**TEN STEPS TO EFFECTIVE RISK**

**TRANSFER IN U.S. SHIPYARD CONTRACTS**

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**I. CONTRACTUAL INDEMNIFICATION PROVISIONS**

**A. Step One – Requirement of Specificity**

**1. Texas Law**

**a. Express Negligence Rule**

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

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

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

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

As an example of an enforceable provision, the Texas Supreme Court has determined that the following indemnity provision satisfies the express negligence test[[3]](#footnote-3):

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

In this case, an employee of the contractor, PPI, filed a lawsuit against the company, Arco, for personal injuries, and Arco sought contractual indemnity for its own negligence from PPI. The Texas Supreme Court held that the, “any negligent act or omission of [Arco]” satisfied the express negligence test.

#### **b. Sole Negligence Exception**

In *Singleton v. Crown Central Petroleum Corp.*,[[4]](#footnote-4) the indemnification agreement excepted “only claims arising out of accidents resulting from the sole negligence of Owner.” With respect to this indemnity provision, the Texas Supreme Court held that the express negligence test was not satisfied.[[5]](#footnote-5) Since the *Singleton* case, an intermediate Texas appellate court reached the same conclusion. In *Texas Utilities Electric Co. v. Babcock & Wilcox, Inc.*,[[6]](#footnote-6) Babcock & Wilcox was required to indemnify Texas Utilities with the exception of “causes of action resulting from [Texas Utilities’] sole negligence.” The Court of Appeals in Texarkana found that this clause did not meet the express negligence test, because “ [i]t does not contain language expressly stating that the Babcock & Wilcox Company agrees to indemnify Texas Utilities for damages incurred by Texas Utilities if it was concurrently negligent with Babcock & Wilcox.”[[7]](#footnote-7)

If the indemnity language in the *Texas Utilities* case had stated that Babcock & Wilcox must indemnify Texas Utilities for all claims, including those caused by Texas Utilities’ negligence except when Texas Utilities was solely negligent, the indemnity agreement probably would have met the Texas specificity requirement.[[8]](#footnote-8) For example, in *Payne & Keller, Inc. v. P.P.G. Industries, Inc.*, the applicable contract required Payne & Keller to indemnify P.P.G. for work related claims “arising out of . . . the acts or omissions . . . of [Payne & Keller] or its . . . employees . . . in the performance of the work . . . irrespective of whether [P.P.G.] was concurrently negligent . . . but excepting where the injury or death was caused by the sole negligence of [P.P.G.].”[[9]](#footnote-9) In considering this indemnification provision, the Texas Supreme Court found that it satisfied the Texas express negligence test, because “[t]he parties clearly expressed their intent that P.P.G. be indemnified for its own concurrent negligence.[[10]](#footnote-10) Similarly, in *Herzog Contracting Corp. v. Burlington Northern Railroad Co.*, a Houston intermediate appellate court considered the following contractual indemnification language: “Each party hereto does hereby agree to indemnify and save the other party harmless of and from all liability cost or expense, including reasonable attorneys’ fees, and including liability, cost or expense caused by the joint and concurrent negligence of the parties, arising on account of injury to or death of any employee . . . of the indemnifying party who shall be performing services hereunder, . . . provided always, however, that if such injury or death to either party’s employees is solely caused by the negligence of the other party, then this indemnity and hold harmless shall be null and void, the party who solely caused the same shall bear all of said cost or expense.”[[11]](#footnote-11) The court found that this indemnity provision satisfied the Texas express negligence test, because “joint and concurring” means the negligence of both parties, which necessarily includes the negligence of the indemnitee.[[12]](#footnote-12) However, use of this language often creates a fact issue for a judge or jury to resolve.

c**. Limitation to Specified Causes of Action**

In the *Houston Lighting & Power* case, the Texas Supreme Court held that a purported indemnitee was not entitled to contractual indemnity for a claim based on strict liability, because the contractual indemnity provision in the contract did not specifically include this cause of action.[[13]](#footnote-13) Similarly, the United States Court of Appeals for the Fifth Circuit has found that, unless specifically itemized, a contractual indemnity provision does not extend to a strict liability CERCLA claim.[[14]](#footnote-14)

### **2. Maritime**

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

While it need not be done in any particular language or form, unless the intention is unequivocally expressed in the plainest of words, the law will consider that the parties did not undertake to indemnify one against the consequences of his own negligence. . . . The purpose to impose this extraordinary liability on the Indemnitor must be spelled out in an unmistakable term. It cannot come from reading into the general words used the fullest meaning which lexicography would permit.[[15]](#footnote-15)

In *Transcontinental Gas*, Transco sued for damage to a pipeline as a result of a drilling rig moving onto location. A federal district court determined the operator (Signal Oil & Gas) and the drilling contractor (ODECO) were both negligent in causing the damage. The issue concerned the obligation of ODECO to indemnify Signal in accordance with a contractual indemnity provision contained within the contract between them. The Fifth Circuit noted that the relative percentage of the parties’ fault was not important in determining contractual indemnity. Also, the court stated that the contract need not contain “the talismanic words ‘even though caused, occasioned or contributed to by the negligence, sole or concurrent, of the Indemnitee’ or like expressions”; however, the language must express this intention.[[16]](#footnote-16)

Thus, although it is not necessary to use any particular words such as negligence, the indemnity language in the contract must clearly demonstrate that the parties agreed for one party to indemnify the other party even for the consequences of the indemnitee’s own negligence. The Fifth Circuit has continued to adhere to this general rule of specificity regarding construction of indemnity agreements in maritime contracts.[[17]](#footnote-17)

**B. Step Two – Requirement of Conspicuousness**

**1. Texas**

To be valid in Texas, an indemnification provision where one party indemnifies another for the consequences of the indemnitee’s own negligence also must be conspicuous. In *Dresser Industries, Inc. v. Page Petroleum, Inc.*,[[18]](#footnote-18) the Texas Supreme Court adopted the standards for conspicuousness set out in the Texas Uniform Commercial Code. Section 1.201(10) of the Texas Uniform Commercial Code provides, in pertinent part, with respect to conspicuousness as follows:

A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. The language in the body of a form is “conspicuous” if it is in larger or other contrasting type or color.[[19]](#footnote-19)

In *Dresser*, the Texas Supreme Court found that the requirement of conspicuousness was not satisfied when the indemnification provision was located on the back side of a work order in a series of numbered paragraphs without headings or contrasting type. In the Texas Supreme Court case of *Littlefield v. Schaefer*,[[20]](#footnote-20) the Court held that a six-paragraph release for motorcycle racing printed in small typeface on the front of a one-page form did not satisfy the conspicuous requirement, because “the language in the body of this release is smaller than other language in the forms and has no contrasting type or color.”

The lack of conspicuousness can be overcome if the indemnitee can establish that the indemnitor “possessed actual notice or knowledge of the indemnity agreement.”[[21]](#footnote-21) One Texas court recently held that actual notice can be satisfied if the president of a company testified that he read the agreement before signing it.[[22]](#footnote-22) The indemnitee has the burden of establishing actual notice or knowledge.[[23]](#footnote-23)

The Texas Supreme Court has held that the requirement of conspicuousness does not extend to “no-damages-for-delay” clauses in construction contracts, in part because “*Dresser* concerned the shifting of tort and negligence damages, whereas the no-damages-for-delay clause shifts economic damages resulting from a breach of contract”[[24]](#footnote-24) and therefore does not involve the same extraordinary risk transfer.[[25]](#footnote-25)

**2.** **Maritime**

An indemnity or exculpatory provision must be conspicuous to be enforceable under maritime law.[[26]](#footnote-26) The Fifth Circuit Court of Appeals has held that to be enforceable, clauses exempting liability from one’s own negligence must be “specific and conspicuous.”[[27]](#footnote-27) In *Coastal Iron Works, Inc*. *v. Petty Ray Geophysical*[[28]](#footnote-28), the Fifth Circuit Court of Appeals appeared to adopt the standard that indemnity agreements are considered conspicuous when a reasonable person against whom the clause is to operate should have noticed the clause.[[29]](#footnote-29) A federal district court has found that the terms of a release provision were conspicuous by their segregation on an isolated, single sheet of paper that was separate and apart from the other terms of the contract.[[30]](#footnote-30)

**C. Step Three – Broadening the Scope of the Indemnity Provision**

**1. Texas**

Several Texas courts have construed the scope of indemnification provisions narrowly and held that, even when employees are on duty, their injuries may fall outside the scope of an indemnification agreement. A typical case is *Employers’ Casualty Co. v. Howard P. Foley Co.*[[31]](#footnote-31) In *Foley*, an employee was injured in a dressing room before work started when a gas explosion occurred. The court held that this accident did not occur in the performance of the contract by the indemnitor, and as a result, the indemnification obligation did not apply. The court stated: “The contract related only to the installation of electric work and none was going on in the dressing room.”[[32]](#footnote-32) Another similar case is *Sun Oil Co. v. Renshaw Well Service, Inc.,*[[33]](#footnote-33) where an employee was injured when he was driving a well service truck on a dirt access road leading away from the well site. The court noted: “The fact that an employee was injured while ‘at work’ does not necessarily answer the question of whether his injury arose out of the performance of that work, or resulted from or in connection with the work contemplated under the indemnity provision.”[[34]](#footnote-34) The court then concluded that the accident occurred due to negligent maintenance of the access road, and since road maintenance was the responsibility of the indemnitee, the accident was unrelated to and had no connection with the well servicing work, and thus, the indemnification agreement was not applicable.[[35]](#footnote-35) Other Texas cases have reached a similar conclusion.[[36]](#footnote-36)

However, several Texas courts have interpreted the “arising out of” language more broadly. For example, in *Banner Sign & Barricade, Inc. v. Berry GP, Inc.*, a Texas intermediate appellate court held that the term “arising out of” does not mean that an indemnitee must show direct or proximate causation; rather, such language only requires that a “general nexus” be established between the indemnitor’s obligations and the claim.[[37]](#footnote-37)

#### **2. Maritime**

Under maritime law, the incident giving rise to the injury or damage must be performed under the contract in order to trigger any indemnity obligation. The Fifth Circuit Court of Appeals, however, has interpreted language such as “arising in connection herewith” in a broad manner.[[38]](#footnote-38) In the *Fontenot* decision, the Fifth Circuit Court of Appeals held as follows:

. . . [W]here the presence of the injured party at the scene of the injury is attributable to or might reasonably be anticipated by his employment responsibilities, then his injuries occur “in connection with” those responsibilities. It is irrelevant that the person is not at that moment performing services or that the injury results from an activity not encompassed by the employer’s contractual undertakings.[[39]](#footnote-39)

In *Fontenot,* the employee of an oil company’s contractor was injured on a drilling vessel’s heliport while en route to perform work on a fixed platform that was under contract to the oil company.[[40]](#footnote-40) The drilling vessel where the injury occurred was also under contract to the oil company.[[41]](#footnote-41) The owner of the drilling vessel demanded indemnity from the oil company based on an indemnity provision in the charter agreement for the drilling vessel.[[42]](#footnote-42) The trial court denied indemnity on the basis that injured party’s claim was not one “arising in connection herewith” because the use of the heliport was only incidental to the business of drilling an oil well, the stated purpose of the contract.[[43]](#footnote-43) The Fifth Circuit reversed the trial court’s decision and enforced the indemnity provision, because the indemnity provision contemplated the operation of a heliport on board the drilling vessel, and the accident in question occurred “in connection [w]ith” the operation of the heliport.

Other indemnity provisions with more restrictive language have been interpreted to be more limited in scope. For example, in *Lanasse v. Travelers Insurance Co.*,[[44]](#footnote-44) a vessel owner’s employee was injured on a fixed platform by the negligence of a crane operator. The indemnity provision in question limited the indemnity to claims arising in connection with the possession, navigation, management and operation of a vessel.[[45]](#footnote-45) Contractual indemnity was denied because the indemnity agreement in the time charter was limited to operations of the vessel, and it did not extend to the operation of a crane on a fixed platform. Other federal courts have reached a similar conclusion when applying maritime law.[[46]](#footnote-46)

**D. Step Four – Requirement of Authority**

A signatory’s authority to bind an indemnitor to an indemnification agreement was first discussed in the case of *Rourke v. Garza*.[[47]](#footnote-47)

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

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

We believe that, as a matter of law, the signing of such broad indemnity contracts is not a duty ordinarily entrusted to a person of [the superintendent’s] position. . . . Contracts indemnifying one against his distribution of defective products should be viewed as exceptions to the usual business practice, in the same manner as those indemnifying one against his own negligence. [Citation omitted.] As evidenced from the facts in this case, they may have a great financial impact on the parties, and are therefore not of the kind ordinarily executed by a superintendent of job sites.[[48]](#footnote-48)

The *Rourke* case indicates that the burden of proof probably would be placed on the indemnitee to establish the authority of the indemnitor’s employee to sign an indemnification agreement.[[49]](#footnote-49) Other more general case law also suggests that the burden of proof would be placed upon the indemnitee.[[50]](#footnote-50)

**E. Step Five – Broadening the Categories of Indemnitees**

Where an indemnity agreement requires an indemnitor to indemnify for “the negligence of any party or parties”, Texas courts generally have found such language to be specific enough to include the other contracting party who is claiming contractual indemnity.[[51]](#footnote-51)

When an indemnity agreement requires an indemnitor to provide indemnity for the personal injuries of the employees of its subcontractors, an indemnitor is not obligated to indemnify an indemnitee for personal injuries to certain independent contractors. This distinction was addressed by the Texas Supreme Court in *Ideal Lease Service, Inc. v. Amoco Production Co., Inc.*[[52]](#footnote-52) In that case, the court refused to require an indemnitor to indemnify an indemnitee, because the injury was to a sole proprietor who worked as an independent contractor for the indemnitor.

A contractor, however, that has not signed the agreement can rely on a contractual indemnity provision to obtain indemnity if the provision specifically includes the non-signatory contractor as a category of indemnitees. For example, the Court of Appeals for the Fifth Circuit has addressed and approved indemnity for a non-signatory party to a contract where the indemnity provision included a reference to “contractors”. In *Campbell v. Sonat Offshore Drilling, Inc.*, a casing contractor, Frank’s, entered into an agreement with an operator, UTP, in which Frank’s agreed to indemnify UTP and UTP’s contractors when injuries occurred to Frank’s employees.[[53]](#footnote-53) The Fifth Circuit, deciding the case under Texas law, held that Frank’s owed indemnity to UTP’s drilling contractor, Sonat, even though Sonat was not a party to the Frank’s/UTP contract.[[54]](#footnote-54)

Further examples of the issue of naming an indemnitee specifically are addressed in the context of releases, which are similar, although of course not identical, instruments.[[55]](#footnote-55) In the context of releases, numerous Texas courts have held that, unless a party is identified in a release, the party is not released.[[56]](#footnote-56) Although a party must be specifically identified, the party can be identified by a category, as long as the category is sufficiently specific to inform the releasing party of whom it is releasing.

In view of the foregoing, when naming the indemnitee, the specific contracting party, when indemnitee, should be named specifically, as well as its parents, subsidiaries, and other affiliates, so that all related parties to the indemnitee can benefit from the indemnity agreement. Further, the contracting party should include its customers, clients, contractors, and subcontractors of any tier, and invitees, and any of their officers, directors, agents, servants, and employees. That way, the broadest group of parties to be indemnified can be enforced.

**F. Step Six – Avoidance of Public Policy Prohibitions and Anti-Indemnity Statutes**

**1. Public Policy Prohibitions**

Generally, when the parties to a contract are private individuals or entities who are bargaining from positions of approximately equal strength, contractual indemnification agreements where one party agrees to indemnify another party for the other party’s negligence generally are enforced as a matter of freedom of contract.[[57]](#footnote-57) In Texas, such contractual indemnification agreements will be enforced unless one party was so disadvantaged that it was essentially forced to agree to an indemnification provision due to unequal bargaining power; under these circumstances, the indemnification provision will not be enforced by a Texas court, because it would be against the public policy of the State of Texas.[[58]](#footnote-58) The same limitation applies under the general maritime law.[[59]](#footnote-59) In contrast to Texas and U.S. maritime law, some U.S. state jurisdictions, as a matter of public policy, will not enforce indemnification agreements where one party seeks to obtain indemnification for its own negligence.

**2. Anti-Indemnity Statutes**

**a. Oil Field Anti-Indemnity Statutes**

Four states, including Texas, have enacted oilfield anti-indemnity statutes. Texas Oil Field Anti-Indemnity Statute invalidates certain contractual indemnification provisions contained in contracts pertaining to a well for oil or gas where the provision seeks indemnity for occurrences caused by or resulting from the sole or concurrent negligence of the indemnitee, its agent or employee, or an individual contractor directly responsible for the indemnitee.[[60]](#footnote-60) There are several exceptions, which include knock-for-knock or a “mutual indemnity obligation,” as well as certain unilateral indemnity obligations. The Texas Oil Field Anti-Indemnity Statute and those of other states are not likely to apply to a shipbuilding contract.

**b. Construction Anti-Indemnity Statutes**

Numerous jurisdictions, including Texas, have construction anti-indemnity acts. The Texas Construction Anti-Indemnity Act will preclude indemnification for a party’s own negligence with regard to property damage, but only with respect to improvements to or on public or private real property.[[61]](#footnote-61) Thus, the Texas Construction Anti-Indemnity Act likely does not apply to shipbuilding contracts.

**c. Section 905(a)-(c) of the Longshore & Harborworkers’ Compensation Act**

Certain provisions of the Longshoremen & Harborworkers’ Compensation Act (“LHWCA”) prohibit indemnification under certain circumstances.[[62]](#footnote-62) However, these provisions of the LHWCA likely do not apply to most shipbuilding contracts.

**3. The *Bisso* Doctrine**

Exculpatory indemnity provisions in towage contracts shift responsibility from the towing vessel to the tow have been found to be unenforceable as against public policy.[[63]](#footnote-63) However, since the *Bisso* doctrine is limited to towage contracts, it should not apply to most shipbuilding contracts.

**4. Indemnification for Gross Negligence**

**a. Texas**

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

Regarding the specificity issue, in the *Crown Central* case, the First Court of Appeals in Houston has held that an indemnity provision which specifically excluded an indemnitee’s sole negligence did not require the indemnitor to provide indemnity for an indemnitee’s gross negligence.[[64]](#footnote-64) The court reasoned that, since the parties specifically excluded the indemnitee’s sole negligence from the indemnity agreement, it logically followed that gross negligence also would be excluded.[[65]](#footnote-65) The San Antonio Court of Appeals, however, has held that an indemnitor can be required to indemnify an indemnitee for the indemnitee’s gross negligence.[[66]](#footnote-66) The San Antonio Court of Appeals distinguished the *Crown Central* case on the basis that the indemnity provision in *Crown Central* violated the express negligence test and therefore could not require indemnity for an indemnitee’s own negligence.[[67]](#footnote-67) The court concluded that, when the parties to an agreement use the term “negligence”, it is assumed that the parties mean all shades of negligence including gross negligence.[[68]](#footnote-68)

Regarding the public policy issue, the Texas Supreme Court has noted that indemnity for one’s own gross negligence or intentional injury does present public policy concerns.[[69]](#footnote-69) However, the Supreme Court refused to address this issue since it was not raised by the parties as part of the appeal.[[70]](#footnote-70) Texas intermediate appellate courts have split on the issue.[[71]](#footnote-71) The primary concern involves the policy justification for awarding punitive damages.[[72]](#footnote-72) Punitive damages that are awarded after a finding of gross negligence or malice serve the public purpose of punishment and deterrence.[[73]](#footnote-73) If parties are allowed to shift responsibility for gross negligence or malice with indemnity provisions, the party that avoids responsibility for its gross negligence or malice would not be punished or deterred.[[74]](#footnote-74) The conflicting policy concern which would justify such a provision is freedom of contract.

### **b. Maritime**

There is limited case law discussing the issue of contractual indemnification for punitive damages under the general maritime law. The few federal courts that have addressed the issue have held that it is against the public policy of the general maritime law to allow an indemnitee to obtain indemnity for punitive damages assessed against the indemnitee.[[75]](#footnote-75) The Ninth Circuit recently stated: “We are persuaded . . . that a party to a maritime contract should not be permitted to shield itself contractually from liability for gross negligence.”[[76]](#footnote-76) Similarly, a federal district court from Louisiana held as follows:

. . . in the case at bar we are confronted with contractual indemnification. No clearer example of a situation which would subvert the purposes of awarding punitive damages can be imagined than to permit such indemnification. To require a party, without recompense, to shoulder the burden of egregious conduct by another and hence permit the other to avoid punitive damage liability would make a mockery of the very concept. In situations where the defendant’s conduct is so extreme as to merit an award of punitive damages, the cost of such must be placed upon the party responsible, and not transferred to a party innocent of any wrongdoing. Accordingly, this Court feels that, even if indemnification is allowed, liability for punitive damages will not be compensable.[[77]](#footnote-77)

The Fifth Circuit[[78]](#footnote-78) and First Circuit[[79]](#footnote-79) courts have indicated in *dicta* that indemnification agreements or exculpatory clauses extending to gross negligence may be against public policy, but both courts concluded that gross negligence had not been established in these cases. Also, the Fifth Circuit has determined that a contractual release of gross negligence (as opposed to a contractual indemnity) is against the public policy of maritime law.[[80]](#footnote-80)

A federal district court from Rhode Island, applying the general maritime law, determined that a party could not obtain “contribution and indemnity” from another party for any punitive damages that had been assessed against it.[[81]](#footnote-81) However, in this case, it appears that the court was referring to some type of tort indemnification as opposed to contractual indemnification. Nevertheless, the court cited the same policy:

Given the policies supporting punitive damages, contribution and indemnity cannot be maintained for such awards. . . . [punitive damages] are awarded to punish the wrongdoer for its actions and to deter it and others from similar acts. . . . Indemnity and contribution would subvert the purposes of punitive damages.[[82]](#footnote-82)

In another related case, the Eleventh Circuit Court of Appeals decided that an indemnitee could not obtain contractual indemnity for penalty wages, because allowing a vessel owner to shift the effect of the penalty wage statute would violate public policy.[[83]](#footnote-83)

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

**G. Step Seven – Proper Selection of a Choice of Law Provision**

As noted above, jurisdictions vary with respect to the requirements pertaining to the first six steps in enforcing an indemnity agreement. Thus, a proper selection of a choice of law with respect to a shipbuilding contract can be critical, and thus should be carefully selected by the parties.

Texas courts generally enforce contractual choice of law provisions for several reasons.

First, Section 35.51 of the Texas Business & Commerce Code generally provides that, in contracts with an aggregate value of at least $1,000,000, a choice of law provision, other than conflict of law rules, is enforceable “regardless of whether the transaction bears a reasonable relation to that jurisdiction.”[[84]](#footnote-84)

Second, if the contract has an aggregate value of less than $1,000,000, a Texas court would apply Section 187 of the Restatement (Second) of Conflicts to determine the enforceability of a contractual choice of law provision.[[85]](#footnote-85) Under this section, a Texas choice of law provision will be enforced (1) unless Texas law “has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties’ choice” or (2) unless the application of Texas law “would be contrary to the fundamental policy of a state which has a materially greater interest than the chosen state in the determination of a particular issue” and which, under Section 188 of the Restatement (Second) of Conflicts, “would be the state of the applicable law in the absence of an effective choice of law by the parties.” Section 188 of the Restatement (Second) of Conflicts utilizes the “most significant relationship” test and considers such factors as the place of contracting, the place of negotiation, the place of performance, the location of the subject matter of the contract, and the citizenship and residency of the parties.[[86]](#footnote-86)

**II. INSURANCE PROVISIONS**

**A. Step Eight – Additional Insured Provisions**

**1. Advantages of Additional Insured Versus Contractual Indemnity Provisions**

Commentators have recognized at least three reasons why additional insured provisions should be included in contracts in addition to indemnity provisions. First, and most importantly, additional insured provisions reinforce a risk transfer otherwise accomplished through contractual indemnity agreements that could be invalidated by courts or by statute. Second, additional insured provisions provide the named party with a direct right against the other party’s insurance carrier.[[87]](#footnote-87) This direct right can avoid damaging a business relationship if one contracting party otherwise would have to sue the other contracting party based upon an indemnity provision: it also can avoid concern over the financial solvency of the indemnitor if no insurance coverage is available for the indemnitor’s contractual indemnity obligation. Third, an additional insured provision essentially prohibits the insurer from subrogating against the additional insured when a loss is caused by the additional insured’s own acts or omissions.[[88]](#footnote-88)

On the other hand, contractual indemnity provisions have several advantages over additional insured provisions. First, contractual indemnity provisions often are unlimited insofar as the dollar amount of the claim is concerned; in contrast, additional insured provisions are necessarily limited to the occurrence and aggregate limits of the insurance policy. Second, insofar as the indemnitor is concerned, contractual indemnity provisions are not subject to the insurance policy’s definitions, conditions and exclusions. Thus, if the indemnitor’s insurance policy excluded coverage for a pollution claim, the insurer would not have to pay for the claim, but the indemnitor may still be contractually liable to indemnify the indemnitee. Third, additional insured claims usually are subject to the policy’s deductible and often require contribution from the additional insured’s own insurance carrier through “other insurance” clauses; contractual indemnity claims do not have these restrictions.[[89]](#footnote-89)

In view of the foregoing, a contracting party is wise to obtain both contractual indemnity and additional insured provisions in a contract if it has sufficient negotiating position to do so.

## **2. Contractual Indemnity Provisions and Additional Insured Provisions Generally Are Separate and Independent Obligations**

Contracts frequently contain a provision which requires one party to name another party as an additional insured in an insurance policy. Although often misunderstood, an additional insured provision generally is a separate and independent obligation from an indemnity provision, unless the additional insured provision has contractual language effectively stating that it is dependent upon the enforceability of the indemnity provision or that it is intended to assure the performance of the indemnity provision.[[90]](#footnote-90) An indemnity provision is an agreement whereby one party (the indemnitor) assumes a certain legal liability of the other party (the indemnitee).[[91]](#footnote-91) A provision in a contract requiring a party to be named as an additional insured essentially is a method for obtaining the same result, but additional insured status relies directly on an insurance policy as protection from a loss as opposed to the other contracting party.[[92]](#footnote-92) The Texas Supreme Court has described the distinction between an indemnity provision and an additional insured provision as follows:

. . . [Indemnity] provisions make the indemnitor liable for the indemnitee’s negligence. Additional insured provisions, on the other hand, make the insurance-purchaser’s insurers liable for the loss caused by the insured’s negligence. The insurance-purchaser is responsible only for paying the insurance premiums, presumably far less than the actual loss.[[93]](#footnote-93)

## **3. Additional Insured Provisions are Subject to All Exclusions, Conditions, and Definitions of the Policy**

The issue of whether an additional insured is subject to all policy exclusions, conditions and definitions has not been specifically addressed by a Texas court. However, courts from other jurisdictions uniformly have found that policy exclusions do apply to additional insureds.[[94]](#footnote-94)

For example, in *Birrenkott v. McManamay*, an employee was injured in a motorcycle accident while he and a fellow employee were engaged in their employer’s business. The injured employee obtained a judgment against the motorcycle driver, his fellow employee. To satisfy the judgment, the fellow employee turned to his employer’s public liability insurance policy. Under the policy, the driver was covered as an omnibus insured, but the policy excluded claims made by an employee of the insured while in the course of the employer’s business. The injured employee argued that the exclusion was limited to employees of the person for whom the policy was invoked, and thus, should be limited to employees of the driver of the motorcycle. The South Dakota Supreme Court disagreed. The court noted that the injured employee’s interpretation would provide greater protection from liability under the policy to the omnibus insured than it offered to the named insured.[[95]](#footnote-95)

The federal Eighth Circuit Court of Appeals reached a similar conclusion in *Universal Underwriters v. McMahon Chevrolet-Olds*.[[96]](#footnote-96) In that case, the court held that an additional insured cannot rely on a severability of interests clause to avoid the effect of the employee or workers’ compensation exclusions and obtain greater liability coverage than that provided to the named insured.[[97]](#footnote-97)

## **4. Restrictions in Additional Insured Endorsements**

Most additional insured endorsements that currently are being issued by insurers have restrictions: some limit coverage to an additional insured’s vicarious liability only; some only cover completed operations; some only cover non-completed operations; and some exclude an additional insured’s sole negligence. To obtain the broadest coverage, a specific type of additional insured endorsement should be included in the additional insured requirements of the applicable shipbuilding contract.

**B. Step Nine – Waiver of Subrogation Provisions**

An insurer who pays a loss to an insured is subrogated to the rights of the insured to pursue third parties responsible for the loss. Shipbuilding contracts very often require one or both parties to obtain an express waiver of its insurers’ rights of subrogation which might otherwise have been asserted against the other party. For example, if a party to shipbuilding contract is required to obtain a waiver of subrogation in its worker’s compensation/employers’ liability policy, and if such a waiver of subrogation of endorsement is contained in the policy, then, the worker’s compensation/employers’ liability insurer cannot proceed against the other contracting party (or its group) for reimbursement of worker’s compensation payments made to an injured employee. It is particularly important to have waiver of subrogation provisions in shipbuilding contracts when “knock-for-knock” indemnities are used, i.e. where each party agrees to indemnify the other party for injuries to its own employees regardless of the negligence of the indemnified party. As noted above, waivers of subrogation are only effective when an appropriate provision is contained in a shipbuilding contract, and when the party agreeing to the waiver of subrogation secures a proper endorsement in its insurance policy.

**C. Step Ten – Primary Insurance Requirements**

**1. Other Insurance Provisions**

Effective additional insured endorsement can be compromised by “other insurance” provisions contained in additional insured’s insurance policies. “Other insurance” clauses may result in additional insured’s insurer also participating in the payment of a claim. State courts in Texas have differed from federal courts in Texas as to treatment of “other insurance” provisions.

**a. Texas State Courts**

The seminalTexas case that addresses conflicting “other insurance” provisions in *Hardware Dealers Mutual Fire Ins. Co. v. Farmers Ins. Exchange*.[[98]](#footnote-98) In this case, the Texas Supreme Court evaluated one insurance policy that contained an excess “other insurance” provision and another insurance policy that contained an escape “other insurance” provision. The court held as follows:

We, therefore, shall follow this rule: When, from the point of the view of the insured, she has coverage from either one of two policies but for the other, each contains a provision which is reasonably subject to a construction that it conflicts with a provision in the other concurrent insurance, there is a conflict of the provisions. In our opinion, the provisions in Farmers’ and Hardware’s policies are reasonably subject to a construction that they conflict.

A repugnancy between policy provisions of two policies has usually been solved by ignoring the two offending provisions. The result is that Hardware’s policy, minus its escape clause, covers the insured; Farmers’ policy, minus its excess clause, covers the insured. . . . Hardware’s limits of liability as to an unnamed insured under the provisions of its policy, set forth above, are the minimum limits specified in the financial responsibility law of Texas. Farmers’ limits of liability are the same. The insured in this case has coverage up to those limits from both Hardware and Farmers. The two concurrent policies cover Anita Hyde. The liability in equally prorated between the two companies and each has an obligation to defend the insured.[[99]](#footnote-99)

In subsequent cases, Texas state courts have found that, when an excess “other insurance” provision of one policy conflicts with an excess “other insurance” provision of another policy, the *Hardware Dealers’* rules also apply.[[100]](#footnote-100)

**b. Texas Federal Courts**

In the case of *Royal Insurance Co. of America v. Hartford Underwriters Ins. Co.*, the federal Fifth Circuit Court of Appeals took the *Hardware Dealers* doctrine one step further and held that, under virtually any circumstances, “other insurance” provisions in policies will be ignored under Texas law.[[101]](#footnote-101) In the recent *Willbros* case, the same court reluctantly followed the *Royal Insurance* approach when one policy contained a pro rata “other insurance” provision and the other policy contained an excess “other insurance” provision.[[102]](#footnote-102) In the concurring opinion in the *Willbros* case, two judges noted: “*Royal Insurance*, however, extended the *Hardware Dealers* rule to situations in which the plain language of the contracts was not subject to a reasonable construction that the other insurance provisions were in conflict.”[[103]](#footnote-103) Nevertheless, in view of the *Royal Insurance* decision, the *Willbros* court was of the opinion that it had no choice but to find that the pro rata clause conflicted with the excess clause, and as a result, liability for the defense of the underlying lawsuit was apportioned on a pro rata basis.[[104]](#footnote-104)

**2. Primary Insurance Requirement**

A shipbuilding contract can contain a primary insurance requirement stating that all policies of insurance required to be maintained by the contracting party (except worker’s compensation and employers’ liability) shall be endorsed to provide that such insurance shall be primary and non-contributing with any other insurance maintained by that party. The party that has a primary insurance requirement must then seek to have its insurance policies endorsed to recognize the primary requirement. When both requirements are satisfied, then the “other insurance” clauses contained in additional insured’s insurance policies will not be invoked by the additional insured’s insurance carrier.

**III. EXEMPLAR CONTRACTUAL INDEMNIFICATION AND INSURANCE PROVISIONS**

**A. Exemplar Contractual Indemnification Provision**

The following contractual indemnification provision in a shipbuilding contract satisfies many of the steps described above with respect to bodily injury and property damage claims on a “knock-for-knock” basis:

**INDEMNITY**

**WHEREVER USED HEREIN, “CLAIMS” SHALL MEAN LOSSES, COSTS, CLAIMS, LIABILITIES, SUITS, JUDGMENTS, CAUSES OF ACTION, AWARDS, OR DAMAGES, INCLUDING REASONABLE ATTORNEY’S FEES AND EXPENSES INCLUDING EXPERT WITNESS FEES, AND WHETHER MADE IN PERSONAM OR IN REM; “COMPANY GROUP” SHALL MEAN COMPANY, ITS PARENTS, SUBSIDIARIES, AND OTHER AFFILIATES, AND ITS/THEIR RESPECTIVE CUSTOMERS, CLIENTS, CONTRACTORS AND SUBCONTRACTORS OF ANY TIER (OTHER THAN CONTRACTOR AND ITS SUBCONTRACTORS), INVITEES, AND THEIR RESPECTIVE EMPLOYEES, OFFICERS, DIRECTORS, AGENTS REPRESENTATIVES, AND SERVANTS; “CONTRACTOR GROUP” SHALL MEAN CONTRACTOR, ITS PARENTS, SUBSIDIARIES, AND OTHER AFFILIATES, AND ITS/THEIR RESPECTIVE CONTRACTORS AND SUBCONTRACTORS OF ANY TIER, INVITEES, AND THEIR RESPECTIVE EMPLOYEES, OFFICERS, DIRECTORS, AGENTS, REPRESENTATIVES, AND SERVANTS; “INDEMNIFY” AND CORRELATIVE TERMS SHALL MEAN RELEASE, PROTECT, DEFEND INDEMNIFY, AND HOLD HARMLESS; “THIRD PARTIES” SHALL MEAN ANY PERSON, ENTITY, OR ORGANIZATION WHICH IS NOT A MEMBER OF EITHER COMPANY GROUP OR CONTRACTOR GROUP; “WORK” MEANS ANY SERVICES RENDERED, PRODUCTS SOLD, OR EQUIPMENT PROVIDED BY CONTRACTOR GROUP; AND “FAULT” MEANS SOLE, JOINT, OR CONCURRENT NEGLIGENCE, IN WHOLE OR IN PART, UNSEAWORTHINESS OF ANY VESSEL OR VESSELS, OTHER TORTS, BREACH OF ANY DUTY, STRICT LIABILITY, PRODUCTS LIABILITY, BREACH OF ANY REPRESENTATION OR EXPRESS OR IMPLIED WARRANTY, BREACH OF CONTRACT, VIOLATION OF ANY RULE, LAW, OR REGULATION, AND DEFECT IN PREMISES, MATERIALS, OR EQUIPMENT, REGARDLESS OF WHETHER PRE-EXISTING THE EXECUTION OF THIS AGREEMENT.**

**(A) THE COMPANY SHALL INDEMNIFY THE MEMBERS OF THE CONTRACTOR GROUP FROM AND AGAINST ANY AND ALL CLAIMS,** **INCLUDING THOSE ASSERTED BY SPOUSES, CHILDREN, PARENTS, SURVIVORS, HEIRS, PERSONAL REPRESENTATIVES, OR ESTATES, ARISING OUT OF OR RESULTING FROM ANY WORK, DIRECTLY OR INDIRECTLY, AND CAUSING ANY ILLNESS, INJURY OR DEATH TO EMPLOYEES, CONSULTANTS, AND OTHER PERSONNEL OF ANY MEMBER OF THE COMPANY GROUP, REGARDLESS OF FAULT OF THE COMPANY GROUP, CONTRACTOR GROUP, OR ANY THIRD PARTY.**

**(B) CONTRACTOR SHALL INDEMNIFY THE MEMBERS OF THE COMPANY GROUP FROM AND AGAINST ANY AND ALL CLAIMS, INCLUDING THOSE ASSERTED BY SPOUSES, CHILDREN, PARENTS, SURVIVORS, HEIRS, PERSONAL REPRESENTATIVES, OR ESTATES, ARISING OUT OF OR RESULTING FROM ANY WORK, DIRECTLY OR INDIRECTLY, AND CAUSING ANY ILLNESS, INJURY OR DEATH TO EMPLOYEES, CONSULTANTS, AND OTHER PERSONNEL OF ANY MEMBER OF CONTRACTOR GROUP, REGARDLESS OF FAULT OF THE COMPANY GROUP, CONTRACTOR GROUP, OR ANY THIRD PARTY.**

**(C) THE COMPANY SHALL INDEMNIFY THE MEMBERS OF THE CONTRACTOR GROUP FROM AND AGAINST ANY AND ALL CLAIMS, ARISING OUT OF OR RESULTING FROM ANY WORK, DIRECTLY OR INDIRECTLY, AND CAUSING ANY LOSS OR LOSS OF USE OR DAMAGE TO PROPERTY OWNED, LEASED, OR HIRED BY ANY MEMBER OF THE COMPANY GROUP, REGARDLESS OF FAULT OF THE COMPANY GROUP, CONTRACTOR GROUP, OR ANY THIRD PARTY.**

**(D) CONTRACTOR SHALL INDEMNIFY THE MEMBERS OF THE COMPANY GROUP FROM AND AGAINST ANY AND ALL CLAIMS, ARISING OUT OF OR RESULTING FROM ANY WORK, DIRECTLY OR INDIRECTLY, AND CAUSING ANY LOSS OR LOSS OF USE OR DAMAGE TO PROPERTY OWNED, LEASED, OR HIRED BY ANY MEMBER OF THE CONTRACTOR GROUP, REGARDLESS OF FAULT OF THE COMPANY GROUP, CONTRACTOR GROUP, OR ANY THIRD PARTY.**

**(E) COMPANY SHALL INDEMNIFY CONTRACTOR GROUP FROM AND AGAINST ANY AND ALL CLAIMS ARISING OUT OF OR RESULTING FROM ANY WORK, DIRECTLY OR INDIRECTLY, AND CAUSING ANY INJURY, ILLNESS, OR DEATH TO OR LOSS OR LOSS OF USE OR DAMAGE TO PROPERTY OF THIRD PARTIES ONLY TO THE EXTENT CAUSED BY THE FAULT OF COMPANY. CONTRACTOR SHALL INDEMNIFY THE COMPANY GROUP FROM AND AGAINST ANY AND ALL CLAIMS ARISING OUT OF OR RESULTING FROM ANY WORK, DIRECTLY OR INDIRECTLY, AND CAUSING ANY INJURY, ILLNESS, OR DEATH TO OR LOSS OR LOSS OF USE OR DAMAGE TO PROPERTY OF THIRD PARTIES ONLY TO THE EXTENT CAUSED BY THE FAULT OF CONTRACTOR.**

**B. Exemplar Insurance Provision**

The following insurance provisions in a shipbuilding contract satisfy steps eight through ten as described above:

INSURANCE

(A) The parties shall maintain, at their expense, with an insurance company or companies authorized to do business in the state(s) or area where the work or services are to be performed, or through a self-insurance program that has been approved by the other party in writing, insurance coverage in the kind and in the amounts as set forth below during the term of this Contract.

(1) Workers’ Compensation Insurance. Each party shall maintain Worker’s Compensation Insurance in full compliance with all applicable state and federal laws and regulations and Employers’ Liability Insurance on an occurrence basis in the amount of $1,000,000 per occurrence, or such other higher amount as required by law where the work or services are being performed, covering injury, illness, or death to all of a party’s employees or leased employees. To the extent permitted by applicable state or federal law, each of the foregoing policies shall have an appropriate All States endorsement(s), an appropriate Borrowed Servant or Alternate Employer endorsement(s) such that each party shall have full coverage as to all of their leased employees and borrowed servants, and a territorial extension(s) to cover all areas where work or services will be performed.

(2) Commercial General Liability Insurance. Each party shall maintain Commercial General Liability Insurance on an occurrence basis, with limits of $1,000,000 for bodily injury, sickness or death in any one occurrence, $1,000,000 for loss or damage to property in any one occurrence, $1,000,000 for personal and advertising injury in any one occurrence, and $2,000,000 general and products/completed operations aggregates, with contractual liability coverage, including, without limitation, coverage for the indemnity agreements set forth herein.

(3) Automobile Liability Insurance.Each party shall maintain Automobile Liability Insurance on an occurrence basis covering owned, non-owned, hired and all other vehicles used by a party, with limits of $1,000,000 applicable to bodily injury, illness or death in any one occurrence and $1,000,000 for any loss or damage to property in any one occurrence, with contractual liability coverage, including, without limitation, coverage for the indemnity agreements set forth herein.

(4) Umbrella or Excess Liability Insurance. Each party shall maintain Umbrella or Excess Liability Insurance on a follow form and on an occurrence basis above that insurance coverage required in Sections 1 through 3 above, with minimum limits of $5,000,000. Coverage under umbrella or excess liability insurance shall be at least as broad as each underlying policy described above.

(B) To the extent permitted by applicable state or federal law, prior to commencing the Work, the policies of insurance required to be maintained by each party shall be endorsed to waive all rights of subrogation in favor of the other party and its Group, for all claims, demands, and causes of action for bodily injury and property damage, to the extent of a party’s indemnification obligations under this Contract.

(C) All policies of insurance noted above, with the exception of Workers’ Compensation Insurance and Employer’s Liability Insurance, shall be endorsed to name the other party and its Group as additional insureds for all claims, demands, and causes of action for bodily injury and property damage arising out of or resulting from the Work, to the extent of a party’s indemnification obligations under this Contract. The Commercial General Liability additional insured coverage shall be provided on Insurance Services Office, Inc. (“ISO”) endorsement forms CG 20 10 07 04 and CG 20 37 07 04 or their equivalents. The Automobile Liability additional insured coverage shall be provided ISO endorsement form CA 04 03 06 04 or its equivalent. The Umbrella or Excess Liability additional insured coverage shall follow the form of the Commercial General Liability additional insured endorsements and the Automobile Liability additional insured endorsement or their equivalents.

(D) All policies of insurance required to be maintained by the parties, except Workers’ Compensation Insurance and Employers’ Liability Insurance, shall be endorsed to provide that all such insurance shall be primary and non-contributing with any other insurance maintained by the other party and its Group for bodily injury and property damage, regarding all claims, demands and causes of action arising out of or resulting from the Work, to the extent of a party’s indemnification obligations under this Contract, notwithstanding any “other insurance” clauses contained in the other party’s required policies.

1. 725 S.W.2d 705, 708 (Tex. 1987). [↑](#footnote-ref-1)
2. *Fireman’s Fund, Ins. Co v. Commercial Standard Ins. Co.*, 490 S.W.2d 818, 822 (Tex. 1972); *Joe Adams & Son v. McCann Construction Co.*, 475 S.W.2d 721 (Tex. 1971); *Ohio Oil Co. v. Smith*, 365 S.W.2d 621 (Tex. 1963). [↑](#footnote-ref-2)
3. *Atlantic Richfield Co. v. Petroleum Personnel, Inc.*, 768 S.W.2d 724 (Tex. 1989). [↑](#footnote-ref-3)
4. 713 S.W.2d 115, 188 (Tex. App.–Houston [1st] 1985), *rev’d*, 729 S.W. 691 (Tex. 1987). [↑](#footnote-ref-4)
5. 729 S.W.2d 690, 691 (Tex. 1987). [↑](#footnote-ref-5)
6. 893 S.W.2d 739 (Tex. App.–Texarkana 1995, no writ). [↑](#footnote-ref-6)
7. 893 S.W.2d at 742. [↑](#footnote-ref-7)
8. *Payne & Keller, Inc. v. P.P.G. Industries, Inc.*, 793 S.W.2d 956, 957-958 (Tex. 1990); *Herzog Contracting Corp. v. Burlington Northern R.R. Co.*, 1997 W.L. 473681 \*3 (Tex. App.–Houston [14th Dist. 1997, no writ); *Kenneth H. Hughes Interests, Inc. v. Westrup*, 879 S.W.2d 229, 232 (Tex. App.–Houston [1st Dist.] 1994, writ denied). [↑](#footnote-ref-8)
9. 793 S.W.2d 956, 957 (Tex. 1990). [↑](#footnote-ref-9)
10. 793 S.W.2d at 958. [↑](#footnote-ref-10)
11. 1997 W.L. 473681 (Tex. App.–Houston [14th Dist.] 1997, no pet.). [↑](#footnote-ref-11)
12. 1997 W.L. 473681 at \*5. Also, in *Tesoro* *Drilling Corp. v. Nabors Drilling U.S.A., Inc.*, a Houston appellate court found that the express negligence test was satisfied with respect to the following indemnification provision: “all indemnity obligations and/or liabilities assumed by such parties under terms of this contract, . . . be without limit and without regard to the cause or causes thereof, including . . . the negligence of any party or parties, whether such negligence be sole, joint, or concurrent, active or passive, but excluding the gross negligence or willful misconduct of a party hereto.” 106 S.W.3d 118, 132 (Tex. App.–Houston [1st Dist.] 2003, pet. denied). Holding that this indemnification provision met the express negligence test, the Houston appellate court stated that “the express intent of the parties was for Tesoro to indemnify Nabors for any acts, including acts of negligence, except those stemming from gross negligence and willful misconduct. The indemnity agreement meets the express negligence requirement.” 106 S.W.3d at 132. *See also Amoco Oil Co. v. Romaco, Inc.*¸ 810 S.W.2d 228 (Tex. App.–Houston [14th Dist.] 1989, no writ). [↑](#footnote-ref-12)
13. *Houston Lighting & Power Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 890 S.W.2d 455 (Tex. 1994). [↑](#footnote-ref-13)
14. *Fina, Inc. v. Arco*, 200 F.3d 266, 273-274 (5th Cir. 2000)(applying Texas law). *See, Halliburton Energy Services, Inc. v. NL Industries*, 648 F.Supp.2d 840, 878-881 (S.D. Tex. 2009)(reviewing cases where courts have considered whether a contractual indemnity provision covers a CERCLA claim). [↑](#footnote-ref-14)
15. *Transcontinental Gas Pipeline Corp. v. Mobil Drilling Barge MR. CHARLIE, et al*, 424 F.2d 684, 692 (5th Cir. 1970), cert. denied, 400 U.S. 832 (1970). [↑](#footnote-ref-15)
16. 424 F.2d at 692. [↑](#footnote-ref-16)
17. *See, e.g.,* *Theriot v. Bay Drilling Corp.*, 783 F.2d 527 (5th Cir. 1986); *Corbitt v. Diamond M Drilling Co.*, 654 F.2d 329 (5th Cir. 1981); *Dow Chemical Co. v. Dixie Carriers, Inc.*, 463 F.2d 120 (5th Cir. 1972); *Lanasse v. Travelers Insurance Co.*, 450 F.2d 580 (5th Cir. 1971). [↑](#footnote-ref-17)
18. 853 S.W.2d 505, 511 (Tex. 1993). [↑](#footnote-ref-18)
19. Tex. Bus. & Comm. Code Ann. § 1.201(10) (Vernon 1997). [↑](#footnote-ref-19)
20. 955 S.W.2d 272 (Tex. 1997). [↑](#footnote-ref-20)
21. *Page Petroleum*, 853 S.W.2d at 508 n.2. [↑](#footnote-ref-21)
22. *Coastal Transport Co. v. Crown Central Petroleum Corp.*, 20 S.W.3d 119, 126 (Tex. App.–Houston [14th Dist.] 2000, pet. denied. [↑](#footnote-ref-22)
23. *Id.*, \*5. [↑](#footnote-ref-23)
24. *Green Int’l, Inc. v. Solis*, 951 S.W.2d 384, 387 (Tex. 1997). [↑](#footnote-ref-24)
25. *Id.* [↑](#footnote-ref-25)
26. *Orduna S.A. v. Zen-Noh Grain Corp*., 913 F.2d 1149, 1153 (5th Cir. 1990); *Coastal Iron Works, Inc. v. Petty Ray Geophysical*, 783 F.2d 577, 582 (5th Cir. 1986); *Harrison v. S/V WANDERER*, 25 F.Supp.2d 754 (S.D. Tex. 1998). [↑](#footnote-ref-26)
27. 913 F.2d at 1153-1154 (citing *Restatement Second of Contracts* § 195, *comment b* (1981). In *Orduna*, the shipowner’s agent signed a berth application that incorporated the terms of a dock tariff by reference, but did not identify by either date or number the specific dock tariff reported to exculpate the dock owner from its own negligence. Based on the “specific and conspicuous” requirement, the Fifth Circuit Court of Appeals affirmed the district court’s finding that the exculpatory provision was unenforceable because the dock owner failed to prove that the shipowner received or consented to the terms of the tariff.  [↑](#footnote-ref-27)
28. 783 F.2d 577. [↑](#footnote-ref-28)
29. 783 F.2d at 582. In *Coastal Iron Works, Inc*., the Court found that a reasonably prudent person should have noticed a red letter clause in a ship repair contract that limited the shipyard’s liability. The provision was clearly displayed on the back page of the repair contract, and there was prominent language at the bottom of the contract’s front page informing a prospective signer of the existence of important terms and conditions on the contract’s reverse side. The Court further noted that previous contracts between the same parties contained the same provision. [↑](#footnote-ref-29)
30. 25 F.Supp.2d at 757-758. [↑](#footnote-ref-30)
31. 58 F.2d 363 (5th Cir. 1947) (applying Texas law). [↑](#footnote-ref-31)
32. 158 F.2d at 365. [↑](#footnote-ref-32)
33. 571 S.W.2d 64 (Tex. Civ. App.–Tyler 1978, writ ref’d n.r.e.). [↑](#footnote-ref-33)
34. 571 S.W.2d at 69. [↑](#footnote-ref-34)
35. 571 S.W.2d at 71. [↑](#footnote-ref-35)
36. *McLane v. Sun Oil Co.*, 634 F.2d 855 (5th Cir. 1981)(applying Texas law); *Martin Wright Electric Co. v. W. R. Grimshaw Co.*, 419 F.2d 1381 (5th Cir. 1969); *cert. denied*, 397 U.S. 1002 (1970) (applying Texas law); *Westinghouse Electric Corp. v. Childs-Bellows*, 352 S.W.2d 806 (Tex. Civ. App.–Fort Worth 1961, writ ref’d). *Brown & Root, Inc. v. Service Painting Co. of Beaumont, Inc.*, 437 S.W.2d 630 (Tex. Civ. App.–Beaumont 1969, writ ref’d). [↑](#footnote-ref-36)
37. 2008 Tex. App. LEXIS 7120 at \*15**-\***16 (Tex. App.–Corpus Christi 2008, no pet.); *Banner Sign & Barricade, Inc. v. Price Construction, Inc.*, 94 S.W.3d 692, 697 (Tex. App.–San Antonio 2002, pet. denied). [↑](#footnote-ref-37)
38. *Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207 (5th Cir. 1986); *Wilson v. Job*, Inc., 958 F.2d 653 (5th Cir. 1992). *But see Marathon Pipe Line Co. v. M/V Sea Level II*, 802 F.2d 585 (5th Cir. 1986) (occurring in connection with, arising out of, or in any wise incident or related to contractor’s performing services and operations” language did not include damage to underwater pipeline that resulted from re-positioning of vessel’s anchor, which did not fall within the indemnitor’s obligation under the contract to mark the pipeline that was damaged). [↑](#footnote-ref-38)
39. *Fontenot v. Mesa Petroleum Co.,* 791 F.2d at 1210. [↑](#footnote-ref-39)
40. *Id.* [↑](#footnote-ref-40)
41. *Id.*  [↑](#footnote-ref-41)
42. *Id.* [↑](#footnote-ref-42)
43. *Id.*  [↑](#footnote-ref-43)
44. 450 F.2d 850 (5th Cir. 1971), *cert denied,* 406 U.S. 921 (1972). [↑](#footnote-ref-44)
45. *Id.* at 852. [↑](#footnote-ref-45)
46. *Gaspard v. Offshore Crane & Equipment, Inc.*, 106 F.2d 1232 (5th Cir. 1997); *Randall v. Chevron USA, Inc.,* 13 F.3d 888 (5th Cir. 1994); *Wilson v. Jobe, Inc.,* 958 F.2d 653 (5th Cir. 1992); *Smith v. Tenneco Oil Co.*, 803 F.2d 1386 (5th Cir. 1986). [↑](#footnote-ref-46)
47. 530 S.W.2d 794 (Tex. 1975). [↑](#footnote-ref-47)
48. 530 S.W.2d at 804. [↑](#footnote-ref-48)
49. 530 S.W.2d at 802. [↑](#footnote-ref-49)
50. *City of Corpus Christi v. Bayfront Associates, Ltd.*, 814 S.W.2d 98, 103 (Tex. App.–Corpus Christi 1991, writ denied); *Incorporated Carriers, Ltd. v. Crocker*, 639 S.W.2d 338, 340 (Tex. App.–Texarkana 1982, no writ); *Howell v. Kelly*, 534 S.W.2d 737 (Tex. Civ. App.–Houston [1st Dist.] 1976, no writ). [↑](#footnote-ref-50)
51. *Atlantic Richfield Oil & Gas Co. v. McGuffin*, 773 S.W.2d 711, 713 (Tex. App.–Corpus Christi 1989, writ dism’d by agreement); *Adams Resources Exploration Corp. v. Resource Drilling, Inc.*, 761 S.W.2d 63, 65 (Tex. App.–Houston [14th Dist.] 1988, no writ). [↑](#footnote-ref-51)
52. 662 S.W.2d 951 (Tex. 1983). [↑](#footnote-ref-52)
53. 979 F.2d 1115, 1125 (5th Cir. 1992). [↑](#footnote-ref-53)
54. *Id.* *See also* *Babcock v. Continental Oil Co.*, 792 F.2d 1346 (5th Cir. 1986) (indemnity was owed to employees of an unnamed and non-signatory “contractor”); *Lirette v. Popich Bros. Water Transport, Inc.*, 699 F.2d 725 (5th Cir. 1983) (indemnity owed to non-signatory “affiliated companies”). [↑](#footnote-ref-54)
55. *Derr Construction Co. v. City of Houston*, 846 S.W.2d 854 (Tex. App.–Houston [14th Dist.] 1992, no writ) (although they are similar, Texas courts have held that releases and contractual indemnification provisions have distinctive characteristics which distinguish one from the other). [↑](#footnote-ref-55)
56. *Angus Chemical Co. v. IMC Fertilizer, Inc.*, 939 S.W.2d 138 (Tex. 1997); *McMillen v. Klingensmith*, 467 S.W.2d 193 (Tex. 1971). [↑](#footnote-ref-56)
57. *Allright, Inc. v. Elledge*, 515 S.W.2d 266, 267 (Tex. 1974); *Valero Energy Corp. v. M.W. Kellogg Construction Co.*, 866 S.W.2d 252, 257 (Tex. App.–Corpus Christi 1993, writ denied); *Derr Construction Co. v. City of Houston*, 846 S.W.2d 854, 859 (Tex. App.–Houston [14th Dist.] 1992, no writ). [↑](#footnote-ref-57)
58. *Allright, Inc. v. Elledge*, 515 S.W.2d 266-268 (Tex. 1974); *Crowell v. Housing Authority of The City of Dallas*, 495 S.W.2d 887, 889 (Tex. 1973); *Valero Energy Corp. v. M.W. Kellogg Construction Co.*, 866 S.W.2d 252, 257 (Tex. App.–Corpus Christi 1993, writ denied). [↑](#footnote-ref-58)
59. *Royal Ins. Co. of Am. v. Southwest Marine*, 194 F.3d 1009, 1014 (9th Cir. 1999) (“clear precedent holds that, ‘absent evidence of overreaching, clauses limiting liability in ship repair contracts will be enforced.’”). [↑](#footnote-ref-59)
60. Tex. Civ. Prac. & Rem. Code §127.003(a)(1)(1999). [↑](#footnote-ref-60)
61. Tex. Ins. Code §151.001(5)(2011). [↑](#footnote-ref-61)
62. 33 U.S.C. §905(a)-(c)(1986). [↑](#footnote-ref-62)
63. *Bisso v. Inland Waterways Corp.*, 349 U.S. 185 (1955). [↑](#footnote-ref-63)
64. *Crown Central Petroleum Corp. v. Jennings*, 727 S.W.2d 739 (Tex. App.–Houston [1st Dist.] 1987, no writ). [↑](#footnote-ref-64)
65. 727 S.W.2d at 741-742. [↑](#footnote-ref-65)
66. *Webb v. Lawson-Avila Const., Inc.*, 911 S.W.2d 457 (Tex. App.–San Antonio 1995, writ dism’d). The San Antonio Court of Appeals also has held that a properly drafted pre-injury release of a potential negligence claim also released a cause of action for gross negligence, because negligence and gross negligence are not separable. *Newman v. Tropical Visions, Inc*., 891 S.W.2d 713 (Tex. App.–San Antonio 1994, writ denied). [↑](#footnote-ref-66)
67. 911 S.W.2d at 461. [↑](#footnote-ref-67)
68. *Id.*  [↑](#footnote-ref-68)
69. *Atlantic Richfield v. Petroleum Personnel, Inc*., 768 S.W.2d 724, 726 (Tex. 1989). [↑](#footnote-ref-69)
70. *Id.*  [↑](#footnote-ref-70)
71. The Beaumont Court of Appeals has held that a pre-injury release attempting to exempt one from liability for gross negligence is against public policy. *Smith v. Golden Triangle Raceway*, 708 S.W.2d 574 (Tex. App.–Beaumont 1986, no writ). The San Antonio and Corpus Christi Courts of Appeals has held to the contrary. *Webb v. Lawson-Avila Const., Inc.,* 911 S.W.2d 457, 461-462 (Tex. App.–San Antonio 1995, writ dism’d); *Valero Energy Corp. v. M.W. Kellogg Const. Co.*, 866 S.W.2d 252, 257-258 (Tex. App.–Corpus Christi 1993, writ denied). [↑](#footnote-ref-71)
72. The public policy concerns for and against indemnification for gross negligence are also raised in the context of whether a pre-injury release of gross negligence is unenforceable as against public policy.  *See* Holcomb*, The Validity and Effectiveness of Pre-injury Releases of Gross Negligence in Texas*, 50 Baylor L. Rev. 233 (1998). [↑](#footnote-ref-72)
73. *Transportation Ins. Co. Moriel*, 879 S.W.2d 10, 16-17 (Tex. 1994). [↑](#footnote-ref-73)
74. Commentators generally support the view that indemnification for gross negligence is against public policy. Restatement (2d) Contracts § 195(1) (1979); 6A Corbin on Contracts § 1472 (Supp. 1999); 8 Williston on Contracts § 19:23 (4th Ed. 1998); Prosser & Keeton, Torts § 68 at 484 (5th Ed. 1984). Further, the Texas Oil Field Anti-Indemnity Act only refers to indemnification for negligence; it does not refer to indemnification for gross negligence. *See,* Tex. Civ. Prac. & Rem. Code §§ 127.002(b) and 127.003(a)(1)(1991). [↑](#footnote-ref-74)
75. *Royal Ins. Co. of Am. v. Southwest Marine*, 194 F.3d 1009 (9th Cir. 1999); *Daughdrill v. Ocean Drilling & Exploration Co.*, 665 F. Supp. 477 (E.D. La. 1987); *Energy XXI, GOM, LLC v. New Tech Eng., L.P.*, 2011 U.S. Dist. LEXIS 41223 at \*44 - \*45 (S.D. Tex. 2011). [↑](#footnote-ref-75)
76. *Royal Ins. Co. of Am. v. Southwest Marine*, 194 F.3d 1009 (9th Cir. 1999). [↑](#footnote-ref-76)
77. *Daughdrill v. Ocean Drilling & Exploration Co.*, 665 F. Supp. 477 (E.D. La. 1987). In *In re Oil Spill by the Oil Rig Deepwater Horizon*, the court reached the same conclusion. MDL No. 2179, Rec. Doc. 5446, p. 19 (E.D. La., January 26, 2012). Similarly, in *Energy XXI, GOM, LLC v. New Tech Eng., L.P.*, the court held that “the indemnity provision in this case, to the extent it encompasses claims for gross negligence, is unenforceable.” 2011 U.S. Dist. LEXIS 41223 at \*44 - \*45 (S.D. Tex. 2011). [↑](#footnote-ref-77)
78. *Todd Shipyards Corp. v. Turbine Serv., Inc.*, 674 F.2d 401, 411 (5th Cir. 1982). Similarly, in *Becker v. Tidewater, Inc.*, 586 F.3d 358 (5th Cir. 2009), the Fifth Circuit likely would have invalidated a contractual indemnity provision for gross negligence, except the court found that Tidewater was not grossly negligent. [↑](#footnote-ref-78)
79. *La Esperanza De P.R., Inc. v. Perez y Cia. De Puerto Rico, Inc.*, 124 F.3d 10, 19 (1st Cir. 1997). [↑](#footnote-ref-79)
80. *Houston Exploration Co. v. Halliburton Energy Servs., Inc.*, 269 F.3d 528, 531 (5th Cir. 2001). [↑](#footnote-ref-80)
81. *Rollins v. Peterson Builders, Inc.*, 761 F.Supp. 918 (D.R.I. 1990). [↑](#footnote-ref-81)
82. 761 F. Supp. at 929. [↑](#footnote-ref-82)
83. *Chung, Yong Il v. Overseas Navigation Co., Ltd.*, 774 F.2d 1043, 1051-53 (11th Cir. 1985). [↑](#footnote-ref-83)
84. Tex. Bus. & Comm. Code § 35.51(c) (Vernon’s Supp. 1999). This statute has several exceptions, including choice of law provisions in construction contracts. *See* Tex. Bus. & Comm. Code §§ 35.51(8) and 35.52 (Vernon’s Supp. 1999). [↑](#footnote-ref-84)
85. *See DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670 (Tex. 1990). [↑](#footnote-ref-85)
86. Restatement (Second) of Conflicts § 188 (1965). [↑](#footnote-ref-86)
87. Malecki & Gibson, *The Additional Insured Book*, (2d ed. 1994), p. 2. [↑](#footnote-ref-87)
88. Malecki & Gibson, *The Additional Insured Book*, (2d ed. 1994), p. 36. [↑](#footnote-ref-88)
89. Although the indemnitee would not have to pay any insurance policy deductible, the indemnitor might have to do so if the indemnitor submits the indemnitee’s claim to its contractual liability insurer. [↑](#footnote-ref-89)
90. Texas Courts: *Getty Oil Company v. Insurance Company of North America*, 845 S.W.2d 794 (Tex. 1993); *Mid-Continent Cas. Co. v. Swift Energy* Co., 206 F.3d at 494 n.8 (5th Cir. 2000) (applying Texas law); *LeBlanc v. Global Marine Drilling Co.*, 193 F.3d 873, 875 (5th Cir. 1999) (applying General Maritime Law); *Lloyd’s of London v. Oryx Energy Co.,* 142 F.3d 255 (5th Cir. 1998) (applying Texas law). *But see Fireman’s Fund Ins. Co. v. Commercial Standard Ins. Co.*, 490 S.W.2d 818 (Tex. 1972); *Emery Air Freight Corp. v. General Transport Systems*, 933 S.W.2d 312 (Tex. App.–Houston [14th Dist.] 1996, no writ). Courts from other jurisdictions: *McGill v. Polytechnic University*, 235 A.D.2d 400, 651 N.Y.2d 992 (N.Y. App. Div. 1997); *Caputo v. Kimco Development Corp.*, 226 A.D.2d 1142, 641 N.Y.S.2d 211 (N.Y. App. Div. 1996); *Home Insurance Company v. Tokyo Marine and Fire Company*, 221 A.D.2d 592, 634 N.Y.2d 50 (N.Y. App. Div. 1995);  *Kinney v. Lisk*, 556 N.E.2d 1090, 76 N.Y.2d 215 (N.Y. App. Div. 1989);  *Lopez v. Hartford Accident & Indemnity Company,* 495 So.2d 375 (La. Ct. App. 1986); *Odonez v. W.T. Grant Company*, 297 So.2d 780 (La. Ct. App. 1974). [↑](#footnote-ref-90)
91. Malecki & Gibson, *The Additional Insured Book*, (2d ed. 1994), p. 36. [↑](#footnote-ref-91)
92. *Id.* [↑](#footnote-ref-92)
93. *Getty Oil Company v. Insurance Co. of North America*, 845 S.W.2d at 794, 803 (Tex. 1993). [↑](#footnote-ref-93)
94. *See Universal Underwriters v. McMahon Chevrolet-Olds*, 866 F.2d 1060, 1063-64 (8th Cir. 1989); *St. Paul Fire & Marine Ins. Co. v. Schilling*, 520 N.W.2d 884 (S. Dak. 1994); *American Family Ins. Group v. Howe*, 584 F. Supp. 369, 371 (D.S.D. 1984); *Birrenkott v. McManamay*, 276 N.W. 725 (S. Dak. 1937). [↑](#footnote-ref-94)
95. 276 N.W. at 725, 726 (S. Dak. 1937). [↑](#footnote-ref-95)
96. 866 F.2d at 1060, 1064 (8th Cir. 1989). [↑](#footnote-ref-96)
97. *Id.*  *See also Am. Family Ins. Group v. Howe*, 584 F. Supp. 369, 371 (D.S. Dak. 1984) ( (stating that “the operation of an omnibus insurance clause creates liability insurance in favor of persons other than the named insured to the same degree as the named insured”). [↑](#footnote-ref-97)
98. 444 S.W.2d 583 (Tex. 1969). [↑](#footnote-ref-98)
99. 444 S.W.2d at 589-590. [↑](#footnote-ref-99)
100. *Safeco Lloyds Ins. Co. v. Allstate Ins. Co.*, 308 S.W.3d 49, 60 (Tex.App.—San Antonio 2009, no pet.)(the excess “other insurance” provisions must be ignored, and each insurer shares liability on a pro rata basis in proportion to the limits of insurance provided in its respective policy); *U.S. Automobile Association v. Underwriters at Interest*, 2000 Tex.App. LEXIS 2080 (Tex.App.—Houston [14th] Dist. 2000, pet. denied)(conflicting excess “other insurance” provisions required a proration of coverage in proportion to policy limits). [↑](#footnote-ref-100)
101. 391 F.3d 639 (5th Cir. 2004). [↑](#footnote-ref-101)
102. *Willbros RPI, Inc. v. Continental Cas. Co.*, 601 F.3d 306 (5th Cir. 2010). [↑](#footnote-ref-102)
103. 601 F.3d at 315. [↑](#footnote-ref-103)
104. 601 F.3d at 313. [↑](#footnote-ref-104)