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Rights and Liabilities for Personal Injuries on the Well Site

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Introduction. This paper considers three basic areas of law which may become involved when a person suffers a physical injury on an oil or gas well site. The first area considers the basic tort liabilities and defenses which may arise. But parties involved in the drilling and operating end of the oil and gas business frequently carry liability insurance to protect against tort claims. The second portion of this paper therefore considers issues which may arise relating to insurance coverage of claims. Finally, usually the direct employer of the injured person is immune from tort liability and the employee's remedy is limited to workers' compensation. That is the last major topic.

This paper presents only an overview of a number of important issues which may arise in the personal injury claim or lawsuit. The potential tort, insurance, and workers' compensation laws which may apply in any given case arise from such extensive, well-developed bodies of law that this paper should be viewed as stating general principles only. Accordingly, when analyzing the issues involved in an actual claim or lawsuit, primary legal sources should be consulted and relied on.

PART I: TORT LIABILITY

I. TORT LIABILITY DEFINED.

Tort liability is generally defined as a liability imposed by law for causing injury to or death of another person or damage to or destruction of another's property. Tort law is often contrasted to contract law. Contractual liability arises out of a duty which one has agreed to assume, either expressly or by implication either arising from conduct indicating the existence of an agreement, or from some relation or dealing between the parties which the law finds sufficient to assume agreement existed. In contrast, tort liability is imposed

by law, in the absence of any specific agreement by the defendant to be liable. Part of this topic, however, considers the effect of one party's agreeing to be responsible for another party's tort liability under an indemnity contract or similar agreement.

For nonlawyers reviewing this paper, a "tortfeasor" is a party who commits, or at least is legally responsible for, an act which causes an injury giving rise to a tort liability. An injured party who files a lawsuit becomes a "plaintiff" and the tortfeasor becomes the "defendant."

II. INTENTIONAL TORTS.

A. General.

An intentional tort is a liability imposed by law for an act which the tortfeasor intended to do. For tort law purposes, the actor "intends" the consequences of his act if either his goal is to bring about the consequence or there is a substantial certainty that these consequences will result from his intended act.

Common intentional torts include assault, battery, trespass to land, and trespass to chattels (tangible personal property). The important point is that the legal meaning of "intent" includes simply an intent to do the act and is not limited to an intent to cause the harm.

B. Agency Issues.

This topic is discussed in detail in the "negligence" section of this paper. For present purposes, it is important to understand that a person who is legally liable for another person's conduct, such as an employer or principal in a principal-agent relationship, can be liable even for the employee's or agent's intentional torts if the intentional tort in some way related to or arose out of the employer's or principal's business. The key point is that the employer or principal did not have to authorize, order, or even know the intentional tort

was being committed if it arose out of the pursuit of the business.

For example, if a fight broke out on a well site, an employer or principal could be liable for the employee's or agent's beating up or killing another well hand or the land owner if the cause of the problem or altercation was connected with the well site operations. In perhaps the most extreme example of how truly far-reaching this principle can extend, a court held a delivery service liable to a female customer who was raped by a delivery man. When the delivery man showed up to deliver furniture, a dispute arose between the delivery man and the customer over whether he was required to haul the furniture upstairs or only deliver it to the front door. The argument became heated, turned violent, and the delivery man raped the customer. There was no claim that the employer in any way authorized, instructed, or even should have foreseen the rape because of the delivery man's past history. Nevertheless, the employer was held civilly liable to the customer for the rape (a form of the intentional tort of battery). Lyon v. Carey, 533 F.2d 649 (D.C. Cir. 1976).

III. NEGLIGENCE.

A. Definition.

A plaintiff's prima facie case for negligence requires proving (a) a duty of the defendant to conform to a specific standard of conduct to protect the plaintiff against an unreasonable risk of injury; (b) the defendant's breach of that duty; (c) that the breach of the duty was the actual and proximate cause of the injury; and (d) damage as a result of the breach of that duty.

In a negligence case, the general duty of the defendant is to act as a reasonable, ordinary, prudent person would under the same or similar circumstances. If the defendant is engaged in some profession requiring special skills or knowledge (such as drilling a gas well or practicing medicine), then the defendant's conduct is measured against the actions

of a reasonable person practicing that profession or performing that specialized job.

B. To Whom Is the Duty Owed?

A duty of care generally is owed only to reasonably foreseeable plaintiffs. It is not necessary, however, that the defendant foresee harm to the specific plaintiff or even know that the plaintiff existed at the time of the act if injury to a person in the plaintiff's situation was reasonably foreseeable. For example, incorrectly performed seismic testing proximately causing a worsening of ground water quality potentially could allow any landowner affected by the change in water quality to maintain a lawsuit, even if that landowner did not own the land on which the seismic testing was done and even if the defendant did not know that particular plaintiff existed.

C. Rules Relating to Owners and Occupiers of Land.

If someone else, such as a gas well operator drilling pursuant to the lease, is lawfully occupying the owner's land, the duty of care to avoid injury to others is placed upon that occupant. Arkansas maintains the distinction between trespassers, licensees, and invitees and the duty owed to each.

1. Trespassers.

Under Arkansas law, an owner, lessee, or occupant of property owes a trespasser no duty until the trespasser's presence on the premises is known. Once the trespasser's presence is known, the owner or occupant owes the trespasser only a duty not to cause him injury by willful or wanton conduct. Ark. Code Ann. § 18-60-108.

An exception to this rule exists for child trespassers under the "attractive nuisance doctrine." The landowner or occupant has the duty to exercise ordinary care to avoid reasonably foreseeable risk of harm to children caused by artificial conditions on the

property. The "attractive nuisance" doctrine involves cases in which the owner or occupier of the land knows or should know that young persons frequent the vicinity of the dangerous condition, that the condition or activity is likely to attract a child's interest or attention, and that the condition is likely to cause injury, particularly because of the child's inability to appreciate the risk. It is easy to conceive of a court declaring drilling operations to be an attractive nuisance and to find the operator or the various companies involved in drilling activities liable for injury to a child under the "attractive nuisance doctrine."

2. Licensees.

A licensee is a person on the land, with the owner or occupier's express or implied permission, for the licensee's personal benefit and not the owner or occupier's benefit. For example, a traveling salesman who is on the property for the purpose of attempting a sale is a licensee if he or she is there with the owner or occupier's permission.

The owner or occupier owes the licensee no duty until the licensee's presence is known; then the owner or occupier owes the licensee a duty not to cause injury by willful or wanton conduct, but if the licensee is in a position of danger, the owner or occupier must use ordinary care to avoid injuring the licensee.

3. Invitees.

An invitee is one who is on the premises for a purpose connected with the owner or occupant's business or for a purpose connected with an activity from which the owner or occupant expects to receive a benefit. For example, all of the subcontractors hired by an oil or gas well operator on the premises pursuant to a lease ordinarily would be invitees.

A defendant owes an invitee a duty to use ordinary care to maintain the premises in a reasonably safe condition or to otherwise use ordinary care for the invitee's safety.

4. States Other Than Arkansas.

A number of states have abolished the trespass/licensee/invitee distinctions and hold that the owner or occupier owes everyone on the premises a duty of ordinary care to refrain from causing injury. Arkansas, as noted, still maintains the three-part distinction.

5. The General Rules as Applied and Refined in Specific Cases.

(a) Unsafe Condition of the Premises.

The operator can have a duty either to keep the premises safe for employees of the subcontractors or to warn of dangerous conditions. For example, in Sun Oil Co. v. Massey, 594 S.W.2d 125 (Tex. Civ. App. 1979) writ ref'd n.r.e. [writ for further appeal refused on the basis that the intermediate appellate decision contained no reversible error], an employee of an independent contractor reworking an oil well was electrocuted. He was killed when a guy wire came into contact with a power line. The jury found that in the process of reworking the well Sun Oil had created a dangerous condition which it knew or should have known about and, accordingly, that Sun Oil failed to make the premises reasonably safe for the subcontractor's employee. The Texas Court of Appeals affirmed a jury verdict for the plaintiff, holding that Sun had a legal duty to protect the subcontractor's employee by taking the reasonably available steps of either relocating the lines or shutting off the power.

Liability for "failure to warn" was imposed in Gutierrez v. Exxon Corp., 764 F.2d 399 (5th Cir. 1985). In that case, Exxon hired Johnson Tool Company to cut and cap an abandoned well. The subcontractor used a "window technique" which caused a tremendous downward pressure by the inner casing on the outer casing. The plaintiff, an employee of Johnson Tool, was cutting the inner casing when the outer casing collapsed from the weight and injured the plaintiff. The jury concluded that Exxon knew that the outer casing could not support the inner casing after the "windows" were cut. The appellate court affirmed,

ruling that Exxon had a duty to warn of dangerous conditions that it knew or should have known existed if the danger was not reasonably apparent to persons such as Johnson Tool and its employees.

Gutierrez is interesting because the court treated it as a "premises defect" case although the premises, specifically the gas well, were not in a dangerous condition until the subcontractor began its welding and cutting operations. Nevertheless, because the "window technique" had been used on approximately 200 Exxon wells, the court concluded that Exxon should have been aware of the danger the technique created.

(b) Dangerous Conditions Arising Out of the Work Performed by an Independent Contractor.

In general, the duty to furnish a safe place to work or to protect trespassers/licensees/invitees from harm is qualified by the rule that one who engages an independent contractor to do the work is not liable for hazards that arise out of or are incidental to the work which the independent contractor was hired to perform.

(1) Arkansas Cases.

In Arkansas it is a firmly-established rule that a defendant is not liable for the torts of an independent contractor. As the Arkansas Supreme Court expressly declared:

> An employer of an independent contractor is not liable for the independent contractor's torts which are committed in the performance of the contracted work.

Blankenship v. Overholt, 301 Ark. 476, 478, 786 S.W.2d 814, 815 (1990).

The court in Blankenship considered the varied factors that are considered in determining whether a tortfeasor is an independent contractor or a servant/employee. These include the extent of control which, by the agreement, the master may impose over the details of the work; whether the one employed is engaged in a distinct occupation or

business; the kind of occupation; the skill required; the identity of the person furnishing the instruments, tools, and place of work; the length of time for which the person is employed; the method of payment; whether or not the work is part of the regular business of the employer; whether the parties believe they are creating a master-servant or independent contractor relationship; and whether the principal is engaged in business. Of all these factors, the extent of control is the principal factor in defining the relationship. Id. at 479, 786 S.W.2d at 815. The court in Blankenship then summarized the rule:

> By a long line of decisions this court is committed to the universal rule, that where the contractor is to produce a certain result, according to specific and definite contractual directions, agreed upon and made a part of the contract, and the duty of the contractor is to produce the net result by means and methods of his own choice, and the owner is not concerned with the physical conduct of either the contractor or his employees, then the contract does not create the relation of master and servant. This court has consistently accepted and stated the settled rule that even though control and direction be retained by the owner, the relation of master and servant is not thereby created unless such control and direction relate to the physical conduct of the contractor in the performance of the work with respect to the details thereof.

Id. at 479-80, 786 S.W.2d at 816.

The rule is perhaps most succinctly stated in the Arkansas Model Instruction on this point:

> An independent contractor is one who, in the course of his independent occupation, is responsible for the performance of certain work, uses his own methods to accomplish it, and is subject to the control of the employer only as to the result of his work.

AMI 707.

In Blankenship, the court reviewed the facts and concluded that the employer "was not concerned with the physical conduct of the contractor. Instead, he was concerned with the result." Id. at 480, 786 S.W.2d at 816. This meant that the defendant-employer was not liable for the plaintiff's damages. Even the fact that the employer specified that a certain type of bracing would be employed in doing that particular work was not sufficient,

because that was not supervision of the work but rather a specification of the result to be obtained. Accordingly, the Arkansas Supreme Court reversed the verdict against the master and dismissed him from the case.

Some Arkansas authority indicates that the general contractor's retaining of the right to monitor the progress of the drilling project is not dispositive. The rationale is that anybody who hires an independent contractor may and should retain the right to approve the work performed. As a federal district court applying Arkansas law has held, "The right to approve or reject the result of the work does not destroy the independent contractor relationship." Wright v. Newman, 539 F. Supp. 1331, 1338-39 (W.D. Ark. 1982).

(2) Texas Cases.

Texas, unlike Arkansas, has produced a number of reported decisions involving personal injuries in oil and gas operations. Many of these decisions deal with the varying duties of different parties involved in the operation when the injury or death occurred. In Texas, earlier cases suggested that the operator has no duty to warn or protect a subcontractor from dangerous conditions created by the subcontractor. For example, in Abalos v. Oil Development Co. of Texas, 544 S.W.2d 627 (Tex. 1976), the plaintiff sued the defendant for injuries sustained while working on the defendant's lease in the employ of an independent contractor. The facts indicate that an employee of the defendant was aware of the danger created by the subcontractor's acts but did not take any immediate action. The plaintiff was caught and severely injured in the dangerous machinery. The subcontractor's employee sued the operator on the theory that the operator's employee owed a duty to warn the plaintiff or to stop the pump. The Texas Supreme Court affirmed a defendant's motion for instructed verdict, concluding:

> [W]here the activity is conducted by, and is under the control of, an independent contractor, and where the danger arises out of the activity staff, the responsibility or duty is that of the independent contractor, and not that of the owner of the

premises.

Id. at 631. Significantly, the defendant's employee had not merely noticed the danger but had assisted the subcontractor by starting the pump which caused the injury. Nevertheless, the operator was relieved of liability because the plaintiff's employer, who was the operator's subcontractor, maintained direction and control of the entire activity which caused the injury.

The operator was found liable in Remuda Oil & Gas Co. v. Nobles, 613 S.W.2d 312 (Tex. Civ. App. 1981) no writ. In that case, Remuda hired Nobles to flow back an oil well. During the course of performing the work, Nobles was struck by an unsecured flow line. Significantly, Nobles told a Remuda representative that the method being used was dangerous and the Remuda supervisor told Nobles to use the procedure, despite Nobles' misgivings. In this case, the court disregarded the general rule shielding the employer of an independent contractor from liability and held that the operator was liable. The rationale was that the activity which injured the plaintiff was performed pursuant to procedures specifically mandated or required by the operator. Furthermore, the operator's employee on the site told the other contractors on the site that he (as the operator's representative) was "in charge." The court reasoned that the operator should be held liable because it actively interfered with the contractor's work.

An interesting case representing some sort of a mid-point between Abalos and Remuda is Tanner v. B D & K Production Co., 671 S.W.2d 941 (Tex. App. 1984) no writ. In that case, the court held that the operator's employee had not become so involved in the subcontractor's work as to impose liability on the operator even though the operator's employee specifically instructed the B D & K tool pusher to "hurry up." The court concluded that simply trying to keep things on schedule was not sufficient interference with the subcontractor's work so as to make the operator responsible for the injury.

If interference with the contractor can make the operator liable, then "joint control"

over the operation or a portion of the operation also can make the operator liable. In Shell Oil Co. v. Waxler, 652 S.W.2d 454 (Tex. App. 1983) writ ref'd n.r.e., a near-stampede of employees at a large refinery trying to leave work through a narrow gate injured the plaintiff, who was an employee of an independent contractor doing construction work at a refinery. The court concluded that both the project owner and the contractor were jointly liable in part because Shell employed a safety representative to insure that Shell's contractors were performing their jobs safely. In addition, Shell's security guards were responsible for opening and closing the gate where the plaintiff was injured. The court could have affirmed the verdict for the injured worker simply on the ground that Shell maintained actual physical control over the gate. The court went beyond that rationale, however, noting that Shell had a safety representative whose job included insuring that the contractors performed their duties safely.

The court seemed to extend the decision in Waxler by finding an affirmative duty on the part of the operator to interfere with the subcontractors in Tovar v. Amarillo Oil Co., 692 S.W.2d 469 (Tex. 1985). In that case, the court found that the operator knew of the subcontractor's deviation from standard procedures and knew the deviation could be dangerous, but did not interfere with the work of the contractor. The contract between the operator and the subcontractor, however, gave the operator the right to shut down the operation in the event of carelessness, inattention, or incompetency by the subcontractor. The court concluded that this right to shut down the operation, coupled with the operator's knowledge of the danger, amounted to a duty to exercise reasonable care in supervising the activity and protecting subcontractors' employees on the job site.

Supervising safety was even taken to a greater extent in Exxon Corp. v. Roberts, 724 S.W.2d 863 (Tex. App. 1986) writ ref'd n.r.e. In that case, two independent contractors were working on an Exxon lease to raise some casing tools from the ground to the rig floor. An employee of one of the contractors was killed. The court concluded that Exxon was liable

under the facts because Exxon exercised control over the procedures used and, further, did not hold a safety meeting and did not require the injured employee's contractor to hold a safety meeting. The court specifically held that "the absence of a rule requiring such meetings could be negligence and proximate cause in a case of this type." Id. at 868.

The operator is not always liable in Texas, however. In Shell Oil Co. v. Songer, 710 S.W.2d 615 (Tex. App. 1986) writ ref'd n.r.e., Shell hired electricians as independent contractors. One of the subcontractor's employees received a severe electrical shock. On appeal, the court reversed an assignment of 50 percent of the negligence to Shell. The court concluded that the electrical work being done was a specialized activity and that the plaintiff's employer (the subcontractor) was in a superior position to oversee the work and eliminate the dangerous condition. Thus, if the dangerous condition is in a sufficiently specialized area and the operator makes no attempt to control the work being done in that area, then the operator may still be found not liable.

The overall impact of these decisions seems to be to set up a rule where the operator is in a better legal position not to concern itself with safety considerations. Although Songer did still recognize an operator's nonliability, the cases holding the operator liable are troubling. The message of the Texas opinions, taken as a whole, seems to be that the operator can best protect itself by making no safety requirements, not involving itself in the subcontracted activities, and not concerning itself with the safety of its subcontractors at all. The more involved the operator becomes in safety considerations, the more likely the operator is to be found liable to an injured employee on the ground that it exercised joint control over the subcontracted work.

It should be the policy of the law to encourage activities which will reduce the number of deaths and injuries, not simply add to the list of defendants who can be sued when an accident occurs. Unfortunately, in Texas an operator who is overly concerned with the safety of the subcontractor's employees seems to be exposing itself to greater, not

less, liability.

IV. STRICT LIABILITY.

A. Liability Issues.

Strict liability exists in Arkansas by statute. In Arkansas, a "supplier" of a product is subject to liability for harm to a person or property if (1) the supplier is engaged in the business of "manufacturing, assembling, selling, leasing, or otherwise distributing" the product, (2) the product is in a defective condition which renders it unreasonably dangerous, and (3) the defective condition is a proximate cause of the injury. Thus, if an injury is caused either by a defectively designed or manufactured piece of equipment or by a defective installation of equipment, then the "supplier" of the product, which could include anybody involved in distributing the product from the original manufacturer to the subcontractor who "supplies" the product at the well site, can be found liable.

The definition of "supplier" is decidedly broad. The author of this paper has been involved in or is aware of several severe injury lawsuits which involved an allegedly malfunctioning piece of drilling or production equipment. In each case, virtually every person or company (other than the plaintiff's employer) who had anything to do with the allegedly defective equipment was sued as a "supplier."

The product must be supplied in a "defective condition," which is defined by statute as meaning "a condition of a product that renders it unsafe for reasonably foreseeable use and consumption." Note that under this definition the use does not have to be that which was intended by the supplier, only that use which was "reasonably foreseeable." Thus, a manufacturer or supplier of a product has a duty under Arkansas law to guard against dangers which not only are inherent in the product's intended use but which also may arise from any "reasonably foreseeable" use, whether the product is intended to be used that way or not.

The definition of "unreasonably dangerous" also is important. Under the statute, to be "unreasonably dangerous" a product must be

> dangerous to an extent beyond that which would be contemplated by the ordinary and reasonable buyer, consumer or user who acquires or uses such product, assuming the ordinary knowledge of the community, or of similar buyers, users or consumers, as to its characteristics, propensities, risks, dangers and proper and improper uses, as well as any special knowledge, training or experience possessed by the particular buyer, user or consumer or which he or she was required to possess. However, as to a minor, "unreasonably dangerous" means that a product is dangerous to an extent beyond that which would be contemplated by an ordinary and reasonably careful minor considering his age and intelligence.

Significantly, this definition recognizes that some products are intended to be used in specialized settings and operated by people with specialized knowledge. Thus, products which are used in connection with the drilling and producing of an oil or gas well must be evaluated not by the standard of whether they would be dangerous to the ordinary person but whether they are unreasonably dangerous to those well-site workers under their knowledge, training, experience, and reasonable contemplation.

B. Defenses.

The Arkansas Product Liability Act provides a number of statutory defenses. These include:

1. A three-year statute of limitations from the date on which the death, injury, or damage occurred. If the injured person is a minor, then the statute of limitations does not begin to run until that person reaches the age of majority or otherwise has their disability removed.

2. Compliance with any federal or state statute or administrative regulation existing at the time the product was manufactured which prescribes standards of design, inspection, testing, manufacture, labeling, warning, or instructions for use "shall be considered as evidence that a product is not in an unreasonably dangerous condition"

insofar as the claims of defect were covered by the standards. Note that this is not an "absolute" defense, but merely a statement that this type of evidence "shall be considered as evidence."

3. Supplying a product after its anticipated life may be considered a defense by the manufacturer as between the manufacturer and supplier if the product is supplied after the expiration date placed on the product by the manufacturer as required by law. (In practical terms, this defense would have little application to oil and gas well site injuries, because the "expiration date" required by law usually applies only to food and drugs.")

4. Use of a product beyond its anticipated life by a consumer when the consumer knew or should have known the anticipated life of the product. Again, this is not an absolute defense but merely one which "may be considered as evidence of fault on the part of the consumer."

5. The jury may also consider the state of scientific and technical knowledge available to the manufacturer or supplier at the time the product was placed on the market, rather than at the time of injury. This again is not an "absolute" defense, but merely recognizes the kind of evidence which may be placed before the jury. This defense does not apply to actions based on express warranties or misrepresentation regarding the product. The rationale obviously is that a defendant should not be able to maintain that a certain design or manufacturing feature was technically impossible at the time the product was manufactured if the defendant was expressly stating that the safety feature existed on the particular product at issue.

6. If a product was not unreasonably dangerous at the time it left the control of the manufacturer or supplier, but was made unreasonably dangerous by subsequent "unforeseeable alteration, change, improper maintenance, or abnormal use," then that conduct may be considered as evidence of fault on the part of the user.

Note that the alteration must not merely make the product dangerous but it must be

an "unforeseeable" alteration. There are many cases in the product liability field holding that the user's removing of safeguards, lockout mechanisms, and other safety features did not prohibit recovery by the plaintiff if removal of the safety feature made the product easier to operate and removal of that safety feature was reasonably foreseeable to the manufacturer/supplier. This rule allowing an injured person to recover damages for an accident caused by a machine which has had safety features removed has been widely criticized, but it remains the law in most jurisdictions. Note that there may be a distinction, however, between the particular plaintiff being the person who actually removed the safety feature and a plaintiff who (especially if on the job) uses a product which had safety features removed by the employer or some other employee. In the former situation, if the person who is injured is the one who actually removed the safety device, then comparative fault principles (discussed below) may apply. On the other hand, if the plaintiff was merely required to use equipment which had been altered by some other employee or by the employer, then courts are much more reluctant to assess fault against the user-plaintiff.

7. Comparative fault. This is discussed in Section VI below.

V. ULTRAHAZARDOUS ACTIVITIES.

In Arkansas, ultrahazardous activities are limited to those which are uncommon and which involve a risk of personal injury or property damage which cannot be eliminated with the exercise of even utmost care. Typically, in Arkansas ultrahazardous activities are activities such as spraying poisonous chemicals and blasting. Other than seismic testing which may precede the drilling of a well, drilling an oil or gas well has not been declared an ultrahazardous activity in Arkansas because it can be done safely.

VI. GENERAL TORT DEFENSES.

Although there may be any number of legal defenses to a particular action, such as the running of the statute of limitations, consent, license, waiver, accord and satisfaction, etc., the most relevant defense for present purposes is the defense of contributory or comparative fault. Arkansas has by statute enacted a comparative fault statute which provides that if the plaintiff's fault is equal to or greater than the fault of all defendants, then the plaintiff cannot recover. In Oklahoma, in contrast, a plaintiff is not barred from recovery unless the plaintiff's fault is greater than that of all defendants. In either state, the award of damages is reduced according to the percentage of comparative fault, up to the point where the degree of fault bars recovery completely. Due to the difference between Arkansas and Oklahoma, however, a plaintiff who is 50 percent at fault in Arkansas recovers nothing while a plaintiff who is 50 percent at fault in Oklahoma is entitled to recover one-half of the total damages.

When there are multiple defendants, the plaintiff's fault is compared with that of all defendants, not each individually. For example, assume a jury found the plaintiff twenty percent at fault, defendant no. 1 ten percent at fault, and defendant no. 2 seventy percent at fault. In that situation the plaintiff's recovery would be reduced twenty percent, but the plaintiff would still have a judgment for the remaining eighty percent of damages against both defendants. Defendant no. 1 does not escape a judgment simply because its share of fault is less than the plaintiff's, because the total defendants' share of fault is greater than the plaintiff's.

VII. AGENCY ISSUES: WHEN ONE IS LIABLE FOR ANOTHER'S ACTS.

As detailed previously in III.C.5.(b) of this paper, the classification of a person working on a gas well as an "agent" of the operator or an "independent contractor" working for the operator can have a substantial effect on the operator's liability. Under general

Arkansas law, a principal who commits no independent action creating a direct tort liability is legally responsible for the torts of an agent but not for the torts of an independent contractor.

An agent is a person who, with the consent of the principal, acts for the principal and is subject to the principal's control. The agreement may be oral, written, or implied from the conduct of the parties. If the right to control exists at the time of the tortious conduct, then the principal-agent relationship, and the resulting transfer of liabilities, may exist at that time, even though the right of control may not have actually been exercised by the principal.

In contrast, an independent contractor is one who, in the course of his independent occupation, is responsible for the performance of certain work, uses his own methods to accomplish it, and is subject to the control of the employer only as to the result of the work.

VIII. CONTRIBUTION AND INDEMNITY.

A. Overview: Distinguishing the Concepts and Summarizing the Rules.

"Contribution" is the legal right existing as a matter of law for one of several tortfeasors jointly responsible to the injured person to pay no more than its proportionate share of the damages by being reimbursed by other joint tortfeasors. Each "joint tortfeasor" individually or "severally" is responsible to the injured plaintiff for the entire judgment. As between the joint tortfeasors, however, one who pays more than its apportioned share of the judgment is entitled to seek contribution from the underpaying defendant(s). See Ark. Code Ann. § 16-64-122.

In practical terms, for example, assume a jury verdict finds the plaintiff not at all at fault (0%), defendant no. 1 is held one percent at fault, and defendant no. 2 is held ninety-

nine percent at fault. If the defendant who is one percent at fault pays the faultless plaintiff the entire award, then that defendant is entitled to seek reimbursement ("contribution") of 99 percent of the payment from the other defendant. If, however, the defendant who was 99 percent at fault has died, disappeared, gone out of business, or simply does not have the money, that is simply the "one percent defendant's" tough luck.

"Indemnity," in contrast, is a right existing by contract, or sometimes implied by law because of the parties' business relationship, for one who has paid a settlement or judgment to a plaintiff to obtain complete (100 percent) repayment from another party. Without attempting to set forth exact language, indemnity provisions in written contracts often will state some or all of the following:

(1) The subcontractor is expressly deemed to be an independent contractor concerning all of the work within the scope of the contract.

(2) The contractor shall defend, indemnify, and hold the operator completely harmless from any type of loss, claim, expense, or demand, including attorney's fees.

(3) The contractor will maintain insurance to protect the operator, including workmen's compensation insurance, employer's liability insurance, and comprehensive general liability insurance. Usually the providing of a certificate of insurance is required to establish compliance with the provision.

(4) It is not unusual for contracts to require the subcontractor to indemnify the operator for the total loss regardless of how fault for an injury to any third person is apportioned between the operator, subcontractor, and any other third parties.

Many people, even many lawyers, often use the terms "contribution" and "indemnity" as if they were either interchangeable terms or inextricably intertwined phrases in the same legal doctrine. They are not. "Contribution" is a tort law concept which grants repayment rights to one paying more than its apportioned share of liability. "Indemnity" is a contractual or quasi-contractual right to complete reimbursement.

B. Claims Against Fellow Employees.

As will be discussed below, an employee's exclusive remedy against his or her direct employer is workers' compensation, subject to a few limited exceptions. This means that an employee injured in the course of employment cannot ordinarily file a tort suit against his or her employer but can sue any non-employer tortfeasor who caused or contributed to the injury. Where one or more joint tortfeasors' claims for contribution or indemnity from the employer are present, however, the situation, as discussed below, can become more complex.

This section is strictly concerned with claims for joint tortfeasor contribution, not express or implied contractual indemnity, from a fellow employee. The Arkansas Workers' Compensation Act specifically provides that the rights and remedies granted to the employee "shall be exclusive of all other rights and remedies of such employee...to recover damages from such employer, or any principal, officer, director, stockholder, or partner acting in their capacity as an employer...." Ark. Code Ann. § 11-9-105. In short, Arkansas employees ordinarily cannot sue their employer for work-related injuries except to make a workers' compensation claim.

Nevertheless, as detailed below, the Arkansas decisions have allowed tort suits against fellow employees in some cases and disallowed them in others. The cases can be resolved under the following rules:

(1) If the only negligence alleged against the fellow employee is negligence in failing to provide a safe place to work, then the workers' compensation act immunity prohibits the suit against the third party.

(2) If the third-party defendant is the owner of the corporate employer, manages the corporation, provides workers' compensation insurance coverage, and the injury is in the scope of employment, then that person is in effect an "employer" under the act and therefore cannot be a "third party" so as to abrogate workers' compensation immunity.

(3) Recent decisions indicate a more restrictive view of the right to pursue a

claim against a corporate owner or manager individually than appeared in earlier decisions. If an employee is not an "alter ego" of the corporation or supervisory employee, then he may be sued for the negligent injury of a fellow employee, so long as the negligence is not the mere failure to provide a safe place to work.

(4) Notwithstanding the above rules, if the claim against the third-party employer is not that it is a joint tortfeasor but that it has an express or implied indemnity obligation to the third-party plaintiff, then the claim may proceed because the "exclusive remedy" provision does not apply to express or implied indemnity contracts, only tort claims.

Although cases in which the injured party is allowed to sue a co-employee for negligence are discussed below, Arkansas law firmly establishes that if the only negligence is the failure to provide a safe place to work, then workers' compensation benefits provide the exclusive remedy. In the early leading case Neal v. Oliver, 246 Ark. 377, 438 S.W.2d 313 (1969), the injured party sued the owner of her corporate employer, alleging negligence in assigning her to work on an unsafe machine. The trial court granted the defendant's motion for summary judgment. Significantly, on appeal the Supreme Court noted that the alleged negligent act was the defendant's "failure to provide a safe place for her to work as required by state law." Id. at 388, 438 S.W.2d at 319. The court noted that the defendant owned the entire corporate stock with his wife, was the manager of the corporate employer, provided workers' compensation insurance coverage, and an employer-employee relationship existed between the plaintiff and defendant at the time of the injury. The court specifically concluded that the defendant and his wife "owned the corporate business and they, as well as the corporation, were the employers." Id. at 387, 438 S.W.2d at 318. Accordingly, the court concluded that under these circumstances the defendant was not a "third party" separate from the employer and affirmed the summary judgment in favor of the defendant.

Neal v. Oliver has been cited many times by later Arkansas appellate decisions in support of the proposition that an owner or supervisory employee ordinarily cannot be sued in tort for an injury covered by the workers' compensation act. But a potentially significant fact mentioned by the Arkansas Supreme Court distinguishes Oliver from our situation. In the same paragraph in which the court noted that the employer had provided workers' compensation insurance to the employee, the court noted that the plaintiff "was not injured by a direct negligent act of Oliver, he wasn't even on the premises when the [plaintiff] was injured." Id. at 388, 438 S.W.2d at 319. This dovetails with the court's statement of law, summarizing a review of cases from across the country, that a president of a corporation or a business owner "may or may not" be an employee for workers' compensation purposes, depending on each case's facts. Id. at 387, 438 S.W.2d at 318.

The court's partial reliance on the employer/defendant's lack of involvement in the actual accident in Neal was disregarded in Morgan Construction Co. v. Larkan, 254 Ark. 838, 496 S.W.2d 431 (1973). In that case a defendant prime contractor filed a third-party complaint against the owner of a subcontractor corporation seeking both contribution and indemnity. The prime contractor relied on the third-party defendant's alleged actual and affirmative negligent act to attempt to distinguish the case from Neal. The court rejected this distinction and held that the owner, as an "employer" who provided workers' compensation insurance, was immune from the claim.

Notwithstanding Larkan, the distinction between being involved in an actual negligent act and simply failing to maintain a safe place to work has retained some life, although that may be accidental. In Simmons First Nat'l. Bank v. Thompson, 285 Ark. 275, 686 S.W.2d 415 (1985), the Arkansas Supreme Court held that supervisory employees are immune from a suit for negligence in failing to provide a safe place to work. The court, in an opinion which like Neal relied on decisions from across the country, concluded that

> since an employer is immune under the [workers' compensation] statutes from a negligent failure to provide employees with a

> safe place to work, this same immunity protects supervisory employees when their general duties involve the overseeing and discharging of that same responsibility.

285 Ark. at 278, 686 S.W.2d at 417 (emphasis added). To hold otherwise would "effectively destroy" the immunity provisions of the workers' compensation act. Id.

In Thompson, each defendant was a supervisory employee and moved for summary judgment on the ground that "as supervisory employees" each was entitled to workers' compensation act immunity. The Arkansas Supreme Court affirmed summary judgments in favor of the defendants but again found it important to note the lack of involvement of the defendants in the actual accident:

> None of the defendants was present at the place of the accident or had any active part in the work that caused the chemicals to enter the sewer. The complaint alleged negligence on the part of each defendant in failing to discharge his responsibility to make the premises safe.

285 Ark. at 276, 686 S.S.2d at 416. The court in Thompson conducted a fairly extensive review of the law and nowhere mentioned Larkan. Thus, in Thompson the court arguably appeared to retain or revive the distinction between a supervisory employee affirmatively committing a negligent act as opposed to one who merely failed to provide a safe working environment and was sued solely as an owner or supervisor.

But the pendulum swung back and the "involved/uninvolved" distinction again was ignored just two years later in Fore v. Circuit Court of Izard County, 292 Ark. 13, 727 S.W.2d 840 (1985). In that case the supervisor was sued in tort for his alleged negligence in "keying a microphone, causing dynamite to explode." Id. at 14, 727 S.W.2d at 841. This, of course, involves an actual affirmative act by the supervisor as opposed to a mere failure to provide a safe workplace. Nevertheless, the court reversed the trial court's denial of the defendant's motions to dismiss and for summary judgment, concluding that the workers' compensation immunity protected the supervisor. The court in Fore appeared to limit the right to sue the employer or a supervisor in tort to only those cases in which an intentional,

willful, or malicious act was committed by the employer or supervisor.

That same year the Arkansas Supreme Court affirmed a motion for summary judgment in favor of several defendant employees when the plaintiffs' decedent was electrocuted when bare electrical wires came into contact with a metal hopper. Five of the six defendants apparently had some management or supervisory duties; the sixth was a maintenance employee. The court concluded that the supervisory employees automatically were immune from suit and that the maintenance man also was immune because "failing to repair or check for bare wires involves failure to provide a safe place to work." Allen v. Kizer, 294 Ark. 1, 6, 740 S.W.2d 137, 140 (1987).

While some cases have been allowed to proceed against fellow employees, those cases involve a co-employee who clearly is not an alter ego of the corporation or even a supervisory employee and the claim involves something more than merely failing to provide a safe place to work. In King v. Cardin, 229 Ark. 929, 319 S.W.2d 214 (1959), the plaintiff was killed when a co-employee who obviously was not a high-level management employee or alter ego of the company struck and killed the plaintiff with a truck while they were working on a highway construction project. The court noted that the workers' compensation act provided exclusive remedies against the "employer" and that a negligent co-employee "is regarded as a third person" who may be sued in tort and is not protected by the exclusive remedy of workers' compensation benefits. A jury verdict in favor of the decedent's estate against the fellow employee was affirmed.

King v. Cardin was cited with approval in Simmons First Nat'l. Bank v. Thompson, supra. However, in that case the court drew a distinction between Neal v. Oliver, in which a tort suit was disallowed, and King v. Cardin, in which the tort suit was permitted, and indicated that doubtful cases probably ought to be resolved in favor of the workers' compensation act providing the exclusive remedy:

> As we all know, the purpose of workers' compensation statutes was to change the common law by shifting the burden of all

> work-related injuries from individual employers and employees to the consuming public. In that effort the matter of fault, as Larson points out, is ordinarily immaterial. Employers were compelled to give up the common-law defenses of contributory fault, fellow servant, and assumption of risk. Employees were compelled to give up the chance of recovering unlimited damages in fault-related cases in return for a certain recovery in all work-related cases. The plaintiffs here are attempting to return to the common-law system based on fault, when it is to their advantage to do so, but at the same time to retain the assured benefits of workers' compensation regardless of fault. The invalidity of their position is too plain to require further discussion.

285 Ark. at 278-79, 686 S.W.2d at 417-18 (emphasis in original).

All of the above cases deal with claims in which the employee has attempted to sue a defendant who claims the protection of the workers' compensation act's "exclusive remedy" provision. That provision, however, also prohibits suits by a third-party against any person whom the employee could not sue directly. The Arkansas Supreme Court has decided this precise question and concluded that such third-party complaints cannot be maintained. The court concluded that the Arkansas General Assembly intended workers' compensation to be an employer's exclusive liability for an on-the-job injury and, accordingly, prohibited third-party suits seeking contribution from the employer as a joint tortfeasor for the employee's injuries. W.M. Bashlin Co. v. Smith, 277 Ark. 406, 643 S.W.2d 526 (1982).

C. Indemnity From the Employer.

The above discussion focuses on a claim in tort for contribution due to the negligence or intentional acts of a fellow employee. Under some circumstances, the plaintiff's employer can be made a third-party defendant, based not on its tortious conduct but upon its express or implied contractual agreements to indemnify the defendant. In C & L Rural Cooperative Corp. v. Kincaid, 221 Ark. 450, 256 S.W.2d 337 (1953), the employer and the defendant had an express contract containing an indemnity provision under which the employer agreed to hold the defendant harmless in case of damages caused by their

negligence. The court allowed that case to proceed because the claim against the employer was not a claim for contribution among joint tortfeasors but was based upon an express indemnity provision in their contract.

In many cases there may be no written contract between the contractor and the subcontractor. There may be, however, a work order or some other type of document which should be examined to explore the possibility that some express indemnity language may exist somewhere. If the parties to the agreement used a "standard form" or "fill in the blanks" form of contract, it very likely may contain indemnity provisions which neither party expressly considered at the time of contracting but which nevertheless are part of the contract.

But sometimes indemnity will be allowed even when the contract does not expressly provide that right. "Implied indemnity" was recognized in Oaklawn Jockey Club, Inc. v. Pickens-Bond Construction Co., 251 Ark. 1100, 477 S.W.2d 477 (1972). In that case, an injured employee brought a suit against Oaklawn and Arkansas Power & Light alleging negligence in failing to provide a safe place to work. Oaklawn filed a third-party complaint against the plaintiff's employer for indemnity. Significantly, the contract did not have an express indemnity provision so Oaklawn was seeking "implied indemnity." The trial court dismissed the third-party complaint but the Arkansas Supreme Court reversed. Significantly, the court noted that

> courts dealing with implied and contractual indemnity, [citations omitted], ordinarily recognized that the contractor's duty to indemnify the owner, under such circumstances, is not controlled by the Workmen's Compensation law.

Id. at 1101, 477 S.W.2d at 478. The court found a policy reason for allowing implied indemnity by noting that if the employee recovered damages against Oaklawn, then the allegedly negligent employer would have the right to be reimbursed under its subrogation lien for workers' compensation benefits paid to the plaintiff. Without recognizing the right of implied indemnity, then the loss would fall on the more innocent party and the negligent

employer actually would receive payment from the innocent third party. The court required, however, that indemnity, whether express or implied, could not be based on joint tortfeasor status but on an "independent duty or obligation owed by the employer to the third party."

Several years later, the court attempted to clarify the difference between joint tortfeasor contribution and express or implied contractual indemnity by noting the proper test: "Is the claim 'on account of' the injury, or on account of a separate obligation running from the employer to the third party?" Morgan Construction Co. v. Larkan, 254 Ark. 838, 841, 496 S.W.2d 431, 433 (1973), quoting Larson, Law of Workmen's Compensation § 76.44. The court in Morgan affirmed the dismissal of a third-party complaint against the employer on the ground that it failed to plead an independent duty owed by the employer to the defendant which would give rise to an indemnity obligation.

PART 2: INSURANCE COVERAGE.

I. THE 1986 COMMERCIAL GENERAL LIABILITY POLICY: BACKGROUND INFORMATION.

Although all insurance companies do not offer general liability policies that are word-for-word identical, standard form insurance policies are the foundation of all liability insurance policies. Each general liability policy is to some degree "customized" to the individual policyholder by the addition or deletion of certain additional coverages or exclusions, with a corresponding variation in premium, but in many essential respects the insurance policies offered by the various underwriters are substantially and substantively alike.

This is because virtually all insurance companies' general liability policies follow the standard form 1986 Commercial General Liability policy (hereinafter the "CGL policy"). That form was widely adopted throughout the insurance industry in that year. That policy

form superseded previous standard form general liability policies promulgated in 1973, 1966, and 1941.

II. SELECTED PROVISIONS OF THE 1986 COMMERCIAL GENERAL LIABILITY POLICY.

A. Coverages.

1. Bodily Injury and Property Damage Liability.

The typical CGL form requires the insured to pay "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." The Insuring Agreement also provides that no other obligation or liability to pay money or perform services is covered unless expressly or explicitly provided for by supplementary endorsements and payments.

"Bodily injury" is usually defined to mean "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." Of particular concern to oil and gas producers would be insurance for claims for injury resulting from discharge of pollutants into ground water, the air, soil, or in any other fashion which could cause a physical injury to a landowner or some other person. The CGL policy, as will be detailed below, contains an exclusion specifically identifying bodily injury allegedly resulting from pollutants.

"Bodily injury" has been given a very literal interpretation by Arkansas courts. It has long been the rule that the "bodily injury" requirement "limits the injury for which a recovery may be had to a physical injury and does not include all injuries to the person or personal injuries." United States Fidelity & Guaranty Co. v. Shrigley, 26 F. Supp. 625, 628 (W.D. Ark. 1939) (husband's claim for loss of services of his wife because of the wife's bodily injuries was not covered). Claims for embarrassment, humiliation, mental anguish, and emotional distress also do not constitute a "bodily injury." Rowlett County v. Western

Casualty & Surety Co., 425 F. Supp. 125 (N.D. 1978). More recently, in a case argued on behalf of the insurance company by the author of this paper, an Arkansas federal court ruled that a sexual harassment claim by an employee against an employer, even if proved to include nonconsensual physical contact, did not state a claim for "bodily injury" covered by insurance. Commercial Union Ins. Co. v. Sky, Inc., 810 F. Supp. 249 (W.D. Ark. 1992).

At this point it may be appropriate to point out, especially for non-lawyers, that the courts which found that the acts described above did not constitute a "bodily injury" for insurance coverage purposes were not saying that the plaintiff did not have a viable lawsuit against the insured party. Rather, the courts were saying that the claims made by the plaintiff simply are not covered by the insurance policy and the insured is left on its own to defend the case and pay any settlement or judgment.

2. The "Occurrence" Requirement.

The CGL form usually provides that, "The 'bodily injury' or 'property damage' must be caused by an 'occurrence.'" The word "occurrence" is usually defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

In several situations courts have seized on the word "accident" to find coverage excluded because the defendant's alleged conduct or the plaintiff's alleged injury was not an "accident." In a case which may have some analogy to certain kinds of landowner claims against energy companies and their subcontractors, the Arkansas Supreme Court ruled that claims for trespass to land and conversion of crops were not covered by the defendant's liability policy because these alleged acts were not accidental. Likewise, insureds who were sued for pumping water from their land into a small drainage ditch which crossed a neighbor's land and caused flooding also were not covered by liability insurance because it was not an "accident." The Arkansas Supreme Court provided a definition for "accident" as

"an event that takes place without one's foresight or expectation---an event that proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected." Continental Ins. Co. v. Hodges, 259 Ark. 541, 542, 534 S.W.2d at 764, 765 (1976).

In the context of oil and gas production, it is easy to imagine how intentional acts of the site work or drilling personnel could go awry and have unintended consequences. If, however, the "occurrence" was not an "accident," because the underlying act was done intentionally, then insurance protection is not available. Whether the lawsuit presents claims arising from an "occurrence" or "accident" may ultimately depend on how the plaintiff pleads the case in the complaint.

3. The Punitive Damages Issue.

The Arkansas Supreme Court specifically has held that punitive damages are covered by an automobile insurance policy having broad coverage language. In Southern Farm Bureau Casualty Insurance Co. v. Daniel, 246 Ark. 849, 440 S.W.2d 582 (1969), the subject automobile insurance policy provided coverage for "all sums which the insured shall become legally obligated to pay as damages ... because of bodily injuries ... and ... injury to or destruction of property...." The Arkansas Supreme Court held that this broad language required the insurer to pay the punitive damages award as well as compensatory damages. This holding was reaffirmed in California Union Insurance Co. v. Arkansas Louisiana Gas Co. 264 Ark. 449, 572 S.W.2d 393 (1978).

Some policies' coverage clauses are distinguishable from those in Southern Farm Bureau and California Union and, thus, arguably a different result should be reached. The policy in Southern, and apparently the policy in California Union, provided coverage for "all sums" which the insured "shall become legally obligated to pay as damages ... because of bodily injuries." In contrast, many policies state that the company will pay damages "for" bodily injury or property damage. Although it cannot be said with any assurance that an

Arkansas appellate court would not find the distinction in language too minor to make any difference, there is certainly an argument to be made that the latter policy language covers only bodily injury or property damage and not punitive damages because punitive damages are not "for" the described losses of "bodily injury or property damage." The policies in the other cases, again, provided coverage for "all sums" for which the insured became liable "because of" bodily injuries and property damage. At best, though, all I can tell you is that there is an argument to be made based on the difference in policy language; the general rule of law in Arkansas at this time is that punitive damages are covered by broad policy language in some policies, which may be distinguished from similar, though not identical, language in other forms.

This discussion concerns only the issue of initial coverage of punitive damages claims. A nationwide survey of cases considering whether punitive damages are covered under various forms of liability policies is found in Liability Insurance Coverage as Extending to Liability for Punitive or Exemplary Damages, 16 A.L.R. 4th 11 (1982 and Supp. 1993). In the following section on "exclusions from coverage," policy provisions potentially excluding otherwise covered punitive damages claims will be considered.

B. Exclusions.

The CGL contains a number of exclusions from coverage. An "exclusion," as the name implies, excludes from coverage a claim which otherwise would be covered. The CGL's exclusions, in summary, are:

1. Bodily injury or property damage "expected or intended from the standpoint of the insured." This clause, though not expressly naming punitive damages in the exclusion, has the practical effect of excluding from coverage many, if not most, of the kinds of acts and resulting claims which are the factual basis of a punitive damages prayer for relief. See, e.g., Commercial Union Ins. Co. v. Sky, Inc., 810 F. Supp. 249 (W.D. Ark.

1992). An annotation examining nationwide interpretation of this exclusion, including its use in excluding coverage for punitive damages, is Construction and Application of Provision of Liability Insurance Policy Expressly Excluding Injuries Expected or Intended by Insured, 31 A.L.R. 4th 957 (1984 and Supp. 1993).

2. Bodily injury or property damage which the insured is obligated to pay because of the assumption of liability in a contract or agreement. Many contracts between prime contractors and subcontractors have "assumption of liability" clauses. If liability is imposed on an insured only because of a contract and not because that party would have been liable for the injury even in the absence of the contract or agreement, then the claim is excluded from insurance coverage.

3. Bodily injury or property damage for which the insured may be held liable because of causing or contributing to the intoxication of any person.

4. Any obligation of the insured arising under a workers' compensation, disability benefits, unemployment compensation, or other similar law.

5. Bodily injury to a spouse, child, parent, brother, or sister of the employee if the injury arose out of and in the course of employment by the insured.

6. Bodily injury or property damage arising out of the "actual, alleged or threatened discharge, dispersal, release or escape of pollutants." The word "pollutants" is defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." It is easy to see how many of the claims which may be made, particularly by a landowner, arising out of the drilling of an oil or gas well could fall under the pollution exclusion.

A number of policies, however, have a limitation on the exclusion arising when the discharge is "sudden and accidental." The rationale is that a "sudden and accidental" discharge of pollutants is much more akin to the traditional type of accidental injury, whether to person or property, traditionally covered by insurance. When that limitation on

the exclusion applies, the exclusion would exclude coverage only for pollutants which are discharged or allowed to escape either intentionally or over an extended period of time.

For a detailed discussion of judicial interpretation of the pollution exclusion, see R. Chemers & R. Franco, The Contemporary View of the Pollution Exclusion---A Provincial Approach, Selected Issues in Insurance Coverage and Practice (Defense Research Institute 1990).

7. Bodily injury or property damage arising out of the ownership, maintenance, use, or entrustment to others of any automobile, aircraft, or watercraft.

8. Bodily injury or property damage arising out of the transportation of "mobile equipment" by an automobile owned or operated by an insured.

9. Bodily injury or property damage due to war.

10. Property damage to the insured's own property. The rationale is that these items traditionally are covered by (and paid for) other types of insurance.

11. Property damage to "your product" or "your work" and related claims.

C. "Additional" Coverages.

The CGL policy typically offers "additional" coverages for "personal and advertising injury liability" and "medical payments." There often are "Supplementary Payments" available covering miscellaneous items like bail bonds, attachment bonds, prejudgment interest, etc. These coverages are not discussed because they are outside the scope of this paper.

D. Who is an "Insured"?

The "insured" is the person(s) or entity/entities designated in the "declarations" page. The declarations page also provides information concerning policy limits, policy periods, etc.

If the insured is an individual, typically the spouse is also an insured, but for both only with respect to the conduct of a business of which the insured is the sole owner.

If the insured is a partnership or joint venture, all members or partners and their spouses are insureds, but only with respect to the conduct of the partnership's or joint venture's business.

If the insured is a corporation, executive officers and directors are also insured, but only with respect to their duties as officers or directors. The stockholders also are insureds, but only with respect to their liability as stockholders.

The insured's employees, other than executive officers, are also insured, but only for acts committed within the scope of their employment. Typically, this provision is limited by excluding coverage for injuries arising in the course of employment.

III. THE INSURED'S DUTIES IN THE EVENT OF AN OCCURRENCE, CLAIM, OR SUIT.

The insured has an obligation to promptly notify the insurer when a covered claim is made against the insured or a lawsuit which may be covered by the insurance policy is filed. Failure to do so may result in the insurer's being able to disclaim coverage and avoid paying an otherwise insured obligation.

From the insurer's standpoint, disclaiming coverage for breach of the duty to cooperate in the defense is a severe step, because a wrong decision can expose the insurance company to liability not only on the underlying claim by the injured party but also by the insured for a wrongful disclaimer of coverage. Nevertheless, under the proper set of facts the insured's failure to cooperate in the lawsuit can result in loss of insurance policy protection.

Perhaps the most frequently-occurring event concerning the insured's breach of its duty to the insurer involves the topic of notification. An energy company, like any insured business, should have a firmly-established procedure for notifying its insurer of any

possibly covered claim made against it. Furthermore, promptly notifying the insurer upon receipt of a lawsuit, as opposed to a nonlitigation claim, against the insured is even more vital. If the insurer is not notified in a timely fashion that the insured has been sued, no answer is filed, and a default judgment results, then the insurer may escape responsibility for paying an otherwise covered loss simply due to the insured's failure to report the lawsuit. On the other hand, if the suit is reported promptly to the insurer and the insurer or its defense counsel allows a default in answering to occur, then the insurer may become liable for the entire judgment entered against the insured, even if that judgment is greater than the insurance policy limits. The rationale, obviously, is that if the insured defendant promptly reports the lawsuit and the insurer causes the default judgment to occur through its own neglect, then the insurer is responsible for not only the entry of the judgment but also the size of the judgment and, in fairness to the insured, the insurer should pay the entire amount even if that exceeds the policy limits.

IV. DEALING WITH YOUR INSURANCE AGENT.

Arkansas, like most states, recognizes the distinction between a "general agent" and a "soliciting agent." A general agent has the power to bind the insurance company to risks and to make contracts on behalf of the insurance company. A soliciting agent, in contrast, only has the authority to accept applications and forward information and payments to the insurer. A soliciting agent cannot change the terms of an insurance policy or make any additional agreements. Jackson v. Prudential Ins. Co. of America, 736 F.2d 450, 454 (8th Cir. 1984); Hunt v. Pyramid Life Ins. Co., 21 Ark. App. 261, 267, 732 S.W.2d 167, 170 (1987).

It is a general rule of law that one who deals with an agent is bound to determine the scope of his authority. Hunt v. Pyramid Life Ins. Co., supra. When dealing with an insurance agent, it is crucial to establish whether the agent actually has the authority to commit the insurer to any undertakings. An insurer, however, may give its limited agents

such an appearance of having authority to bind the insurer that the insurer cannot later deny the agent's actions. This is the doctrine of "apparent authority." Dixie Ins. Co. v. Joe Works Chevrolet, Inc., 298 Ark. 106, 110, 766 S.W.2d 4, 7 (1989). This doctrine, significantly, could also be used against oil and gas companies.

Furthermore, any "understandings" between the insured and its insurer should be reduced to writing so that there is no misunderstanding at a later, crucial time. If there is a misunderstanding, it usually will come to light only because a problem with a claim or a lawsuit has led to a conflict between the insured and the insurer.

Finally, as noted previously, if a lawsuit is filed against the insured the insurer must be notified promptly. Failure to notify the insurer may result in a loss of insurance coverage on the claim. But failure of the insurer to protect the insured's interests when notified of the suit may result in the insurer being responsible for the entire claim, even if larger than the policy limits or subject to an exclusion.

V. INSURER'S "BAD FAITH" LIABILITY.

The whole area of insurer's bad faith is a relatively new area of Arkansas law. For years Arkansas has had a statute which provided for a twelve percent penalty and attorney's fees for a plaintiff prevailing in a "direct action" against an insurer on an insurance policy. Ark. Code Ann. § 23-79-208 (1987). In 1983, however, the Supreme Court of Arkansas specifically decided that this statute was not the exclusive remedy for failure to pay a claim and did not preempt a "tort of bad faith" action against an insurer failing to pay a claim. Aetna Casualty & Surety Co. v. Broadway Arms Corp., 281 Ark. 128, 664 S.W.2d 463 (1983). The court in that case made the following statement:

> [I]n order to be successful a claim based on the tort of bad faith must include affirmative misconduct by the insurance company, without a good faith defense, and that the misconduct must be dishonest, malicious, or oppressive in an attempt to avoid its liability under an insurance policy. Such a claim cannot be based upon good faith denial, offers to

> compromise a claim or for other honest errors of judgment by the insurer. Neither can this type claim be based upon negligence or bad judgment so long as the insurer is acting in good faith. We agree with the Ohio Supreme Court in Columbus Finance v. Howard, 42 Ohio St.2d 178, 327 N.E.2d 654 (1975), holding that in an action of this type for tort, actual malice is that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge. Actual malice may be inferred from conduct and surrounding circumstances.

The court in Broadway Arms did not find whether the facts in that case amounted to bad faith. The court did find that there was a question sufficient to justify trial on the bad faith claim when, among other things, the agent threatened the insured by stating that the insurer might be called upon to explain to authorities why it paid $75,000 on a loss when the insured's books revealed that it had valued the inventory at $23,000 for tax purposes. an additional passage amplifying the tort of bad faith in Arkansas is found in a separate opinion in Broadway Arms, which concurred in part and dissented in part:

> The tort can only be based upon an affirmative action of intentional, dishonest, malicious, or oppressive conduct by a company to avoid its liability. Those are strong words, and impose a heavy burden on an insured, as they well should, because Arkansas has an adequate remedy for an insured against a company that either refuses or through nonfeasance will not honor its contract obligations. See Ark. Stat. § 66-3001 et seq. (Repl. 1980). While good reasons for recognizing this cause of action exist, the tort should not be merely a new legal tool to collect attorney's fees, or a means of intimidating the insurance industry so it cannot fairly and reasonably resist false, suspicious or even disputed claims.
>
> That is the reason I characterized the new tort as outrage, because it better describes the kind of conduct that should result in punishment. Bad faith can be, in my judgment, interpreted by jurors as merely negligence, and this tort is not one of negligence---it is one of intentional, malicious, dishonest and oppressive conduct.

281 Ark. at 139-40 (Hickman, J., concurring and dissenting).

The separate opinion then went on to note that, although the court was not actually deciding the issue, the evidence against Aetna in that case "does not justify a finding that Aetna is guilty of such conduct. Negligence, and poor judgment, probably; outrageous

conduct, hardly."

Obviously, these statements from this leading case indicate that the insured has a heavy burden in succeeding in a bad faith claim against an insurer. Two later cases also are instructive in showing the kind of conduct that the Arkansas Supreme Court is concerned with in the tort of bad faith. There appear to be no reported Arkansas cases dealing with a "bad faith" claim by an energy company against its liability insurer. In Employers Equitable Life Ins. Co. v. Williams, 282 Ark. 29, 665 S.W.2d 873 (1984), the insurer cancelled the insured's coverage after the insured suffered a heart attack, claiming that the insured had failed to pay his premium. The insured produced checks showing that all of the premiums had been paid. More significantly, the insurer's payment records showed evidence of alteration. The court found that this was substantial evidence from which the jury could find that the insured had paid the premiums and that the insurer later fraudulently altered its own records to falsely show that the policy had lapsed for nonpayment.

In a 1985 case, the Arkansas Supreme Court did not express a definite opinion as to whether the insurer's conduct amounted to bad faith but did remand the case for trial on that issue. In Thomas v. Farm Bureau Insurance Co., 287 Ark. 313, 698 S.W.2d 508 (1985), a state trooper testified that he was told by the insurer to "go out there and scare the people so they would settle" while he was conducting an arson investigation. The state trooper further testified that he wasn't on so much an investigation as a "mission of intimidation" and that his investigation produced no evidence whatsoever of arson. A jury verdict in the insurer's favor was reversed on the grounds that the trial court improperly excluded evidence that Farm Bureau violated the Arkansas Arson Reporting Immunity Act. Essentially, Farm Bureau did not make the required reportings to the state for suspected arson. The Arkansas Supreme Court ruled that the trial court erred in not admitting this evidence. The court found that the evidence was relevant to the question of whether Farm

Bureau in good faith believed there was a possibility of arson or in bad faith was using that allegation against the insured to intimidate him in settling the claim.

In these and several other post-Broadway Arms cases, the Arkansas Supreme Court has not established a specific set of elements which must be met in order for a plaintiff to prove the tort of bad faith. Instead, each case generally describes what bad faith entails and then decides whether the facts of that case amount to bad faith.

PART 3: WORKERS' COMPENSATION.

I. INTRODUCTION.

Arkansas workers' compensation law recently has undergone a significant change. The original Arkansas workers' compensation act was passed in 1948-49. A substantial revision of that act took place in 1975. There have been a number of amendments to the act since 1975, but the basic provisions of the Arkansas Workers' Compensation Act had been in place since 1975, if not in place since the original act in 1949.

In 1993, the Arkansas legislature found that the state's workers' compensation act needed substantial revision. Accordingly, the General Assembly enacted a number of substantive and substantial changes to the act. This revision was the most wide-ranging change in Arkansas workers' compensation law since the original 1949 act and the 1975 revision.

The 1993 amendments to the workers' compensation statute apply only to injuries which occur after July 1, 1993.

II. TO WHOM WORKERS' COMPENSATION DUTIES ARE OWED.

Under the new Arkansas act, every employer should "secure" compensation to its employees" to pay or provide compensation for their disability or death from a compensable injury "arising out of and in the course of employment without regard to fault

as a cause of the injury." Ark. Code Ann. § 11-9-401(a)(1).

"Employee" under the new act is defined as

> any person, including a minor, whether lawfully or unlawfully employed in the service of an employer under any contract of hire or apprenticeship, written or oral, express or implied; but excluding one whose employment is casual and not in the course of the trade, business, profession, or occupation of his employer....

Ark. Code Ann. § 11-9-102(10). The definition continues to note that a sole proprietor or partner who devotes full time to the proprietorship or partnership is a statutory "employee" for workers' compensation purposes. Sole proprietors or partners are given the option of "opting out" of workers' compensation coverage (and, as a probable result, of paying insurance premiums) by filing a certificate of noncoverage with the Workers' Compensation Commission.

An independent contractor is not a statutory "employee" and no workers' compensation liability is owed by the principal to the contractor or the contractor's employees. A number of factors, including control of the method of performing the work, mode for determining payment owed, who is obligated to furnish tools, equipment, and materials, and the right to cease the employment without further liability are considered in determining whether one is an employee or an independent contractor. Purdy's Flower Shop v. Livingston, 262 Ark. 575, 580, 559 S.W.2d 24, 27 (1977).

In contrast, a "subcontractor," which is defined as one who takes a portion of a contract from a prime contractor, is responsible for securing compensation to its employees. But if the "subcontractor" fails to do so, the prime contractor is responsible for workers' compensation benefits to the subcontractor's employees. Ark. Code Ann. § 11-9-401 (1993 Supp.)

III. A "COMPENSABLE INJURY."

A. Definitions and Criteria.

Only "compensable injuries" are covered by the workers' compensation act. Under the new statute, a "compensable injury" means, in general, an accidental injury causing physical harm to the body arising out of and in the course of employment "only if it is caused by a specific incident and is identifiable by time and place of occurrence." Ark. Code Ann. § 11-9-102(5)(A)(i).

Some physical conditions requiring medical care and creating a disability are in fact related to employment activities but are not caused by a specific accident and arise over a period of time. If this type of injury arises out of and in the course of employment but is not caused by a specific incident or is not identifiable by time and place, it still is a compensable injury if it is a repetitive motion injury such as carpal tunnel syndrome, a back injury not caused by a specific incident or identifiable by time and place of occurrence, or a hearing loss not caused by a specific incident or identifiable by time and place of occurrence. Id. at (2)(i).

Mental illnesses or injuries were given a substantially more restrictive definition, now being required to be caused by physical injury to the employee's body (unless the employee was a victim of a violent crime). The section relating to mental illness or injury also places stricter requirements on the medical/psychological/psychiatric proof to be offered in support of such a finding.

Heart or lung injuries, including heart attacks, are compensable only if an accident is the "major cause" of the physical harm. Furthermore, the heart or lung illness or injury is not compensable unless it is shown that the exertion of the work necessary to precipitate the disability or death "was extraordinary and unusual in comparison to the employee's usual work in the course of the employee's regular employment or, alternatively, that some

unusual and unpredicted incident occurred which is found to have been the major cause of the physical harm." Ark. Code Ann. § 11-9-114(b)(1). Subsection (2) of that statute adds that physical or mental stress shall not be considered. The phrase "major cause" means more than 50 percent of the cause, established according to the preponderance of the evidence. Ark. Code Ann. § 11-9-102(14).

A compensable injury must be established by medical evidence, supported by "objective findings." The phrase "objective findings" is defined as "those findings which cannot come under the voluntary control of the patient." The definition goes on to specifically state that when determining physical or anatomical impairment, neither a physician, other medical provider, administrative law judge, workers' compensation commission, nor the courts may consider complaints of pain or, for the purpose of making physical or anatomical impairment ratings, straight-leg raising tests or range-of-motion tests. The definition finally states that medical opinions addressing compensability and the degree of permanent impairment must be stated within a reasonable degree of medical certainty. All these requirements are more restrictive than the Arkansas workers' compensation law prior to the 1993 amendments.

B. Designated Noncompensable Injuries.

Under the new Act, compensable injuries specifically do not include

(1) Injury resulting from a work place fight if the fight was the result of a non-employment-related hostility.

(2) Except for innocent victims, injuries caused by horseplay.

(3) Injury caused by recreational or social activities. Presumably this is an attempt to cut back on the "company picnic injury" as being a compensable injury.

(4) Any injury inflicted upon the employee at a time when employment services were not being performed.

(5) An injury when the accident was "substantially occasioned" by the use of alcohol, illegal drugs, or prescription drugs used in contravention of the physician's orders. The presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders shall create a rebuttable presumption that the injury is noncompensable. Furthermore, that section of the statute provides that every employee is deemed to have impliedly consented to "reasonable and responsible testing by properly trained medical or law enforcement personnel" for the presence of any contraband substances in the employee's body. If any of these substances is found, the employee is not entitled to compensation unless it is proved by a preponderance of the evidence that the substance did not "substantially occasion" the injury or accident.

IV. BURDEN OF PROOF.

The 1993 act also changes requirements concerning burden of proof. For an accidental injury causing internal or external physical harm to the body, the employee shall have the burden of proving the claim by a preponderance of the evidence. This is in accordance with prior law.

For the repetitive motion injuries, back injury not caused by a specific incident, hearing loss not caused by a specific incident, mental illness, heart, cardiovascular injury, accident or disease, or hernia, the employee must prove the claim by the preponderance of the evidence and the condition is compensable "only if the alleged compensable injury is the major cause of the disability or need for treatment." Ark. Code Ann. § 11-9-102(5)(E)(ii). This is a substantive change from prior law.

V. LIBERAL CONSTRUCTION ABOLISHED.

Under the former law, judges were to construe the workers' compensation act liberally, in favor of the claimant/employee. Under the 1993 revisions, workers'

compensation judges and the Arkansas appellate courts shall construe the provisions "strictly." Ark. Code Ann. § 11-9-704(c)(3). An earlier amendment to the statute already had changed the act's longtime requirement that the commission and courts resolve doubts in the evidence in favor of the employee to a standard requiring the evidence to be viewed impartially. The 1993 amendment seems to follow the previous amendment by changing the rules for construing the act as well as for reviewing the evidence.

VI. EXCLUSIVE REMEDY.

The workers' compensation act provides the exclusive remedies available to an injured employee. If, however, the employer fails to "secure" the payment of compensation as required by this chapter (basically, by either purchasing workers' compensation insurance or satisfying the commission and receiving permission to proceed as a self-insured employer), then the employer may be subjected to fines by the workers' compensation commission and an injured employee has the option to proceed with either a workers' compensation claim (with statutorily-limited damages but no requirement to prove the employer was at fault) or a tort suit against the employer (with potentially unlimited damages but a duty to show that the accident was caused by fault of the employer).

VII. CONCLUSION; NOT COMPREHENSIVE REVIEW.

The 1993 act was such a substantial rewriting of Arkansas workers' compensation law that any comprehensive review would be voluminous. The author assumes that the employers attending the institute or reviewing this paper either have workers' compensation insurance or, if self-insured, have a knowledgeable workers' compensation claims administrator either in-house or on contract. Accordingly, for present purposes this paper attempts to cover only some of the changes in or continued rules related to basic liabilities. There has been no attempt to review benefits payable or procedural issues involved in

making or defending workers' compensation claims.

In the event that you or your employer has a workers' compensation claim filed against it which is not covered by an existing insurance policy (in which case the insurance company would do its own claims managing), then in light of the new act it is imperative that a qualified workers' compensation attorney be consulted. The "bottom line" is that assumptions and knowledge concerning workers' compensation claims and Arkansas workers' compensation law which may have been valid for years may no longer be valid today. Any person either pursuing or defending a workers' compensation claim should fully investigate the impact of the new law.