

# Interpretation and Enforceability of Indemnity Provisions in Maritime Contracts: We Really Do Have to Ask, Is It Salty Enough?

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“It would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence, or is indeed even entirely consistent within our admiralty jurisprudence.”<sup>1</sup>

### I. INTRODUCTION

It is well recognized that the whole of admiralty law<sup>2</sup> in the United States is derived from a one-phrase grant of power in Article III of the United States Constitution delegating the entire subject matter to the jurisdiction of the federal judiciary.<sup>3</sup> “The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction.”<sup>4</sup> In the First Judiciary Act, Congress supplemented this jurisdictional grant by extending jurisdiction over civil actions in admiralty to the federal district courts.<sup>5</sup> The successor to the First Judiciary Act is 28U.S.C. § 1333(1). In addition to conferring original subject matter jurisdiction on the federal courts for

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1. *Am. Dredging Co. v. Miller*, 510 U.S. 443, 452, 1994 AMC 913 (1994).

2. Many sources of information on admiralty law use the terms “admiralty law,” “admiralty jurisdiction,” and “maritime law” interchangeably. Admiralty derives from the system administered in a single English court while maritime law makes a broader, more descriptive reference. The United States Supreme Court differentiated the terms by stating that admiralty jurisdiction defines also “the place or territory *where* the law maritime prevails.” *New England Mut. Marine Ins. Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 25, 1997 AMC 2394 (1870); *see also Gibbs ex rel. Gibbs v. Carnival Cruise Lines*, 314 F.3d 125, 2003 AMC 179 (3d Cir. 2002). Thus, admiralty law and maritime law are applicable when a claim falls within admiralty jurisdiction. Additionally, substantive federal maritime law, with a few exceptions for areas of maritime law that are underdeveloped, is coextensive with admiralty jurisdiction. 1 THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* § 5-1, at 248 (5th ed. 2011).

3. 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 1-1, at 1 (4th ed. 2004).

4. U.S. CONST. art. III, § 2, cl. 1.

5. Judiciary Act of 1789, ch. 20, § 9, 1789 Stat. 73, 76–77 (current version at 28 U.S.C. § 1331 (2006)). The modern statute, based on the same constitutional grant of admiralty jurisdiction, confers original subject matter jurisdiction on the federal district courts without regard to diversity of citizenship and the amount in controversy. Notably, the Supreme Court has held that admiralty cases are not federal question cases. *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 1959 AMC 832 (1959).

admiralty and maritime claims, § 1333(1) also has a savings clause that “sav[es] to suitors in all cases all other remedies to which they are otherwise entitled.”<sup>6</sup> The Supreme Court has interpreted this clause to mean that suitors have the right to a common law remedy “in all cases where the common law is competent to give it.”<sup>7</sup>

In one of the seminal decisions in United States admiralty law jurisprudence, *DeLovio v. Boit*,<sup>8</sup> Justice Story set the stage for the dilemma that is the focus of this article: Which corpus of maritime law, federal or state, controls the interpretation of maritime insurance contracts? In deciding whether a policy of marine insurance was within admiralty jurisdiction, Justice Story held that “policies of insurance are within (though not exclusively within) the admiralty and maritime jurisdiction of the United States.”<sup>9</sup> To explain his parenthetical carve out from federal maritime jurisdiction, Justice Story noted, “[t]here can be no possible question that the courts of common law have acquired a concurrent jurisdiction, though, upon the principles of the ancient common law, it is not easy to trace a legitimate origin to it.”<sup>10</sup>

In this same opinion, Justice Story provided three additional fundamental principles of admiralty law that guide its application to the interpretation of maritime contracts. First, based on the etymology and use of both “maritime” and “admiralty,” Justice Story interpreted the constitutional grant of subject matter jurisdiction over maritime and admiralty matters to “warrant the most liberal interpretation.”<sup>11</sup> Second, he noted that a uniformity of rules and decisions in all maritime questions was critical to the success of the nation’s commerce and navigation.<sup>12</sup> Finally, Justice Story pronounced that the maritime and admiralty jurisdiction of the United States extended to all maritime contracts, torts, and injuries; maritime contracts are within the admiralty jurisdiction of the courts

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6. 28 U.S.C. § 1333(1) (2006).

7. *Leon v. Galceran*, 78 U.S. (11 Wall.) 185, 191 (1870).

8. 7 F. Cas. 418, 1997 AMC 550 (C.C.D. Mass. 1815) (No. 3,776).

9. *DeLovio*, 7 F. Cas. at 444.

10. *Id.* at 444 n.48.

11. *Id.* at 443.

12. *Id.*; *see also Exxon Corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603, 608, 1991 AMC 1817 (1991) (“In determining the boundaries of admiralty jurisdiction, we look to the purpose of the [constitutional] grant. As we recently reiterated, the ‘fundamental interest giving rise to maritime jurisdiction is the protection of maritime commerce.’” (quoting *Sisson v. Ruby*, 497 U.S. 358, 367, 1990 AMC 1801 (1990))).

regardless of where they were made or executed as long as the contract “relate[d] to the navigation, business or commerce of the sea.”<sup>13</sup>

This article will present a step-by-step method of analysis that will allow practitioners to determine the entity most likely responsible for interpreting indemnity provisions in contracts. This article will also present a road map of considerations that should be taken into account when drafting such indemnity provisions.

## II. IS THE CONTRACT CONTAINING THE INDEMNITY PROVISION MARITIME OR NON-MARITIME?

“The boundaries of admiralty jurisdiction over contracts—as opposed to torts or crimes—being conceptual rather than spatial, have always been difficult to draw.”<sup>14</sup>

### A. General Methodology

When endeavoring to determine which body of law will be used to interpret an indemnity provision in a maritime contract, the first question to be answered is whether the contract containing the indemnity provision is maritime or non-maritime. “In general, a contract relating to a ship in its use as such, or to commerce or navigation on navigable waters, or to transportation by sea or to maritime employment is subject to maritime law and the case is one of admiralty jurisdiction . . . .”<sup>15</sup> Thus, the classification of a contract can depend on what qualifies as a “vessel” and the definition of “navigable waters.”<sup>16</sup> To determine whether a contract is maritime, the courts look to the nature and character of the contract,<sup>17</sup> rather than to the

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13. *DeLovio*, 7 F. Cas. at 444.

14. *Kossick v. United Fruit Co.*, 365 U.S. 731, 735, 1961 AMC 833 (1961).

15. 1 Benedict, *Benedict on Admiralty* § 182 (7th ed., rev. 2011).

16. Generally, “vessel” is defined as “every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.” 1 U.S.C. § 3 (2006). A body of water is navigable if in its present condition, either by itself or by connection with other waters, it can be traveled by boat to another state or ocean. *The DANIEL BALL*, 77 U.S. (10 Wall.) 557, 563, 2000 AMC 2106 (1871) (Waters are navigable “when they form in their ordinary condition by themselves, or by uniting with other waters, a contained highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.”).

17. *Norfolk S. Ry. Co. v. James. N. Kirby Pty Ltd.*, 543 U.S. 14, 23–24, 2004 AMC 2705 (2004) (“To ascertain whether a contract is a maritime one, . . . the answer depends upon the nature and character of the contract . . . .”); *see also Exxon Corp.*, 500 U.S. at 610 (“[I]n determining whether a contract falls within admiralty, the true criterion is the nature and subject-

place of execution or performance, and to how judicial precedent has previously classified the type of contract at issue.<sup>18</sup> It is important to note that not every contract touching a vessel will be found to be maritime in nature.<sup>19</sup> “[T]here must be a direct and proximate link between the contract and the operation of a ship.”<sup>20</sup>

Historically, certain kinds of contracts have been deemed maritime, while others have been classified as non-maritime. Some examples of contracts traditionally characterized as maritime include: vessel repair or reconstruction contracts; contracts to furnish services, supplies or accessories to a particular vessel; charter parties and contracts for the hire of a vessel; wharfage agreements; vessel storage contracts; contracts for carriage of goods by sea; stevedoring contracts; contracts for carriage of passengers; ship mortgages; personnel contracts for drilling barges; contracts to remove obstructions from navigation (even if it is a “dead ship”); and, particularly pertinent here, marine insurance policies.<sup>21</sup> Some examples of contracts traditionally characterized as non-maritime include: contracts to construct a vessel; contracts for the sale of a vessel; offshore oil production contracts; contracts for services to vessels laid up and out of navigation; and contracts for the obligation to procure marine insurance.<sup>22</sup> If the character and nature of the contract is found to be non-maritime, then a court would analyze which state’s laws will govern the dispute.<sup>23</sup> If the character and nature of the contract is found to be maritime, then a court would apply substantive maritime law to the contract’s interpretation.<sup>24</sup> Both of these concepts will be discussed in greater detail in Parts III and IV, respectively.

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matter of the contract, as whether it was a maritime contract, having reference to maritime service or maritime transactions.”).

18. *Kossick*, 365 U.S. at 735 (“Precedent and usage are helpful insofar as they exclude or include certain common types of contract . . .”).

19. *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 538 (5th Cir. 1986).

20. *Id.* (quoting 1 BENEDICT, BENEDICT ON ADMIRALTY § 183 (7th ed. 1985)).

21. See 1 SCHOENBAUM, *supra* note 3, § 1-10 at 63–6; see also Susan A. Daigle and James T. Rivera, *Contractual Indemnity in Maritime Law*, 55 LA. L. REV. 813 (1995); David W. Robertson, *Admiralty and Maritime Litigation in State Court*, 55 LA. L. REV. 685, 694 (1995); *Puerto Rico Ports Auth. v. Umpierre-Solares*, 456 F.3d 220, 2006 AMC 2261 (1st Cir. 2006).

22. *Id.*

23. See *infra*, Part III.

24. See *infra*, Part IV.

### *B. Mixed Contracts*

As is often the situation, the contract in dispute may not fit neatly into either the wholly maritime or wholly non-maritime category. Many modern contracts are behemoths of legalese containing both maritime and non-maritime provisions. Prior to 2004, the courts would attempt to divide a mixed contract into its maritime and non-maritime elements or determine the primary purpose of the contract. If the contract could be successfully divided into separate components, the courts would apply admiralty jurisdiction to the maritime provisions of the contract and the appropriate state law to the non-maritime provisions.<sup>25</sup> In this situation, if the indemnity provision was subsidiary to a maritime obligation, then its interpretation and enforcement would be subject to admiralty. If the court could not separate the maritime and non-maritime obligations, the court generally denied admiralty jurisdiction, even for the maritime elements of the contract.<sup>26</sup>

Frequently, the courts would find that a contract was maritime or non-maritime based on whether the non-maritime component of the contract was merely incidental. The courts cautioned that it “is fundamental that the mere inclusion of maritime obligations in a mixed contract does not, without more, bring non-maritime obligations within the pale of admiralty law.”<sup>27</sup> If a contract required performance of long-distance land travel, for example, the courts generally found that the contract was non-maritime because the non-maritime land travel obligation was not incidental to the maritime elements. The same contract, however, without the long-distance land travel obligation would be found to be maritime in nature because the

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25. See *Berkshire Fashions, Inc. v. M.V. HAKUSAN II*, 954 F.2d 874, 880, 1992 AMC 1171 (3d Cir. 1992) (“[I]f a contract is partially maritime and partially non-maritime, the court will entertain admiralty jurisdiction if the maritime and non-maritime portions of the contract can be severed without prejudice to either party. . . . [A] federal court may exercise maritime jurisdiction over the entire contract if the non-maritime aspects of the transaction are merely incidental.”); see also *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313, 315–16, 1994 AMC 1519 (5th Cir. 1990) (“If separable maritime obligations are imposed by supplementary contracts . . . these are maritime obligations that can be separately enforced in admiralty without prejudice to the rest, hence subject to maritime law.”); *Hale v. Co-Mar Offshore Corp.*, 588 F. Supp. 1212, 1215, 1986 AMC 1620 (W.D. La. 1984).

26. See, e.g., *Brosonic Co. v. M/V MATHILDE MAERSK*, 270 F.3d 106, 2001 AMC 2996 (2d Cir. 2001).

27. *Thurmond v. Delta Well Surveyors*, 836 F.2d 952, 955, 1988 AMC 2736 (5th Cir. 1988) (quoting *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223, 1231, 1986 AMC 237 (5th Cir. 1985)).

non-maritime land travel element was merely incidental.<sup>28</sup>

Courts using the primary obligation analysis would determine the principal purpose of the contract and then decide whether the primary purpose was a maritime or non-maritime obligation.<sup>29</sup> If the primary purpose of the contract was maritime, the court would apply admiralty jurisdiction to the contract as whole, but only if the non-maritime obligations were deemed to be incidental to the maritime components.<sup>30</sup>

In 2004, however, the Supreme Court in *Norfolk Southern Railway Company v. James N. Kirby Pty Ltd.*,<sup>31</sup> addressed the severability of the maritime and non-maritime components of a mixed contract and cast doubt on the continuing validity of the mixed contract doctrine. Specifically addressing a bill of lading that required both sea transportation and rail transportation of cargo, the Court found that the lower courts' rules for identifying maritime contracts depended solely on geography, which was inconsistent with the conceptual approach that Supreme Court's precedent required.<sup>32</sup> The Court held that the determination of whether a contract is maritime necessitates an evaluation of the *nature* and *character* of the contract.<sup>33</sup> The Court also reaffirmed that the purpose of maritime jurisdiction is "the protection of maritime commerce."<sup>34</sup> Harkening back to

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28. See *Hartford Fire Ins. Co. v. Orient Overseas Container Lines (UK) Ltd.*, 230 F.3d 549, 555, 2001 AMC 25 (2d Cir. 2000) ("Transport by land under a bill of lading is not 'incidental' to transport by sea if the land segment involves great and substantial distances."); see also *Sea-Land Serv., Inc. v. Danzig*, 211 F.3d 1373, 1378, 2000 AMC 1674 (Fed. Cir. 2000) (holding that contracts with sea and land obligations were not maritime contracts because the substantial inland transportation was not incidental to the sea transportation); *Kuehne & Nagel (AG & Co.) v. Geosource, Inc.*, 874 F.2d 283, 290 (5th Cir. 1989) ("extensive land-based operations [in the form of land transportation up to 1,000 miles] cannot be viewed as merely incidental to the maritime operations.").

29. *Laredo*, 754 F.2d 1223.

30. *Id.* at 1231–32.

31. 543 U.S. 14, 2004 AMC 2705 (2004).

32. *Kirby*, 543 U.S. at 24 (while two bills of lading called for some performance on land, "under a conceptual rather than spatial approach, this fact does not alter the essentially maritime nature of the contracts.").

33. *Id.* at 24 ("To ascertain whether a contract is a maritime one we cannot look to whether a ship or other vessel was involved in the dispute . . . . Nor can we simply look to place of the contract's formation or performance. Instead, the answer depends upon the nature and character of the contract and the true criterion is whether it has reference to maritime service or maritime transactions.").

34. *Id.* at 25.

its earlier decision in *Kossick v. United Fruit Co.*,<sup>35</sup> the Court used a two-step analysis to find that federal law governed the jurisdictional dispute.<sup>36</sup> The first step was to determine whether the contract was maritime in nature and, if it was, the second step was to determine whether the contract was of such a local nature that state law should apply.<sup>37</sup> Because a court judges the inherently local nature of a contract only after the contract has been found to be maritime, the second question in the analysis “functions more as a basis for abstention than as a prerequisite for jurisdiction.”<sup>38</sup> In answering the first question, the *Kirby* Court, using the conceptual approach, found the shoreline to be “an artificial place to draw a line.”<sup>39</sup> The Court further explained that,

[c]onceptually, so long as a bill of lading requires substantial carriage of goods by sea, its purpose is to effectuate maritime commerce—and thus it is a maritime contract. Its character as a maritime contract is not defeated simply because it also provides for some land carriage. . . . [However,] [i]f a bill’s sea components are insubstantial, then the bill is not a maritime contract.<sup>40</sup>

In answering the second question in the analysis, the Court found that “[a]pplying state law to cases like this one would undermine the uniformity of general maritime law.”<sup>41</sup> Thus, it seems that separating mixed contracts into maritime and non-maritime elements is no longer part of the proper analysis.<sup>42</sup> At least for international intermodal transportation contracts, the contract must be judged as either wholly maritime and therefore subject to admiralty jurisdiction or wholly non-maritime and therefore governed by state law.

Part VII discusses the impact this decision has had on the enforcement

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35. *Id.* at 24–25 (citing *Kossick v. United Fruit Co.*, 365 U.S. 731, 734–35 (1961)).

36. *Kossick*, 365 U.S. at 734–35.

37. *Id.*

38. *New Hampshire Ins. Co. v. Home Savings & Loan Co.*, 581 F.3d 420, 426, 2009 AMC 2448 (6th Cir. 2009).

39. *Kirby*, 543 U.S. at 25.

40. *Id.* at 27.

41. *Id.* at 28.

42. *Sentry Select Ins. Co. v. Royal Ins. Co.*, 481 F.3d 1208, 1218–20, 2007 AMC 913 (9th Cir. 2007); *see also* *Folksamerica Reinsurance Co. v. Clean Water of N.Y., Inc.*, 413 F.3d 307, 315, 2005 AMC 1747 (2d Cir. 2005).

of maritime insurance contracts.

### III. YOUR CONTRACT IS NON-MARITIME

If the character and nature of the contract is found to be non-maritime, a court will analyze which state's laws will govern the dispute. Lower courts have developed a variety of methodologies to resolve choice of law questions in admiralty contract disputes based on guidance from the Supreme Court in *Lauritzen v. Larsen*<sup>43</sup> and *Romero v. Int'l Terminal Operating Co.*<sup>44</sup> The common basis of these different methodologies is determining and assigning value to the points of contact between the transaction and the states or governments whose competing laws were involved.<sup>45</sup> This determination is a two-step process. First, the court must evaluate which states may have jurisdiction over the contract at issue.<sup>46</sup> This includes the states in which the contract was formed, executed, and/or where performance was carried out.<sup>47</sup> Once the eligible states have been determined, the court then determines which of the eligible states has the greatest interest in the resolution of the issues. Greatest interest is determined by which state has the most significant relationship to the substantive issue in question.<sup>48</sup> A court will examine the relative interests of all of the states which share a sufficient relationship with the transaction and parties.<sup>49</sup>

### IV. YOUR CONTRACT IS MARITIME, BUT DOES A FEDERAL STATUTE PREEMPT THE APPLICATION OF FEDERAL MARITIME LAW?

If the character and nature of a contract is determined to be maritime, the second question in our road map asks whether there is a federal statute

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43. 345 U.S. 571, 1953 AMC 1210 (1953).

44. 358 U.S. 354, 382, 1959 AMC 832 (1959).

45. *Lauritzen*, 345 U.S. at 582.

46. *Albany Ins. Co., v. Kieu*, 927 F.2d 882, 890-91, 1991 AMC 2211 (5th Cir. 1992).

47. *State Trading Corp. of India, Ltd., v. Assuranceforeningen Skuld*, 921 F.2d 409, 417, 1991 AMC 1147 (2d Cir. 1990) (discussing that while the Fifth Circuit looks to location where contract was issued and delivered, other courts have looked to the state with the most significant nexus, and the Restatement of Conflict of Laws lists five factors to be considered: (1) place of contracting; (2) place of negotiation of contract; (3) place of performance; (4) location of subject matter of contract; and (5) the domicile, residence, nationality, place of incorporation and place of business of the parties).

48. *Kieu*, 927 F.2d at 891.

49. *Id.*

that may preempt the otherwise applicable substantive maritime law. Admiralty law recognizes horizontal preemption by federal statute because while admiralty law consists of judicially-created maritime law and federal statutory law, when there is a conflict between a federal statute and general maritime law, the federal statute, if it speaks directly to an issue in question, prevails.<sup>50</sup> Congress has passed many statutes that preempt or grant admiralty jurisdiction. Of particular importance to our discussion is the Outer Continental Shelf Lands Act (“OCSLA”). OCSLA substitutes state law as a surrogate for federal law under certain circumstances.<sup>51</sup> The Longshoreman and Harbor Workers’ Compensation Act (“LHWCA”) is also worth reviewing because of its impact on indemnification agreements.<sup>52</sup>

### *A. Outer Continental Shelf Lands Act*

Congress passed the Outer Continental Shelf Lands Act (“OCSLA”) to confer federal jurisdiction over the resources on the Outer Continental Shelf. OCSLA provides that the laws of each adjacent state will be applied as surrogate federal law for any gaps in the legal coverage of the statute.<sup>53</sup> With regard to contract interpretation, the Fifth Circuit, in which the majority of OCSLA cases have been heard, held that the so-called “PLT test” should be used to determine if state law applies.<sup>54</sup> Under the PLT test, state law will govern in lieu of admiralty law if three elements exist: (1) the controversy arises on an OCSLA situs; (2) federal maritime law does not apply of its own force; and (3) the applicable state law is not inconsistent with federal law.<sup>55</sup>

Recently, the Fifth Circuit clarified that with regard to contracts, the first prong of the PLT test should be a “focus-of-the-contract” inquiry; this means that a court must determine where the contract contemplates the majority of the performance will occur.<sup>56</sup> In order to satisfy the second

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50. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 1991 AMC 1 (1990); *City of Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981) (“Congressional legislation preempts the general maritime law if it speak directly to the question at issue.”); 1 SCHOENBAUM, *supra* note 2, § 4-3, at 233.

51. 43 U.S.C. § 1333(a)(2)(A) (2006).

52. *Becker v. Tidewater, Inc.*, 586 F.3d 358 (5th Cir. 2009).

53. 43 U.S.C. § 1333(a)(2)(A) (2006).

54. *Union Texas Petroleum Corp. v. PLT Eng’g, Inc.*, 895 F.2d 1043 (5th Cir. 1996).

55. *Id.* at 1047.

56. *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778, 793–796, 2010 AMC

prong of the PLT test, a court must look first at admiralty jurisprudence to see how the type of contract at issue has been treated historically and then, the court must look at the specific facts of the case.<sup>57</sup> The court employs the six-factor “Davis test” to determine whether the contract is “salty” enough to be a maritime contract and therefore within admiralty jurisdiction.<sup>58</sup> In evaluating whether a state law is inconsistent with federal law, the Fifth Circuit has stated that the Texas and Louisiana anti-indemnification statutes are not inconsistent with federal law.<sup>59</sup> If all three conditions of the PLT test have been met, the court will apply the appropriate adjacent state law, but if the PLT test conditions have not been met, maritime law will apply.<sup>60</sup>

Whether state law applies is important because many of the states adjacent to the continental shelf have enacted laws that in certain circumstances vitiate indemnity agreements, making them entirely void. For example, both Louisiana and Texas have enacted anti-indemnity statutes.<sup>61</sup> Thus, if either of these states is the adjacent state in the OCSLA analysis, their laws might nullify the indemnity provisions of the contracting parties or have very specific requirements which the indemnity provisions must meet to be valid. This is potentially a drastic change from what the parties may have anticipated in terms of risk shifting and total risk exposure at the time of contract formation.

Generally, for an indemnity provision to be valid under Louisiana law, the provision must pass the clear-and-unequivocal test.<sup>62</sup> This standard does not require that any specific language be used, but it does mandate

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808 (5th Cir. 2009).

57. *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313, 316 (5th Cir. 1990).

58. *Id.* at 316 (The six *Davis & Sons* factors are: (1) what does the specific work order in effect at the time of injury provide?; (2) what work did the crew assigned under the work order actually do?; (3) was the crew assigned to work aboard a vessel in navigable waters; (4) to what extent did the work being done relate to the mission of that vessel?; (5) what was the principal work of the injured worker?; and (6) what work was the injured worker actually doing at the time of injury?).

59. *Hodgen v. Forest Oil Corp.*, 87 F.3d 1512, 1528 (5th Cir. 1996) (applying Louisiana law); *Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115, 1126, 1993 AMC 1008 (5th Cir. 1992) (applying Texas law).

60. *Grand Isle Shipyard*, 589 F.3d at 783.

61. Louisiana Oilfield Indemnity Act, LA. REV. STAT. ANN. § 9:2780 (2012); Texas Oilfield Anti-Indemnity Act, TEX. CIV. PRAC. & REM. CODE ANN. §§ 127.001–127.007 (Vernon 2010).

62. *Sovereign Ins. Co. v. Tex. Pipe Line Co.*, 488 So. 2d 982, 984 (La. 1986).

clear and explicit language demonstrating a party's clear and unequivocal intent to enter into a risk-allocation agreement.<sup>63</sup> If Louisiana law is applicable to a contract because of OCSLA, indemnity provisions for personal injury or death claims are void, but indemnification for property damage is allowed.<sup>64</sup> Only certain types of contracts fall under the Louisiana Oilfield Indemnification Act ("LOIA"), typically contracts that pertain to wells for oil, gas or water.<sup>65</sup>

If Texas law is applicable to a contract because of OCSLA, Texas law mandates that an indemnity agreement satisfy the express-negligence doctrine,<sup>66</sup> the conspicuity requirement,<sup>67</sup> and the Texas Oilfield Anti-Indemnity Act ("TOAIA").<sup>68</sup> The express-negligence doctrine requires the parties to clearly and expressly articulate their intent to release negligence claims within the four corners of the contract.<sup>69</sup> The conspicuity requirement protects the risk-assuming party by ensuring that it receives fair notice of the risk-shifting provision.<sup>70</sup> TOAIA voids outright indemnity provisions that seek to indemnify a person for his own negligence.<sup>71</sup> However, TOAIA has created an insurance-related exception that allows for the enforcement of otherwise voidable indemnity provisions that are accompanied by liability insurance.<sup>72</sup> There is a \$500,000 limit for unilateral indemnity provisions if the indemnity is supported by insurance,<sup>73</sup> but if the indemnity agreement is mutual, the indemnity is enforceable up to the insurance limits agreed upon.<sup>74</sup>

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63. *Rodrigue v. LeGros*, 563 So. 2d 248, 254 (La. 1990); *Sovereign Ins. Co.*, 488 So. 2d at 986.

64. La. Rev. Stat. Ann. § 9:2780(A) (2008).

65. LA. REV. STAT. ANN. § 9:2780(C) (2008); *see also* *Matte v. Zapata Offshore Co.*, 784 F.2d 628, 631 (5th Cir. 1986) (The purpose of the Louisiana statute was "to remedy a perceived imbalance in the relative bargaining position of contracting parties in the oil industry, for the purpose of enhancing safety in that dangerous industry.").

66. *Storage & Processors, Inc. v. Reyes*, 134 S.W.3d 190, 192 (Tex. 2004).

67. *Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931, 938 (Tex. 1991).

68. *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 708 (Tex. 1987).

69. *Id.* at 708.

70. *K & S Oil Well Serv., Inc. v. Cabot Corp., Inc.*, 491 S.W.2d 733, 737-38 (Tex. Civ. App. 1973).

71. Tex. Civ. Prac. & Rem. Code Ann. § 127.003 (Vernon 2010).

72. Tex. Civ. Prac. & Rem. Code Ann. § 127.005 (Vernon 2010).

73. Tex. Civ. Prac. & Rem. Code Ann. § 127.005(c) (Vernon 2010).

74. Tex. Civ. Prac. & Rem. Code Ann. § 127.005(b) (Vernon 2010).

### ***B. Longshore and Harbor Workers' Compensation Act***

Congress passed the Longshore and Harbor Workers' Compensation Act ("LHWCA") to provide a federal system of no-fault compensation for certain workers.<sup>75</sup> The LHWCA specifically invalidates certain types of indemnity provisions. Section 905(b) voids agreements that indemnify a vessel from injuries to a longshoreman, but allows contractual indemnity between a non-vessel entity and an employer of a longshoreman.<sup>76</sup> Section 905(c), however, allows reciprocal indemnity agreements between a vessel and an employer of a longshoreman when a longshoreman is entitled to LHWCA relief by virtue of OCSLA.<sup>77</sup> These reciprocal indemnity agreements do not have to be concomitant to be enforceable.<sup>78</sup> Finally, the indemnity agreement is void if it includes a waiver for gross negligence.<sup>79</sup>

Even if the contract is not subject to OCSLA or LHWCA, one must consider and investigate whether another federal statute might preclude the application of federal maritime law.

### **V. YOUR CONTRACT IS MARITIME AND FEDERAL MARITIME LAW HAS NOT BEEN PREEMPTED; WILL STATE LAW STILL FIND A WAY TO INTERVENE?**

The short answer is "maybe." If there is existing federal maritime law on point, whether created by statute or by courts, that federal law will govern and preempt state law on the subject.<sup>80</sup> Maritime and state law are

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75. 1 SCHOENBAUM, *supra* note 2, § 7-2.

76. See *Becker v. Tidewater, Inc.*, 586 F.3d 358, 366, 2010 AMC 945 (5th Cir. 2009); *Fontenot v. Dual Drilling, Co.*, 179 F.3d 969, 974 (5th Cir. 1999); see also *Wagner v. McDermott, Inc.*, 79 F.3d 20, 22–23 (5th Cir. 1996).

77. *Becker*, 586 F.3d at 366.

78. *Diamond Offshore Co. v. A & B Builders, Inc.*, 302 F.3d 531, 548, 2002 AMC 2289 (5th Cir. 2002).

79. *Becker*, 586 F.3d at 367.

80. See *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 1955 AMC 467 (1955); see also *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917); *Misener Marine Constr., Inc. v. Norfolk Dredging Co.*, 2010 AMC 250 (11th Cir. 2010); see generally 1 SCHOENBAUM, *supra* note 2, §§ 4-3, 19-6. Further, it should be noted that the preemptive force of federal maritime law exists regardless of whether the issue arises in a federal court exercising admiralty jurisdiction, in a federal court exercising diversity jurisdiction, or in a state court. *Jowers v. Lincoln Electric Co.*, 617 F.3d 346, 358 (5th Cir. 2010). Generally, however, if a maritime plaintiff chooses to file her claim in state court, the defendant cannot defeat the choice on the basis of admiralty jurisdiction. In the rare instances when a defendant in a maritime case is able to remove a case to the federal court it is on a federal-question or diversity jurisdiction basis

in conflict if the state law “contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations.”<sup>81</sup> In 1994, the Supreme Court clarified that to qualify as a “characteristic feature” of federal maritime law, the law had to originate in admiralty or have exclusive application in admiralty.<sup>82</sup>

There are two situations, however, in which state law may be applied in lieu of federal maritime law. First, state law may apply if there is no existing federal maritime law. Because federal maritime case law is not a complete body of law, there are many gaps that the federal judiciary must fill either by creating a new maritime rule or by applying existing state law. If there is a gap in federal maritime case law and the court decides not to create a new federal rule, the court may look to state law to fill in a gap or supplement federal law, as long as the state law does not directly conflict with and does not narrow a principle of existing federal admiralty law.<sup>83</sup> If, in fact, state law directly conflicts with or narrows a principle of federal

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independent of admiralty jurisdiction. Additionally, Jones Act cases are never removable on any basis. *See generally* 1 SCHOENBAUM, *supra* note 2, § 4-5. More recently, the United States District Court for the Southern District of Texas held that a case based on general judicially-created maritime law had to be remanded to Texas state court. *Roth v. Kiewit Offshore Servs., Ltd.*, 625 F. Supp. 2d 376 (S.D. Tex. 2008).

The court based its holding on 28 U.S.C. § 1441(b) and the Supreme Court’s holding in *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 354, 1959 AMC 832 (1959). Section 1441(b) provides that civil action not based on a federal question can only be removed to federal court if none of the interested parties are citizens of the State in which the action was brought. 28 U.S.C. § 1441(b) (2006). The Supreme Court’s holding in *Romero* states that federal maritime law is not a basis for establishing a court’s subject matter jurisdiction. 358 U.S. at 354. Therefore, because the case was initiated in Texas state court and because one of the defendants was a Texas corporation, the case had to be remanded to Texas state court. *Roth*, 625 F. Supp. 2d 376.

81. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917).

82. *Am. Dredging Co. v. Miller*, 510 U.S. 443, 450, 1994 AMC 913 (1994); *see also* *Commercial Union Ins. Co. v. Harvest Seafood Co.*, 251 F.3d 1294 (10th Cir. 2001) (In interpreting the refrigeration clause in an insurance policy for ocean marine cargo, the Tenth Circuit agreed with the Ninth Circuit that there is a judicially fashioned admiralty rule with respect to the interpretation of refrigeration clauses that derangement or breakdown of refrigeration machinery applies to losses caused by mechanical disorders not by human failure to operate the refrigeration equipment properly. Because the insurance contract was maritime, properly before the court in admiralty, and because there was a judicially created admiralty rule, federal admiralty law preempted state law).

83. *Wilburn Boat*, 348 U.S. at 319–20; *see also* 1 SCHOENBAUM, *supra* note 2, § 4-3.

admiralty law, the court must fashion a new admiralty rule.<sup>84</sup>

Second, state law may apply if two conditions are met: (1) the state has a strong interest in the subject matter at issue, and (2) using state law would not disrupt the uniformity of admiralty law, which the Supreme Court has declared necessary to effect the principal purpose of admiralty law—to protect maritime commerce.<sup>85</sup> If, however, there is a strong federal interest in the issue before the court, the court may not apply state law and must instead create a new maritime law.<sup>86</sup> This concept is sometimes referred to as the “maritime but local” test. That is, if the contract and issue before the court are maritime in nature, but there is such a strong local, i.e. state, interest and the state’s laws will not threaten the uniformity of admiralty law, the courts may apply state law. The Supreme Court seems to have dusted-off the “maritime but local” test in its relatively recent holding in *Kirby*, discussed in Parts II.A and B *supra*. And, states may have laws that impact or prohibit indemnity provisions.

Finally, state law may apply concurrently with federal law in connection with certain admiralty claims. The savings clause of 28 U.S.C. § 1333(1) permits “suits in all cases all other remedies to which they are otherwise entitled.”<sup>87</sup> The Supreme Court has interpreted this clause to mean that suitors have the right to a common law remedy in all cases “where the common law is competent to give it.”<sup>88</sup> Common law is competent in all *in personam* suits, meaning that a claimant may choose to proceed in admiralty or in an ordinary civil action. Of course, if there is a statute granting the courts exclusive admiralty jurisdiction over a particular issue, state law will not be concurrently applicable.<sup>89</sup> Choosing concurrent state jurisdiction in this manner is the choice of the claimant, not a choice made by the court. There may be strategic reasons to invoke state law in lieu of admiralty law, but that discussion is beyond the scope of this article.

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84. 1 SCHOENBAUM, *supra* note 2, § 4-3, at 234-35.

85. *Id.*

86. *Id.* § 4-3, at 235 n.11.

87. 28 U.S.C. § 1333(1) (2006).

88. *Leon v. Galceran*, 78 U.S. (11 Wall.) 185, 186 (1870) (citations omitted).

89. 1 SCHOENBAUM, *supra* note 2, §4-4, at 239–40. Additionally, there is exclusive admiralty jurisdiction over *in rem* proceedings because the *in rem* action was not known to common law.

## VI. SUBSTANTIVE MARITIME LAW

If the contract is found to be maritime in nature, and there is no applicable federal statute then substantive federal maritime law will generally apply to the interpretation and enforcement of an indemnity provision in a maritime contract.<sup>90</sup> The Fifth Circuit has gone as far to say:

In interpreting the indemnity provision, we noted that “[o]f course, the construction of a maritime contract is governed by federal, not state, law” . . . . We now apply federal maritime law to construe the indemnity clauses of the [maritime] contract.<sup>91</sup>

In order for an indemnity provision to be enforceable it must be specific and conspicuous, and expressed in clear and unequivocal terms.<sup>92</sup> Federal admiralty law allows indemnity provisions that exempt a party from liability for its own negligence as long as these provisions are also unequivocal and conspicuous,<sup>93</sup> and knock-for-knock indemnity agreements have been regularly upheld under maritime law.<sup>94</sup> Exemptions from liability, however, do not extend to gross negligence because it is against public policy to allow “harm willfully inflicted or caused by gross or wanton negligence” to be exempt from liability.<sup>95</sup> “Indemnity provisions are conspicuous when a reasonable person against whom the

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90. See *Navieros Oceanikos, S.A., v. S.T. MOBIL TRADER*, 554 F.2d 43, 47 (2d. Cir. 1977) (“The interpretation of an indemnity clause as part of a maritime contract is a matter governed by federal maritime law and not state law.” (citing *Capozziello v. Brasileiro*, 443 F.2d 1155, 1157 (2d Cir. 1971))); see also *Hardy v. Gulf Oil Corp.*, 949 F.2d 826, 834 (5th Cir. 1992); *Lirette v. Popich Bros. Water Transp.*, 699 F.2d 725, 728 n.11 (5th Cir. 1983); *Laughlin v. Falcon Operators, Inc.*, No. Civ. A. 00-1484, 2002 U.S. Dist. LEXIS 23394, at \*4–6 (E.D. La. Dec. 4, 2002).

91. *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 539 (5th Cir. 1986).

92. *Id.* at 540; *Breaux v. Halliburton Energy Servs.*, 562 F.3d 358, 365, 2009 AMC 1269 (5th Cir. 2009) (“The contract need not contain any special words to evince an intention to create a right of indemnity for independent contractual liabilities. We hold only that it must clearly express such a purpose”).

93. See *One Beacon Ins. Co. v. Crowley Marine Servs. Inc.*, 648 F.3d 258, 267 (5th Cir. 2011); see also *Orduna S.A. v. Zen-Noh Grain Corp.*, 913 F.2d 1149, 1153 (5th Cir. 1990); *Theriot*, 783 F.2d at 540; *United States v. Seckinger*, 397 U.S. 203, 215–16 (1970).

94. *Theriot*, 783 F.2d at 540; *Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207, 1216 (5th Cir. 1986).

95. See *Royal Ins. Co. v. Sw. Marine*, 194 F.3d 1009, 1016 (9th Cir. 1999) (quoting 6A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1472 (1962 ed. & Supp. 1999)); see also *La Esperanza de P.R., Inc. v. Perez y Cia. de Puerto Rico, Inc.*, 124 F.3d 10, 19 (1st Cir. 1997) (quoting same); *Todd Shipyards Corp. v. Turbine Serv., Inc.*, 674 F.2d 401, 411 (5th Cir. 1982) (also quoting same).

provision is to operate should have noticed it.”<sup>96</sup>

Indemnity provisions are generally read broadly under federal maritime law:<sup>97</sup>

A contract of indemnity should be construed to cover all losses . . . which reasonably appear to have been within the contemplation of the parties, but it should not be read to impose liability for those losses . . . which are neither expressly within its terms nor of such a character that is can be reasonably inferred that the parties intended to include them within the indemnity coverage.<sup>98</sup>

If limiting language is included in the indemnity provision, such as “arising out of” or “related to” or “in connection with,” then the courts typically interpret the scope of the indemnity provisions using those limitations.<sup>99</sup> By the same token, if an indemnity provision is drafted more broadly, the courts will enforce the provision accordingly.<sup>100</sup> That being said, catch-all indemnity agreements are not “boundless,” and they should not be read to create unusual or surprising obligations.<sup>101</sup>

Federal maritime law requires that a contract containing an indemnity agreement be “read as a whole and its words given their plain meaning unless the provision is ambiguous.”<sup>102</sup> Under federal maritime law, a court should not look beyond the written language of the contract to determine the intent of the parties unless the disputed language is ambiguous.<sup>103</sup> Unlike non-maritime contract law, however,

[d]isagreement as to the meaning of a contract does not make it

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96. Daniel B. Shilliday, *Contractual Risk-Shifting in Offshore Energy Operations*, 81 TUL. L. REV. 1579, 1599 (2007).

97. *In re Fitzgerald Marine & Repair, Inc.*, 619 F.3d 851, 860, 2010 AMC 2052 (8th Cir. 2010); *Breaux*, 562 F.3d at 364.

98. *Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329, 333 (5th Cir. 1981); *see also In re Fitzgerald*, 619 F.3d at 860 (The court confirmed that since *Corbitt*'s holding uses “neither . . . nor,” it provides two alternative bases for indemnity.).

99. *See Wilson v. Job, Inc.*, 958 F.2d 653, 658 (5th Cir. 1992); *Smith v. Tenneco Oil Co.*, 803 F.2d 1386, 1388–89 (5th Cir. 1986); *Lanasse v. Travelers Ins. Co.*, 450 F.2d 580, 582–83 (5th Cir. 1970).

100. *Breaux*, 562 F.3d at 364; *Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207, 1213–15 (5th Cir. 1986).

101. *Gisclair v. Galliano Marine Serv.*, 484 F. Supp. 2d 518, 522–23 (E.D. La. 2007).

102. *In re Fitzgerald*, 619 F.3d at 860 (quoting *Breaux*, 562 F.3d at 364).

103. *Id.* at 858 (quoting *Fontenot*, 791 F.2d at 1214).

ambiguous, nor does uncertainty or lack of clarity on the language chosen by the parties. Where the written instrument is so worded that it can be given a certain definite legal meaning or interpretation, then it is not ambiguous, and this Court will construe the contract as a matter of law.<sup>104</sup>

If a court were to find any ambiguity, such ambiguity will generally be construed against the drafting party, essentially nullifying the indemnity.<sup>105</sup>

#### ***A. Unique and Confusing Features of Enforcement of Pass-Through Indemnity Provisions***

Prior to 2009, the Fifth Circuit enforced pass-through indemnity provisions provided that the indemnity expressly contemplated a party's indemnity obligations to others. The court was concerned with ensuring that a party was not subject to unexpected risk and exposure not bargained for at the creation of the contract.<sup>106</sup>

In 2009, however, the Fifth Circuit muddied the waters with its *en banc* decision in *Grand Isle Shipyard v. Seacor*, and the Supreme Court declined to address the tumult created by the decision.<sup>107</sup> The case involved two contracts—the first between British Petroleum (“BP”) and Seacor and the second between BP and Grand Isle Shipyard (“Grand Isle”). The contract between BP and Seacor provided for transportation of BP's employees and the workers of BP's contractors.<sup>108</sup> That was a maritime contract because it is for the use of a vessel, with the work primarily to be performed on a vessel, and thus would be within the court's admiralty jurisdiction. The contract between BP and Grand Isle was primarily for the repair and maintenance of BP's offshore platforms.<sup>109</sup> That contract would

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104. *Breaux*, 562 F.3d at 364 (quoting *Weir v. Fed. Asset Disposition Ass'n*, 123 F.3d 281, 286 (5th Cir. 1997)).

105. *See, e.g., Krzywicki v. Tidewater Equip. Co.*, 600 F. Supp. 629 (D. Md. 1985), *aff'd* 785 F.2d 305 (4th Cir. 1986) (without opinion).

106. *See Sumrall v. Ensco Offshore Co.*, 291 F.3d 316, 320–21, 2002 AMC 1420 (5th Cir. 2002); *see also Demette v. Falcon Drilling Co.*, 280 F.3d 492, 2002 AMC 686 (5th Cir. 2002); *Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115, 1115, 1993 AMC 1008 (5th Cir. 1992); *Babcock v. Cont'l Oil Co.*, 792 F.2d 1346 (5th Cir. 1986) (per curiam); *Foreman v. Exxon Corp.*, 770 F.2d 490, 497 (5th Cir. 1985); *Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329, 333 (5th Cir. 1981).

107. 589 F.3d 778, 778, 2010 AMC 808 (5th Cir. 2009), *cert. denied* 130 S. Ct. 3386 (2010).

108. *Id.* at 781.

109. *Id.*

be governed by Louisiana law because federal admiralty law would be preempted by a federal statute, namely OCSLA, which allows state law to act as a surrogate for federal law.<sup>110</sup> Both contracts contained indemnity provisions whereby Seacor and Grand Isle agreed to indemnify BP's other contractors.<sup>111</sup> The undisputed objective of the contracts was to create reciprocal indemnity obligations between and among BP's contractors.<sup>112</sup> The court had to decide what law governed the enforceability of the indemnity provision in Grand Isle's contract.<sup>113</sup>

The court held that the "focus-of-the contract" test was the proper tool to analyze which law should apply to enforce the indemnity provisions. Because the focus of the Grand Isle contract was platform based work, the court found that the Grand Isle contract was governed by OCSLA. As discussed above, OCSLA preempts federal admiralty law and thus Louisiana law and the Louisiana Oilfield Indemnity Act were applicable to the contract between BP and Grand Isle, thereby invalidating the indemnity provisions in the contract. So even though Seacor had a clearly maritime contract which would have fallen within the court's admiralty jurisdiction, and even though Seacor was suing under the indemnity provision in its own contract with BP, they were not afforded the benefit of their bargain because the court found that Grand Isle's contract was governed by OCSLA.

This holding appears to be contrary to the fundamental principle underlying the court's concern that no party be subject to unexpected risk. Grand Isle, a sophisticated entity, presumably knew the risk it undertook when negotiating a contract which included an indemnity provision, yet it was able to escape its responsibilities, resulting in Seacor's assumption of unexpected risk and exposure.

The result of the court's decision is that only if *all* of the parties are engaged in primarily maritime commerce will contracts with mutual indemnity clauses be reciprocally enforced. Additionally, there is no benefit or incentive for a party to a maritime contract to include a mutual indemnity clause for another unknown party with a contract that may, or may not be, maritime in nature. Ultimately, this means that having a maritime contract that would fall within federal admiralty jurisdiction does

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110. See *supra*, Part IV.A.

111. *Grand Isle*, 589 F.3d at 781.

112. *Id.*

113. *Id.* at 781–82.

not necessarily guarantee that an indemnity provision within the maritime contract will be interpreted under federal maritime law.

### ***B. Exceptions to the Rule—Towage Contracts***<sup>114</sup>

The Supreme Court has held that exculpatory clauses and indemnity provisions that favor tug owners in a towage contract are invalid.<sup>115</sup> The rationale behind this ruling was that the Court wanted to prevent the tug owners, with their superior bargaining power, from taking advantage of parties requiring towing services. The Court also likely wanted to generally hold negligent powers liable for any damages caused by their negligence.<sup>116</sup> The Supreme Court did not, however, invalidate indemnity clauses in towage contracts which favor the tow rather than the tug.<sup>117</sup> The effect of this rule has been negated through the use of contractual clauses requiring the tow to name the tug as an additional assured in its insurance policy.<sup>118</sup> Generally the tow may only insure up to the value of the barge or vessel under its hull and machinery policy, and these policies typically include a waiver of subrogation.<sup>119</sup>

### ***C. A Word About Gross Negligence in the Fifth Circuit***

A recent decision from the United States District Court for the Eastern District of Louisiana<sup>120</sup> calls into question whether an indemnity provision

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114. See *supra*, Part IV.A. As previously discussed, exceptions to the applicability of substantive maritime law to the interpretation of indemnity provisions in a maritime contract include preemption of maritime law by a federal statute, such as the LHWCA or OCSLA.

115. *Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co.*, 372 U.S. 697, 698, 1963 AMC 829 (1963); *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 94, 1955 AMC 899 (1955).

116. *Bisso*, 349 U.S. at 91–92; *Dixilyn Drilling Corp.*, 372 U.S. 697; *Sander v. Alexander Richardson Invs.*, 334 F.3d 712, 715, 2003 AMC 1817 (8th Cir. 2003).

117. *Bisso*, 349 U.S. 85; *Chevron U.S.A. v. Progress Marine, Inc.*, 1980 AMC 1637, 1643 (E.D. La. 1979).

118. See *Twenty Grand Offshore Inc. v. W. India Carriers, Inc.*, 492 F.2d 679, 685, 1974 AMC 2254 (5th Cir. 1974); see also *Dillingham Tug & Barge Corp. v. Collier Carbon & Chem. Corp.*, 707 F.2d 1086, 1089–91, 1984 AMC 1990 (9th Cir. 1983); *BASF Wyandotte Corp. v. The TUG LEANDER, JR.*, 590 F.2d 96, 97–98, 1979 AMC 1721 (5th Cir. 1979). But see *PPG Indust., Inc. v. Ashland Oil Co.-Thomas Petroleum Transit Div.*, 592 F.2d 138, 1979 AMC 2056 (3d Cir. 1978).

119. See *Twenty Grand Offshore Inc.*, 492 F.2d at 685; *Dillingham Tug & Barge Corp.*, 707 F.2d at 1089–1091; see also *BASF Wyandotte Corp.*, 590 F.2d at 97–98. But see *PPG Indust., Inc.*, 592 F.2d at 138.

120. *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010, Nos. 10-2771, 10-4536, and All Cases (Deepwater Horizon)*, 2012 U.S. Dist. LEXIS 9005,

that includes liability for gross negligence is void as contrary to public policy. In a case emanating from the Deepwater Horizon mobile offshore drilling unit (“MODU”) explosion on April 20, 2010, Transocean, the owner of the MODU, impleaded British Petroleum (“BP”) and moved for summary judgment claiming that the contract between the parties required BP to defend and indemnify Transocean from all claims and liabilities related to pollution originating from below the surface of the water even if the pollution was caused by Transocean’s gross negligence.<sup>121</sup> BP crossclaimed arguing that the scope of indemnity extended only to ordinary negligence and, even if Transocean’s interpretation of the scope of indemnity was correct, that public policy prohibits and invalidates contractual indemnity that includes gross negligence.<sup>122</sup> The parties agreed that maritime law governed the contract containing the indemnity provision.<sup>123</sup>

The court interpreted the relevant portions of the contract as *not* excluding gross negligence, in part based on the contract language that BP would assume “*any* loss, damage, expense, claim, fine penalty, demand, or liability for pollution or contamination . . . not assumed by Transocean.”<sup>124</sup> The court then held that there were no controlling cases and went on to state that an indemnity provision including protection for gross negligence was void as against public policy.<sup>125</sup> The court differentiated between a release or exculpatory clause, which surrenders obligations between the parties to the contract, and an indemnity clause, which dictates who will bear the risk of injury to third parties.<sup>126</sup> The court distinguished the case before it from prior cases in which releases containing exemptions for gross negligence were held to be invalid by holding that the prior cases only discussed releases and therefore, exemptions for gross negligence would invalidate a release, but not necessarily an indemnity provision.<sup>127</sup> The court then found that it was free to decide the question of whether gross negligence invalidates an indemnity provision as contrary to public policy.

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at \*4–6 (E.D. La. Jan. 26, 2012).

121. See *id.*

122. *Deepwater Horizon*, 2012 U.S. Dist. LEXIS 9005, at \*7, \*16.

123. *Id.* at \*11.

124. *Id.* at \*20 (emphasis added).

125. *Id.* at \*22.

126. *Id.* at \*21.

127. *Id.* at \*27–28.

In determining that gross negligence does not invalidate an indemnity provision, the court balanced the public policy concern of discouraging grossly negligent conduct and the freedom to contract.<sup>128</sup> The court found significant that the contract between Transocean and BP allocated risk to both parties because the reciprocal nature of the indemnities meant that Transocean was at least discouraged from grossly negligent behavior and at most was incentivized to avoid grossly negligent behavior.<sup>129</sup> The court also found that the two parties had equal bargaining power and that the indemnity clauses were not constructed so as to leave a third party without recourse for injury.<sup>130</sup> Finally, while the Oil Pollution Act (“OPA”), the federal law governing compensatory damages arising from oil pollution, is silent as to whether an indemnity may include gross negligence, the court found that the “OPA is not opposed to indemnification for gross negligence.”<sup>131</sup> The court narrowed its holding by limiting it to compensatory damages only and thus, not applicable to punitive damages.<sup>132</sup>

This decision has upturned what was considered a well-settled maritime law concept and may have far reaching implications for indemnity provisions already in place and certainly for drafters moving forward. Additionally, this could potentially impact other federal and state laws that are used to interpret maritime contracts. For example, the LHWCA dictates that an indemnity is void if it includes a waiver for gross negligence. Also, when OCSLA dictates state law to act as a surrogate for federal law, Texas law voids indemnity provisions which indemnify personal negligence. It is too early to determine if other Circuit Courts of Appeal will follow the Fifth Circuit’s lead on this issue.<sup>133</sup>

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128. *Id.* at \*28.

129. *Id.* at \*29–30.

130. *Id.* at \*30–32.

131. *Id.* at \*35.

132. *See id.* at \*36. The court also found that civil penalties under the Clean Water Act were intended to punish and deter future pollution as much as they were intended to give restitution. As such, the court held that public policy prohibited contract indemnification for civil penalties under the Clean Water Act. *Id.* at \*39–42.

133. As of the printing of this article, an appeal had not been filed on this issue.

### *D. Attorneys' Fees*

“Maritime disputes generally are governed by the ‘American Rule,’ pursuant to which each party bears its own costs.”<sup>134</sup> Thus, indemnity provisions typically include the recovery of attorney’s fees incurred in defending against a claim covered by the indemnity, but they do not include the right to recover costs and fees associated with establishing the right to indemnification.<sup>135</sup> Fees associated with establishing the right to indemnification may be recoverable if the right to recovery is expressly stated in the indemnity provision.<sup>136</sup>

When addressing an appeal of an award of attorney’s fees that were not distinguished as between those fees associated with defending a claim and those fees associated with establishing a right to indemnification, the Eighth Circuit found no established federal maritime law mandating the denial of recovery of non-segregated attorney’s fees.<sup>137</sup> Because no federal maritime law existed to govern the situation, the court affirmed the lower court’s award of attorney’s fees because there was no clear error and because the lower court found that the fees could not be reasonably segregated.<sup>138</sup>

## VII. MARINE INSURANCE POLICIES

It has long been established that policies of marine insurance are maritime contracts and therefore are within the federal courts’ admiralty jurisdiction.<sup>139</sup> The caveat is that not every insurance policy with a

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134. *In re Fitzgerald Marine & Repair, Inc.*, 619 F.3d 851, 864, 2010 AMC 2052 (8th Cir. 2010).

135. See 1 SCHOENBAUM, *supra* note 2, § 5-21, at 521; see also *In re Fitzgerald Marine & Repair, Inc.*, 619 F.3d at 864; *Becker v. Tidewater, Inc.*, 586 F.3d 358, 375, 2010 AMC 945 (5th Cir. 2009).

136. See 1 SCHOENBAUM, *supra* note 2, § 5-21, at 521; see also *In re Fitzgerald Marine & Repair, Inc.*, 619 F.3d at 864–65; *Peter Fabrics, Inc. v. S.S. HERMES*, 765 F.2d 306, 316, 1986 AMC 1699 (2d Cir. 1985); *Dillingham Shipyard v. Associated Insulation Co.*, 649 F.2d 1322, 1328, 1984 AMC 1990 (9th Cir. 1981).

137. *In re Fitzgerald Marine & Repair, Inc.*, 619 F.3d at 866.

138. *Id.* at 860.

139. See *DeLovio v. Boit*, 7 F. Cas. 418, 1997 AMC 550 (C.C.D. Mass. 1815) (No. 3,776); see also *Wilburn Boat Co. v. Fireman’s Fund Ins., Co.*, 348 U.S. 310, 1955 AMC 467 (1955); *Ins. Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 25, 1997 AMC 2394 (1870); *In re Fitzgerald Marine & Repair, Inc.*, 619 F.3d 851; *New Hampshire Ins. Co. v. Home Savings & Loan Co.*, 581 F.3d 420, 426, 2009 AMC 2448 (6th Cir. 2009); *Royal Ins. Co. of Am. v. KSI Trading Corp.*, 563 F.3d 68 (3d Cir. 2009); *Sentry Select Ins. Co. v. Royal Ins. Co.*, 481 F.3d 1208, 1218–20, 2007 AMC 913

connection to a boat qualifies as a policy of marine insurance.<sup>140</sup> Even a policy not typically viewed as marine insurance may be subject to federal admiralty law if it insures a risk that is a traditionally within maritime activity.<sup>141</sup> Therefore, even though marine insurance policies are traditionally considered maritime contracts, it is important to analyze the nature and character of the risk insured by the policy to ensure that it is salty enough to be eligible for admiralty jurisdiction. Moreover, when an insurance policy is deemed to be maritime in nature and character, further analysis may be required to determine whether state law rather than federal maritime law may govern the interpretation of the policy.

### ***A. Is a Marine Insurance Policy Really a Maritime Contract After Kirby?***

While marine insurance policies have traditionally been characterized as maritime in nature, as discussed previously, in *Norfolk Southern Railway Co. v. James N. Kirby Pty Ltd.*, the Supreme Court clarified that the proper methodology for determining whether a contract is maritime necessitates an evaluation of the nature and character of the contract.<sup>142</sup> It has been over seven years since the *Kirby* decision, giving us an opportunity to analyze how the lower courts have applied the *Kirby* holding.

Five Circuit Courts of Appeal have had occasion to interpret insurance policies using the *Kirby* decision to guide their analyses.

#### **1. When a Marine Insurance Policy Is Maritime in Nature**

In deciding whether an insurance policy covering the cleaning of oil tanks on a barge moored in a navigable waterway within New York Harbor was subject to admiralty jurisdiction, the Second Circuit focused on whether the principal objective of the contract was to facilitate maritime

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(9th Cir. 2007); *Lloyd's of London v. Pagan-Sanchez*, 539 F.3d 19, 2008 AMC 1990 (1st Cir. 2008); *Folksamerica Reinsurance Co. v. Clean Water of N.Y., Inc.*, 413 F.3d 307, 315, 2005 AMC 1747 (2d Cir. 2005); *Navieros Oceanikos, S.A., v. S.T. MOBIL TRADER*, 554 F.2d 43, 47 (2d Cir. 1977).

140. *New Hampshire Ins. Co.*, 581 F.3d at 424.

141. *Folksamerica Reinsurance Co.*, 413 F.3d 307.

142. 543 U.S. 14, 24, 2004 AMC 2705 (2004) (“To ascertain whether a contract is a maritime one we cannot look to whether a ship or other vessel was involved in the dispute . . . . Nor can we simply look to place of the contract’s formation or performance. Instead, the answer depends upon the nature and character of the contract and the true criterion is whether it has reference to maritime service or maritime transactions.”).

commerce.<sup>143</sup> The court stated that, “[u]ltimately, coverage determines whether a policy is ‘marine insurance,’ and coverage is a function of the terms of the insurance contract and the nature of the business insured.”<sup>144</sup> The court went on to evaluate the insurance policy coverage and found that the particular insurance policy at issue had two sections, “one of which provide[d] fully marine insurance, and the other [was] specifically modified to cover maritime risks.”<sup>145</sup> Thus, even though the insurance policy covered maritime and non-maritime risks, the court held that the primary objective of the policy was to establish marine insurance and thus fell within admiralty jurisdiction.<sup>146</sup>

More recently, in 2010, the Eighth Circuit heard an appeal from summary judgment requiring Fitzgerald Marine & Repair, Inc. to indemnify Ingram Barge Co. for an injury sustained by a Fitzgerald employee when coming to the aid of Ingram’s sinking vessel.<sup>147</sup> The contract containing the indemnity provision was for repair services to barges, tows, and other vessels.<sup>148</sup> A contract for such repair services has traditionally been considered a maritime contract, and thus the court held that it would interpret the contract, including the indemnity clause, using federal maritime law.<sup>149</sup> As such, the court applied substantive federal maritime rules to uphold the indemnity provision in the contract, ultimately requiring Fitzgerald to indemnify Ingram for the injuries suffered by the Fitzgerald employee while working on an Ingram barge.<sup>150</sup> The court in *Fitzgerald* was presented with a classically maritime contract; thus the court did not have to closely analyze whether the contract was truly maritime in nature. The case is therefore more useful because it confirms the applicable law in connection with an indemnity provision within a maritime contract.

Because the post-*Kirby* cases reviewed by the First and Third Circuits required the interpretation of insurance policies providing coverage for

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143. Folksamerica Reinsurance Co., 413 F.3d at 315.

144. *Id.* at 317.

145. *Id.* at 324.

146. *Id.*

147. *In re Fitzgerald Marine & Repair, Inc.*, 619 F.3d 851, 854, 2010 AMC 2052 (8th Cir. 2010).

148. *Id.* at 858.

149. *Id.*

150. *Id.* at 866.

activities traditionally considered maritime in nature, those cases will be discussed in Part VII.B., *infra*, to illustrate other aspects of the courts' interpretation of maritime insurance policies.<sup>151</sup>

## 2. When a Marine Insurance Contract Is Not Maritime in Nature

In keeping with the principles articulated in *Kirby* and *Kossick*, the courts have identified instances in which a policy insuring a marine interest will not be deemed to be a maritime contract. In 2007, the Ninth Circuit reviewed whether the lower court properly exercised admiralty jurisdiction, and thus properly applied the federal maritime law doctrine of *uberrimae fidei* to allow a party to avoid an insurance policy's indemnity provision.<sup>152</sup> The court held that the crux of the issue was whether the insurance policy containing the indemnity provision, the Big Shield Commercial Catastrophe Liability Insurance Policy ("Big Shield Policy") and its Marine Coverage Endorsement ("MEL") were maritime in nature.<sup>153</sup> Using the guidance provided by the Supreme Court in *Kirby*, and endorsing the Second Circuit's holding in *Folksamerica*,<sup>154</sup> the Ninth Circuit focused on whether the primary focus of the Big Shield Policy, to which the MEL was an endorsement, was to provide insurance coverage for maritime commerce.<sup>155</sup> The court found that the Big Shield Policy's primary objective was to provide umbrella coverage in excess of a "shore-side insurance policy, not to protect . . . maritime commerce operations," and that it excluded traditional maritime risks.<sup>156</sup> The only part of the Big Shield Policy relating to maritime commerce was the MEL endorsement which was so insignificant that the insurer did not even increase the

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151. See *Royal Ins. Co. of Am. v. KSI Trading Corp.*, 563 F.3d 68, 68 (3d Cir. 2009) (interpreting an insurance policy that provided hull, machinery, and liability coverage for the defendant's new pleasure boat); see also *Lloyd's of London v. Pagan-Sanchez*, 539 F.3d 19, 24–26 (1st Cir. 2008) (interpreting an insurance policy covering goods being shipped by a vessel).

152. *Sentry Select Ins. Co. v. Royal Ins. Co.*, 481 F.3d 1208, 1217, 2007 AMC 913 (9th Cir. 2007).

153. *Id.*

154. *Folksamerica Reinsurance Co. v. Clean Water of N.Y., Inc.*, 413 F.3d 307, 315, 2005 AMC 1747 (2d Cir. 2005) (after the Supreme Court's decision in *Norfolk S. Ry. Co. v. James N. Kirby Pty Ltd.*, 543 U.S. 14, 24, 2004 AMC 2705 (2004), the Second Circuit held that "admiralty jurisdiction will exist over an insurance contract whether primary or principle objective is the establishment of policies of marine insurance.").

155. *Sentry Select Ins. Co.*, 481 F.3d at 1219.

156. *Id.*

premium when it was added.<sup>157</sup> Ultimately, the court found that the policy provided coverage for shore-side operations and held that a claim for indemnity under the Big Shield Policy was not a marine insurance contract claim over which it could exercise admiralty jurisdiction, and thus, the federal maritime doctrine of *uberrimae fidei* was not applicable.<sup>158</sup>

In another recent case decided by the Sixth Circuit, the insurance policy at issue was a general liability policy insuring against loss or damage to inventory, loss or damage to third-party property while in the insured's custody, personal injury or property damage occurring on the insured's boats or at its marina, and loss or damage of its tools and equipment.<sup>159</sup> The court noted with displeasure that the Supreme Court provided little guidance in applying a conceptual approach to determining the primary objective of a contract. The court also declined to follow the Second Circuit's approach and took issue with the Second Circuit's holding in *Folksamerica*, finding that the Second Circuit improperly narrowed the scope of admiralty jurisdiction.<sup>160</sup> The Sixth Circuit examined the interests and risks insured by the policies at issue and found that the primary objective of the coverage did not relate to maritime commerce because a policy covering marina operations does not implicate commercial maritime activity.<sup>161</sup> The court distinguished the case before it from other cases in which insurance policies covering boats docked at marinas were considered maritime contracts, because those policies insured individual vessels,<sup>162</sup> while the insurance policy at issue was for the marina as a whole and appeared to exclude "owned water craft" from coverage.<sup>163</sup> Relying on a discussion by the D.C. Circuit in *Upper Steamboat Co. v. Blake*,<sup>164</sup> the Sixth Circuit further distinguished insurance policies that cover vessels, which are maritime contracts, from policies that cover "fixed structures," which are not agents of maritime commerce and therefore are not maritime contracts. The court concluded that the insurance policy covering the

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157. *Id.*

158. *Id.* at 1220.

159. *New Hampshire Ins. Co. v. Home Savings & Loan Co.*, 581 F.3d 420, 422, 2009 AMC 2448 (6th Cir. 2009).

160. *Id.* at 425–26.

161. *Id.* at 428–31.

162. *Id.* at 429 (discussing *Sisson v. Ruby*, 497 U.S. 358, (1990) and *Wilburn Boat Co. v. Fireman's Fund Ins., Co.*, 348 U.S. 310, 1955 AMC 467 (1955)).

163. *Id.* at 424 (citations omitted).

164. 2 App. D.C. 51 (D.C. Cir. 1893).

marina was a policy that covered a fixed structure and thus, was not maritime in nature.<sup>165</sup> Accordingly, the court held that the insurance policy was not subject to admiralty jurisdiction and that the federal court did not have subject matter jurisdiction to hear the claim.<sup>166</sup>

***B. If the Marine Insurance Policy Is a Maritime Contract, Is Federal Maritime Law or State Law Applied to Interpretation of the Contract?***

“American law has been thrown into disarray by the *Wilburn Boat* case, and one can only sympathize with American legal advisers on the present state of the law.” – Donald O’May, *Authority on British insurance law*.<sup>167</sup>

In *Wilburn Boat Co. v. Fireman’s Fund Insurance, Co.*,<sup>168</sup> the Supreme Court held that even if a maritime contract falls under admiralty jurisdiction, it does not mean “that every term in every maritime contract can only be controlled by some federally defined admiralty rule.”<sup>169</sup> The Court further stated: “In the field of maritime contracts . . . the National Government has left much regulatory power in the States,” and “this state regulatory power, exercised with federal consent or acquiescence, has always been particularly broad in relation to insurance companies and the contracts they make.”<sup>170</sup>

The Court provided a two-part test to determine when state law should be used in lieu of federal maritime law. First, a court must determine whether there exists a judicially established federal admiralty rule governing the specific issue in dispute, and if so, then federal maritime law would rule.<sup>171</sup> If no federal rule exists, the court must secondarily ask whether it should fashion a new rule.<sup>172</sup> The *Wilburn Boat* Court found that there were very few federal cases on marine insurance which dealt with the specific issue before them—the strict breach of warranty rule.<sup>173</sup> Finding

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165. *New Hampshire Ins. Co.*, 581 F.3d at 430–31.

166. *Id.* at 427.

167. Donald O’May, *Marine Insurance: Law and Policy* 81 (Julian Hill ed., 1993).

168. 348 U.S. 310, 1955 AMC 467 (1955).

169. *Wilburn Boat*, 348 U.S. at 313.

170. *Id.* at 313–14.

171. *Id.* at 314.

172. *Id.*

173. *Id.* at 315.

no federal admiralty rule governing the issue before them, the Court held that it should not create a new rule to govern whether a breach of warranty should relieve the insurer of liability, even when the breach was immaterial to the loss.<sup>174</sup> The Court found historically, courts, Congress, insurance companies, and those insured relied on state law governing the interpretation of marine insurance policies.<sup>175</sup> Additionally, because there were varied policy considerations in determining whether to create a new rule to solely regulate marine insurance, the Court stated that Congress, not the courts, was the appropriate place for the development of new rules.<sup>176</sup> Thus, the *Wilburn Boat* Court ultimately held that state law should govern the interpretation of a breach of warranty in a marine insurance policy.<sup>177</sup>

As the courts have struggled to apply the test articulated in *Wilburn Boat*, four methods of interpretation have emerged. Some courts apply the test in a straightforward manner, interpreting *Wilburn Boat* to mean that the Supreme Court wanted to discourage the creation of new federal law and to favor the application of state law.<sup>178</sup> This had been the Fifth Circuit's approach, as evidenced by its creation of a three-part test requiring the application of federal maritime law only if it is "entrenched federal precedent."<sup>179</sup> The Ninth Circuit has stated that state law will be used to interpret marine insurance policies in the "absence of a federal statute, a judicially fashioned admiralty rule, or a need for uniformity in admiralty practice."<sup>180</sup> Finally, a federal district court in Florida has held that if there is not a federal maritime rule that governs the issue, state law may be invoked if it is not contrary to an express and entrenched principle of admiralty law.<sup>181</sup> The result is a lack of clarity as to what constitutes settled or entrenched federal admiralty law.

Moreover, even in cases where there does seem to be an entrenched

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174. *Id.* at 310.

175. *Id.* at 317.

176. *Id.* at 319–20.

177. *Id.* at 321.

178. 1 SCHOENBAUM, *supra* note 2, § 19-9, at 385. *But see* *Lloyd's of London v. Pagan-Sanchez*, 539 F.3d 19, 24–26, 2008 AMC 1990 (1st Cir. 2008) (the First Circuit applied federal maritime law to the interpretation of breach of warranty in a marine insurance contract instead of Puerto Rican law).

179. *Albany Ins. Co., v. Kieu*, 927 F.2d 882, 886, 1991 AMC 2211 (5th Cir. 1992).

180. *Bohemia, Inc. v. Home Ins. Co.*, 725 F.2d 506, 510 (9th Cir. 1984).

181. *ABB Power T & D Co. v. Gothaer Versicherungsbank VVAG*, 939 F. Supp. 1568, 1578, 1997 AMC 488 (S.D. Fla. 1996) (citations omitted).

federal admiralty rule, a court may nonetheless choose to apply state law to a contract's interpretation. For example, in *Taylor v. Lloyds Underwriters of London*,<sup>182</sup> the defendant cited three cases supporting the proposition that federal maritime law prohibited the imposition of punitive damages against an insurance company.<sup>183</sup> Despite this, the Fifth Circuit did not find that these three cases established a specific and controlling federal rule disallowing the recovery of punitive damages and thus, under *Wilburn Boat*, it looked to state law to determine whether the plaintiff could collect the punitive damages awarded to him by the jury.<sup>184</sup>

More recently, the First and Third Circuits have had occasion to determine whether federal maritime law or state law applied to a marine insurance contract. The First Circuit, in determining whether Puerto Rico law or federal maritime law would apply to the interpretation of the consequences of a breach of warranty under a marine insurance policy, found that federal maritime law applied.<sup>185</sup> The policy at issue provided hull, machinery, and liability coverage for the defendant's pleasure craft.<sup>186</sup> The court held the defendant in breach of a warranty in the insurance policy as part of his duty as the insured.<sup>187</sup> The court applied the choice of law test articulated in *Wilburn Boat*, and clarified by *Kirby*, and found, first, that the insurance policy was a maritime contract because it insured a traditionally marine interest.<sup>188</sup> Second, the court held that there was a general federal maritime rule that a breach of warranty will allow the insurer to avoid liability even if the breach is unrelated to the loss.<sup>189</sup> Having established that there is a federal maritime rule that governs, the court then evaluated whether Puerto Rico had a contrary rule or a strong interest in having a different rule.<sup>190</sup> Because the court found that the Puerto Rico legislature had expressly excluded marine insurance contracts

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182. 972 F.2d 666, 1994 AMC 607 (5th Cir. 1992).

183. *Id.* at 668 (citing *Dubois v. Ark. Valley Dredging Co.*, 651 F. Supp. 299 (W.D. La. 1987); *Smith v. Front Lawn Enterprises, Inc.*, 1987 AMC 1130 (E.D. La. 1986); *Nw. Nat'l Casualty Co. v. McNulty*, 307 F.2d 432 (5th Cir. 1962)).

184. *Id.* at 669.

185. *Lloyd's of London v. Pagan-Sanchez*, 539 F.3d 19, 24–26, 2008 AMC 1990 (1st Cir. 2008).

186. *Id.* at 21.

187. *Id.* at 23.

188. *Id.* at 24.

189. *Id.*, 24–25 (citations omitted).

190. *Id.* at 25.

from the protection and regulation of its Insurance Code, the court held that the consequences of a breach of warranty in a marine insurance policy did not implicate a local interest.<sup>191</sup> Therefore, the court declined to apply Puerto Rico law and instead applied federal maritime law, finding the insurers excused from liability because of the defendant's breach of warranty.<sup>192</sup>

In 2009, when interpreting a Marine Open Cargo Policy (a quintessential marine insurance policy), the Third Circuit noted that admiralty law governs maritime contracts but, following *Wilburn Boat*, in the absence of an established federal rule, state law must be applied.<sup>193</sup> The parties disagreed as to whether the Warehouse Storage Section of the policy covered merchandise lost in a fire when that merchandise was domestically acquired, instead of internationally acquired and arriving via vessel.<sup>194</sup> The court found no established federal rule governing the construction of the insurance policy at issue. This, coupled with the fact that the parties did not dispute that New Jersey law was the relevant body of law, led the court to hold that New Jersey law would govern.<sup>195</sup>

If a court determines that state law should apply, the court then must decide which state's law should apply.<sup>196</sup>

### ***C. Be Careful What You Wish for: Choosing Your Own Law and Forum***

If the contract at issue has a choice-of-law clause that dictates that maritime or admiralty law governs, we turn to the admiralty rules that govern how to interpret an indemnity provision.<sup>197</sup> As discussed above, the only certainty in the interpretation of maritime contracts is that it is uncertain which body of law a court will apply. While some trends in courts' practices have emerged, they fall far short of the kind of reliability contracting parties seek when negotiating agreements. Thus, parties will

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191. *Id.*

192. *Id.* at 25–26.

193. *Royal Ins. Co. of Am. v. KSI Trading Corp.*, 563 F.3d 68, 68 (3d Cir. 2009).

194. *Id.* at 73 (The court did not explicitly label the insurance policy as maritime in nature because it covered interests affecting maritime commerce, however, it may have thought it went without saying that a policy covering goods being shipped by a vessel is the very definition of maritime commerce and thus needed no further explanation).

195. *Id.* at 73.

196. *See supra*, Part III.

197. *Breaux v. Halliburton Energy Servs.*, 562 F.3d 358, 364 2009 AMC 1269 (5th Cir. 2009).

regularly include choice-of-law provisions and/or forum selection clauses in their contracts. The Supreme Court has stated that these clauses are indispensable elements in international trade, commerce, and contracting,<sup>198</sup> and should be enforced because “a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power . . . should be given full effect.”<sup>199</sup>

In *The BREMEN v. Zapata Offshore Co.*,<sup>200</sup> the Supreme Court stated that forum selection clauses are prima facie valid and enforceable unless enforcement was shown to be unreasonable under the circumstances.<sup>201</sup> A clause of this kind is enforced unless it imposes a venue “so gravely difficult and inconvenient that [the plaintiff] will for all practical purposes be deprived of his day in court.”<sup>202</sup> There would have to be a strong showing that the clause should be set aside.<sup>203</sup> The Court specifically noted that this doctrine should be followed by federal courts sitting in admiralty, in part because the choice of forum was made in an arm’s length negotiation by experienced and sophisticated businessmen; the implication being that they are affirmatively making the forum choice with full knowledge of the consequences of their choice.<sup>204</sup> Selecting the forum in which a maritime contract will be interpreted can help cut through some of the confusion as to what law applies.

Under federal admiralty law choice-of-law provisions will also generally be enforced unless “the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties’ choice,” or “application of the law of the chosen state would be contrary to a fundamental policy of the jurisdiction which would provide the rule of decision for the particular issue involved in the absence of an effective contrary choice of law by the parties.”<sup>205</sup> Thus, if the parties

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198. *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433, 2448, 2010 AMC 1521 (2010) (citing *The BREMEN v. Zapata Off-Shore Co.*, 407 U.S. 1, 13–4, 1972 AMC 1407 (1971)).

199. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 591, 1991 AMC 1697 (1991) (citing *The BREMEN*, 407 U.S. at 12–13).

200. 407 U.S. 1.

201. *Id.* at 10.

202. *The BREMEN*, 407 U.S. at 18.

203. *Shute*, 499 U.S. at 592 (citation omitted).

204. *The BREMEN*, 407 U.S. at 10–12.

205. *Hale v. Co-Mar Offshore Corp.*, 588 F. Supp. 1212, 1215, 1986 AMC 1620 (W.D. La. 1984) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (1971)).

have chosen a particular state's law to govern any potential disputes in a maritime contract falling within admiralty jurisdiction, the court will generally uphold the parties' decision, thereby allowing the parties to navigate around the uncertainties as to which law might be used to interpret their contract.

Of course, this means that the drafters of contracts need to be particularly careful in choosing the law to be applied. For example, in one case involving the interpretation of an indemnity provision in a maritime contract, the parties drafted themselves out of a favorable decision by making a poor choice of law.<sup>206</sup> The choice-of-law clause referred to Louisiana law, but the indemnity provision was void under LOAI.<sup>207</sup> If there had been no choice-of-law provision, federal maritime law would have governed and the indemnity would have been enforced.<sup>208</sup>

Drafters also need to take special care when including more than one choice-of-law provision. In an apparent attempt at thoroughness, the choice-of-law clause at issue in *Angelina Casualty Co. v. Exxon Corp., U.S.A.*,<sup>209</sup> stated that the contract would be interpreted under Louisiana law *and* federal maritime law.<sup>210</sup> The court interpreted the choice-of-law provision making two types of law applicable to mean that state law would apply when state law was appropriate, and federal maritime law would apply when it was appropriate.<sup>211</sup> Since this case pre-dated the ruling in *Kirby*, which cast doubt on separating a mixed contract into its maritime and non-maritime components, the court held that because the indemnity arose out of one of the maritime obligations, as opposed to one of the non-maritime obligations, admiralty jurisdiction and federal maritime law applied.<sup>212</sup> It is unclear whether the same facts would yield the same result in a post-*Kirby* world, however, it is worth noting that giving the court a choice of law within a choice-of-law clause could be problematic if the provision does not clearly and explicitly state which laws will govern which parts of the contract.

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206. *Stoot v. Fluor Drilling Servs., Inc.*, 851 F.2d 1514, 1989 AMC 20 (5th Cir. 1988).

207. *Id.* at 1518–19.

208. *Id.* at 1517.

209. 876 F.2d 40, 1989 AMC 2677 (5th Cir. 1989).

210. *Id.* at 42.

211. *Id.*

212. *Id.*

### VIII. CONCLUSION

Navigating the often turbulent choice-of-law waters with respect to indemnity provisions in maritime contracts can be perilous indeed. Perhaps only Odysseus' journey home was fraught with comparable trials and tribulations. Contract drafters must pursue a multi-pronged approach to ensure that the parties receive the benefit of the bargain contemplated at the contract's inception. The best, but still imperfect, method of mitigating risk is for the parties to include choice-of-law provisions in their contracts. Additionally, drafters must determine whether the subject matter of the contract may be subject to federal statutes which would preempt substantive federal maritime law and perhaps invalidate an indemnity provision. Finally, parties must consider and provide for the possibility that interpretation of an indemnity provision under particular state's laws may result in the invalidity of an indemnity or significant alteration of the anticipated risk mitigation.

While no plan survives contact with the enemy, i.e., the courts may wreak havoc with even the best laid plans, a thorough approach, taking into consideration each of the potential pitfalls and caveats outlined in this article, should help minimize the uncertainty in this area of law.