or that are classified as hazardous or toxic under any local, state or federal environmental law.

The term “release” shall mean any releasing, spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, disposing, or dumping.

(b) Compliance.

(1) Lessee shall not cause or permit any hazardous material to be used, generated, manufactured, produced, stored, brought upon, or released on, under or about the leased premises, or transported to and from the leased premises, by Lessee, its agents, employees, contractors or invitees in violation of any environmental law; provided, however, Lessor shall be solely responsible for (i) the presence, generation, use, manufacture or release of any hazardous materials, or (ii) violation of any environmental law, in each case occurring or existing prior to the Effective Date. Lessee shall indemnify, defend and hold harmless Lessor from and against any and all liability, loss, damage, expense, penalties and legal and investigation fees or costs, arising from or related to any claim or action for injury, liability, breach of warranty of representation, or damage to persons or property and any and all claims or actions brought by any person, entity or governmental body, alleging or arising in connection with contamination of,

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or adverse affects on, the environment or violation of any environmental law or other statute, ordinance, rule, regulation, judgment or order of any government or judicial entity, to the extent incurred or assessed as a result of any activity or operation on or discharge by, through or under Lessee from the during the term of this Lease subsequent to the Effective Date. This obligation includes but is not limited to all costs and expenses related to cleaning up the leased premises, land, soil, underground or surface water as required under the law. Lessee's obligations and liabilities under the paragraph shall continue so long as Lessor bears any liability or responsibility under the environmental laws for any action that occurred on the leased premises during the term of this Lease. This indemnification of the Lessor includes, without limitation, costs incurred in connection with any investigation of site conditions or any cleanup, remedial, removal or restoration work required by any federal, state or local governmental agency or political subdivision because of hazardous material located on the leased premises or present in the soil or ground water on, under or about the leased premises. Notwithstanding the foregoing, Lessee shall not be responsible for, or indemnify any person for, any liability or obligation arising from (i) the presence, generation, use, manufacture or release of hazardous materials, or (ii) violation of any environmental law, occurring or existing prior to the Effective Date. Lessor shall indemnify, defend and hold harmless Lessee from and against any and all liability, loss, damage, expense, penalties and legal and investigation fees or costs, arising from or related to any claim or action for injury, liability, breach of warranty of representation, or damage to persons or property and any and all claims or actions brought by any person, entity or governmental body, alleging or arising in connection with contamination of, or adverse affects on, the environment or violation of any environmental law or other statute, ordinance, rule, regulation, judgment or order of any government or judicial entity, to the extent incurred or assessed as a result of any activity or operation on or discharge from the leased premises occurring or existing prior the Effective Date. This obligation includes but is not limited to all costs and expenses related to cleaning up the leased premises, land, soil, underground or surface water as required under the law. Lessor's obligations and liabilities under the paragraph shall continue so long as Lessee bears any liability or responsibility under the environmental laws for any action that occurred or existed on the leased premises occurring or existing prior the Effective Date. This indemnification of Lessee includes, without limitation, costs incurred in connection with any investigation of site conditions or any cleanup, remedial, removal or restoration work required by any federal, state or local governmental agency or political subdivision because of hazardous material located on the leased premises or present in the soil or ground water on, under or about the leased premises.