Combat & Patrol Craft Annual
Help From Across the Big Pond
The logistics of operating vessels are difficult and require the teamwork of a large number of companies. The team often includes companies that provide vessels, crew, catering, equipment, supplies and repair vendors. As many of these relationships are long term in nature, but require sporadic use, the parties often enter into a master service agreement that outlines the terms of the service. Many of these agreements include mutual indemnity obligations where each party usually accepts responsibility for indemnifying the other party for injuries to their employees. Under maritime law, such indemnities are valid.

**KNOW THE LAW**

Unfortunately, if you are working around fixed platforms, docks, or other locations that fall within the scope of the Longshore Act or state law, several states, including Louisiana, have adopted anti-indemnity statutes that prohibit indemnity obligations in an attempt to protect smaller companies that do not have the bargaining power needed to negotiate with large oil companies and other large marine operators.

Although all states with anti-indemnity statutes prohibit indemnification, several states allow for the procurement of insurance coverage that creatively indemnifies the other party to injuries to these employees. However, the applicable rules vary from state to state. For example, on the Gulf Coast, Texas allows for such additional insured coverage where Louisiana does not.

Under Louisiana law, any provision in any agreement that requires additional insured insurance protection is prohibited by the Louisiana Oil Field Anti-Indemnity Act (LOIA) and is null and void and of no force and effect. So, if you are operating in Louisiana waters, or off of the coast of Louisiana, and you sustain an incident where you may be entitled to additional insured coverage, the statute, on its face, prohibits such coverage.

**THE MARCEL EXCEPTION**

All is not lost. The courts have carved out an exception to this additional insured prohibition. It provides a mechanism where companies can provide additional insured coverage to their clients or customers that overcomes these LOIA restrictions. To overcome this restriction, the parties must craft an additional insured provision pursuant to the United States Fifth Circuit Court of Appeal’s holding in Marcel v. Placid Oil Co. This exception is commonly referred to as the Marcel Exception and the insurance premium to be paid is referred to as the Marcel Premium.

The Marcel Exception allows for insurance coverage for a prohibited indemnity obligation when the party being indemnified pays for its own additional insurance coverage and no part of the cost of the additional insured coverage is paid by the party procuring the coverage. To meet this requirement, and obtain valid additional insured coverage, the potential indemnitee must pay the premium to the other party’s insurance company that covers the costs associated with adding the indemnitee as an additional insured on the policy.

Although many contracts include the language required for the execution of the Marcel Exception, very few transactions, in practice, meet the requirements. In the event that the agreement includes the appropriate Marcel Exception language, but the indemnitee is not provided with an invoice for the procurement of this coverage, or, if an invoice is issued, it fails to pay for the actual coverage, such coverage is not valid. Furthermore, in the event that the amount of premium requested and paid does not reflect the actual cost of procuring the insurance coverage, the provision will be invalid.

This simple process provides many potential pitfalls that can sink your attempt to obtain indemnity. For example, many companies have insurance policies that include a blanket additional insured provision that provides coverage to entities that are contractually named as additional insureds. Although such a provision would be valid absent the anti-indemnity statute, such a provision does not overcome the LOIA restrictions as it does not fully comply with the Marcel...
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Although additional insured coverage is procured, the cost of coverage is not paid by the indemnified party. Thus, the additional insured provision is invalid.

On the other hand, if additional insured coverage is provided and the indemnified party is provided with an invoice for the procurement of coverage that does not adequately reflect the cost of such coverage, that transaction is invalid as well. For example, if your contract provides for the procurement of Marcel coverage and you contractually pay $100 for the procurement of a liability policy, the courts will likely find that such payment does not reflect the actual cost of providing insurance to the indemnified party.

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So, it is important that you make Marcel your friend. When you enter into an agreement that includes an indemnity provision with the goal of overcoming an anti-indemnity prohibition, make sure that you reach out to your contracting party’s insurance broker to determine if additional insured coverage is available, what the actual cost of providing such insurance is, and ask to be billed for the procurement of such coverage. Once you pay this premium, if all of the other elements of the exception are met, you will have valid additional insured coverage despite LOIA’s indemnity prohibition.

Although this sounds simple, due to the nature of our business and how these transactions unfold, it is rare that these conditions are all met. Unfortunately, most companies are not aware that they failed to properly comply with the Marcel Exception until it is too late because an accident has occurred and someone is trying to invalidate an indemnity request.

With that in mind, it is probably a good time to review your agreements to check that the indemnity language provides a mechanism for the provision of additional insured coverage under the Marcel Exception and that your company is complying with all of the steps required to obtain such coverage. If it does not appear that you have satisfied the Marcel test, it would not hurt to reach out to the other party’s insurance broker to try to obtain such coverage.