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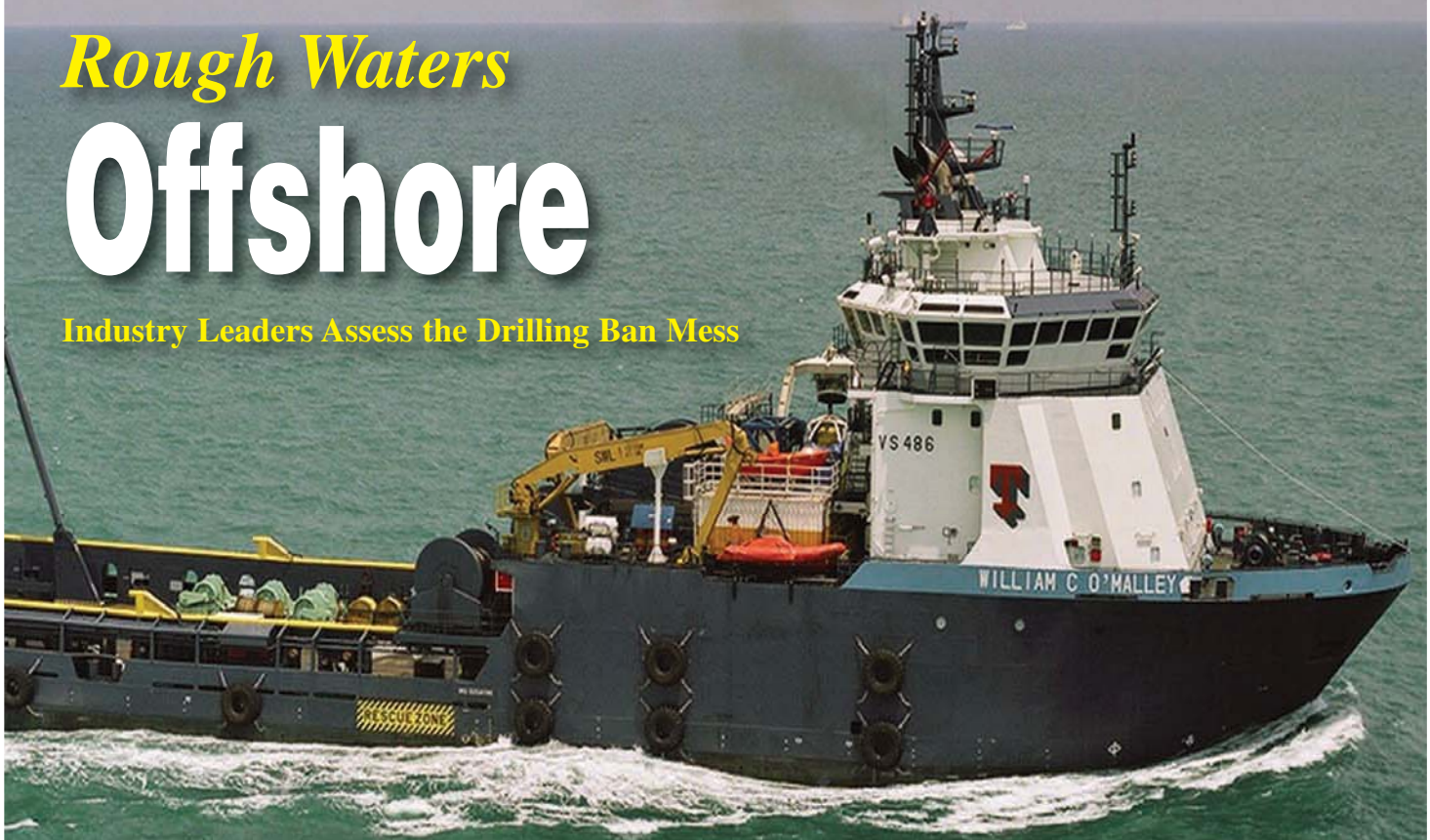

Rough Waters

Offshore

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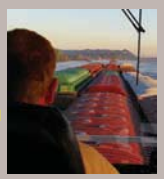
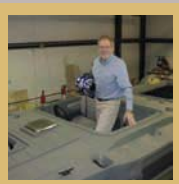
On the Water
Captain Rusty
Reporting from Theresa Wood on the Mighty Mississippi



Tech File
Plastic Hull
Prototype plastic boat for the U.S.Navy



Indemnity Provisions in Contracts & Charters

By Frederick B. Goldsmith

I have previously written in *MarineNews* about the importance of having properly-worded indemnity clauses in vessel-related agreements and how a missing "magic" word here or there can render an indemnity agreement unenforceable. Without intending to overwhelm you, what follows is a backgrounder on these types of clauses.

What is an Indemnity Agreement?

An indemnity agreement is a contractual provision in which one party agrees to answer for any specified or unspecified liability or harm that the other party might incur. Through an indemnity clause in a contract, parties can agree to shift the liability for one party's negligent, or claimed-to-be-negligent conduct (as well as other specified conduct and claims), to the other party.

Clear & Unequivocal Test(s) for Enforceable Indemnity Agreements

Agreements for the charter or use of a vessel that is "in navigation," that is, in operation and not removed from navigation for major repairs, and operated on U.S. navigable waters, such as the Western Rivers or Gulf of Mexico, are legally considered "maritime contracts," and thus, unless a choice of law clause purports to apply some state's or country's law, the general maritime law of the United States will apply to their interpretation.

Since indemnity agreements are a form of risk-shifting, something courts consider unusual and harsh, courts applying the general maritime law will only enforce an indemnity agreement if it "clearly and unequivocally" expresses the nature and extent of the obligation. Thus, if one party is agreeing to be responsible for the consequences of another party's "negligence" or claimed negligence, courts applying the general maritime law often do not require the agreement to use the word "negligence," but they do require fairly specific language as to the scope of the indemnity agreement.

For instance, in 2004 the U.S. Fifth Circuit Court of Appeals, which hears appeals from federal trial courts in Texas, Louisiana, and Mississippi, wrote that the following clause in an indemnity agreement was enforceable, even though it did not use the word "negligence":

Since indemnity agreements are a form of risk-shifting, something courts consider unusual and harsh, courts applying the general maritime law will only enforce an indemnity agreement if it "clearly and unequivocally" expresses the nature and extent of the obligation.

"[Party A] shall be responsible for all ... causes of action of every kind ... arising in connection herewith ... of ... [Party B's] invitees on account of bodily injury ... without regard to cause."

Other Fifth Circuit cases, however, have required the use of the word "negligence" for the indemnity obligation to be enforceable.

State Law on Indemnity

While most vessel agreements will be governed by the general maritime law, sometimes even vessel-related agreements, in addition to typical shoreside contracts, are governed by state law — for instance if the vessel is not operated on "navigable waters." So it helps to understand some state law on indemnity agreements.

Several states, such as Pennsylvania, also apply a "clear and unequivocal" test to see if an indemnity agreement is enforceable. In Perry v. Payne, a 1907 decision, the Pennsylvania Supreme Court refused to enforce an indemnity agreement that had this language as part of an indemnity clause: "… from all loss, cost or expense … arising from accidents to mechanics or laborers employed in the construction of said work, or to persons passing where the work is being constructed." The court in Perry v. Payne held:

"… a contract of indemnity against personal injuries, should not be construed to indemnify against the negligence of the indemnitee, unless it is so expressed in unequivocal terms. The liability on such indemnity is so hazardous, and the character of the indemnity so unusual and extraordinary, that there can be no presumption that the indemnitor intended to assume the responsibility

unless the contract puts it beyond doubt by express stipulation. ... [U]nless expressly stipulated in the contract, the owner is not to be indemnified against his own negligence."

In 1991, the Pennsylvania Supreme Court clarified its "clear and unequivocal" standard for enforcing indemnity clauses and that year, in the case of Ruzzi v. Butler Petroleum, held: "..if parties intend to include within the scope of their indemnity agreement a provision that covers losses due to the indemnitee's own negligence, they must do so in clear and unequivocal language. No inference from words of general import can establish such indemnification."

Pennsylvania courts applying their version of the "clear and unequivocal" test thus refuse to enforce indemnity agreements lacking the word "negligence." Other state courts, even though they may also call their test the "clear and unequivocal" test, vary on whether they will require the word "negligence" to appear in the indemnity clause before it will be enforced. For instance, Ohio uses the "clear and unequivocal" test, but does not require use of the word "negligence." An indemnity agreement releasing one party from "all liability" was sufficient.

As another example of how the law varies on this issue from state-to-state, West Virginia courts apply the "clear and definite" test. Its appellate court, the West Virginia Supreme Court of Appeals, wrote in 1959: "to relieve a party from his own negligence by contract, language to that effect must be clear and definite." The West Virginia Supreme Court of Appeals considered the following indemnity clause in a contract:

"Subcontractor shall indemnify Contractor against all claims for damages arising from accidents to persons or property occasioned by the Subcontractor, his agents or employees: and Subcontractor shall defend all suits brought against the Contractor on account of any such accidents and shall reimburse Contractor for any expense including reasonable attorneys' fees sustained by Contractor by reason of such accidents."

Since the clause lacked the word

"negligence," the court refused to enforce it. While West Virginia's highest court has not outright stated this is a requirement for enforceable indemnity agreements, it has refused to enforce indemnity agreements lacking the word "negligence," and it has cited approvingly a North Carolina court decision requiring use of the word "negligence."

Texas' Fair Notice Rule

Texas has one of if not the most rigorous standard before its courts will enforce an indemnity agreement. Its courts have adopted the "fair notice" rule for indemnity agreements, a rule which has two prongs.

The first prong is the "express negligence" or "Ethyl Express Negligence" rule, based on the Texas Supreme Court's 1987 decision in Ethyl Corp. v. Daniel Construction Co., in which the court held, "parties seeking to indemnify the indemnitee from the consequences of its own negligence must express that intent in specific terms ... within the four corners of the contract."

The second prong of Texas' fair notice rule is the "conspicuousness" test, which, as the Texas Supreme Court held in its 1993 decision in Dresser Industries, Inc. v. Page Petroleum, Inc., requires that "something must appear on the face of the [contract] to attract the attention of a reasonable person when he looks at it." The Dresser court applied the Uniform Commercial Code's definition of "conspicuous" to indemnity agreements. Under the UCC, "[a] printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color."

While courts applying the general maritime law's "clear and unequivocal" test do not usually also require the clause to be "conspicuous" to be enforceable, the U.S. Fifth Circuit Court of Appeals in its 1990 decision in Orduna S.A. v. Zen-Noh Grain Corp. did require conspicuousness.

Conclusion: Get Help

I ride street bikes and dirt bikes. As for maintaining them, I can change the oil and filter and other fluids, replace pipes, repack silencers, and troubleshoot some wiring issues. But I won't tackle installing new clutch plates or replacing a head. I turn to a mechanic. Indemnity agreements, along with insurance clauses in commercial agreements, are the same way. I wouldn't recommend trying to draft or negotiate these clauses without legal and insurance broker help. There are just too many nuances, too many arcane legal rules involved, and too many exceptions to the rules: for instance the Bisso rule in the tug-tow context, a provision in the U.S. Longshore and Harbor Workers Compensation Act, and oilfield anti-indemnity acts in a handful of oil producing states. Your company should spend the money and get professional legal and insurance broker help when drafting or negotiating indemnity and insurance clauses. ***MN***

Fred Goldsmith, formerly general counsel of one of the country's largest tug operators, is licensed in PA, WV, OH, and TX, and practices admiralty & maritime, railroad, personal injury, motorcycle, insurance coverage, and commercial litigation with Pittsburgh-based Goldsmith & Ogrodowski, LLC (www.golawllc.com). You can reach him at fbg@golawllc.com or (877) 404-6529.