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JUDICIAL INTERPRETATION OF INDEMNITY CLAUSES

Indemnity clauses are found in most construction and maintenance contracts, and are sometimes referred to as "hold harmless" agreements.¹ In fact, indemnity clauses are standard provisions in the model contract forms of the American Institute of Architects and the Engineer's Joint Contract Documents Committee.² They are used primarily as a means of allocating the risks of a project among the parties involved. Without these contractual provisions, those risks might be apportioned years later by a jury acting on "equitable" grounds.³ By fixing liability at the time of the contract, the parties can anticipate the scope of their obligations and plan accordingly. Thus, each party can obtain the proper amount of insurance and accurately calculate his costs of the venture.

Indemnity clauses are a constant source of litigation in Louisiana. A typical indemnity clause provides:

Contractor agrees to defend, indemnify and hold harmless company, its officers and employees, from and against any and all claims and causes of action and all losses on account of any personal injury or death or property damage arising out of or in any way related to the performance of the Contractor or any sub-contractor of the Contractor of services hereunder.⁴

Indemnity clauses take one of three general forms, varying only in the amount of responsibility assumed by the contractor. In the basic indemnity clause, the contractor/indemnitor agrees to bear the cost of defending any suit and paying any judgment against the owner/indemnitee arising out of any negligent acts or omissions of the contractor. In other agreements, the contractor also agrees to take responsibility for any damages arising from the concurrent negligence of the owner and the contractor. Finally, in the broadest form of indemnity clause, the contractor agrees to assume responsibility for all damage, even that caused solely by the owner's negligence.

Problems often arise because the indemnity clause fails to clearly indicate which level of liability the contractor has assumed. In the absence

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1. Similar clauses are found in many types of contracts. This paper focuses on a line of cases involving the relationship between owners and contractors.

2. 3 S. Stein, *Construction Law* ¶ 13.17, at 13-122 (1986).

3. *Id.*

4. See, e.g., *Polozola v. Garlock, Inc.*, 376 So. 2d 1009 (La. App. 1st Cir. 1979), writ denied, 379 So. 2d 1103 (La. 1980); *Arnold v. Stupp Corp.*, 205 So. 2d 797 (La. App. 1st Cir. 1967), writ denied, 251 La. 936, 207 So. 2d 540 (1968).

of express language, the intent of the parties shall prevail. However, deriving the intent of the parties from these indemnity clauses has been no easy task for the Louisiana courts. At the center of the dispute rests the phrase "any and all claims." Does this language indicate an intent on the part of the contractor to indemnify the owner against liability based on the owner's concurrent negligence with the contractor, the sole negligence of the owner, and even the strict liability of the owner? This article discusses how Louisiana courts have answered these questions.

Indemnification From An Indemnitee's Own Negligence

In deciding whether indemnification from "any and all claims" includes the right of an indemnitee to be indemnified from its own negligent acts, jurisprudence in various states has led to the evolution of a majority and a minority view. The majority view can best be stated as follows: A contract of indemnity will not be construed to indemnify the indemnitee against losses resulting through his negligent acts where such intention is not expressed in unequivocal terms.⁵ This interpretation is based on the assumption that "any and all claims" is a general term which fails to indicate an intent to impose "an obligation so extraordinary and harsh" that the indemnitor will be held liable for the sole negligence of the indemnitee.⁶ On the other hand, the minority view takes the position that the words "any and all claims" are unambiguous and evidence a clear intent to indemnify the indemnitee from any claim against it, including one based on the indemnitee's sole negligence.⁷

The minority view certainly possesses a textual appeal; "all claims" means "all," not "some." The very broad and sweeping language of these indemnity clauses manifests a clear intention of the parties to provide for indemnification against every conceivable claim, including the indemnitee's negligence. The indemnitee's position can be summarized as follows: "Before I allow you, the Contractor, on my land to perform services, I want your assurance that you will indemnify me from *any* claims made upon me arising out of the work you are performing, regardless of who is to blame." If the "any and all claims" language in the indemnity clause evidences the parties' intention as interpreted by the minority view, then that meaning of the language should be "the law between the parties and subject to judicial recognition and enforcement."⁸

5. 41 Am. Jur. 2d Indemnity § 15, at 700 (1968); 42 C.J.S. Indemnity § 12, at 580 (1944).

6. *Arnold v. Stupp Corp.*, 205 So. 2d 797, 799 (La. App. 1st Cir. 1967), writ denied, 251 La. 936, 207 So. 2d 540 (1968).

7. *Id.* See, e.g., *General Accident Fire & Life Assurance Corp. v. Smith & Oby Co.*, 272 F.2d 581, 585 (6th Cir. 1959).

8. *Arnold*, 205 So. 2d at 799.

Despite the appeal of the minority view, Louisiana has adopted the majority view partially due to policy considerations and the difficulty of determining whether both parties to the contract intended the broad interpretation under the minority view. In *Arnold v. Stupp Corp.*,⁹ the Louisiana First Circuit Court of Appeal discussed both the minority and majority views, and held that Louisiana was committed to the latter.¹⁰ In *Mills v. Fidelity & Casualty Co.*,¹¹ a federal district court held that contracts providing indemnification from an indemnitee's own acts of negligence "are disfavored to the extent that they will not be enforced unless the terms of the agreement clearly require such interpretation."¹² In *Strickland v. Nutt*,¹³ the first circuit reaffirmed the *Arnold* court's commitment to the majority view and extended the rationale to situations involving the concurrent negligence of the indemnitee and indemnitor.¹⁴ The Louisiana Supreme Court followed *Arnold* by holding that an indemnity contract purporting to indemnify one from his own negligence will be strictly construed; thus, such indemnification will not be allowed unless the intention was expressed in "unequivocal terms."¹⁵

9. 205 So. 2d 797 (La. App. 1st Cir. 1967), writ denied, 251 La. 936, 207 So. 2d 540 (1968) (employee of the contractor fell from a ladder while replacing a bolt on manufacturer's premises).

10. The court cited several cases in support of its conclusion: *Brady v. American Ins. Co.*, 198 So. 2d 907 (La. App. 4th Cir. 1967); *Moore v. Liberty Mut. Ins. Co.*, 149 So. 2d 192 (La. App. 3d Cir. 1963); *Dorman v. T. Smith & Son, Inc.*, 55 So. 2d 587 (La. App. Orl. 1951), aff'd, 223 La. 29, 64 So. 2d 833 (1953); *Buford v. Sewerage & Water Bd. of New Orleans*, 175 So. 110 (La. App. Orl. 1937); *Motor Sales & Serv. v. Grasselli Chem. Co.*, 15 La. App. 353, 131 So. 623 (Orl. 1930).

11. 226 F. Supp. 786 (W.D. La. 1964), aff'd sub nom., *Yuba Consol. Indus. v. Fidelity & Casualty Co.*, 338 F.2d 341 (5th Cir. 1964).

12. *Id.* at 790.

13. 264 So. 2d 317 (La. App. 1st Cir.), writ denied, 262 La. 1124, 266 So. 2d 432 (1972). In *Strickland*, an employee of the contractor was killed in a collision with a boat belonging to the master. The court found the contractor's employee and the master's employee to be concurrently negligent. The master was denied indemnification under the "any and all claims" language of the contract.

14. *Id.* at 323. The court in *Strickland* cited *Transcontinental Gas Pipe Line Corp. v. Mobile Drilling Barge*, 424 F.2d 684 (5th Cir.), cert. denied, 400 U.S. 832, 91 S. Ct. 65 (1970), for support of its conclusion that where, as in *Strickland*, the indemnitee and the indemnitor are concurrently negligent, the rule of strict interpretation of the indemnity clause still applies.

15. *Polozola v. Garlock, Inc.*, 343 So. 2d 1000 (La. 1977). The *Polozola* litigation produced a series of reported opinions, all of which are discussed in this paper. In *Polozola v. Garlock, Inc.*, 334 So. 2d 530 (La. App. 1st Cir. 1976) (hereinafter "*Polozola I*"), the first circuit held that an indemnity clause containing the words "whether caused by Dow's negligence or otherwise" did not entitle Dow's employees to indemnification. The Louisiana Supreme Court, in *Polozola v. Garlock, Inc.*, 343 So. 2d 1000 (La. 1977) (hereinafter "*Polozola II*"), reversed the first circuit, holding that this language included

Equitable considerations require the strict interpretation that the courts have given to these indemnity clauses. If the indemnitee is allowed indemnification from his own negligence, a great burden is placed upon the indemnitor. The indemnitor is usually in no position to prevent the risk by controlling the conduct of the indemnitee, yet he is assuming the liability. This extreme burden should not be imposed upon an indemnitor absent an unequivocal finding that the risk was expressly bargained for and accepted. Also, if the indemnitee is allowed to easily shift his burden of due care to the indemnitor, the situation "may encourage antisocial acts and a relaxation of vigilance toward the rights of others by relieving the wrongdoer of liability for his conduct."¹⁶

Louisiana courts will therefore presume that no intent exists to indemnify an indemnitee against losses resulting from his own negligent acts in the absence of unequivocal intention to the contrary.¹⁷ Since the language "any and all claims" is not considered unequivocal under the majority rule of interpretation, the Louisiana courts have used the Civil Code articles governing construction of contracts¹⁸ to determine the intent of the parties.¹⁹

Given this strict interpretation requiring an unequivocal intent to indemnify an indemnitee from his negligent acts, it is not surprising that Louisiana courts have been reluctant to find that the parties entered into such an agreement. In *Polozola III*,²⁰ the Louisiana First Circuit Court of Appeal noted that indemnity agreements fall into three general categories: (1) those that specify that the indemnitor will indemnify the indemnitee from his own negligence;²¹ (2) those that specify that the indemnitor will not indemnify the indemnitee from his own negligence;²² and (3) those that are silent on that issue, but contain other language that might be so construed. As to those agreements in the first category, a court should have no problem finding a clear, unequivocal intent that the indemnitor indemnify for the indemnitee's negligence.²³ The courts are reluctant to do so, however, in instances of category three agreements

Dow's employees. The first circuit dealt with another indemnity agreement between Dow and a second contractor/indemnitor in *Polozola v. Garlock, Inc.*, 376 So. 2d 1009 (La. App. 1st Cir. 1979), writ denied, 379 So. 2d 1103 (La. 1980) (hereinafter "*Polozola III*").

16. *Sovereign Ins. Co. v. Texas Pipe Line Co.*, 488 So. 2d 982, 986 (La. 1986).

17. *Sovereign*, 488 So. 2d at 986, citing *Polozola II*. The *Sovereign* Court also referred to La. Civ. Code art. 1852, which states that a presumption not established by law is left to the discretion of the court.

18. See La. Civ. Code arts. 2045-2057.

19. See, e.g., *Sovereign*, 488 So. 2d at 984-86; *Polozola II*, 343 So. 2d at 1003.

20. 376 So. 2d 1009, 1014 (La. App. 1st Cir. 1979).

21. See, e.g., *Polozola II*, 343 So. 2d at 1003, *Lee v. Allied Chem. Corp.*, 331 So. 2d 608 (La. App. 1st Cir.), writ denied, 337 So. 2d 525 (La. 1976).

22. See, e.g., *Green v. Taca Int'l Airlines*, 304 So. 2d 357 (La. 1974).

23. See *Polozola II*, 343 So. 2d at 1003.

which fail to specifically mention indemnification for the indemnitee's negligence.

While the *Polozola II* rule of strict interpretation requires an unequivocal intent to indemnify an indemnitee from his own negligence,²⁴ it does not require express language stating such an intent. In *Lee v. Allied Chemical Corp.*,²⁵ the court held that "the absence of the words 'negligence of the indemnitees' is evidence of the intent not to cover such negligence."²⁶ However, the court noted, "the real question posed is that of the intent of the parties, and the intent so to cover has been found even in absence of the magic words."²⁷ In *Hyde v. Chevron U.S.A., Inc.*,²⁸ the court agreed that: "Louisiana does not require a specific reference to negligent acts in order for an indemnity agreement . . . to cover claims based on negligent acts. However, the intention of the parties, as inferred from the language of their agreement, must clearly indicate an intention to include negligent acts"²⁹ While *Lee* and *Hyde* indicate that there can be an intent to indemnify for acts of negligence in the absence of "the magic words,"³⁰ relatively few cases have actually imposed such liability.

One such case is *Jennings v. Ralston Purina Co.*,³¹ in which the court found an intent for the indemnitor to indemnify the indemnitee from its own negligence. The indemnity clause provided:

Contractor shall protect, indemnify and hold harmless Company from any loss, damage, liability and expense for all injuries, including death to persons or damage to property directly or

24. See supra text accompanying note 17.

25. 331 So. 2d 608 (La. App. 1st Cir. 1976). In *Lee*, an employee of the indemnitor/contractor was injured by a fall caused by unsafe working conditions. He sued the indemnitee/owner and seven of its employees. These parties sought indemnification from the contractor under a clause purporting to indemnify the owner for damage caused by the owner's own negligence.

26. *Id.* at 611.

27. *Id.*

28. 697 F.2d 614 (5th Cir. 1983). In *Hyde*, an employee of the contractor was injured when he fell on a defectively welded staircase on an oil platform belonging to the operator. At issue was whether a broad form indemnity clause indemnified the operator from its strict liability.

29. *Id.* at 633 (quoting *Battig v. Hartford Accident & Indem. Co.*, 482 F. Supp. 338, 343-44 (W.D. La. 1977), *aff'd*, 608 F.2d 119 (5th Cir. 1979)).

30. The statements in *Lee* and *Hyde* on this issue are dicta. *Lee* dealt with a clause that expressly included indemnity for the indemnitee's negligence, while *Hyde* dealt with indemnification for the indemnitee's strict liability.

31. 201 So. 2d 168 (La. App. 2d Cir.), writ denied, 251 La. 215, 203 So. 2d 554 (1967). *Jennings*, the plaintiff, was an employee of the indemnitor, which was installing a roof on an addition to the indemnitee's loading shed. The roof became wet due to the negligence of the indemnitee's employees in washing down the upper portions of the plant walls. *Jennings* slid off of the roof and was severely injured.

indirectly arising or growing out of the performance of this Contract except loss or damage that is recoverable under Company's fire and extended coverage insurance. Contractor shall hold Company harmless from and shall answer and defend any action instituted against Company for any loss, damage or injury sustained by any person resulting from the performance of this Contract.

Contractor shall carry and maintain such liability insurance as will protect Contractor and Company from claims under any workmen's compensation acts and from any other damages . . . sustained by [anyone] due to the performance of this Contract.³²

The court concluded that the contract revealed a "clearly quoted, specifically stated and thoroughly comprehensive obligation on the part of the [indemnitor] to indemnify [the indemnitee] against *any damage or injury arising out of the performance of the contract*" regardless of any negligence on the part of Ralston, the indemnitee.³³

This decision appears to follow the minority rule;³⁴ however, the court in *Jennings* stated that it had "no quarrel" with the general majority rule of strict construction.³⁵ Indeed, instead of being identified as representative of the minority view, *Jennings* has been distinguished factually on the basis of contract language. According to *Arnold v. Stupp Corp.*, the general language in the first paragraph of the *Jennings* contract ("from any loss") must be considered in light of the specific exclusion "except loss or damage that is recoverable under Company's fire and extended coverage insurance."³⁶ The *Arnold* court also noted the contract clause requiring the contractor to carry insurance to protect both the contractor and the company from workmen's compensation claims and from any other damages. The court took the position that this specific clause excepting damage for which the indemnitee was insured evidenced an intent to indemnify the indemnitee from *all* other causes, including those resulting from the consequences of its own negligence. The fact that the indemnitor was required to carry insurance for workmen's compensation claims and "any other damages" also supported the conclusion that the indemnitor was to be held responsible for the indemnitee's negligence. The *Arnold* court noted: "To hold otherwise would in effect be saying that *Jennings* represents a conscious departure from the majority view"³⁷

32. Id. at 174.

33. Id. at 175.

34. See supra text accompanying note 7.

35. *Jennings*, 201 So. 2d at 175.

36. 205 So. 2d 797, 803 (La. App. 1st Cir. 1967).

37. Id.

In *Polozola III*,³⁸ the court again looked to the intent of the parties rather than the mere presence of a specific reference to the indemnitee's negligence. The court cited *Jennings*, and then concluded that "each agreement must be interpreted according to its intended meaning, and that the absence of a specific reference to the indemnitee's 'negligence' is not decisive either way."³⁹

Asserting four reasons in support of its conclusion, the court in *Polozola III* held that the parties intended for the indemnitor to indemnify from the consequences of the indemnitee's own negligence. First, the language of the indemnity clause was broad and general. The indemnitor agreed to indemnify "from and against *any and all claims and causes of action* and all losses therefrom, arising out of or in any way related to the performance" by the indemnitor under the contract, "including without limitation" any claims for personal injury made by the indemnitor's employees.⁴⁰ The contract proceeded to state that the duty to indemnify extended to "any and all claims made against [the indemnitee] by any employees of [the indemnitor] . . . arising from any source."⁴¹ The court found the language of the Dow-Weise indemnity clause to be "if anything, broader than" the *Jennings* clause.⁴² As for the cases holding these clauses not to include indemnification from the indemnitee's own negligence, the court stated that the present agreement was "certainly distinguishable."⁴³

38. 376 So. 2d 1009 (La. App. 1st Cir. 1979). *Polozola*, employed by the contractor/indemnitor, suffered severe injuries while performing work at a plant owned by Dow, the indemnitee. The court found that the accident occurred due to the failure of three Dow employees to equip a pipeline with a proper safety pressure release mechanism. The indemnity clause provided:

Contractor agrees to indemnify and hold harmless Dow, its officers and employees, from and against any and all claims and causes of action and all losses therefrom, arising out of or in any way related to the performance by Contractor or any sub-contractor of Contractor of services hereunder, including without limitation any such claims for personal injury or death or property damage or destruction urged by employees of Dow, employees of Contractor, any sub-contractor, and employees of any sub-contractor of Contractor, or all third parties whomsoever. This indemnity obligation of Contractor shall further extend to and include any and all claims made against Dow by any employees of Contractor or any sub-contractor or any employee of any sub-contractor, arising from any source while any such party is on premises owned, operated, leased or controlled by Dow.

Id. at 1014.

39. *Id.* at 1014-15.

40. *Id.* at 1015.

41. *Id.*

42. *Id.*

43. *Id.* The distinguishable cases cited were the following: *Gorsalitz v. Olin Mathieson Chem. Corp.*, 429 F. 2d 1033 (5th Cir. 1970); *Breaux v. Rimmer & Garrett, Inc.*, 320 So. 2d 214 (La. App. 3d Cir. 1975); *Arnold v. Stupp Corp.*, 205 So. 2d 797 (La. App. 1st Cir. 1967).

Second, the court noted that other portions of the agreement indicated an intent to indemnify the indemnitee from its own negligence.⁴⁴ The indemnitor was bound to acquire certain insurance policies that would cover its indemnity obligations. The *Jennings* court found that a similar clause indicated an intent for the indemnitor to protect against the indemnitee's negligence.⁴⁵ Also, under the contract, the insurance underwriters of the contractor were required to waive "subrogation against [the indemnitee] and its underwriters."⁴⁶ The court concluded that this phrase was senseless unless the parties intended that the indemnitor bear the consequences of the indemnitee's negligence.⁴⁷

The third reason was that the indemnitee had another contract with a second maintenance company that specifically included indemnification for the indemnitee's negligence.⁴⁸ The indemnitee paid both contractors the same percentage over wages to cover overhead, insurance, and profit. The court felt that this indicated an intent to indemnify the indemnitee from its own negligence because if no such intent were present, the indemnitee certainly would not have paid an identical percentage to two contractors assuming "decidedly different risks."⁴⁹

Fourth, the court stated that the contract involved sophisticated parties who could have easily written a contract that clearly excluded indemnification from the owner's negligence. In fact, the court noted that the indemnitor had such a contract with another large chemical corporation.⁵⁰

The court concluded that "Weise and Dow agreed that Weise would indemnify Dow in the circumstances which prevailed in the instant case. The purpose of the indemnity agreement, considered as a whole, was to make Weise liable for matters within its orbit of responsibility."⁵¹

Under current Louisiana jurisprudence, a clear unequivocal intent is required before a court will enforce an indemnity agreement purporting to indemnify the indemnitee from his own acts of negligence.⁵² However, as the *Jennings v. Ralston Purina Co.* and *Polozola III* decisions indicate,

44. The court examined other provisions of the agreement on the authority of La. Civ. Code art. 1955 (1870).

45. *Polozola III*, 376 So. 2d at 1015.

46. *Id.*

47. *Id.*

48. Dow had a contract with National Maintenance Corporation for similar work. This contract was the subject of the other two *Polozola* decisions. See *supra* note 15.

49. *Polozola III*, 376 So. 2d at 1016.

50. *Id.* The court noted a contract between the indemnitor and Shell Chemical Corporation for work in the same general area, citing *Pearson v. Hartford Accident & Indem. Co.*, 345 So. 2d 123 (La. App. 1st Cir.), writ denied, 347 So. 2d 255-56 (La. 1977).

51. *Polozola III*, 376 So. 2d at 1016.

52. *Arnold v. Stupp Corp.*, 205 So. 2d 797, 799-803 (La. App. 1st Cir. 1967).

“unequivocal” does not necessarily require express reference to negligence of the indemnitee. The courts have been reluctant, nevertheless, to imply an intent to indemnify an indemnitee from its own negligence in the absence of express language. Policy considerations dictate that the general words “any and all liability” alone are insufficient to support such an intent.

In the absence of express language, an attorney should point out other language and facts that evidence the required unequivocal intent. *Jennings* and *Polozola III* best exemplify this technique. If, as in *Polozola III*, the clause includes several broad, inclusive phrases besides the “any and all claims” language, it can be argued that the requisite intent is present. Also, if the contract requires the indemnitor to carry insurance for the benefit of the indemnitee, an intent to indemnify from the indemnitee’s own negligence may be implied.

The argument that the parties “should have known how to write, and could have written, a contract which would have specifically excluded coverage by [indemnitor] of the consequences of [indemnitee’s] negligence”⁵³ is not persuasive. A contract to specifically include coverage could have been formed just as easily.

Certain indemnity agreements have been legislatively declared null and void, and against the public policy of the state.⁵⁴ The legislature, however, has given no indication of its attitude towards other indemnity agreements. Indeed, indemnification from one’s own acts of negligence is anything but disfavored. As the court noted in *Jennings*: “To hold that a party cannot protect itself through indemnification or insurance against liability for its own negligent acts would . . . do violence to well established authority”⁵⁵ Indemnification from one’s own acts of negligence forms the underlying basis of the entire insurance industry. Certainly it is understandable that an owner would want a contractor to agree to bear the risk of matters within its orbit of responsibility and control.

Indemnification From One’s Own Strict Liability

Recently, the Louisiana Supreme Court discussed indemnification from one’s own strict liability. *Sovereign Insurance Co. v. Texas Pipeline*

53. *Polozola III*, 376 So. 2d at 1016.

54. La. R.S. 9:2780 (Supp. 1987). Louisiana’s anti-indemnity statute was passed in the summer of 1981 and became effective on September 11, 1981. The statute declares many typical indemnity agreements in contracts for oil and gas exploration void as against public policy. The provisions of the statute may potentially affect other cases.

55. *Jennings v. Ralston Purina Co.*, 201 So. 2d 168, 175 (La. App. 2d Cir. 1967).

Co.⁵⁶ involved a contract between Texas Pipeline Company (Pipeline) and Atlas Construction Company, Inc. (Atlas). Pipeline had leased a tract of land with the intent of operating a crude oil storage facility. Atlas contracted to construct three storage tank foundations. After construction had begun, a roadbed on the leased premises collapsed, destroying a sub-contractor's cement truck. The district court held Pipeline strictly liable under Civil Code article 2317, but rejected its claim for indemnification under the contract. In an evenly divided *en banc* decision, the first circuit affirmed.⁵⁷ The plurality opinion reasoned that the rule of strict construction set out in *Polozola II* applied to indemnification from the indemnitee's strict liability as well as its negligence.⁵⁸ The supreme court reversed,⁵⁹ stating that the lower court had misinterpreted the *Polozola II* rule, which "does not apply to the question of whether the parties intended to indemnify against the indemnitee's strict liability under Civil Code article 2317."⁶⁰

Noting the absence of express contractual language granting indemnification from strict liability, the court applied the general rules of contract interpretation⁶¹ to determine the intent of the parties. Focusing on the phrase "each and every claim, demand or cause of action and any liability," the court concluded that the parties intended that Pipeline be indemnified from its strict liability arising under Civil Code article 2317.⁶²

In support of its conclusion, the court pointed out other contractual provisions in which the indemnitor represented that it had inspected the

56. 488 So. 2d 982 (La. 1986). The indemnity clause provided:

"Contractor [Atlas] shall fully defend, protect, indemnify and hold harmless the Company [Texas], its employees and agents from and against each and every claim, demand or cause of action and any liability, cost, expense (including but not limited to reasonable attorney's fees and expenses incurred in defense of the Company), damage or loss in connection therewith, which may be made or asserted by Contractor, Contractor's employees or agents, subcontractors, or any third parties, (including but not limited to Company's agents, servants or employees) on account of personal injury or death or property damage caused by, arising out of, or in any way incidental to, or in connection with the performance of the work hereunder, whether or not Company may have jointly caused or contributed to, by its own negligence, any such claim, demand, cause of action, liability, cost, expense, damage or loss, except as may result solely from the Company's negligence."

Id. at 983.

57. *Soverign Ins. Co. v. Texas Pipeline Co.*, 470 So. 2d 969 (La. App. 1st Cir. 1985).

58. *Soverign*, 470 So. 2d at 973-74.

59. *Soverign*, 488 So. 2d at 986 (Lemmon, J., dissenting).

60. Id. at 983.

61. The court referred to La. Civ. Code arts. 1903, 1945, 1949, 1950, 1955, 1956, 1959, 1962, 1965 (1870) and La. Civ. Code arts. 13, 2045, 2046, 2050-2052, and 2055.

62. *Soverign*, 488 So. 2d at 985.

premises and promised to take any measures necessary to prevent injury to person or property. Also, the contract expressly excluded indemnification from claims resulting from the indemnitee's sole negligence. "Considering the contract as a whole, it is clear that the parties adverted to the possibility of claims, causes of actions and judgments based upon strict liability for damage caused by premises hazards or defects."⁶³

While the court focused on the intent of the parties when interpreting the general language, the analysis differed significantly from that in a negligence situation. When strict liability is the issue, if the intent of the parties is not apparent after applying the general rules of interpretation, the court may then interpret the contract in light of everything that is considered by law, custom, usages, or equity as incidental or necessary to the contract.⁶⁴ These elements "may be shown for the purpose not only of elucidating [the contract], but also of completing it."⁶⁵ "When there is doubt as to indemnification against an indemnitee's own negligence liability, however, usage, custom or equity may not be used to interpret a contract expansively in favor of the indemnitee."⁶⁶ This results from the *Polozola II* presumption: "[I]f the intention to indemnify against an indemnitee's liability for his negligence is equivocal, this court has established a presumption that the parties did not intend to indemnify an indemnitee against losses resulting from his own negligent act."⁶⁷

Logically, this distinction between situations of negligence and strict liability is justifiable. The equity concerns that led to the *Polozola II* presumption are absent where strict liability is at issue. For claims arising under Civil Code article 2317,⁶⁸ the indemnitor usually possesses pertinent knowledge equal to the indemnitee. A contractor working daily on the premises may, in fact, occupy a better position than the landowner to discover the risk.⁶⁹ Additionally, indemnifying a party from liability for dangerous things in his custody will not lead to the same "relaxation

63. Id.

64. Id.

65. Id. (citing *Southern Bitulithic Co. v. Algiers Ry. & Lighting Co.*, 130 La. 830, 58 So. 588 (1912)).

66. *Soverign*, 488 So. 2d at 985.

67. Id. at 985-86.

68. La. Civ. Code art. 2317 provides in pertinent part: "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody."

69. The court in *Hyde v. Chevron U.S.A., Inc.*, 697 F.2d 614, 633 (5th Cir. 1983), recognized this possibility: "There is no public policy against [making the drilling contractors, rather than the operators, responsible for damage claims by workers], for the contractors in control of the platforms are in the best position to prevent injuries to their crews."

of vigilance toward the rights of others"⁷⁰ as would indemnify for his negligent acts. Since strict liability is not based on culpability, the burden assumed by the indemnitor is much less troublesome than it would be if he were assuming responsibility for the indemnitee's negligence.

Although the *Sovereign* court does not specifically so hold, one may reach the reasonable conclusion that the general language "any and all claims" will be held to evidence an intent to indemnify the indemnitee from his strict liability. In a decision preceding *Sovereign*, the United States Fifth Circuit Court of Appeals held that such language indicated "a clear intention" to indemnify the indemnitee from any claims based on its strict liability.⁷¹ While it is conceivable that a court could read such general language, and, in light of "law, custom, usages, or equity," fail to find an intent to indemnify an indemnitee from strict liability, such a result seems unlikely.

Conclusion

The *Sovereign* court made a commendable effort to clarify the rules of judicial interpretation of indemnity clauses in those cases involving negligence and those involving strict liability. When a party claims indemnification from its negligent acts, the contract must contain evidence of a clear, unequivocal consent by the parties to such an agreement. While express language is not required, mere general terms like "any and all claims" are not sufficient to prove such intent.

The *Polozola II* rule dictates that when indemnification from one's own negligence is claimed, the contract must be strictly construed. However, when indemnification from one's strict liability is claimed, the court will look beyond the contract. This more liberal standard reflects the difference in equitable considerations arising under negligence and under strict liability. If, in the light of "law, custom, usages, or equity," general language indicates a common intention to indemnify against the indemnitee's strict liability, relief will be granted to the indemnitee.

In theory, these interpretative rules are sound; in practice, however, problems arise. Louisiana courts have been very reluctant to find anything less than express language to be an indication of an intent to indemnify the indemnitee from his own negligence. A careful reading of cases like *Polozola III* and *Jennings* reveals that the courts have relied on more than just general language and that only in exceptional situations is express language not needed to find an "unequivocal" intent. However, this has not discouraged the owner/indemnitee from seeking indemnification under a clause containing the general "any and

70. *Sovereign*, 488 So. 2d at 986.

71. *Hyde*, 697 F.2d at 633-35.

all claims" language. Thus, the result has been a mass of litigation involving apparently similar indemnity clauses, producing quite dissimilar results.

Extensive litigation can be foreseen in light of the *Sovereign* decision. The contractor/indemnitor will argue that, given the "law, custom, usages, or equity," the general language of the indemnity clause at issue does not evidence an intent to indemnify the indemnitee from his strict liability. Due to the sheer number of these clauses in existence, it is very likely that eventually a court will be faced with a set of facts under which such an argument could prevail.

Narrow exceptions serve the purpose of allowing courts to deviate from the general interpretation in exceptional cases, but not without a cost. Every time personal injury, death, or property damage occurs as a result of the work performed under a contract with an indemnity clause containing general language, a potential source of litigation arises. In the case of negligence, a steadfast rule, requiring express contractual reference to the indemnitee's negligence before relief is granted, should be imposed.⁷² Conversely, the broad general language "any and all claims" should be conclusive evidence of an intent to indemnify the indemnitee from his strict liability. Adoption of these rigid rules would have the effect of clarifying the relationship between the parties and putting an end to much of the litigation in this area. These rules may initially seem harsh; however, once the law is settled sophisticated parties will adapt. Contractors and landowners will be forced to recognize these issues and decide them in advance by clearly expressing their intent in the contract.

In the absence of such reform, the prudent attorney would be wise to address these issues when drafting indemnity agreements. A simple statement in the contract expressing the parties' intent to indemnify the indemnitee from his negligence and strict liability can prevent needless future litigation.

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72. This result may be obtained in two ways: judicial interpretation and legislation. A wide range of anti-indemnification statutes have been passed throughout the country. For a complete summary of their contents and effects, see 3 S. Stein, *Construction Law* ¶ 13.17, at 13-128 to 13-143 (1986).

